Memorandum 2017-26

Civil Discovery Improvements (Introduction of Study)

In December 2016, in setting its work priorities for the coming year, the Commission[1] directed the staff to begin work, as resources permit, on civil discovery topics.[2] In particular, the Commission was interested in studying an issue raised by Commissioner Capozzola, regarding the proper procedure to follow when a deponent objects to attending a deposition or fails to attend and testify as scheduled.[3] Commissioner Capozzola describes the issue in the following communication:

This memorandum begins the discussion and analysis of that topic. As a threshold matter, the staff briefly describes its efforts regarding stakeholder outreach for this study. The memorandum then (1) provides some background on the Civil Discovery Act generally, (2) examines the specific rules governing deposition attendance, (3) presents the problem raised by Commissioner Capozzola, and (4) provides some analysis of that problem.

STAKEHOLDER OUTREACH

The Commission has indicated that it wants the staff to provide information about the stakeholders contacted when any new study is initiated. Specifically, in 2014, the Commission gave staff the following direction:

1. 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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (Dec. 2016), p. 3.

3. The Commission also directed the staff to prepare a list of other previously suggested civil discovery topics. See Minutes (Dec. 2016), p. 3. The staff will provide that list in a future memorandum.

> When inviting stakeholder participation in a new study, the staff should provide Commissioners with a list of the groups and individuals that were invited to participate.[4]

The staff proposes to use the Commission's regular judiciary and civil procedure mailing list as the primary distribution list for this study. That list includes approximately 250 subscribers. Among them are persons affiliated with the following groups: the California Defense Counsel ("CDC"), the California Judges Association ("CJA"), the Civil Justice Association of California ("CJAC"), the Consumer Attorneys of California ("CAOC"), the Judicial Council, the State Bar of California,[5] certain county courts, and a number of law firms.

In addition, pursuant to the Commission's Tribal Consultation Policy, the Executive Director sent a letter notifying California Tribes about the commencement of this study.[6]

The staff welcomes any suggestions of additional stakeholders who should be contacted about this study.[7]

CIVIL DISCOVERY ACT

Before analyzing the specific issue raised by Commissioner Capozzola, it may be helpful to have some general context about the primary law at issue — the Civil Discovery Act (Code Civ. Proc. §§ 2016.010-2036.050). This Act governs the formal exchange of evidentiary information and materials between parties to a pending civil action or a special proceeding of a civil nature.

The substance of the current Act largely derives from a proposal prepared by a joint commission of the State Bar and the Judicial Council,[8] which was enacted in 1986.[9] There have been many revisions over the years and the entire Act was

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4. See Minutes (Oct. 2014), p. 3.

5. The State Bar has a procedure for distributing Commission materials to interested groups within the organization (such as the Litigation Section, which may be particularly interested in this study). That procedure remains in place despite ongoing efforts to reorganize the State Bar. We are monitoring the situation and will make adjustments if necessary to ensure that the Litigation Section continues to receive materials relating to this study as they are generated.

6. See Minutes (Sept. 2016), p. 3.

7. Interested persons who wish to receive electronic notices related to this study may subscribe to the Commission's electronic mailing list. Please notify the staff of your interest in subscribing (by sending email to kburford@clrc.ca.gov or bgaal@clrc.ca.gov) and we will add you to that mailing list free of charge.

8. State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986: Proposed Act and Reporter's Notes (Jan. 1986).

9. See 1986 Cal. Stat. ch. 1334.

recodified without substantive change in 2004, on recommendation of this Commission.[10]

Broad Pretrial Discovery

"Discovery procedures are based on the theory that a lawsuit should be a search for the truth, and not a game to be fought and won mainly by strategic moves and surprise tactics."[11] In furtherance of that concept, a "central precept" of the Civil Discovery Act is to "uphold the right to discovery wherever reasonable and possible."[12] As the California Supreme Court explained, allowing broad pretrial discovery is intended to:

(1) Assist parties in ascertaining the truth and in checking and preventing perjury.
(2) Provide an effective means of detecting and exposing false, fraudulent, and sham claims and defenses.
(3) Make available, in a simple, convenient, and inexpensive way, facts that otherwise could not be proved without great difficulty.
(4) Educate the parties before trial as to the real value of their claims and defenses, thus encouraging settlements.
(5) Expedite litigation.
(6) Safeguard against surprise.
(7) Prevent delay.
(8) Simplify and narrow the issues.
(9) Expedite and facilitate both preparation and trial.[13]

Self-Executing Discovery System

Another "central precept" of the Civil Discovery Act is that "civil discovery be essentially self-executing."[14] "A self-executing discovery system is 'one that operates without judicial involvement.'"[15]

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10. See 2004 Cal. Stat. ch. 182; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003). The nonsubstantive recodification became operative on July 1, 2005. See 2004 Cal. Stat. ch. 182, § 64.

11. 2 B. Witkin, California Evidence *Discovery* § 1, at 969 (5th ed. 2012); see, e.g., Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) (principal purpose of discovery was to do away with sporting theory of litigation — i.e., surprise at trial).

12. Obregon v. Superior Court, 67 Cal. App. 4th 424, 434, 79 Cal. Rptr. 2d 62 (1998).

13. *Greyhound*, 56 Cal. 2d at 376.

14. Townsend v. Superior Court, 61 Cal. App. 4th 1431, 1435, 72 Cal. Rptr. 2d 333 (1998).

15. Clement v. Alegre, 177 Cal. App. 4th 1277, 1291, 99 Cal. Rptr. 3d 791 (2009), *quoting* 2 Hogan & Weber, Cal. Civil Discovery *Sanctions* § 15.4, pp. 15-7 to 15-8 (2d ed. 2005).

"Conduct frustrates the goal of a self-executing discovery system when it requires the trial court to become involved in discovery because a dispute leads a party to move for an order compelling a response."[16] The same is of course true with respect to other types of discovery motions, such as a motion for a protective order.

Thus, as a general matter, the Act creates incentives for parties to work out their discovery disputes rather than bring those disputes before the court. Key mechanisms establishing such incentives are (1) the meet and confer requirement and (2) the use of discovery sanctions.

