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INVITATION TO COMMENT LEG11-01

Title	Action Requested
Civil Law: Proposed Clean-Up Legislation on the Discovery of Electronically Stored Information	Review and submit comments by Monday, June 20, 2011
Proposed Rules, Forms, Standards, or Statutes Amendments to the Code of Civil Procedure	Proposed Effective Date January 1, 2013
Proposed by Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair	Contact Patrick O'Donnell, 415-865-7665 patrick.o'donnell@jud.ca.gov

Summary

This is a proposal for Judicial Council–sponsored legislation to amend California’s Civil Discovery Act. The Civil and Small Claims Advisory Committee proposes that the council consider sponsoring legislation to address certain gaps and omissions in the e-discovery legislation that was enacted in 2009. This clean-up legislation, if sponsored by the Judicial Council and enacted next year, would become effective January 1, 2013. The proposal has been approved for circulation by the Judicial Council’s Policy Coordination and Liaison Committee.

Discussion

Background

The Judicial Council previously sponsored the legislation that resulted in the Electronic Discovery Act.¹ Assembly Bill 5 was introduced in 2009. This bill was jointly sponsored by the Judicial Council, Consumer Attorneys of California, and California Defense Counsel. Other interested entities supported the legislation. The bill was enacted and signed by the Governor.² This legislation was the first major revision in the California discovery law since the mid-1980s.

¹ A copy of the Judicial Council report recommending the support of the e-discovery legislation is available at www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf.

²The text of AB 5, as chaptered, may be viewed at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

It substantially amended the discovery statutes to apply to the discovery of electronically stored information.³

This Legislative Proposal

In introducing the discovery of electronically stored information into the Civil Discovery Act, AB 5 amended many sections of the Code of Civil Procedure.⁴ The amendments to the code relating to the discovery of electronically stored information were extensive, but not completely comprehensive. There are still some sections of the code that only refer only to paper documents or records and that fail to mention electronically stored information in appropriate places. To be consistent with the Electronic Discovery Act, these sections should be amended. That is the purpose of this legislative proposal.

Like the original legislation, this proposal seeks to integrate provisions relating to the discovery of electronically stored information into the existing framework of the California Discovery Act. It generally retains the same procedural requirements and same timelines as existed under preceding law. The main features of the proposal are described below.⁵

*Subpoenas (Code Civ. Proc., § 1985 et seq.).*⁶ Civil subpoenas are dealt with in chapter 2 of title 3 of the Code of Civil Procedure. AB 5 made some changes to this chapter—most notably the addition of new section 1985.8 on subpoenas for the production of electronically stored information. That section provides that a subpoena in a civil proceeding may require the production of electronically stored information and it includes many specific provisions similar to other statutes on the production of electronically stored information. But the amendments to the statutes in the chapter on subpoenas were incomplete.

To be consistent with The Electronic Discovery Act, the words “electronically stored information” would be added after the word “documents” in the first subpoena statute. (See amended Code Civ. Proc., § 1985(a).) Elsewhere, where the words “electronic data” are used in the statutes, they would be replaced with “electronically stored information,” to be consistent with the terminology used throughout the act. (See amended Code Civ. Proc., §§ 1985.3(a)(1)

³ In 2009, the council also amended rule 3.724 to require parties to meet-and-confer about any issues relating to electronic discovery before the first civil case management conference. A copy of the Judicial Council report on the amendment of rule 3.724 is available at www.courtinfo.ca.gov/jc/documents/reports/081409item8.pdf.

⁴ The bill amended Code of Civil Procedure sections 2016.020 (definitions), 2031.010, 2031.020, 2031.030, 2031.040, 2031.050, 2031.060, 2031.210, 2031.220, 2031.230, 2031.240, 2031.250, 2031.260, 2031.270, 2031.280, 2031.290, 2031.300, 2031.310, and 2031.320 (document production). It also added sections 2031.285 (production of privileged material) and 1985.8 (civil subpoenas).

⁵ In preparing this proposal, the Committee on Administration of Justice of the State Bar of California has been of substantial assistance. That committee identified the need for clean-up legislation and provided draft language that was used as a starting point for this proposal.

⁶ Unless otherwise stated, the statutory references in this discussion are to the amended statutes in the proposed clean-up legislation that is attached at the end of this invitation to comment at pages [7–34].

and 1985.6(a)(3).) There are also a few other subpoena statutes that would also be included in the proposed clean-up legislation. Two of these statutes refer to “documents” and do not currently contain provisions expressly addressing “electronically stored information”; hence, they too should be amended. (See proposed amendments to Code Civ. Proc., §§ 1987(c) and 1987.1(c) [adding references to electronically stored information].) Also, to be consistent with the amendments previously made to other sanctions statutes, a safe harbor provision similar to those added elsewhere under AB 5 should be added to section 1987.2.⁷ (See amended Code Civ. Proc., §§ 1987.2(b)[adding a safe harbor provision to the sanctions statute].)

Although these amendments to the subpoena statutes may not be strictly necessary because section 1985.8 already provides generally that subpoenas may require the production of electronically stored information and includes other more specific provisions, the clean-up legislation would eliminate statutory inconsistencies in language, avoid possible ambiguity and confusion, and make the application of subpoenas to electronically stored information clearer and more consistent.

One aspect of these statutes merits particular attention. Some of these subpoena statutes concern production of information at trial as well as in discovery and raise some procedural issues. In particular, section 1987(c) provides that if the notice to appear is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, the subpoena may include a request that the party or person bring with him or her books, documents, or other things.⁸ Under this legislative proposal, section 1987(c) would be amended to permit a request for “electronically stored information” as well as for “books, documents, or other things.” Comments are invited on whether, if that change is made, any changes need to be made to the 20-day provision or any of the other timeframes in the statute? In other words, does the

⁷ The “safe harbor “ provisions provide that, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system. The safe harbor provisions also state that they shall not be construed to alter any obligation to preserve discoverable information.

⁸ The subdivision further provides:

The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required...

By comparison, it may be noted that Code of Civil Procedure section 1985.3(d) provides that a subpoena duces tecum for the production of personal records “shall be served in sufficient time to allow the witness a reasonable time, as provided in Section 2020.410, to locate and produce the records or copies thereof,” so that statute for the subpoena of person records does not raise the same issues about the timeframe for responses as section 1987(c).

addition of requests for “electronically stored information” in section 1987(c) require any changes to the timing or procedures for requesting the production of information? Or are the current timing and procedures still appropriate?

Scope of Discovery (Code Civ. Proc., § 2017.020). Code of Civil Procedure section 2017.020 prescribes the scope of discovery. It currently includes a provision for monetary sanctions. (Code Civ. Proc., § 2017.020(b).) However, this section does not include a safe harbor provision. To be consistent with the amendments previously made to other sanctions provisions, a safe harbor provision similar to those added elsewhere under AB 5 would be added to this section. (See amended Code Civ. Proc., § 2017.020(c).)

Discovery Methods in Complex Litigation. The Civil Discovery Act contains, in chapter 3, sections enacted in 2004 providing for the use of technology in conducting discovery in complex cases. (Code Civ. Proc., §§ 2017.710–2017.740.) This chapter was enacted in 2004 before the Electronic Discovery Act. Many of the provisions in this chapter appear to be obsolete. The committee asked judges and attorneys involved in complex litigation about this issue. The consensus was that these statutes are not used, are not necessary, and are inconsistent in some respects with more recently enacted legislation on e-discovery, e-service, and e-filing. Accordingly, this proposal recommends that all the code sections in chapter 3 be repealed.

