

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Dennis M. Perluss, Chair
Discovery and Rules Reform Subcommittee
Hon. Andrew P. Banks, Chair
Anne M. Ronan, Committee Counsel, 415-865-8933
anne.ronan@jud.ca.gov

DATE: February 9, 2009

SUBJECT: Civil Discovery: Deposition Subpoenas in Actions Pending Outside
California (adopt Cal. Rules of Court, rule 3.1015) (Action Required)

Issue Statement

The Legislature recently passed the Interstate and International Depositions and Discovery Act (the Act), Assembly Bill 2193 ([Tran] Stats. 2008, ch.231). The new law is intended to replace the prior statute authorizing deposition subpoenas in actions pending outside the state (Code Civ. Proc., § 2029.010) with a more detailed law concerning how to obtain those subpoenas and, if necessary, how to resolve discovery disputes in those proceedings. The new statutory provisions do not become operative until January 1, 2010, but the bill inadvertently repealed the section 2029.010¹ effective January 1, 2009, leaving a one-year gap in the law authorizing such subpoenas.

The proposed rule is intended to fill this unintended gap in the law, incorporating the language of former section 2029.010 into the rules of court so that courts and litigators may continue to act under that rule until the new statutes go into effect. The rule includes a sunset clause, stating that it is repealed when the Act goes into effect. An advisory committee comment explains why the rule is being enacted.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial

¹ All future references to statutory sections are to the Code of Civil Procedure.

Council adopt rule 3.1015 of the California Rules of Court, effective March 13, 2009.

In light of the lack of any current statute or rule authorizing the issuance of deposition subpoenas in actions pending outside the state, the committee recommends that the rule be adopted effective immediately. The committee further recommends that the rule be circulated for public comment for a 30-day period to allow for comments and, if needed, later amendment of the rule.

The text of the proposed rule is set forth at page 5.

Rationale for Recommendation

Assembly Bill 2193 (AB 2193) adopts the Interstate and International Depositions and Discovery Act to replace the prior statute that authorized issuance of California deposition subpoenas in actions pending outside the state, former Code of Civil Procedure section 2029.010.² The Act clarifies the deponents for whom California subpoenas can be issued in out-of-state proceedings, provides a process for obtaining those subpoenas, and provides a process for the resolution of discovery disputes in out-of state proceedings. The Act provides that, except for a provision mandating the Judicial Council to develop certain forms before January 1, 2010, the new statutes do not become operative until January 1, 2010.

The California Law Revision Commission, which authored the bill, has informed the Administrative Office of the Courts (AOC) that it inadvertently drafted the bill in such a way as to repeal the predecessor statute effective January 1, 2009. The California Law Revision Commission only discovered this error recently and has worked with the legislative sponsor of the new law, Assembly Member Van Tran, to attempt to remedy it. On January 26, 2009, Assembly Member Tran entered into the *Assembly Daily Journal* a letter stating that the early repeal of Code of Civil Procedure 2029.010 was inadvertent and that the author's intent was to leave the provisions of that statute in effect until the new statute becomes operative in January 2010.³

The adoption and immediate implementation of rule 3.1015 to cover this gap in the law is recommended to provide courts with guidance on how to issue subpoenas in out-of-state proceedings, ensure there is consistency among the trial courts, and provide certainty among parties in this area. Several out-of-state litigants already have contacted the AOC inquiring as to what procedures to follow to obtain a deposition subpoena in light of the lack of any operative statutory

² A copy of former Code of Civil Procedure 2029.010 is attached at page 7.

³ A copy of that letter is attached at page 6.

provisions. Courts also have inquired as to the current process that should be followed. While it is unlikely that any trial court would refuse to permit California discovery in such proceedings for the year, even without a statutory provision, it is possible that courts would provide differing solutions to the problem, with some looking to the new law and some relying on the old. This proposal provides that, for this year, all courts and litigants may continue their reliance on the law as it existed before the enactment of AB 2193.

The advisory committee currently is developing Judicial Council forms, including new deposition subpoenas and an application form to implement the Act, which are expected to be presented for approval to the Judicial Council in October for an effective date of January 1, 2010, the date the statutory scheme becomes operative. (Code Civ. Proc., § 2029.900.) The proposed rule will, by its terms, terminate on that date.

The Judicial Council has the authority to adopt the proposed rule under article VI, section 6 of the California Constitution. The rule is not inconsistent with statute – currently there is no operative statute concerning issuance of subpoenas for depositions in proceedings outside California. Moreover, the rule is not inconsistent with legislative intent, in that there is no evidence in the legislative history that AB 2193 was intended to place a moratorium on California depositions in out of state cases during the current year. Rather, the legislative intent in passing the new law appears to have been only to clarify and expand the procedures regarding such depositions in future years.

Because of the inadvertent early repeal of the predecessor statute, the law is now silent on the procedures to be used to issue subpoenas for depositions in out-of-state cases during 2009. The proposed rule fills a gap in the statute and provides guidance on procedures that should be used in an area where the law is silent.