Meet and Confer Requirement

Before filing a discovery motion, a party is obligated to consult (typically, meet and confer) with the other party.[17] The meet and confer requirement is designed to encourage parties to work out their differences informally and avoid the necessity of a court order.[18] By promoting informal, extrajudicial resolution of discovery disputes, the meet and confer requirement lightens the burden on the court and prevents unnecessary expenditures by litigants.[19]

"A reasonable and good faith attempt at informal resolution entails something more than bickering" with opposing counsel.[20] "Argument is not the same as informal negotiation."[21]

Rather, "the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate."[22] More specifically, to effectively meet and confer the parties must

> present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its

16. *Clement,* 177 Cal. App. 4th at 1291-92.
17. See, e.g., *id.* at 1293-94; *Obregon,* 67 Cal. App. 4th at 434; *Townsend,* 61 Cal. App. 4th at 1435-36.
18. Stewart v. Colonial Western Agency, Inc., 87 Cal. App. 4th 1006, 1016, 105 Cal. Rptr. 2d 115 (2001).
19. *Id.*; see also *Townsend,* 61 Cal. App. 4th at 1435.
20. *Townsend,* 61 Cal. App. 4th at 1439.
21. *Id.*
22. *Id.*; see also *Clement,* 177 Cal. App. 4th at 1281, 1294.

> position in light of all applicable information, can there be a "sincere effort" to resolve the matter.[23]

Determining whether an attempt to meet and confer is adequate involves the exercise of discretion.[24] As a leading case explains:

> The level of effort at informal resolution which satisfies the "reasonable and good faith attempt" standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects of success and other similar factors can be relevant.[25]

Sanctions

The Civil Discovery Act also places parties, their attorneys, and anyone else misusing the discovery process at risk of sanctions when a discovery dispute is brought before the court.[26] The Act includes specific provisions authorizing sanctions in connection with particular motions, as well as a chapter with more general provisions on sanctions for misuse of the discovery process.[27] Although that chapter includes an illustrative list of misuses of the discovery process, it appears that those misuses may only be subject to sanctions if sanctions are authorized in another part of the Act.[28]

When a court decides a discovery motion, the Act generally requires the imposition of a monetary sanction on the losing party, unless that party's actions were substantially justified or sanctions would otherwise be unjust.[29] A

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23. *Townsend,* 61 Cal. App. 4th at 1435, *quoting* Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 120 (D. Nev. 1993).

24. *Obregon,* 67 Cal. App. 4th at 431.

25. *Id.*

26. *Id.* "Motions for sanctions based on bad faith conduct in discovery should be brought under the applicable provisions of the Civil Discovery Act." CEB, California Civil Discovery Practice *Discovery Motion Practice and Sanctions* § 15.87, p. 15-72 (2017). The statute that generally governs sanctions for bad faith acts (Code Civ. Proc. § 128.7) expressly states that it "shall not apply to disclosures and discovery requests, responses, objections, and motions." Code Civ. Proc. § 128(g); *but see* CEB, *supra, Discovery Motion Practice and Sanctions* § 15.107, p. 15-102.

27. Code Civ. Proc. §§ 2023.010-2023.040.

28. See Code Civ. Proc. § 2023.030 ("To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process….").

29. See Code Civ. Proc. § 2023.030(a).

monetary sanction is to be comprised of "the reasonable expenses, including attorney's fees, incurred by anyone as a result of" the sanctionable conduct.[30]

More severe sanctions under the Civil Discovery Act include issue sanctions,[31] evidence sanctions,[32] terminating sanctions,[33] and contempt sanctions.[34] The discovery statutes "evince an incremental approach to discovery sanctions, *starting* with monetary sanctions and *ending* with the ultimate sanction of termination."[35]

In determining which type of sanction to impose, a trial court has "broad discretion," but "this discretion must be exercised in a manner consistent with the basic purposes of such sanctions, e.g., to compel disclosure of discoverable information."[36] Sanctions must also be "appropriate to the dereliction."[37] They "may not be imposed solely to punish the offending party,"[38] nor may they provide a windfall to the other party, by putting the prevailing party in a better position than if he or she had obtained the discovery sought and it had been favorable."[39] "[W]illful failure to comply with a court order is generally prerequisite to the imposition of nonmonetary sanctions."[40]

A court may impose sanctions not only for unreasonably refusing or seeking discovery, but also for failing to meet and confer in good faith, or for acting

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30. *Id*. A monetary sanction may be appropriate even when the prevailing party incurred no expenses because counsel handled the matter on a pro bono basis. See, e.g., Do v. Superior Court, 109 Cal. App. 4th 1210, 135 Cal. Rptr. 2d 855 (2003).

31. A court may impose "an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." Code Civ. Proc. § 2023.030(b). Another option is to "impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses." *Id.*

32. A court may impose "an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence." Code Civ. Proc. § 2023.030(c).

33. A court may impose a terminating sanction by entering an order that (a) strikes all or part of the pleadings of a party engaging in misuse of the discovery process, (b) stays further proceedings by that party until an order for discovery is obeyed, (c) dismisses all or part of that party's case, or (d) renders judgment by default against that party. Code Civ. Proc. § 2023.030(d).

34. A court may impose "a contempt sanction by an order treating the misuse of the discovery process as a contempt of court." Code Civ. Proc. § 2023.030(e).

35. Doppes v. Bentley Motors, Inc., 174 Cal. App. 4th 967, 992, 94 Cal. Rptr. 3d 802 (2009) (emphasis added); see also Lopez v. Watchtower Bible & Tract Society, 246 Cal. App. 4th 566, 604, 201 Cal. Rptr. 3d 156 (2016).

36. Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1193, 190 Cal. Rptr. 3d 411 (2015).

37. *Doppes,* 174 Cal. App. 4th at 992.

38. *Rutledge,* 238 Cal. App. 4th at 1193.

39. *Id.*

40. 27B Cal. Jur. 3d *Discovery & Depositions* § 330 (2017); see, e.g., Code Civ. Proc. § 2025.480(k).

unreasonably with respect to a discovery motion.[41] This further obligates a party to work cooperatively to resolve discovery disputes, even when that party has the winning legal argument. More to the point, even when a party is confident in the legal correctness of their position, that party would be subject to sanctions if they decline to participate in the other party's effort to informally resolve the dispute.

The Joint Commission that developed the Civil Discovery Act concluded that the new sanctions provisions would better deter discovery abuses than the prior system. The Act effectively makes substantial justification an excuse to escape sanctions, while the prior system required an affirmative finding of a lack of substantial justification before sanctions could be imposed.[42]

DEPOSITIONS

Having taken a look at the Civil Discovery Act generally, it seems advisable to explain more specifically how the discovery statutes work in the context raised by Commissioner Capozzola, the taking of a deposition. After examining the statutory scheme, it will be easier to present and analyze the basis for his concern.