Methods and Sequence of Discovery (Code Civ. Proc., § 2019.040). The clean-up legislation includes a new provision on the methods and sequence of discovery. (See Code Civ. Proc., § 2019.040.)⁹ This provision would provide that, when any method of discovery permits the production, inspection, copying, testing, or sampling of documents or tangible things, such method shall also permit the production, inspection, copying, testing, or sampling of electronically stored information. (See Code Civ. Proc., § 2019.040(a).) The new section would also provide that all procedures available to compel, prevent or limit the production, inspection, copying, testing, or sampling of documents or tangible things shall be available to compel, prevent, or limit the production, inspection, copying, testing, or sampling of electronically stored information. (See Code Civ. Proc., § 2019.040(b).)

The new section is meant to serve as a general catch-all provision to clarify that, even if a particular chapter, section, or subdivision of the Civil Discovery Act fails to specifically address the discovery of electronically stored information, all the methods of discovery and procedures relating to compelling or limiting discovery apply to the discovery of electronically stored information. If all the other specific changes recommended in this clean-up proposal are made, this new section may not be necessary. Comments are invited on whether this proposed new section should be included in the final legislative proposal.

⁹ This section was suggested by the State Bar’s Committee on Administration of Justice.

Nonparty Discovery. (Code Civ. Proc., § 2020.20 et seq.) The Civil Discovery Act addresses nonparty discovery in chapter 6. (Code Civ. Proc., § 2020.010 et seq.) It provides for discovery of documents and things from nonparties, as well as testimony. To be consistent with The Electronic Discovery Act, the words “electronically stored information” would be added wherever the word “documents” appears in this chapter. (See Code Civ. Proc., §§ 2020.010(c), 2020.220(a), and 2020.510(a).)

The section on business records would be revised to include the provisions similar to those that appear in the recently enacted subpoena section (section 1985.8(c)–(l)). (See amended Code Civ. Proc., § 2020.010(d)–(m).) These include provisions relating to specifying the form of production, the discoverability of electronically stored information that is not reasonably accessible, the proportionality principles, and a safe harbor provision.

The statutes on production of business records only and production of business records as well as testimony of a deponent would be amended to add provisions on the form of production. (Amended Code Civ. Proc., §§ 2020.410(a) and 2020.510(a)(4).)

Sanctions (Code Civ. Proc., § 2023.30). The Civil Discovery Act addresses discovery sanctions generally in chapter 7. (Code Civ. Proc., § 2023.010 et seq.) Section 2023.030 specifies the sanctions that may be imposed for misuse of the discovery process. To be consistent with changes made elsewhere under the Electronic Discovery Act, this section would be amended to add a safe harbor provision. (See Code Civ. Proc., § 2023.030(f).)

Oral Depositions Inside California (Code Civ. Proc., § 2025.220 et seq.). The Civil Discovery Act addresses oral depositions inside California in chapter 9. (Code Civ. Proc., § 2025.010 et seq.) To be consistent with the Electronic Discovery Act, several sections in this chapter would be amended to include references to “electronically stored information” as well as a “document.” (See Code Civ. Proc., §§ 2025.220(a), 2025.280(a) and (b), 2025.450(a) and (b), and 2025.460(e).)

The deposition notice statute would be amended to add that the notice shall include the form of any electronically stored information to be produced, if a particular form is desired. (See Code Civ. Proc., § 2025.220(a)(7).) The section that provides for monetary sanctions would be amended to include a safe harbor provision. (See Code Civ. Proc., § 2025.220(e).)

The section on protective orders relating to oral depositions in California would be amended to add the same provisions that were added under AB 5 to section 2031.060, the protective order statute relating to the discovery of documents. These include provisions relating to the discovery of electronically stored information from a source that is not reasonably accessible, proportionality principles, and a safe harbor provision. (See Code Civ. Proc., § 2025.420(c)–(f) and (i).) Similarly, the section on motions to compel attendance and production relating to oral depositions would be amended to add the same provisions that were added under AB 5 to section 2031.310, the statute relating to motions to compel the discovery of documents. Again, these

include provisions relating to the discovery of electronically stored information from a source that is not reasonably accessible, proportionality principles, and a safe harbor provision. (See Code Civ. Proc., § 2025.450(c)–(f) and (i).) Finally, similar provisions would be added to the section on motions to compel answers and production. (See Code Civ. Proc., § 2025.480(d)–(g) and (l).)

The section of the oral deposition statutes on objections based on privilege or work product protection would be amended to include a provision similar to that added to section 2031.210(d) under AB 5, which permits an objection based on the grounds that the electronically stored information is from a source that is not reasonably accessible. (See Code Civ. Proc., § 2025.460(d).) That section would also be amended to include a provision stating that the clawback provision in section 2031.285 is applicable to privileged or protected electronically stored information that is produced pursuant to a deposition notice. (See Code Civ. Proc., § 2025.460(f).)

Depositions Outside of California (Code Civ. Proc., § 2026.010 and 2027.010. The Civil Discovery Act addresses oral depositions outside of California in chapter 10. Such depositions may include requests for production of documents. (Code Civ. Proc., § 2026.010 and 2027.010.) To be consistent with the Electronic Discovery Act, the sections in this chapter would be amended to provide for requests for “electronically stored information” as well as for a “document.” The amendments will clarify that electronically stored information is discoverable. (See Code Civ. Proc., §§ 2026.010(b), (c), and (f) and 2027.010 (b) and (c).)

Discovery in Out-of-State Actions (Code Civ. Proc., § 2029.200. The Civil Discovery Act addresses discovery in California relating to actions pending outside of the state or country in chapter 10. (Code Civ. Proc., § 2029.100 et seq.) This chapter was recently amended to reflect the Interstate and International Depositions and Discovery Act. It does not need to be further amended to refer to electronically stored information because the statutes in this chapter already authorize the discovery of such information. But to be consistent with the Electronic Discovery Act, section 2029.200 would be amended to permit discovery by “inspection, copying, testing, or sampling” instead of only “inspection and copying.” (See Code Civ. Proc., § 2029.200(e)(2).)

Production of Documents, Electronically Stored Information, Tangible Things, Land and Other Property (Code Civ. Proc., § 2031.285). The Civil Discovery Act addresses discovery of documents, electronically stored information, tangible things, land and other property in chapter 14. (See Code Civ. Proc., § 2031.010 et seq.) The proposed legislation proposal would make a minor technical change in this chapter. It would simply amend the chapter title to reflect the changes to the law made by AB 5; it would expressly refer to “electronically stored information” and to the ability to “copy, test, or sample.”¹⁰ The statutes under the title would not be changed.

¹⁰ Thus, the attached text shows the following change in the title: “Inspection, Copying, Testing, Sampling, and Production of Documents, Electronically Stored Information, Tangible Things, Land, and Other Property.”

The Code of Civil Procedure would be amended, effective January 1, 2013, to read:

Code of Civil Procedure

[Subpoenas]

1 Section 1985. (a) The process by which the attendance of a witness is required is the
2 subpoena. It is a writ or order directed to a person and requiring the person's attendance
3 at a particular time and place to testify as a witness. It may also require a witness to bring
4 any books, documents, electronically stored information, or other things under the
5 witness's control which the witness is bound by law to produce in evidence. When a
6 county recorder is using the microfilm system for recording, and a witness is subpoenaed
7 to present a record, the witness shall be deemed to have complied with the subpoena if
8 the witness produces a certified copy thereof.

9 (b) A copy of an affidavit shall be served with a subpoena duces tecum issued before
10 trial, showing good cause for the production of the matters and things described in the
11 subpoena, specifying the exact matters or things desired to be produced, setting forth in
12 full detail the materiality thereof to the issues involved in the case, and stating that the
13 witness has the desired matters or things in his or her possession or under his or her
14 control.

