

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

455 Golden Gate Avenue
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Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Lee Smalley Edmon, Chair
Discovery Subcommittee
Hon. Andrew P. Banks, Chair
Patrick O'Donnell, Committee Counsel, 415-865-7665,
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DATE: October 9, 2007

SUBJECT: Commission to Take Deposition Outside California (approve form DISC-030) (Action Required)

Issue Statement

There is currently no Judicial Council form for litigants to use to request, and for courts to issue or order, commissions to take out-of-state depositions. It would be beneficial to have such a form available.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2008, approve *Commission to Take Deposition Outside California* (form DISC-030), an optional form to be used by parties to make requests for, and by courts to issue or order, commissions to take out-of-state depositions.

A copy of form DISC-030 is attached at page 4.

Rationale for Recommendation

Under Code of Civil Procedure section 2026.010, which provides for the issuance of commissions to take depositions outside California, the process for obtaining commissions is uncomplicated and requires no judicial involvement in many or most instances. Section 2026.010(f) provides:

On request, the clerk of the court shall issue a commission authorizing the deposition in another state or place. The commission

shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions. The commission shall be issued by the clerk to any party in any action pending in its venue without a noticed motion or court order. The commission may contain terms that are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application.

Presently, no Judicial Council form is available to implement section 2026.010. The availability of a standardized commission form will help litigants and courts process commission requests expeditiously, in keeping with the ministerial nature of the commission process under the Code of Civil Procedure. The *Commission to Take Deposition Outside California* (form DISC-030) can be used for either clerk-issued or court-ordered commissions under Code of Civil Procedure section 2026.010(f). Litigants will make their selection based on the requirements of the particular out-of-state jurisdiction where the deposition is to be taken.

To eliminate potential confusion on the part of out-of-state court clerks, who are likely unfamiliar with California law and might perceive clerk-issued commissions as less compelling than court-ordered commissions, the form explains that clerk-issued commissions are authorized by California law. In addition, the form “requests that process issue in the...place where the examination is to be held, requiring the attendance and enforcing the obligations of the deponent to produce documents and answer questions.”

Because section 2026.010(f) provides that “[t]he commission may contain terms that are required by the foreign jurisdiction to initiate the process,” the form provides for the attachment of additional pages to supplement the form as needed.

Alternative Actions Considered

Because this simple, one-page form will facilitate the process for the obtaining of commissions to take out-of-state depositions, the committee did not consider any alternatives.

Comments From Interested Parties

Twelve comments were received on the proposed form. The commentators included judges, court administrators, a local bar association, the State Bar’s Committee on Administration of Justice, and a legal forms publisher. A chart summarizing the public comments and the committee’s responses is attached at pages 5–7.

Based on the comments, the committee has revised the form (1) to refer to the “identity” of the deponent rather than the “name” of the deponent, (2) to include a new item 4 for requesting the production of documents, and (3) to revise the language of item 5 to clarify that any additional terms are those required by the foreign jurisdiction.

Implementation Requirements and Costs

The availability of this form should facilitate the statutory process for a party to obtain a commission to take an out-of-state deposition. Courts will need to become familiar with this new form. Once that is done, the process should be easier for both litigants and the courts. Courts may incur minor costs in copying and making the form available, although in most cases attorneys will obtain the form from other sources.

Attachments

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i> <hr/> TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
<p style="text-align: center;">COMMISSION TO TAKE DEPOSITION OUTSIDE CALIFORNIA</p> <input type="checkbox"/> ORDERED BY COURT <input type="checkbox"/> ISSUED BY THE CLERK OF THE COURT	CASE NUMBER:

1. The Superior Court of California hereby authorizes the deposition, upon oral examination, of *(identity of deponent):*

2. The deposition is to be taken in *(state of the United States, territory, or insular possession subject to its jurisdiction):*

3. The deposition will be conducted *(check one):*
 - a. Under the supervision of a person who is authorized to administer oaths by the laws of the United States or those of the place where the examination is to be held, and who is not otherwise disqualified under California Code of Civil Procedure sections 2025.320 and 2025.340(b)-(f); or
 - b. Before *(name of appointee):*
 who is appointed to administer oaths and to take testimony.

4. The documents or things to be produced at the time and place of the deposition are
 described in Attachment 4 none.

5. Additional terms required by the foreign jurisdiction to initiate the process are contained in Attachment 5. Number of pages attached: _____.

6. Under California Code of Civil Procedure section 2026.010, California authorizes that a commission to take an out-of-state deposition may be issued by the clerk of the court or, if the foreign jurisdiction requires it, by order of the court.