"A deposition is a method of obtaining discovery by taking a witness's testimony under oath."[43] There are a number of different types of depositions.[44]

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41. See Code Civ. Proc. § 2023.010.

42. See State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986: Proposed Act and Reporter's Notes 23 (January 1986) (instead of requiring party seeking discovery sanctions to prove that opponent's conduct was not substantially justified, "[t]he proposed change provides in effect that expenses should ordinarily be imposed unless the court finds that the losing party acted justifiably in carrying his point to court.") (*quoting* Advisory Committee for the Federal Rules of Civil Procedure (1970)).

43. Judicial Council, California Judges Benchbook: Civil Proceedings — Discovery *Oral Depositions* § 15.1, p. 240 (2016). Other key methods of discovery include interrogatories, requests for admission, inspection demands, and physical and mental examinations.

44. For instance, a deposition can require only testimony, only the production of documents or materials, or both testimony and the production of documents. See Code Civ. Proc. §§ 2020.020, 2025.220(a)(4). Further,

- A deposition can be oral or written.
- The deponent can be a party or a nonparty.
- A deposition can occur in a California case, or in a case pending in another jurisdiction.
- A deposition can take place in California, or in another location.
- A deposition can involve only two parties, or it can involve multiple parties and perhaps also one or more nonparties.

For the sake of simplicity, the analysis in this memorandum focuses on a common situation: an oral deposition of a party witness[45] in a California lawsuit.[46] The memorandum assumes that the deposition does not involve the production of documents or any objection by a nonparty witness. The staff will address other deposition scenarios in the future, as appears appropriate.

The discussion below briefly summarizes the process for scheduling a testimonial deposition of a party witness and the objections and motions that may be made when the deponent is unwilling or unable to attend or refuses to testify. For ease of reference, this memorandum will refer to the party scheduling the deposition as the "deposing party" and the party sought to be deposed as the "deponent."

Scheduling a Deposition

When seeking to depose a party witness, a party must serve a deposition notice to secure the party witness' attendance. Service of a deposition notice "is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify…."[47]

Code of Civil Procedure Sections 2025.210 to 2025.290 contain provisions governing the timing, contents and service requirements for a deposition notice. Section 2025.220 specifies the required contents of the deposition notice (including location, date, time, and deponent's name or general description[48]). Section 2025.240 specifies that the deposition notice must be served on the other parties that have appeared in the action.

Written Objections to a Deposition Notice

Any party served with a deposition notice that contains errors or irregularities must promptly serve a written objection at least three calendar days

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45. For the purposes of this memorandum, a "party witness" includes a party-affiliated witness for whom a subbpoena is not required to secure testimony. See, e.g., Code Civ. Proc. §§ 2025.280(a), 2025.450(a), (h).

46. For special rules applicable to discovery in an action pending outside of California, see the Interstate and International Depositions and Discovery Act (Code Civ. Proc. §§ 2029.100-2029.900).

47. Code Civ. Proc. § 2025.280(a).

48. Where the deponent is not a natural person, the deposition "shall describe with reasonable particularity the matters on which examination is requested." The deponent must then "designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters…." Code Civ. Proc. § 2025.230.

prior to the date scheduled for the deposition.[49] A party that fails to serve such written objections waives any error or irregularity.[50]

The filing of written objections *does not* appear to stay the deposition.[51]

It appears that, in practice, the filing of a written objection could serve to initiate a meet and confer process between the deposing party and the objecting party. In some cases, the parties may be able to resolve the dispute and proceed with the deposition as originally scheduled. In other cases, the dispute may be intractable and the parties may need the court to resolve the issue.

Motion to Quash a Deposition Notice and Stay the Deposition

Where parties are unable to resolve a dispute over a deposition notice through the meet and confer process, the law authorizes an objecting party to move for an order staying the deposition and quashing the deposition notice.[52] The motion must be accompanied by a meet and confer declaration.[53] The filing of such a motion *automatically stays* the taking of the deposition.[54]

The court is obligated to impose sanctions against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash, unless the court finds that the one subject to sanction acted with substantial justification or that sanctions would otherwise be unjust.[55]

A party deponent who serves written objections, but decides not to proceed with a motion to quash, would be at risk if that party fails to attend the deposition. In particular, a leading treatise states:

> If you receive a deposition notice in time to attend, it is risky (maybe foolhardy) to stay away from the deposition because of perceived errors or defects in the notice.
>
> If it is your client's deposition, you are exposing the client and yourself to the risk of sanctions if it turns out you are wrong.
>
> …

49. Code Civ. Proc. § 2025.410(a).

50. *Id*.

51. See Code Civ. Proc. § 2025.410(b), (c). However, a party who proceeds with a deposition in the face of a valid objection is prohibited from using the deposition against the objecting party. Code Civ. Proc. § 2025.410(b).

52. Code Civ. Proc. § 2025.410(c).

53. *Id*.

54. *Id*.

55. Code Civ. Proc. § 2025.410(d).

> If you do not want the deposition to go forward and are willing to risk not attending, you could … file either a motion for a protective order or a motion to quash the [deposition] notice.
>
> As a practical matter, however, the effort and expense involved in such motions are *rarely* justified. It usually makes more sense simply to contact counsel noticing the [deposition] and *negotiate* your objections.[56]

The treatise goes on to state:

> Moving to quash the deposition notice is *not recommended* unless the defect is critical and you have *exhausted reasonable efforts* to obtain a proper notice.[57]

Motion for a Protective Order Relating to a Deposition

The Civil Discovery Act also authorizes a party, deponent, or other affected person to move for a protective order before, during,[58] or after a deposition.[59] The motion must be accompanied by a meet and confer declaration.[60]

The Act does not require filing of written objections prior to seeking a protective order. Under the Act, it appears that "written objections" are specifically related to defects in the notice (i.e., issues that would be addressed by a motion to quash).[61] In practice, parties may also want to memorialize their other objections in writing in order to initiate the mandatory meet and confer process.

Filing a motion for a protective order *does not* automatically stay the deposition. However, a party seeking a protective order can also seek to stay the deposition until the court rules on the motion for the protective order.[62]

In ruling on a motion for a protective order, the court "may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or

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56. Robert Weil & Ira Brown, Jr., Civil Procedure Before Trial Discovery § 8:512, at 8E-31 (Rutter Group 2017) (emphasis in original and citations omitted).

57. *Id*. § 8:515 at 8E-32.