15 (c) The clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and
16 sealed but otherwise in blank to a party requesting it, who shall fill it in before service.
17 An attorney at law who is the attorney of record in an action or proceeding, may sign and
18 issue a subpoena to require attendance before the court in which the action or proceeding
19 is pending or at the trial of an issue therein, or upon the taking of a deposition in an action
20 or proceeding pending therein; the subpoena in such a case need not be sealed. An
21 attorney at law who is the attorney of record in an action or proceeding, may sign and
22 issue a subpoena duces tecum to require production of the matters or things described in
23 the subpoena.
24

25 Section 1985.3. (a) For purposes of this section, the following definitions apply:

26 (1) "Personal records" means the original, any copy of books, documents, other
27 writings, or ~~electronic data~~ electronically stored information pertaining to a consumer and
28 which are maintained by any "witness" which is a physician, dentist, ophthalmologist,
29 optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian,
30 veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center,
31 clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank,
32 state or federal association (as defined in Section 5102 of the Financial Code), state or
33 federal credit union, trust company, anyone authorized by this state to make or arrange
34 loans that are secured by real property, security brokerage firm, insurance company, title
35 insurance company, underwritten title company, escrow agent licensed pursuant to

1 Division 6 (commencing with Section 17000) of the Financial Code or exempt from
2 licensure pursuant to Section 17006 of the Financial Code, attorney, accountant,
3 institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the
4 United States Code, or telephone corporation which is a public utility, as defined in
5 Section 216 of the Public Utilities Code, or psychotherapist, as defined in Section 1010 of
6 the Evidence Code, or a private or public preschool, elementary school, secondary
7 school, or postsecondary school as described in Section 76244 of the Education Code.

8 (2) "Consumer" means any individual, partnership of five or fewer persons, association,
9 or trust which has transacted business with, or has used the services of, the witness or for
10 whom the witness has acted as agent or fiduciary.

11 (3) "Subpoenaing party" means the person or persons causing a subpoena duces tecum
12 to be issued or served in connection with any civil action or proceeding pursuant to this
13 code, but shall not include the state or local agencies described in Section 7465 of the
14 Government Code, or any entity provided for under Article VI of the California
15 Constitution in any proceeding maintained before an adjudicative body of that entity
16 pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and
17 Professions Code.

18 (4) "Deposition officer" means a person who meets the qualifications specified in
19 Section 2020.420.

20 (b) Prior to the date called for in the subpoena duces tecum for the production of
21 personal records, the subpoenaing party shall serve or cause to be served on the consumer
22 whose records are being sought a copy of the subpoena duces tecum, of the affidavit
23 supporting the issuance of the subpoena, if any, and of the notice described in subdivision
24 (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service
25 shall be made as follows:

26 (1) To the consumer personally, or at his or her last known address, or in accordance
27 with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a
28 party, to his or her attorney of record. If the consumer is a minor, service shall be made
29 on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot
30 be located with reasonable diligence, then service shall be made on any person having the
31 care or control of the minor or with whom the minor resides or by whom the minor is
32 employed, and on the minor if the minor is at least 12 years of age.

33 (2) Not less than 10 days prior to the date for production specified in the subpoena
34 duces tecum, plus the additional time provided by Section 1013 if service is by mail.

35 (3) At least five days prior to service upon the custodian of the records, plus the
36 additional time provided by Section 1013 if service is by mail.

37 (c) Prior to the production of the records, the subpoenaing party shall do either of the
38 following:

39 (1) Serve or cause to be served upon the witness a proof of personal service or of
40 service by mail attesting to compliance with subdivision (b).

1 (2) Furnish the witness a written authorization to release the records signed by the
2 consumer or by his or her attorney of record. The witness may presume that any attorney
3 purporting to sign the authorization on behalf of the consumer acted with the consent of
4 the consumer, and that any objection to release of records is waived.

5 (d) A subpoena duces tecum for the production of personal records shall be served in
6 sufficient time to allow the witness a reasonable time, as provided in Section 2020.410, to
7 locate and produce the records or copies thereof.

8 (e) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer
9 or his or her attorney in accordance with subdivision (b) shall be accompanied by a
10 notice, in a typeface designed to call attention to the notice, indicating that (1) records
11 about the consumer are being sought from the witness named on the subpoena; (2) if the
12 consumer objects to the witness furnishing the records to the party seeking the records,
13 the consumer must file papers with the court or serve a written objection as provided in
14 subdivision (g) prior to the date specified for production on the subpoena; and (3) if the
15 party who is seeking the records will not agree in writing to cancel or limit the subpoena,
16 an attorney should be consulted about the consumer's interest in protecting his or her
17 rights of privacy. If a notice of taking of deposition is also served, that other notice may
18 be set forth in a single document with the notice required by this subdivision.

19 (f) A subpoena duces tecum for personal records maintained by a telephone corporation
20 which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not
21 be valid or effective unless it includes a consent to release, signed by the consumer whose
22 records are requested, as required by Section 2891 of the Public Utilities Code.

23 (g) Any consumer whose personal records are sought by a subpoena duces tecum and
24 who is a party to the civil action in which this subpoena duces tecum is served may, prior
25 to the date for production, bring a motion under Section 1987.1 to quash or modify the
26 subpoena duces tecum. Notice of the bringing of that motion shall be given to the witness
27 and deposition officer at least five days prior to production. The failure to provide notice
28 to the deposition officer shall not invalidate the motion to quash or modify the subpoena
29 duces tecum but may be raised by the deposition officer as an affirmative defense in any
30 action for liability for improper release of records.

31 Any other consumer or nonparty whose personal records are sought by a subpoena
32 duces tecum may, prior to the date of production, serve on the subpoenaing party, the
33 witness, and the deposition officer, a written objection that cites the specific grounds on
34 which production of the personal records should be prohibited.

35 No witness or deposition officer shall be required to produce personal records after
36 receipt of notice that the motion has been brought by a consumer, or after receipt of a
37 written objection from a nonparty consumer, except upon order of the court in which the
38 action is pending or by agreement of the parties, witnesses, and consumers affected.

39 The party requesting a consumer's personal records may bring a motion under Section
40 1987.1 to enforce the subpoena within 20 days of service of the written objection. The

1 motion shall be accompanied by a declaration showing a reasonable and good faith
2 attempt at informal resolution of the dispute between the party requesting the personal
3 records and the consumer or the consumer's attorney.

4 (h) Upon good cause shown and provided that the rights of witnesses and consumers
5 are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time
6 for service of a subpoena duces tecum or waiving the requirements of subdivision (b)
7 where due diligence by the subpoenaing party has been shown.

8 (i) Nothing contained in this section shall be construed to apply to any subpoena duces
9 tecum which does not request the records of any particular consumer or consumers and
10 which requires a custodian of records to delete all information which would in any way
11 identify any consumer whose records are to be produced.

12 (j) This section shall not apply to proceedings conducted under Division 1
13 (commencing with Section 50), Division 4 (commencing with Section 3200), Division
14 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200),
15 of the Labor Code.

16 (k) Failure to comply with this section shall be sufficient basis for the witness to refuse
17 to produce the personal records sought by a subpoena duces tecum.

18 (l) If the subpoenaing party is the consumer, and the consumer is the only subject of the
19 subpoenaed records, notice to the consumer, and delivery of the other documents
20 specified in subdivision (b) to the consumer, is not required under this section.

21
22 Section 1985.6. (a) For purposes of this section, the following terms have the following
23 meanings:

24 (1) "Deposition officer" means a person who meets the qualifications specified in
25 Section 2020.420.

