

**Answering Questions About Discovery in California  
From Your Out-of-State Contacts Just Got Easier**

by

Sarah Brite Evans, Esq.

Schwartz Semerdjian Haile Ballard & Cauley LLP

Starting January 1, 2010, the procedure for out-of-state litigants to subpoena witnesses for depositions and documents in California and the process for resolving disputes over discovery issues that arise will be uniform and clear. California's adoption of the "California version of the Uniform Interstate Depositions and Discovery Act" will soon take effect to accomplish this.

#### Problems across the state

Until recently, California's Code of Civil Procedure vaguely described the process for compelling a California witness to give deposition testimony or produce records for use in litigation in another state. That provision said simply, "the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in California." See the former CCP § 2029.010.

This "process" varies widely between counties. For instance, the Superior Courts in San Diego, San Mateo and Sacramento counties issue subpoenas for free; the courts in Los Angeles, San Francisco and Santa Clara require a civil case cover sheet and a \$320 first appearance filing fee. The courts in San Francisco and Santa Clara also require local counsel to sign a civil cover sheet. There was also no uniform procedure for handling discovery disputes that arose over out-of-state subpoenas for discovery in California. The lack of uniformity was problematic, and existed not only within California but across the nation.

#### The newest Uniform Act

Unlike the Federal Rules of Civil Procedure, which provide for a simplified procedure for conducting discovery throughout the country in the federal courts, there is no similar uniform procedure among the states. This lack of uniformity exists despite the enactment of so-called uniform acts such as the Uniform Foreign Depositions Act and the Uniform Interstate and International Procedure Act. Although these two acts dominated the area of interstate deposition statutes, they have not been enacted by all states and vary among the states that have.

In 2007, the Uniform Law Commission approved the Uniform Interstate Depositions and Discovery Act, a new act designed to provide explicit guidance by establishing a "simple clerical procedure" which involves "minimal judicial oversight", according to the press release concerning the approval. See <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=187>. As that press release states, "The net effect of the procedure enables the appropriate clerk of the court in the discovery state to simply reissue the subpoena – in the form of the discovery state subpoena – that has been filed in the trial state, and the new subpoena is served on the witness in accordance with the laws of the discovery state."

After being approved by the Uniform Law Commission, a uniform act is officially promulgated for consideration by the states, and legislatures are urged to adopt it. Since its inception, the ULC has been responsible for more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act.

California was one of the first adopters of the Uniform Interstate Depositions and Discovery Act.

The new California provisions

The California Law Revision Commission sponsored the California version of the Interstate and International Depositions and Discovery Act, which is based on the Uniform Interstate Depositions and Discovery Act of 2007. The procedure that our Legislature adopted is explicit and relatively simple.

Either a court clerk or an active California attorney may issue a subpoena in an out-of-state matter, provided that certain conditions are met. In order for the court clerk to issue it, the requesting party must submit to the superior court clerk in the county in which discovery is sought the subpoena, commission, letters rogatory or other court document that requires a person in California to provide discovery. CCP § 2029.300(a). The party must also submit an application on a form that the Judicial Counsel will create requesting that the Superior Court issue a subpoena with the same terms as the out-of-state subpoena and pay a \$20 fee. *Id.* at subdiv. (b). The clerk is required to “promptly issue” the requested subpoena. *Id.* at subdiv. (c).

Alternatively, an active member of the California state bar may issue a subpoena in an out-of-state matter so long as he or she receives the out-of-state subpoena, commission, letters rogatory or other court document that requires a person in California to provide discovery. CCP § 2029.350(a).

Regardless of whether the subpoena is issued by a court clerk or a licensed attorney, it must incorporate the terms used in the out-of-state subpoena and contain or be accompanied by the contact information of all counsel of record in the proceeding. CCP §§ 2029.300(d) and 2029.350(b). The Judicial Counsel will prescribe the appropriate forms for these subpoenas. *Id.*

California’s discovery provisions regarding service, deposition, production, and inspection procedures apply to these subpoenas once issued. CCP §§ 2029.400 and 2029.500.

If a dispute arises relating to discovery under these provisions or if there is any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief, it may be filed in the court in the county in which the discovery is to be conducted and must comply with California’s applicable rules and statutes. CCP § 2029.600(a).

All such requests for relief are to be labeled a “petition” and must be accompanied by a civil cover sheet. *Id.* at subdivs. (b) and (c). When such a petition is filed, the filing party must pay a first appearance fee, and if a party to the out-of-state proceeding files a response to the petition, that party must also pay a first appearance fee. CCP § 2029.610. A person who is not a party to the out-of-state proceeding may file a petition response without paying a fee. *Id.* at subdiv. (c).

The filing and service requirements applicable to most motions applies to these discovery petitions. CCP § 2029.630. If another dispute later arises relating to discovery being conducted in the same county for purposes of the same out-of-state proceeding, another petition may be filed in the same Superior Court as the previous one and is to use the same case number that the Court assigned to the first petition. CCP § 2029.620.

A Superior Court judge's decision on these out-of-state discovery petitions will be subject to review only through a petition for extraordinary writ to the appropriate appellate district. CCP § 2029.650.

We're not the only ones

This proposed uniform law is gaining traction nationwide. As of the writing of this article, ten states have already adopted the Uniform Interstate Deposition and Discovery Act, and it has been introduced/proposed in five others. For an up-to-date list of which states have adopted this procedure, you can look online at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uidda.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uidda.asp).

In the meantime...

Ironically, when the Legislature enacted the Interstate Depositions and Discovery Act, the bill inadvertently repealed the predecessor Code of Civil Procedure section 2029.010 effective January 1, 2009, leaving a one-year gap in the law authorizing such subpoenas. See CCP § 2029.900. Thus, the Judicial Council adopted California Rules of Court rule 3.1015 to fill this unintended gap. Rule 3.1015. It incorporates the language of the predecessor statute into the rules of court so that courts and litigators may continue to act under that rule until the new statute goes into effect at the beginning of the new year.