58. See, e.g., 27B Cal. Jur. 3d Discovery & Depositions § 82 (2017) ("[A] deposing counsel's insistence on inquiring into irrelevant areas could justify suspension of the deposition under the rule permitting suspension in order to allow objecting counsel to move for a protective order …. … [S]uspension is available only where an interrogation into improper matters reveals an underlying purpose to harass, annoy, or oppress …."); see also Code Civ. Proc. § 2025.470.

59. Code Civ. Proc. § 2025.420(a).

60. *Id*.

61. See Code Civ. Proc. § 2025.410(a); see also Code Civ. Proc. § 2025.450(a).

62. Code Civ. Proc. § 2025.270(d).

undue burden and expense."[63] The party seeking the protective order has the burden to establish good cause for the relief sought.[64]

The law provides an illustrative list of possible protections that the court could order. Among other things, this list includes:

- Prohibiting the deposition altogether.[65]
- Prohibiting inquiry into certain matters.[66]
- Modifying the time or place of the deposition.[67]
- Allowing the taking of a deposition only under specified terms and conditions.[68]
- Sealing the deposition and only opening it on court order.[69]
- Terminating the examination of the deponent. [70]

If a court denies a motion for a protective order, in whole or in part, the court may order the deponent to permit the discovery sought by the deposing party.[71]

The court must impose a monetary sanction on any person, party, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless the court finds that the one subject to sanction acted with substantial justification or the imposition of sanctions would otherwise be unjust.[72]

Motion to Compel a Deponent's Attendance and Testimony

If, after service of a deposition notice, a party "fails to appear for examination, or to proceed with it," without having made a valid objection regarding a notice defect, the deposing party may move for an order compelling the deponent's attendance and testimony.[73]

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63. Code Civ. Proc. § 2025.420(b).
64. Weil & Brown, *supra* note 56, § 8:689 at 8E-100 to 8E-101.
65. Code Civ. Proc. § 2025.420(b)(1).
66. Code Civ. Proc. § 2025.420(b)(9).
67. Code Civ. Proc. § 2025.420(b)(2), (b)(4).
68. Code Civ. Proc. § 2025.420(b)(5).
69. Code Civ. Proc. § 2025.420(b)(15).
70. Code Civ. Proc. § 2025.420(b)(16).
71. Code Civ. Proc. § 2025.420(g).
72. Code Civ. Proc. § 2025.420(h).
73. Code Civ. Proc. § 2025.450(a). Similarly, where a deponent attends a deposition and testifies, but fails to answer specific questions, the Civil Discovery Act authorizes the deposing party to move the court to compel answers to the questions that the deponent fails to answer. Code Civ. Proc. § 2025.480.

Under the terms of the statute, it appears that the deposing party could not bring such a motion before the noticed deposition time.[74] Until then, there is no failure to appear or proceed, and thus no basis for a motion to compel. This would seem to be so even in situations where the deponent clearly refuses to attend the deposition.

Before bringing a motion to compel, a deposing party should also consider whether the recalcitrant deponent has served a valid objection regarding a notice defect. The lack of such an objection appears to be a condition for filing a motion to compel a deponent to attend and testify.[75]

Such a motion "shall be accompanied by … a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance."[76] In *Leko v. Cornerstone Building Inspection Service*, the Second District Court of Appeal explained that "*[i]mplicit* in the requirement that counsel contact the deponent to inquire about the nonappearance is a requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue."[77]

There does not seem to be a California Supreme Court decision on whether a meet and confer obligation is implicit in the statutory requirement to "contac[t] the deponent about the nonappearance." Aside from *Leko*, the only cases we found on the point are unpublished and divided in outcome.[78]

According to the Judicial Council's benchbook on discovery, a judge ruling on a motion to compel a deponent's attendance should first determine:

- Whether the deponent's failure to attend the scheduled deposition is clearly documented, either in a transcript lodged with the court or by declaration.
- In the case of a *party* deponent's failure to obey a deposition notice, whether the deponent served a timely written objection to the notice.

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74. See Code Civ. Proc. § 2025.450(a).

75. See *id.* This rule suggests that a deponent who serves a valid written objection does not waive the objection by failing to file a motion to quash. See also Code Civ. Proc. § 2025.410(b) ("Any deposition taken after the service of a written objection shall not be used against the objecting party under Section 2025.620 if the party did not attend the deposition and if the court determines that the objection was a valid one.").

76. Code Civ. Proc. § 2025.450(b)(2).

77. 86 Cal. App. 4th 1109, 1124, 33 Cal. Rptr. 2d 858 (2001) (emphasis added).

78. *Compare* Said v. Regents, 2007 Cal. App. Unpub. LEXIS 1827, at *52-*54 (2017) (referring to *Leko* with approval) *with* Ntephe v. Mesiwala, 2015 Cal. App. Unpub. LEXIS 7926, at *15-*16 (when deponent fails to appear "all that is required is a declaration by the moving party that he or she has contacted the deponent 'to inquire about the nonappearance.'").

- If a *party* deponent seeks to excuse disobedience of a deposition notice on such grounds as conflicting obligations or illness, whether
  - — The seriousness of the conflict or illness is adequately documented.
  - — The deponent gave reasonable notice of the existence of the conflict or illness and made a reasonable effort to be available at another time.
  - — The moving party made a reasonable effort to accommodate the deponent's special needs; and
  - — Special arrangements can be made to accommodate these needs when the deposition is rescheduled.[79]

If a judge *grants* such a motion to compel, the judge will enter an order directing the deponent to appear and testify. The judge must also impose a monetary sanction in favor of the deposing party and against the deponent or party affiliated with the deponent, unless the court finds that the person subject to the sanction acted with substantial justification or that the sanction is otherwise unjust.[80] More severe sanctions generally would not be appropriate unless and until the deponent violates a court order to appear and testify.[81]

If a judge *denies* a motion to compel a deponent to attend and testify, sanctions might sometimes be warranted against the *moving* party. In *Leko,* for

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79. Benchbook, *supra* note 43, § 15.40, at pp. 264-65 (emphasis in original; citations omitted).

80. Code Civ. Proc. § 2025.450(g)(1); see also *Do,* 109 Cal. App. 4th at 1218; CEB, *supra* note 26, *Discovery Motion Practice and Sanctions*, § 15.90, p. 15-73. In addition, the court is obligated, on motion of any other party attending the deposition as noticed, to impose a monetary sanction against the deponent or party affiliated with the deponent, unless the court finds that the person subject to the sanction acted with substantial justification or that the sanction is otherwise unjust. Code Civ. Proc. § 2025.450(g)(2).