26 (2) "Employee" means any individual who is or has been employed by a witness
27 subject to a subpoena duces tecum. "Employee" also means any individual who is or has
28 been represented by a labor organization that is a witness subject to a subpoena duces
29 tecum.

30 (3) "Employment records" means the original or any copy of books, documents, other
31 writings, or ~~electronic data~~ electronically stored information pertaining to the
32 employment of any employee maintained by the current or former employer of the
33 employee, or by any labor organization that has represented or currently represents the
34 employee.

35 (4) "Labor organization" has the meaning set forth in Section 1117 of the Labor Code.

36 (5) "Subpoenaing party" means the person or persons causing a subpoena duces tecum
37 to be issued or served in connection with any civil action or proceeding, but does not
38 include the state or local agencies described in Section 7465 of the Government Code, or
39 any entity provided for under Article VI of the California Constitution in any proceeding

1 maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing
2 with Section 6000) of Division 3 of the Business and Professions Code.

3 (b) Prior to the date called for in the subpoena duces tecum of the production of
4 employment records, the subpoenaing party shall serve or cause to be served on the
5 employee whose records are being sought a copy of: the subpoena duces tecum; the
6 affidavit supporting the issuance of the subpoena, if any; the notice described in
7 subdivision (e); and proof of service as provided in paragraph (1) of subdivision (c). This
8 service shall be made as follows:

9 (1) To the employee personally, or at his or her last known address, or in accordance
10 with Chapter 5 (commencing with Section 1010) of Title 14 of Part 2, or, if he or she is a
11 party, to his or her attorney of record. If the employee is a minor, service shall be made
12 on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot
13 be located with reasonable diligence, then service shall be made on any person having the
14 care or control of the minor, or with whom the minor resides, and on the minor if the
15 minor is at least 12 years of age.

16 (2) Not less than 10 days prior to the date for production specified in the subpoena
17 duces tecum, plus the additional time provided by Section 1013 if service is by mail.

18 (3) At least five days prior to service upon the custodian of the employment records,
19 plus the additional time provided by Section 1013 if service is by mail.

20 (c) Prior to the production of the records, the subpoenaing party shall either:

21 (1) Serve or cause to be served upon the witness a proof of personal service or of
22 service by mail attesting to compliance with subdivision (b).

23 (2) Furnish the witness a written authorization to release the records signed by the
24 employee or by his or her attorney of record. The witness may presume that the attorney
25 purporting to sign the authorization on behalf of the employee acted with the consent of
26 the employee, and that any objection to the release of records is waived.

27 (d) A subpoena duces tecum for the production of employment records shall be served
28 in sufficient time to allow the witness a reasonable time, as provided in Section 2020.410,
29 to locate and produce the records or copies thereof.

30 (e) Every copy of the subpoena duces tecum and affidavit served on an employee or his
31 or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a
32 typeface designed to call attention to the notice, indicating that (1) employment records
33 about the employee are being sought from the witness named on the subpoena; (2) the
34 employment records may be protected by a right of privacy; (3) if the employee objects
35 to the witness furnishing the records to the party seeking the records, the employee shall
36 file papers with the court prior to the date specified for production on the subpoena; and
37 (4) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an
38 attorney should be consulted about the employee's interest in protecting his or her
39 rights of privacy. If a notice of taking of deposition is also served, that other notice may
40 be set forth in a single document with the notice required by this subdivision.

1 (f) (1) Any employee whose employment records are sought by a subpoena duces
2 tecum may, prior to the date for production, bring a motion under Section 1987.1 to
3 quash or modify the subpoena duces tecum. Notice of the bringing of that motion shall be
4 given to the witness and the deposition officer at least five days prior to production. The
5 failure to provide notice to the deposition officer does not invalidate the motion to quash
6 or modify the subpoena duces tecum but may be raised by the deposition officer as an
7 affirmative defense in any action for liability for improper release of records.

8 (2) Any nonparty employee whose employment records are sought by a subpoena duces
9 tecum may, prior to the date of production, serve on the subpoenaing party, the
10 deposition officer, and the witness a written objection that cites the specific grounds on
11 which production of the employment records should be prohibited.

12 (3) No witness or deposition officer shall be required to produce employment records
13 after receipt of notice that the motion has been brought by an employee, or after receipt
14 of a written objection from a nonparty employee, except upon order of the court in which
15 the action is pending or by agreement of the parties, witnesses, and employees affected.

16 (4) The party requesting an employee's employment records may bring a motion under
17 subdivision (c) of Section 1987 to enforce the subpoena within 20 days of service of the
18 written objection. The motion shall be accompanied by a declaration showing a
19 reasonable and good faith attempt at informal resolution of the dispute between the
20 party requesting the employment records and the employee or the employee's attorney.

21 (g) Upon good cause shown and provided that the rights of witnesses and employees
22 are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time
23 for service of a subpoena duces tecum or waiving the requirements of subdivision (b)
24 if due diligence by the subpoenaing party has been shown.

25 (h) This section may not be construed to apply to any subpoena duces tecum that does
26 not request the records of any particular employee or employees and that requires a
27 custodian of records to delete all information that would in any way identify any
28 employee whose records are to be produced.

29 (i) This section does not apply to proceedings conducted under Division 1
30 (commencing with Section 50), Division 4 (commencing with Section 3200), Division
31 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200),
32 of the Labor Code.

33 (j) Failure to comply with this section shall be sufficient basis for the witness to refuse
34 to produce the employment records sought by subpoena duces tecum.

35 (k) If the subpoenaing party is the employee, and the employee is the only subject of
36 the subpoenaed records, notice to the employee, and delivery of the other documents
37 specified in subdivision (b) to the employee, are not required under this section.

38
39 Section 1985.8. (a) (1) A subpoena in a civil proceeding may require that electronically
40 stored information, as defined in Section 2016.020, be produced and that the party

1 serving the subpoena, or someone acting on the party's request, be permitted to inspect,
2 copy, test, or sample the information.

3 (2) Any subpoena seeking electronically stored information shall comply with the
4 requirements of this chapter.

5 (b) A party serving a subpoena requiring production of electronically stored
6 information may specify the form or forms in which each type of information is to be
7 produced.

8 (c) Unless the subpoenaing party and the subpoenaed ~~party~~ person otherwise agree or
9 the court otherwise orders, the following shall apply:

10 (1) If a subpoena requiring production of electronically stored information does not
11 specify a form or forms for producing a type of electronically stored information, the
12 person subpoenaed shall produce the information in the form or forms in which it is
13 ordinarily maintained or in a form that is reasonably usable.

14 (2) A subpoenaed person need not produce the same electronically stored information
15 in more than one form.

16 (d) The subpoenaed person opposing the production, inspection, copying, testing, or
17 sampling of electronically stored information on the basis that information is from a
18 source that is not reasonably accessible because of undue burden or expense shall bear
19 the burden of demonstrating that the information is from a source that is not
20 reasonably accessible because of undue burden or expense.

21 (e) If the person from whom discovery of electronically stored information is
22 subpoenaed establishes that the information is from a source that is not reasonably
23 accessible because of undue burden or expense, the court may nonetheless order
24 discovery if the subpoenaing party shows good cause, subject to any limitations imposed
25 under subdivision (h).

26 (f) If the court finds good cause for the production of electronically stored information
27 from a source that is not reasonably accessible, the court may set conditions for the
28 discovery of the electronically stored information, including allocation of the expense of
29 discovery.

30 (g) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing
31 party, shall, through detection devices, translate any data compilations included in the
32 subpoena into a reasonably usable form.