7. The Superior Court of the State of California hereby requests that process issue in the above-referenced place where the examination is to be held, requiring the attendance and enforcing the obligations of the deponent to produce documents and answer questions.



Date: _____

- Judge
- OR
- Clerk, by _____, Deputy

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	Commentator	Position	Comment on behalf of group?	Comment	Committee's Response
1.	Saul Bercovitch On behalf of Committee on Administration of Justice State Bar of California San Francisco, CA	AM	Y	The Committee on Administration of Justice (CAJ) supports adoption of the proposed new form, subject to one modification. CAJ believes that item 5 [circulated as item 4] should be modified to read as follows: “Additional terms <u>required by the foreign jurisdiction to initiate the process</u> are contained in the attachment.” That is consistent with the language of Code of Civil Procedure section 2026.010. CAJ is concerned that the litigants may misinterpret item [5], without the additional language, believing they can attach a variety of other types of terms to the form (location of the deposition, length of the deposition, etc.), and have the judge or the clerk in California “approve” those terms by authorizing the commission.	The committee agreed with the proposed change; it clarifies the purpose of the item. Hence, the words have been added to the item.
2.	Stephen A. Bouch Executive Officer Superior Court of California, County of Napa Napa, CA	A	N	No specific comments.	No response required.
3.	Joseph Chairez President Orange County Bar Association Irvine, CA	A	Y	No specific comments.	No response required.
4.	Hon. Mary E. Fuller Judge of the Superior Court of California, County of San Bernardino Rancho Cucamonga, CA	A	N	This will be helpful.	The committee agreed.
5.	Julie A. Goren	AM	N	I wonder if it might be even less confusing to	The committee disagreed. The

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	Attorney/Author-Publisher Sherman Oaks, CA			the out-of-state clerks if use of the form were restricted to commissions issued by the clerk, thus eliminating any mention of a court order. If so, I would delete the check box choices in the title, and in item 6 [circulated as item 5] strike everything following "clerk of the court." Perhaps, it would make sense to have a separate form for court-ordered commissions.	combined form clarifies that the commission may be either (1) ordered by the court; or (2) issued by the clerk, and further indicates that the choice depends on the requirements of the foreign jurisdiction.
6.	Dennis B. Jones Executive Officer Superior Court of California, County of Sacramento	AM	Y	Who is the "Clerk" issuing the commission? Is this the Clerk of the Court or a Deputy Clerk?	Code of Civil Procedure section 2026.010 provides that the "clerk of the court shall issue a commission authorizing the deposition in another state." Under California law, a deputy clerk may perform the duties of the clerk. (See Gov. Code, §§ 7 and 1194.) Because in practice, the commission will generally be issued by a deputy clerk rather than the clerk, the form is designed to be issued by the deputy clerk.
7.	Hon. Carolyn B. Kuhl Managing Judge, Complex Litigation Superior Court of California, County of Los Angeles Los Angeles, CA	AM	N	1. Item 1 on the form does not clearly provide for the deposition of a "person most knowledgeable" of an entity. Perhaps, the parenthetical phrase should read: "(name of deponent or description of person most qualified)." 2. There is not an item allowing specification of documents to be produced at the deposition.	1. The committee agreed that the terminology should be revised. It has replaced "name" with "identity," which would include a "person most knowledgeable." The person preparing the commission, who will generally be an attorney, can specifically name or describe the person in item 1. 2. The committee agreed that an item should be added for specifying

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				Perhaps, the requirement to produce documents could be accommodated as an "Additional term" in item 4. But I would favor having a separate item stating something like, "The documents specified in attachment 1 are to be produced by the deponent at the time and place of the deposition. Number of pages attached: ____." (Then in item 4, the additional terms could be attachment 2.)	the documents to be produced. It has added new item 4 for this purpose. It is phrased slightly different than proposed.
8.	Superior Court of California, County of Los Angeles Los Angeles, CA	A	Y	No specific comments.	No response required.
9.	Pam Moraida Program Manager Superior Court of California, County of Solano Fairfield, CA	A	N	No specific comments.	No response required.
10.	Andrea Nelson Director of Operations Superior Court of California, County of Butte Oroville, CA	A	N	No specific comments.	No response required.
11.	Michael M. Roddy Executive Officer Superior Court of California, County of San Diego San Diego, CA	A	Y	No specific comments.	No response required.
12.	Gloria M. Sanchez Small Claims/Civil Advisor Superior Court of California, County of Contra Costa Martinez, CA	A	N	No specific comments.	No response required.