81. As Witkin explains,

> C.C.P. 2025.450(c) and (d) [now C.C.P. 2025.450(g) and (h)] discontinue the former practice of imposing severe sanctions for an initial, wilful failure to appear for a deposition. The [State Bar-Judicial Council Joint Commission on Discovery] believed that that approach needlessly created questions about the meaning of "wilfulness," and that in practice most courts were reluctant to impose severe sanctions for a mere failure to respond. Thus, only a monetary sanction is available in the first instance for a party's failure to appear for a deposition. "However, if the court orders that party to appear, and this order is not obeyed, the it becomes more appropriate to deal with disobedience by one of the severe sanctions."

B. Wikin, *supra* note 11, § 62, p. 1039, *quoting* Reporter's Note to former Code Civ. Proc. § 2025(j)(3).

instance, the Second District Court of Appeal upheld a $950 sanction for "filing an unnecessary motion to compel."[82]

Notably, however, the section that authorizes a motion to compel a deponent to attend and testify (Code Civ. Proc. § 2025.450) does not explicitly authorize a court to impose sanctions on a deposing party whose motion to compel is denied.[83] That omission may be inadvertent. In *Leko*, the court relied instead on the general provision enumerating discovery abuses,[84] notwithstanding other statutory language[85] that might require a more precise source of authority for imposing sanctions.[86]

ISSUE RAISED BY COMMISSIONER CAPOZZOLA

As noted at the beginning of this memorandum, Commissioner Capozzola has experienced some problems with how the statutes governing deposition attendance function in practice. As a practicing litigator, he "often find[s] that there is confusion with regard to depositions."[87]

He frames the issue as follows:

> If a party notices a deposition of a party witness, or if a party notices a deposition of a non-party witness and subpoenas that witness to appear for deposition, and the witness or counsel for the witness or another party in the case wishes to contest that deposition going forward, *whose initial burden is it to go through the time and expenses of seeking an order from the Court?* Is it sufficient for the witness or another party to simply serve an objection, forcing the *deposing counsel* to seek an immediate order *enforcing* the

82. See 86 Cal. App. 4th at 1124.

83. See Code Civ. Proc. § 2025.450(g).

84. See former Code Civ. Proc. § 2023(a), now codified as Code Civ. Proc. § 2023.010. Among other things, this provision classifies the following as misuses of the discovery process: (1) "[p]ersisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery" and (2) [m]aking…, unsuccessfully and without substantial justification, a motion to compel…." See Code Civ. Proc. § 2023.010 (a), (h).

85. See former Code Civ. Proc. § 2023(b), now codified as Code Civ. Proc. § 2023.030 (permitting a court to impose sanctions for misuses of the discovery process "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title.").

86. See *Leko*, 86 Cal. App. 4th at 1124 ("Sanctions were properly awarded under section 2023, subdivision (a)(3) and (9)."). Similar reasoning may underlie the statement in a leading treatise that sanctions "may also be awarded against a party who *fails to oppose a motion to compel*, or who *withdraws* its opposition or furnishes the requested discovery before the motion hearing." Weil & Brown, *supra* note 56, § 8:837, at 8E-149 (emphasis in original).

87. Exhibit p. 1.

> deposition notice or subpoena, *or* is it incumbent upon the *witness or other party* to immediately seek an order from the Court *shutting down* the deposition, whether as a motion for protective order or motion to quash?[88]

Commissioner Capozzola notes that some of the confusion may stem from the differing effects of a motion to quash and a motion for a protective order.[89] As previously discussed, the former automatically stays the taking of a deposition while the latter does not.

Apparently, however, that difference in treatment is not the only potential source of confusion. As Commissioner Capozzola points out, it comes into play only if "the witness or other non-deposing party files a motion at all."[90]

In his experience, "often what happens in actual practice" is that "counsel for the witness simply serves objections and sends a letter or an e-mail saying that the witness will not appear …."[91] He asks what rule applies in that situation: "Is the deposition still on calendar, potentially subjecting the witness and his counsel to sanctions for nonappearance?"[92] Commissioner Capozzola says there is confusion on this point:

> In practice this all tends to be somewhat unclear and usually gets resolved based on the relationships among counsel and/or the demeanor of the judge. *There does not seem to be consistency, despite what statutes that do exist.*[93]

On rare occasions, the dispute is over the location of a deposition[94] or the choice of a deponent to provide testimony on behalf of an organization.[95] More frequently, the dispute concerns scheduling.

According to Commissioner Capozzola, most attorneys are pretty good at accommodating each other's scheduling conflicts and those of their clients or other witnesses — trial dates, medical appointments, graduations, weddings, and the like. In part, he thinks this may be because they realize that they may

88. *Id.* (emphasis added).
89. See *id.*
90. *Id.*
91. Exhibit pp. 1-2.
92. Exhibit p. 2.
93. *Id.* (emphasis added).
94. See, e.g., Van v. LanguageLine Solutions, 8 Cal. App. 5th 73, 76 & n.1, 213 Cal. Rptr. 3d 822 (2017).
95. For example, an attempt to depose the CEO of a corporation instead of a lower level employee who is more familiar with the subject matter at hand.

need to request a similar scheduling accommodation before long.[96] Commissioner Capozzola finds, however, that problems typically arise relating to litigation strategy and gamesmanship.[97]

For example, an attorney may receive a deposition notice from opposing counsel, but refuse to let his client be deposed until his opponent produces a particular set of documents. He considers it important for his client to review those documents and refresh her recollection before testifying under oath.

Opposing counsel contends, however, that the document request is overbroad and fails to describe the requested documents with sufficient particularity. Opposing counsel wants to go forward with the deposition as scheduled. The two attorneys meet and confer about the matter, but neither is willing to back down.[98]

To give a second example, perhaps an attorney schedules a deposition but she has to postpone it when the deponent becomes sick. Her opponents then try to take another deposition before allowing her to complete the deposition that had to be postponed. In other words, her opponents attempt to leapfrog the deposition schedule, seeking to build their case before she can complete her own, earlier-requested discovery.

She insists that she should be allowed to complete her deposition first, relying on *Rosemont v. Superior Court,* in which the California Supreme Court said:

> Since discovery proceedings can seldom if ever be conducted simultaneously, it is inherent in such proceedings that the party who secures discovery first may derive advantages by securing information from his adversary before he is required to reciprocate by divulging information to him. *Parties should be encouraged to expedite discovery and should not needlessly be deprived of the advantages that normally flow from prompt action.*[99]

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96. Phone conversation between B. Gaal and D. Capozzola (July 6, 2017).