33 (h) The court shall limit the frequency or extent of discovery of electronically stored
34 information, even from a source that is reasonably accessible, if the court determines that
35 any of the following conditions exists:

36 (1) It is possible to obtain the information from some other source that is more
37 convenient, less burdensome, or less expensive.

38 (2) The discovery sought is unreasonably cumulative or duplicative.

39 (3) The party seeking discovery has had ample opportunity by discovery in the action to
40 obtain the information sought.

1 (4) The likely burden or expense of the proposed discovery outweighs the likely
2 benefit, taking into account the amount in controversy, the resources of the parties, the
3 importance of the issues in the litigation, and the importance of the requested discovery
4 in resolving the issues.

5 (i) If a subpoenaed person notifies the subpoenaing party that electronically stored
6 information produced pursuant to a subpoena is subject to a claim of privilege or of
7 protection as attorney work product, as described in Section 2031.285, the provisions of
8 Section 2031.285 shall apply.

9 (j) A party serving a subpoena requiring the production of electronically stored
10 information shall take reasonable steps to avoid imposing undue burden or expense on a
11 person subject to the subpoena.

12 (k) An order of the court requiring compliance with a subpoena issued under this
13 section shall protect a person who is neither a party nor a party's officer from undue
14 burden or expense resulting from compliance.

15 (l) (1) Absent exceptional circumstances, the court shall not impose sanctions on a
16 subpoenaed person or any attorney of a subpoenaed person for failure to provide
17 electronically stored information that has been lost, damaged, altered, or overwritten as
18 the result of the routine, good faith operation of an electronic information system.

19 (2) This subdivision shall not be construed to alter any obligation to preserve
20 discoverable information.

21
22 Section 1987. (a) Except as provided in Sections 68097.1 to 68097.8, inclusive, of the
23 Government Code, the service of a subpoena is made by delivering a copy, or a ticket
24 containing its substance, to the witness personally, giving or offering to the witness at the
25 same time, if demanded by him or her, the fees to which he or she is entitled for travel to
26 and from the place designated, and one day's attendance there. The service shall be made
27 so as to allow the witness a reasonable time for preparation and travel to the place of
28 attendance. The service may be made by any person. If service is to be made on a minor,
29 service shall be made on the minor's parent, guardian, conservator, or similar fiduciary,
30 or if one of those persons cannot be located with reasonable diligence, service shall be
31 made on any person having the care or control of the minor or with whom the minor
32 resides or by whom the minor is employed, and on the minor if the minor is 12 years of
33 age or older. If the minor is alleged to come within the description of Section 300, 601, or
34 602 of the Welfare and Institutions Code and the minor is not in the custody of a parent
35 or guardian, regardless of the age of the minor, service also shall be made upon the
36 designated agent for service of process at the county child welfare department or the
37 probation department under whose jurisdiction the minor has been placed.

38 (b) In the case of the production of a party to the record of any civil action or
39 proceeding or of a person for whose immediate benefit an action or proceeding is
40 prosecuted or defended or of anyone who is an officer, director, or managing agent of any

1 such party or person, the service of a subpoena upon any such witness is not required if
2 written notice requesting the witness to attend before a court, or at a trial of an issue
3 therein, with the time and place thereof, is served upon the attorney of that party or
4 person. The notice shall be served at least 10 days before the time required for attendance
5 unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand,
6 shall be paid witness fees and mileage before being required to testify. The giving of the
7 notice shall have the same effect as service of a subpoena on the witness, and the parties
8 shall have those rights and the court may make those orders, including the imposition of
9 sanctions, as in the case of a subpoena for attendance before the court.

10 (c) If the notice specified in subdivision (b) is served at least 20 days before the time
11 required for attendance, or within any shorter period of time as the court may order, it
12 may include a request that the party or person bring with him or her books, documents,
13 electronically stored information, or other things. The notice shall state the exact
14 materials or things desired and that the party or person has them in his or her possession
15 or under his or her control. Within five days thereafter, or any other time period as the
16 court may allow, the party or person of whom the request is made may serve written
17 objections to the request or any part thereof, with a statement of grounds. Thereafter,
18 upon noticed motion of the requesting party, accompanied by a showing of good cause
19 and of materiality of the items to the issues, the court may order production of items to
20 which objection was made, unless the objecting party or person establishes good cause
21 for nonproduction or production under limitations or conditions. The procedure of this
22 subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the
23 cases herein provided for, and no subpoena duces tecum shall be required.

24 Subject to this subdivision, the notice provided in this subdivision shall have the same
25 effect as is provided in subdivision (b) as to a notice for attendance of that party or
26 person.

27
28 Section 1987.1. (a) If a subpoena requires the attendance of a witness or the production
29 of books, documents, electronically stored information or other things before a court, or
30 at the trial of an issue therein, or at the taking of a deposition, the court, upon motion
31 reasonably made by any person described in subdivision (b), or upon the court's own
32 motion after giving counsel notice and an opportunity to be heard, may make an order
33 quashing the subpoena entirely, modifying it, or directing compliance with it upon those
34 terms or conditions as the court shall declare, including protective orders. In addition, the
35 court may make any other order as may be appropriate to protect the person from
36 unreasonable or oppressive demands, including unreasonable violations of the right of
37 privacy of the person.

38 (b) The following persons may make a motion pursuant to subdivision (a):

39 (1) A party.

40 (2) A witness.

- 1 (3) A consumer described in Section 1985.3.
2 (4) An employee described in Section 1985.6.
3 (5) A person whose personally identifying information, as defined in subdivision (b) of
4 Section 1798.79.8 of the Civil Code, is sought in connection with an underlying action
5 involving that person's exercise of free speech rights.
6 (c) Nothing in this section shall require any person to move to quash, modify, or
7 condition any subpoena duces tecum of personal records of any consumer served under
8 paragraph (1) of subdivision (b) of Section 1985.3 or employment records of any
9 employee served under paragraph (1) of subdivision (b) of Section 1985.6.

10
11 Section 1987.2. (a) Except as specified in subdivision ~~(b)~~(c), in making an order pursuant
12 to motion made under subdivision (c) of Section 1987 or under Section 1987.1, the court
13 may in its discretion award the amount of the reasonable expenses incurred in making or
14 opposing the motion, including reasonable attorney's fees, if the court finds the motion
15 was made or opposed in bad faith or without substantial justification or that one or more
16 of the requirements of the subpoena was oppressive.

17 (b) (1) Notwithstanding subdivision (a), absent exceptional circumstances, the court
18 shall not impose sanctions on a subpoenaed person or the attorney of a subpoenaed
19 person for failure to provide electronically stored information that has been lost,
20 damaged, altered, or overwritten as the result of the routine, good faith operation of an
21 electronic information system.

22 (2) This subdivision shall not be construed to alter any obligation to preserve
23 discoverable information.

24 ~~(b)~~(c) If a motion is filed under Section 1987.1 for an order to quash or modify a
25 subpoena from a court of this state for personally identifying information, as defined in
26 subdivision (b) of Section 1798.79.8 of the Civil Code, for use in an action pending in
27 another state, territory, or district of the United States, or in a foreign nation, and that
28 subpoena has been served on any Internet service provider, or on the provider of any
29 other interactive computer service, as defined in Section 230(f)(2) of Title 47 of the
30 United States Code, if the moving party prevails, and if the underlying action arises from
31 the moving party's exercise of free speech rights on the Internet and the respondent has
32 failed to make a prima facie showing of a cause of action, the court shall award the
33 amount of the reasonable expenses incurred in making the motion, including reasonable
34 attorney's fees.