Alternative Actions Considered

The Civil and Small Claims Advisory Committee considered two additional alternatives: proposing remedial legislation and not making any recommendation. It rejected both of these alternatives.

The Office of Governmental Affairs of the AOC has stated that it is not feasible for this situation to be remedied legislatively in a timely fashion. In light of the Legislature's current focus on budgetary and fiscal affairs, a remedial statute would not be passed during the current session in time to be of any help to the courts and litigants in the immediate future. The committee also understands that the legislative sponsor of the bill does not intend to propose a legislative fix at this time. In the event the Legislature should decide to act on the issue, the proposed rule includes a provision that the rule will terminate at the time any further law on

this subject goes into effect.

The committee also considered making no proposal, instead leaving the issue to be addressed by individual courts. The committee rejected this alternative as overly burdensome on the courts and the public. The predecessor statute provides for issuance of subpoenas in out-of-state actions using the same processes as may be employed in issuing deposition subpoenas in actions within California. These processes include issuance of subpoenas by a court clerk as a ministerial action or by counsel of record. Because such statutory authority is not currently operative, any request for a deposition in an out-of-state action during 2009 any request potentially would need to be determined by a judicial officer. This would be an added burden on the courts that adoption of the new rule would relieve.

Comments From Interested Parties

Due to the urgency of the situation, the committee recommends that the rule be adopted immediately. It further recommends that the rule be circulated for public comment for a 30-day period to allow for comments and, if needed, later amendment of the rule.

Implementation requirements and Costs

The new rule will have no implementation costs.

Attachments

Rule 3.1015 of the California Rules of Court is adopted effective March 13, 2009, to read:

1 **Rule 3.1015. Discovery in action pending outside of California**

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

10
11 This rule is repealed January 1, 2010, or at such earlier date as a state law
12 concerning depositions in proceedings pending outside the state goes into effect.

13
14 **Advisory Committee Comment**

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16 Assembly 2193 ([Trans] Stats. 2008, ch.231) establishes the Interstate and International
17 Depositions and Discovery Act, which is intended to replace Code of Civil Procedure section
18 2029.010. A provision in the act directs the Judicial Council to prepare certain forms to
19 implement the act, which provision became operative on January 1, 2009. The remainder of the
20 act will not become operative until January 1, 2010. The legislation inadvertently repealed the
21 predecessor statute, Code of Civil Procedure section 2029.010, effective January 1, 2009, a year
22 earlier than intended. (See Assembly Daily Journal, January 26, 2009, pp. 231-32.) This rule
23 incorporates the text of that predecessor statute to fill the gap left by its unintended early repeal,
24 thus providing that courts and litigants are to continue to act under the provisions of the prior law
25 until the new provisions go into effect or until the Legislature should determine otherwise.
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STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0069
(916) 319-2068
FAX (916) 319-2188
DISTRICT OFFICE
1503 SOUTH COAST DRIVE, STE. 205
COSTA MESA, CA 92626
(714) 668-2100
FAX (714) 668-2104
E-MAIL
assemblymember.tran@assembly.ca.gov

Assembly
California Legislature



VAN TRAN
ASSISTANT REPUBLICAN LEADER
ASSEMBLYMAN, SIXTY-EIGHTH DISTRICT

COMMITTEES:
VICE CHAIR
JUDICIARY
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UTILITIES AND COMMERCE
GOVERNMENTAL ORGANIZATION

January 26, 2009

E. Dotson Wilson
Chief Clerk of the Assembly
State Capitol, Room 3106
Sacramento, CA 95624

Re: Letter to Assembly Journal regarding AB 2193 (Tran)

Dear Mr. Wilson:

AB 2193 (Tran), enacted as 2008 Cal. Stat. ch. 231, establishes the Interstate and International Depositions Act. This Act was drafted by the California Law Revision Commission and is based in part on the Uniform Interstate Depositions and Discovery Act. It provides much-needed guidance on the procedure for conducting discovery in this state for purposes of a lawsuit pending in another state or country.

A provision in the Interstate and International Depositions Act directs the Judicial Council to prepare certain forms to implement the Act. That provision became operative on January 1, 2009. The remainder of the Act will not become operative until January 1, 2010.

Unfortunately, the legislation failed to make clear that the predecessor of the Act (Code Civ. Proc. § 2029.010*) remains in effect until January 1, 2010. As a result, this provision was inadvertently repealed on January 1, 2009, a year earlier than intended. Technically, there is no statutory law specifically governing this area for the ensuing year.

The California Law Revision Commission has expressed its regret for the drafting error, and confirmed that the intent of the legislation was to leave this provision in place and have courts and litigants follow its procedures until the new Act became operative. This was also my intent as the author of the bill, and it is my hope that courts and litigants continue complying with the provisions of former Code of Civil Procedure section 2029.010 until the new law becomes operative on January 1, 2010.

Respectfully submitted,


ASSEMBLYMAN VAN TRAN

Code of Civil Procedure § 2029.010. [repealed January 1, 2009 and superseded by enactment of the Interstate and International Depositions and Discovery Act (Sections 2029.100-2029.900)]

Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, 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.