97. *Id.*

98. For a case involving somewhat similar facts, see Rosemont v. Superior Court, 60 Cal. 2d 709, 36 Cal. Rptr. 439, 388 P.2d 671 (1964); see also Witkin, *supra* note 11, *Discovery* § 67, pp. 1044-46.

99. 60 Cal. 2d 709, 714, 388 P.2d 671, 36 Cal. Rptr. 439 (1964) (emphasis added); see also Young v. Rosenthal, 212 Cal. App. 3d 96, 106, 260 Cal. rptr. 369 (1989) ("Because of Rosenthal's refusals to produce the requested documents or return for his deposition, CEH was placed in a position of losing its priority in discovery."); CEB, *supra* note 26, *Deposition Procedures* § 5.49, p. 5-37 ("Counsel who unilaterally alters the sequence of depositions by continuing his or her client's deposition, then noticing the opposing party's deposition, risks issuance of a protective order and the imposition of sanctions."); Weil & Brown, *supra* note 56, *Depositions* § 8:497, p. 8E-28 ("Even in the absence of statutory authority or rule, many judges will order depositions to be taken and

Her opponents refuse to back down, however, stressing that the postponement was unavoidable, the case is set for mediation in a few weeks, and the deposition they scheduled may affect their mediation strategy. They point out that the Civil Discovery Act "does not recognize priority based on notice alone: Unless state or local court rules or local uniform written policy provide otherwise, 'the fact that a party is conducting discovery, whether by deposition or another method, *shall not operate to delay the discovery of any other party*.'"[100]

These kinds of disputes can be heated and hard for attorneys to resolve without assistance. Commissioner Capozzola thus thinks "it may be worth study and input from the litigation community as to *whether a more precisely and better coordinated statutory regime would create helpful consistency* for counsel and courts to follow."[101] He says it might turn out that "the statutes as drafted are fine and the problem is with the counsel and courts who don't understand them or don't follow them," but he believes the issue is "worth looking at …."[102]

ANALYSIS

As a purely technical matter, the above-described statutory scheme may appear clear-cut, with little uncertainty about whether a deposition will go forward as scheduled. Under that scheme,

- Service of a properly prepared deposition notice is sufficient to require a party witness to attend and testify at the time and place specified in the notice.
- Service of a written objection to the deposition notice does *not*, by itself, stay the taking of the deposition.
- Filing a motion to quash a deposition notice *automatically* stays the taking of the deposition; no court order is necessary.
- Filing a motion for a protective order *does not* automatically stay the taking of the deposition. However, the moving party may file an accompanying motion for a stay, which will only halt the deposition if the court grants that motion.
- Absent a stay, the deposition is to go forward as scheduled, with no need for a motion to compel.

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completed in the order noticed. Protective orders … may be granted to prevent a party from unilaterally altering the sequence of depositions (e.g., by obtaining a continuance of his or her deposition and then noticing a deposition of the opponent)." (emphasis in original)).

100. Weil & Brown, *supra* note 56, *Depositions* § 8:495, p. 8E-27 (emphasis in original).

101. Exhibit p. 2 (emphasis added).

102. *Id.*

Overlying those basic rules, however, is the specter of sanctions. As the staff noted in the 2016 new topics memorandum, (1) "under existing law, it is incumbent on both the deponent and the deposing party to act reasonably and in good faith to resolve an objection to the taking of a deposition," and (2) "*both sides proceed to some extent at their peril* if they are unable to resolve such an objection (whether they will be sanctioned depends largely on whether the court views their conduct as reasonable and in good faith) …."[103]

In practice, then, the situation may entail great stress and considerable confusion for attorneys, clients, and witnesses, as they try to gauge the validity of their positions and opposing perspectives and act accordingly. They strive to avoid unnecessary costs, inconvenience, and other adverse effects, without stepping over the line into sanctionable conduct.

For instance, an attorney may feel trapped between competing pressures. On the one hand, the attorney needs to project toughness and protect his or her client from being taken advantage of, ambushed with previously undisclosed documents, or bullied in other ways. On the other hand, the attorney and client must go to reasonable lengths to accommodate requests from the other side.

As the Second District Court of Appeal noted in *Townsend v. Superior Court*, "too often the ego and emotions of counsel and client are involved at depositions."[104] Counsel "can become blinded by the combative nature of the proceeding and be rendered incapable of informally resolving a disagreement."[105]

What, if anything, should be done about this situation? The staff sees a number of possibilities, some of which deal with the full breadth of Commissioner Capozzola's issue, while others only address specific aspects of it.

Possible Approaches to the Whole Issue

Two sweeping, sharply contrasting approaches to Commissioner Capozzola's issue are described below.

Leave the Law As Is

One viewpoint is that the Civil Discovery Act is functioning exactly as it is intended to function and should be left alone. It is a complex procedural statute,

103. Memorandum 2016-53, pp. 34-35 (emphasis added; footnotes omitted).
104. 61 Cal. App. 4th at 1436.
105. *Id.*

in which risk and uncertainty appear to be used to promote informal resolution. Although the Act seems to provide clear standards, the application of those standards may be somewhat unpredictable in practice (e.g., judges might have differing thoughts on whether a party's discovery conduct was "substantially justified"). That unpredictability may promote the policy goals of reducing abuse and encouraging informal resolution, keeping discovery disputes out of the courts.

"Trial courts generally have little tolerance for discovery motions because of a perception that the parties ought to be able to resolve many, if not most, discovery disputes without judicial intervention."[106] By creating incentives for informal resolution, the current scheme minimizes the need for judges to devote time to such disputes. It may already be the optimum solution.

Develop a Set of Factors or Presumptions That Would Provide Guidance on Resolving Conflicts Over Deposition Scheduling

Another possibility would be to try to develop a set of factors or presumptions that would provide guidance to attorneys, parties, and courts in resolving conflicts over deposition scheduling. This would be challenging, because such conflicts can arise in many different ways and each case is to some extent unique.

Nonetheless, it might be possible to codify some key principles that would provide a measure of helpful guidance. For example, perhaps there should be a provision explicitly identifying some factors that a court *must* take into account in resolving such a dispute (such as the order in which depositions were noticed). Or perhaps there should be a rebuttable statutory presumption that a medical emergency in the deponent's immediate family is "substantial justification" for postponing a deposition.