35
36
37

[Scope of Discovery]

38 Section 2017.020. (a) The court shall limit the scope of discovery if it determines that the
39 burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that
40 the information sought will lead to the discovery of admissible evidence. The court may

1 make this determination pursuant to a motion for protective order by a party or other
2 affected person. This motion shall be accompanied by a meet and confer declaration
3 under Section 2016.040.

4 (b) The court shall impose a monetary sanction under Chapter 7 (commencing with
5 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
6 opposes a motion for a protective order, unless it finds that the one subject to the sanction
7 acted with substantial justification or that other circumstances make the imposition of the
8 sanction unjust.

9 (c) (1) Notwithstanding subdivision (b), or any other section of this act, absent
10 exceptional circumstances, the court shall not impose sanctions on a party or any attorney
11 of a party for failure to provide electronically stored information that has been lost,
12 damaged, altered, or overwritten as the result of the routine, good faith operation of an
13 electronic information system.

14 (2) This subdivision shall not be construed to alter any obligation to preserve
15 discoverable information.

16 [Discovery Methods in Complex Litigation]

17
18
19 ~~Section 2017.710. Subject to the findings required by Section 2017.730 and the purpose~~
20 ~~of permitting and encouraging cost effective and efficient discovery, "technology," as~~
21 ~~used in this chapter, includes, but is not limited to, telephone, e-mail, CD-ROM, Internet~~
22 ~~Web sites, electronic documents, electronic document depositories, Internet depositions~~
23 ~~and storage, videoconferencing, and other electronic technology that may be used to~~
24 ~~improve communication and the discovery process.~~

25
26 ~~Section 2017.720. (a) Nothing in this chapter diminishes the rights and duties of the~~
27 ~~parties regarding discovery, privileges, procedural rights, or substantive law.~~
28 ~~—(b) Nothing in this chapter modifies the requirement for use of a stenographic court~~
29 ~~reporter as provided in Section 2025.330. The rules, standards, and guidelines adopted~~
30 ~~pursuant to this chapter shall be consistent with the requirement of Section 2025.330 that~~
31 ~~deposition testimony be taken stenographically unless the parties agree or the court orders~~
32 ~~otherwise.~~

33 ~~—(c) Nothing in this chapter modifies or affects in any way the process used for the~~
34 ~~selection of a stenographic court reporter.~~

35
36 ~~Section 2017.730. (a) Pursuant to a noticed motion, a court may enter an order~~
37 ~~authorizing the use of technology in conducting discovery in any of the following:~~
38 ~~—(1) A case designated as complex under Section 19 of the Judicial Administration~~
39 ~~Standards.~~

1 ~~—(2) A case ordered to be coordinated under Chapter 3 (commencing with Section 404)~~
2 ~~of Title 4 of Part 2.~~

3 ~~—(3) An exceptional case exempt from case disposition time goals under Article 5~~
4 ~~(commencing with Section 68600) of Chapter 2 of Title 8 of the Government Code.~~

5 ~~—(4) A case assigned to Plan 3 under paragraph (3) of subdivision (b) of Section 2105 of~~
6 ~~the California Rules of Court.~~

7 ~~—(b) In a case other than one listed in subdivision (a), the parties may stipulate to the~~
8 ~~entry of an order authorizing the use of technology in conducting discovery.~~

9 ~~—(c) An order authorizing the use of technology in conducting discovery may be made~~
10 ~~only upon the express findings of the court or stipulation of the parties that the~~
11 ~~procedures adopted in the order meet all of the following criteria:~~

12 ~~—(1) They promote cost effective and efficient discovery or motions relating thereto.~~

13 ~~—(2) They do not impose or require an undue expenditure of time or money.~~

14 ~~—(3) They do not create an undue economic burden or hardship on any person.~~

15 ~~—(4) They promote open competition among vendors and providers of services in order~~
16 ~~to facilitate the highest quality service at the lowest reasonable cost to the litigants.~~

17 ~~—(5) They do not require the parties or counsel to purchase exceptional or unnecessary~~
18 ~~services, hardware, or software.~~

19 ~~—(d) Pursuant to an order authorizing the use of technology in conducting discovery,~~
20 ~~discovery may be conducted and maintained in electronic media and by electronic~~
21 ~~communication. The court may enter orders prescribing procedures relating to the use of~~
22 ~~electronic technology in conducting discovery, including orders for service of discovery~~
23 ~~requests and responses, service and presentation of motions, conduct of discovery in~~
24 ~~electronic media, and production, storage, and access to information in electronic form.~~

25 ~~—(e) The Judicial Council may promulgate rules, standards, and guidelines relating to~~
26 ~~electronic discovery and the use of electronic discovery data and documents in court~~
27 ~~proceedings.~~

28
29 ~~Section 2017.740. (a) If a service provider is to be used and compensated by the parties in~~
30 ~~discovery under this chapter, the court shall appoint the person or organization agreed on~~
31 ~~by the parties and approve the contract agreed on by the parties and the service provider.~~
32 ~~If the parties do not agree on selection of a service provider, each party shall submit to~~
33 ~~the court up to three nominees for appointment, together with a contract acceptable to the~~
34 ~~nominee. The court shall appoint a service provider from among the nominees. The court~~
35 ~~may condition this appointment on the acceptance of modifications in the terms of the~~
36 ~~contract. If no nominations are received from any of the parties, the court shall appoint~~
37 ~~one or more~~
38 ~~service providers.~~

39 ~~—(b) Pursuant to a noticed motion at any time and on a showing of good cause, the court~~
40 ~~may order the removal of the service provider or vacate any agreement between the~~

1 ~~parties and the service provider, or both, effective as of the date of the order. The~~
2 ~~continued service of the service provider shall be subject to review periodically, as agreed~~
3 ~~by the parties and the service provider, or annually if they do not agree. Any disputes~~
4 ~~involving the contract or the duties, rights, and obligations of the parties or the service~~
5 ~~provider may be determined on a noticed motion in the action.~~

6
7 **[Methods and Sequence of Discovery]**
8

9 Section 2019.040. (a) When any method of discovery permits the production, inspection,
10 copying, testing, or sampling of documents or tangible things, such method shall also
11 permit the production, inspection, copying, testing, or sampling of electronically stored
12 information.

13 (b) All procedures available under this title to compel, prevent or limit the production,
14 inspection, copying, testing, or sampling of documents or tangible things shall be
15 available to compel, prevent, or limit the production, inspection, copying, testing, or
16 sampling of electronically stored information.

17
18 **[Nonparty Discovery]**
19

20 Section 2020.020. A deposition subpoena may command any of the following:

21 (a) Only the attendance and the testimony of the deponent, under Article 3
22 (commencing with Section 2020.310).

23 (b) Only the production of business records for copying, under Article 4 (commencing
24 with Section 2020.410).

25 (c) The attendance and the testimony of the deponent, as well as the production of
26 business records, other documents, electronically stored information, and tangible things
27 under Article 5 (commencing with Section 2020.510).

28
29 Section 2020.220. (a) Subject to subdivision (c) of Section 2020.410, service of a
30 deposition subpoena shall be effected a sufficient time in advance of the deposition to
31 provide the deponent a reasonable opportunity to locate and produce any designated
32 business records, documents, electronically stored information, and tangible things, as
33 described in Article 4 (commencing with Section 2020.410), and, where personal
34 attendance is commanded, a reasonable time to travel to the place of deposition.

35 (b) Any person may serve the subpoena by personal delivery of a copy of it as follows:

36 (1) If the deponent is a natural person, to that person.

37 (2) If the deponent is an organization, to any officer, director, custodian of records, or
38 to any agent or employee authorized by the organization to accept service of a subpoena.