Some efforts to provide similar guidance on deposition scheduling have already been made,[107] but the staff is not aware of any such efforts at the statutory level. A reform along these lines would go to the heart of the problem

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106. CEB, *supra* note 26, *Discovery Motion Practice & Sanctions* § 15.38, at 15-27.

107. See, e.g., State Bar of California, *California Attorney Guidelines of Civility and Professionalism* (July 20, 2007), at §§ 9(a)(1) ("When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement."); 9(b)(6) ("An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.").

raised by Commissioner Capozzola: the current lack of consistency in resolving disputes over deposition attendance, in which results may vary "based on the relationships among counsel and/or the demeanor of the judge."[108]

Is the Commission interested in this type of approach? If so, obtaining broad input from the litigation community, based on wide range of discovery experiences, will be crucial in developing a useful set of statutory criteria.

Narrow Adjustments

The staff also thought of several more narrow reforms that might to some extent address the issue raised by Commissioner Capozzola. The Commission could pursue any or all of these more narrow reforms instead of, or in addition to, developing a set of factors or presumptions to guide resolution of disputes over deposition scheduling. The reforms in this category are described below.

Codify Leko

As previously discussed, when a prospective deponent fails to show up for a deposition, the deposing party must contact the deponent "to inquire about the nonappearance" before filing a motion to compel.[109] The statute does not specify what this inquiry must entail, nor does it explicitly obligate the party to meet and confer, as is required for other discovery motions.

Leko holds that the statute requires more than a simple, pro forma inquiry. According to the court, counsel must "listen to the reasons offered and make a good faith attempt to resolve the issue."[110]

As explained earlier, *Leko* appears to be the only published decision on this point. Its approach seems to reflect sound policy. In many instances, a nonappearance may be excusable — attributable to a miscommunication, a medical emergency, a transportation problem beyond the deponent's control, or other extenuating circumstances. If the deposing party has to make more than a simple pro forma inquiry about the incident, it might be possible to readily resolve the matter and spare considerable expense and effort.

It might therefore be helpful to codify *Leko*, making its guidance clear on the face of the governing statute. **Is the Commission interested in this idea?**

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108. Exhibit p. 2.
109. See Code Civ. Proc. § 2025.450(b)(2).
110. *Leko*, 86 Cal. App. 4th at 1124.

Explicitly Authorize a Court to Impose Sanctions on a Deposing Party Who Unreasonably Pursues a Motion to Compel

Another previously-mentioned oddity is that the code section that authorizes a motion to compel a deponent to attend and testify (Code Civ. Proc. § 2025.450) does not explicitly authorize a court to impose sanctions on a deposing party whose motion to compel is denied. That could well be an oversight, which might be worth fixing.

For example, the section could be amended to direct a court to impose a monetary sanction on a deposing party who unreasonably pursues a motion to compel, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If it seems appropriate, the accompanying Comment could explain that this is not a substantive change.

Is this concept of any interest to the Commission?

Automatic Stay Upon Filing a Motion for a Protective Order

It is not clear to the staff why filing a motion to quash a deposition notice automatically stays the taking of the deposition, but filing a motion for a protective order does not.[111] We suspect in part it is because a defect in a deposition notice might make attendance infeasible (e.g., if a deposition is accidentally noticed for April 31), while that type of problem could not occur if the deposition is properly noticed. That might not be the only reason for the differing treatment; there might be other considerations as well. **Input on this point would be helpful.**

According to a background study that Prof. Gregory Weber (McGeorge School of Law) prepared for the Commission in 2001, "in contrast to California practice, the filing of a motion for a protective order in Colorado, New Mexico, New York, and Wyoming automatically stays the taking of a deposition."[112] The

111. See discussions of "Motion to Quash a Deposition Notice and Stay the Deposition" and "Motion for a Protective Order Relating to a Deposition" *supra.* A party moving for a protective order can also ask the court to stay the deposition, but the party is not automatically entitled to a stay. See Code Civ. Proc. § 2025.270(d).

112. Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California From the State and Federal Courts,* p. 29 (July 2001). Prof. Weber's background study is available on the Commission's website at http://www.clrc.ca.gov/J503.html#Background%20Study.

The background study cites the following statutes on the point in question: Colo. R. Civ. Proc. 121 § 1-12; N.M. R. Civ. Proc. 30(b)(4); N.Y. C.P.L.R. 3103; Wyo. R. Civ. Proc. 26(c)(4). The New Mexico and Wyoming citations are no longer correct; the corresponding current provisions appear to be N.M. R. Civ. Proc. 1-030D(3) and Wyo. R. Civ. Proc. 30(d)(3)(A).

staff does not know how well this alternative approach is working in these jurisdictions. We could do further research on this if the Commission is interested.

To some extent, the granting of an automatic stay seems inconsistent with the Civil Discovery Act's "central precept" of "uphold[ing] the right to discovery wherever reasonable and possible."[113] There may, however, be competing policy considerations to take into account.

Would the Commission like the staff to do more research on the possibility of automatically staying a deposition if the deponent files a motion for a protective order in advance of the scheduled deposition date?

Monitor the Effect of AB 383 (Chau), Regarding Informal Discovery Conferences

Finally, the Commission should be aware that a pending bill may have an impact on the situation that prompted Commissioner Capozzola's concern. Specifically, we are referring to Assembly Bill 383, which is authored by Assembly Member Chau, who is a legislative member of the Commission.

As presently drafted, AB 383 would, on an experimental basis, authorize a court to "conduct an *informal discovery conference* upon request by a party or on the court's own motion for the purpose of discussing discovery matters in dispute between the parties."[114] That step could occur only if the parties are unable to reach an informal resolution through the meet and confer process.[115] This reform would remain in effect only until January 1, 2023, "unless a later enacted statute that is enacted before January 1, 2023, deletes or extends that date."[116]

According to the author (as quoted by the Senate Judiciary Committee),

> Informal Discovery Conferences (IDCs) are cost-effective and efficient ways for the judge in a case to quickly look at a controversy during the discovery process, and try to resolve disputes without the filing of massive motions, which drain court resources and client funds.

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113. *Obregon*, 67 Cal. App. 4th at 434.

114. See proposed Code Civ. Proc. § 2106.080(a) in AB 383, as amended on July 6, 2017 (emphasis added). The outcome of the informal discovery conference would not bar a party from filing a discovery motion or prejudice the disposition of such a motion. *Id.*

115. *Id.*

116. See proposed Code Civ. Proc. § 2106.080(g) in AB 383, as amended on July 6, 2017.

> IDCs are used in some California courts, and have been incredibly effective and cost-efficient. However, there is no clear statutory authority for courts to establish — or judges to use — these programs, raising some questions as to their validity — and, more importantly, discouraging other courts from establishing such programs.
>
> AB 383 will provide that clear statutory authority and help improve court efficiency by making IDCs an available tool for judges and parties to use in resolving disputes and moving a case forward, rather than relying solely on motions to compel, as an action of first choice.[117]

IDCs "would be an intermediate step between the 'self-executing' process that is envisioned [in the Civil Discovery Act] and the more tedious participation of the court in the minutiae of the discovery process that results from discovery motions."[118] Los Angeles Superior Court is among the courts that have already had positive experience with IDCs. The bill analysis for the Senate Judiciary Committee reports that these conferences in Los Angeles usually take about 30 minutes and in nearly every case that time investment "'resolves the dispute and spares the court (and counsel) the significant time and expense involved in litigating discovery motions.'"[119] Likewise, the bill analysis for the Assembly Judiciary Committee states that "the *possibility* of an informal discovery conference forces attorneys to take the meet and confer requirement more seriously, and 'invest more time meaningfully meeting and conferring, knowing that a judge will expect them to explain why they are at an impasse and the nature and extent of their efforts to resolve the dispute.'"[120] "In other words, the looming possibility of judicial oversight is sufficient to encourage parties to behave a little more civilly with one another."[121]

AB 383 is sponsored by the California Conference of Bar Associations ("CCBA") and has no known opposition. It passed the Assembly by a vote of 76-0 and passed the Senate in slightly different form by a vote of 40-0. It is now

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117. Senate Committee on Judiciary Analysis of AB 383 (June 20, 2017), p. 3, *quoting* author's statement.

118. Senate Committee on Judiciary Analysis of AB 383 (June 20, 2017), p. 4.

119. *Id.* at 5, *quoting* Los Angeles County Superior Court website.

120. Assembly Committee on Judiciary Analysis of AB 383 (March 14, 2017), p. 5, *quoting* Jessner et al., *Streamlining Discovery: Judges Find that Informal Discovery Conferences Often Facilitate Discovery Disputes and May Resolve the Entire Case*, 39 L.A. Lawyer 18, 20 (Oct. 2016) (emphasis in bill analysis).

121. Assembly Committee on Judiciary Analysis of AB 383 (March 14, 2017), p. 5.

pending in the Assembly for concurrence in the Senate amendments. If the bill passes the Legislature and is approved by the Governor, it will become law on January 1, 2018.

The Commission should consider the potential impact of AB 383 on the problem raised by Commissioner Capozzola. In particular, the Commission should assess whether the option of conducting an IDC would obviate the need for other reforms, such as the ones discussed above.

Assuming AB 383 is enacted, one possibility would be to monitor its impact during the trial period (i.e., until the sunset date of January 1, 2023) and then revisit the problem discussed in this memorandum.

REQUEST FOR INPUT

Comments from knowledgeable persons and organizations are invaluable in the Commission's study process. The Commission **encourages stakeholders and other interested persons to express their views on the issues discussed above.** In addition, the Commission welcomes more general input on problematic uncertainties, ambiguities, and inconsistencies in the laws governing civil discovery.

Respectfully submitted,

Kristin Burford
Staff Counsel

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM DAMIAN D. CAPOZZOLA
(9/22/16)

Brian and Barbara,

As we discussed in our previous meeting and again briefly today, as a practicing litigator I often find that there is confusion with regard to depositions. If a party notices a deposition of a party witness, or if a party notices a deposition of a non-party witness and subpoenas that witness to appear for deposition, and the witness or counsel for the witness or another party in the case wishes to contest that deposition going forward, whose initial burden is it to go through the time and expenses of seeking an order from the Court? Is it sufficient for the witness or another party to simply serve an objection, forcing the deposing counsel to seek an immediate order enforcing the deposition notice or subpoena, or is it incumbent upon the witness or other party to immediately seek an order from the Court shutting down the deposition, whether as a motion for protective order or motion to quash?

Relevant statutes of course include CCP Sections 1985 et seq. and 2025.010 et seq., and I'd also direct you to the Rutter Guide (Weil & Brown, Civil Procedure Before Trial) Chapter 8(E) on Depositions (Section 8:414 et seq.).

Perhaps the source of the confusion that is often encountered in actual practice arises from this discrepancy between a motion to quash and a motion for protective order, referenced at Section 8:513 et seq. of the Rutter Guide:

(2) [8:513] **Motion to quash depo notice:** After serving written objections, the objecting party may move for an order staying the deposition and quashing the deposition notice.

Such motion must be accompanied, however, by a declaration of *"reasonable and good faith attempt" to resolve the issues informally*. (This clearly requires you to call the defect to opposing counsel's attention and give him or her the opportunity to send out proper notice, as discussed below.) [CCP § 2025.410(c)] (The "attempt to resolve informally" requirement is discussed in more detail at *¶8:1158 ff.*)

➪ [8:513.1] ***PRACTICE POINTER:*** *Consider alternative procedures discussed at ¶8:787.1.*

(a) [8:514] **Effect—deposition automatically stayed:** Filing the motion to quash *automatically* stays the taking of the deposition until the matter is determined. No court order is required. [CCP § 2025.410(c)]

Compare: A motion for *protective order* will *not* automatically stay a deposition; notice and hearing are required (*see ¶8:687*).

But this still assumes that the witness or other non-deposing party files a motion at all. What if, for example, counsel for the witness simply serves objections and sends a

letter or an e-mail saying that the witness will not appear, which is often what happens in actual practice. Is the deposition still on calendar, potentially subjecting the witness and his counsel to sanctions for nonappearance? In practice this all tends to be somewhat unclear and usually gets resolved based on the relationships among counsel and/or the demeanor of the judge. There does not seem to be consistency, despite what statutes that do exist.

Thus, I think it may be worth study and input from the litigation community as to whether a more precisely and better coordinated statutory regime would create helpful consistency for counsel and courts to follow. Maybe the conclusion will ultimately be that the statutes as drafted are fine and the problem is with the counsel and courts who don't understand them or don't follow them. But I do think this is an issue worth looking at and considering for further study and application of the CLRC's resources.

Thank you for considering these issues.

--Damian