39 (c) Personal service of any deposition subpoena is effective to require all of the
40 following of any deponent who is a resident of California at the time of service:

- 1 (1) Personal attendance and testimony, if the subpoena so specifies.
- 2 (2) Any specified production, inspection, copying, testing, and sampling.
- 3 (3) The deponent's attendance at a court session to consider any issue arising out of the
4 deponent's refusal to be sworn, or to answer any question, or to produce specified items,
5 or to permit inspection or photocopying, if the subpoena so specifies, or specified testing
6 and sampling of the items produced.
- 7 (d) Unless the subpoenaing party and the subpoenaed person otherwise agree or the
8 court otherwise orders, the following shall apply:
- 9 (1) If a subpoena requiring production of electronically stored information does not
10 specify a form or forms for producing a type of electronically stored information, the
11 person subpoenaed shall produce the information in the form or forms in which it is
12 ordinarily maintained or in a form that is reasonably usable.
- 13 (2) A subpoenaed person need not produce the same electronically stored information
14 in more than one form.
- 15 (e) The subpoenaed person opposing the production, inspection, copying, testing, or
16 sampling of electronically stored information on the basis that the information is from a
17 source that is not reasonably accessible because of undue burden or expense shall bear
18 the burden of demonstrating that the information is from a source that is not
19 reasonably accessible because of undue burden or expense.
- 20 (f) If the person from whom discovery of electronically stored information is
21 subpoenaed establishes that the information is from a source that is not reasonably
22 accessible because of undue burden or expense, the court may nonetheless order
23 discovery if the subpoenaing party shows good cause, subject to any limitations imposed
24 under subdivision (h).
- 25 (g) If the court finds good cause for the production of electronically stored information
26 from a source that is not reasonably accessible, the court may set conditions for the
27 discovery of the electronically stored information, including allocation of the expense of
28 discovery.
- 29 (h) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing
30 party, shall, through detection devices, translate any data compilations included in the
31 subpoena into a reasonably usable form.
- 32 (i) The court shall limit the frequency or extent of discovery of electronically stored
33 information, even from a source that is reasonably accessible, if the court determines that
34 any of the following conditions exists:
- 35 (1) It is possible to obtain the information from some other source that is more
36 convenient, less burdensome, or less expensive.
- 37 (2) The discovery sought is unreasonably cumulative or duplicative.
- 38 (3) The party seeking discovery has had ample opportunity by discovery in the action to
39 obtain the information sought.

1 (4) The likely burden or expense of the proposed discovery outweighs the likely
2 benefit, taking into account the amount in controversy, the resources of the parties, the
3 importance of the issues in the litigation, and the importance of the requested discovery
4 in resolving the issues.

5 (j) If a subpoenaed person notifies the subpoenaing party that electronically stored
6 information produced pursuant to a subpoena is subject to a claim of privilege or of
7 protection as attorney work product, as described in Section 2031.285, the provisions of
8 Section 2031.285 shall apply.

9 (k) A party serving a subpoena requiring the production of electronically stored
10 information shall take reasonable steps to avoid imposing undue burden or expense on a
11 person subject to the subpoena.

12 (l) An order of the court requiring compliance with a subpoena issued under this section
13 shall protect a person who is neither a party nor a party's officer from undue burden or
14 expense resulting from compliance.

15 (m) (1) Absent exceptional circumstances, the court shall not impose sanctions on a
16 subpoenaed person or any attorney of a subpoenaed person for failure to provide
17 electronically stored information that has been lost, damaged, altered, or overwritten as
18 the result of the routine, good faith operation of an electronic information system.

19 (2) The subdivision shall not be construed to alter any obligation to preserve
20 discoverable information.

21
22 Section 2020.410. (a) A deposition subpoena that commands only the production of
23 business records for copying shall designate the business records to be produced either by
24 specifically describing each individual item or by reasonably particularizing each
25 category of item, and shall specify the form in which any electronically stored
26 information is to be produced, if a particular form is desired.

27 (b) Notwithstanding subdivision (a), specific information identifiable only to the
28 deponent's records system, like a policy number or the date when a consumer interacted
29 with the witness, is not required.

30 (c) A deposition subpoena that commands only the production of business records for
31 copying need not be accompanied by an affidavit or declaration showing good cause for
32 the production of the business records designated in it. It shall be directed to the
33 custodian of those records or another person qualified to certify the records. It shall
34 command compliance in accordance with Section 2020.430 on a date that is no earlier
35 than 20 days after the issuance, or 15 days after the service, of the deposition subpoena,
36 whichever date is later.

37 (d) If, under Section 1985.3 or 1985.6, the one to whom the deposition subpoena is
38 directed is a witness, and the business records described in the deposition subpoena are
39 personal records pertaining to a consumer, the service of the deposition subpoena shall be
40 accompanied either by a copy of the proof of service of the notice to the consumer

1 described in subdivision (e) of Section 1985.3, or subdivision (b) of Section 1985.6, as
2 applicable, or by the consumer's written authorization to release personal records
3 described in paragraph (2) of subdivision (c) of Section 1985.3, or paragraph (2) of
4 subdivision (c) of Section 1985.6, as applicable.
5

6 Section 2020.510. (a) A deposition subpoena that commands the attendance and the
7 testimony of the deponent, as well as the production of business records, documents,
8 electronically stored information and tangible things shall:

9 (1) Comply with the requirements of Section 2020.310.

10 (2) Designate the business records, documents, electronically stored information, and
11 tangible things to be produced either by specifically describing each individual item or by
12 reasonably particularizing each category of item.

13 (3) Specify any testing or sampling that is being sought.

14 (4) Specify the form in which any electronically stored information is to be produced, if
15 a particular form is desired.

16 (b) A deposition subpoena under subdivision (a) need not be accompanied by an
17 affidavit or declaration showing good cause for the production of the documents and
18 things designated.

19 (c) If, as described in Section 1985.3, the person to whom the deposition subpoena is
20 directed is a witness, and the business records described in the deposition subpoena are
21 personal records pertaining to a consumer, the service of the deposition subpoena shall be
22 accompanied either by a copy of the proof of service of the notice to the consumer
23 described in subdivision (e) of Section 1985.3, or by the consumer's written authorization
24 to release personal records described in paragraph (2) of subdivision (c) of Section
25 1985.3.

26 (d) If, as described in Section 1985.6, the person to whom the deposition subpoena is
27 directed is a witness and the business records described in the deposition subpoena are
28 employment records pertaining to an employee, the service of the deposition subpoena
29 shall be accompanied either by a copy of the proof of service of the notice to the
30 employee described in subdivision (e) of Section 1985.6, or by the employee's written
31 authorization to release personal records described in paragraph (2) of subdivision (c) of
32 Section 1985.6.
33

34 [Sanctions]

35
36 Section 2023.030. To the extent authorized by the chapter governing any particular
37 discovery method or any other provision of this title, the court, after notice to any
38 affected party, person, or attorney, and after opportunity for hearing, may impose the
39 following sanctions against anyone engaging in conduct that is a misuse of the discovery
40 process:

1 (a) The court may impose a monetary sanction ordering that one engaging in the misuse
2 of the discovery process, or any attorney advising that conduct, or both pay the
3 reasonable expenses, including attorney's fees, incurred by anyone as a result of that
4 conduct. The court may also impose this sanction on one unsuccessfully asserting that
5 another has engaged in the misuse of the discovery process, or on any attorney who
6 advised that assertion, or on both. If a monetary sanction is authorized by any provision
7 of this title, the court shall impose that sanction unless it finds that the one subject to the
8 sanction acted with substantial justification or that other circumstances make the
9 imposition of the sanction unjust.

10 (b) The court may impose an issue sanction ordering that designated facts shall be taken
11 as established in the action in accordance with the claim of the party adversely affected
12 by the misuse of the discovery process. The court may also impose an issue sanction by
13 an order prohibiting any party engaging in the misuse of the discovery process from
14 supporting or opposing designated claims or defenses.

15 (c) The court may impose an evidence sanction by an order prohibiting any party
16 engaging in the misuse of the discovery process from introducing designated matters in
17 evidence.

18 (d) The court may impose a terminating sanction by one of the following orders:

19 (1) An order striking out the pleadings or parts of the pleadings of any party engaging
20 in the misuse of the discovery process.

21 (2) An order staying further proceedings by that party until an order for discovery is
22 obeyed.

23 (3) An order dismissing the action, or any part of the action, of that party.

24 (4) An order rendering a judgment by default against that party.

25 (e) The court may impose a contempt sanction by an order treating the misuse of the
26 discovery process as a contempt of court.

27 (f) (1) Notwithstanding subdivision (a), or any other section of this act, absent
28 exceptional circumstances, the court shall not impose sanctions on a party or any attorney
29 of a party for failure to provide electronically stored information that has been lost,
30 damaged, altered, or overwritten as the result of the routine, good faith operation of an
31 electronic information system.

32 (2) This subdivision shall not be construed to alter any obligation to preserve
33 discoverable information.

34
35 **[Oral Depositions Inside California]**
36

37 Section 2025.220. (a) A party desiring to take the oral deposition of any person shall give
38 notice in writing. The deposition notice shall state all of the following:

39 (1) The address where the deposition will be taken.

1 (2) The date of the deposition, selected under Section 2025.270, and the time it will
2 commence.

3 (3) The name of each deponent, and the address and telephone number, if known, of
4 any deponent who is not a party to the action. If the name of the deponent is not known,
5 the deposition notice shall set forth instead a general description sufficient to identify the
6 person or particular class to which the person belongs.

7 (4) The specification with reasonable particularity of any materials or category of
8 materials, including any electronically stored information, to be produced by the
9 deponent.

10 (5) Any intention by the party noticing the deposition to record the testimony by audio
11 or video technology, in addition to recording the testimony by the stenographic method as
12 required by Section 2025.330 and any intention to record the testimony by stenographic
13 method through the instant visual display of the testimony. If the deposition will be
14 conducted using instant visual display, a copy of the deposition notice shall also be given
15 to the deposition officer. Any offer to provide the instant visual display of the testimony
16 or to provide rough draft transcripts to any party which is accepted prior to, or offered at,
17 the deposition shall also be made by the deposition officer at the deposition to all parties
18 in attendance. Any party or attorney requesting the provision of the instant visual display
19 of the testimony, or rough draft transcripts, shall pay the reasonable cost of those
20 services, which may be no greater than the costs charged to any other party or attorney.

21 (6) Any intention to reserve the right to use at trial a video recording of the deposition
22 testimony of a treating or consulting physician or of any expert witness under subdivision
23 (d) of Section 2025.620. In this event, the operator of the video camera shall be a person
24 who is authorized to administer an oath, and shall not be financially interested in the
25 action or be a relative or employee of any attorney of any of the parties.

26 (7) The form in which any electronically stored information is to be produced, if a
27 particular form is desired.

28 (b) Notwithstanding subdivision (a), where under Article 4 (commencing with Section
29 2020.410) only the production by a nonparty of business records for copying is desired, a
30 copy of the deposition subpoena shall serve as the notice of deposition.

31
32 Section 2025.280. (a) The service of a deposition notice under Section 2025.240 is
33 effective to require any deponent who is a party to the action or an officer, director,
34 managing agent, or employee of a party to attend and to testify, as well as to produce any
35 document, electronically stored information or tangible thing for inspection and copying.

36 (b) The attendance and testimony of any other deponent, as well as the production by
37 the deponent of any document, electronically stored information, or tangible thing for
38 inspection and copying, requires the service on the deponent of a deposition subpoena
39 under Chapter 6 (commencing with Section 2020.010).

40

1 Section 2025.410. (a) Any party served with a deposition notice that does not comply
2 with Article 2 (commencing with Section 2025.210) waives any error or irregularity
3 unless that party promptly serves a written objection specifying that error or irregularity
4 at least three calendar days prior to the date for which the deposition is scheduled, on the
5 party seeking to take the deposition and any other attorney or party on whom the
6 deposition notice was served.

7 (b) If an objection is made three calendar days before the deposition date, the objecting
8 party shall make personal service of that objection pursuant to Section 1011 on the party
9 who gave notice of the deposition. Any deposition taken after the service of a written
10 objection shall not be used against the objecting party under Section 2025.620 if the party
11 did not attend the deposition and if the court determines that the objection was a valid
12 one.

13 (c) In addition to serving this written objection, a party may also move for an order
14 staying the taking of the deposition and quashing the deposition notice. This motion shall
15 be accompanied by a meet and confer declaration under Section 2016.040. The taking of
16 the deposition is stayed pending the determination of this motion.

17 (d) The court shall impose a monetary sanction under Chapter 7 (commencing with
18 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
19 opposes a motion to quash a deposition notice, unless it finds that the one subject to the
20 sanction acted with substantial justification or that other circumstances make the
21 imposition of the sanction unjust.

22 (e) (1) Notwithstanding subdivision (d), absent exceptional circumstances, the court
23 shall not impose sanctions on any party, person, or attorney for failure to provide
24 electronically stored information that has been lost, damaged, altered, or overwritten as
25 the result of the routine, good faith operation of an electronic information system.

26 (2) This subdivision shall not be construed to alter any obligation to preserve
27 discoverable information.

28
29 Section 2025.420. (a) Before, during, or after a deposition, any party, any deponent, or
30 any other affected natural person or organization may promptly move for a protective
31 order. The motion shall be accompanied by a meet and confer declaration under Section
32 2016.040.

33 (b) The court, for good cause shown, may make any order that justice requires to
34 protect any party, deponent, or other natural person or organization from unwarranted
35 annoyance, embarrassment, or oppression, or undue burden and expense. This protective
36 order may include, but is not limited to, one or more of the following directions:

37 (1) That the deposition not be taken at all.

38 (2) That the deposition be taken at a different time.

39 (3) That a video recording of the deposition testimony of a treating or consulting
40 physician or of any expert witness, intended for possible use at trial under subdivision (d)

1 of Section 2025.620, be postponed until the moving party has had an adequate
2 opportunity to prepare, by discovery deposition of the deponent, or other means, for
3 cross-examination.

4 (4) That the deposition be taken at a place other than that specified in the deposition
5 notice, if it is within a distance permitted by Sections 2025.250 and 2025.260.

6 (5) That the deposition be taken only on certain specified terms and conditions.

7 (6) That the deponent's testimony be taken by written, instead of oral, examination.

8 (7) That the method of discovery be interrogatories to a party instead of an oral
9 deposition.

10 (8) That the testimony be recorded in a manner different from that specified in the
11 deposition notice.

12 (9) That certain matters not be inquired into.

13 (10) That the scope of the examination be limited to certain matters.

14 (11) That all or certain of the writings or tangible things designated in the deposition
15 notice not be produced, inspected, or copied, or that conditions be set for the production
16 of electronically stored information designated in the deposition notice.

17 (12) That designated persons, other than the parties to the action and their officers and
18 counsel, be excluded from attending the deposition.

19 (13) That a trade secret or other confidential research, development, or commercial
20 information not be disclosed or be disclosed only to specified persons or only in a
21 specified way.

22 (14) That the parties simultaneously file specified documents enclosed in sealed
23 envelopes to be opened as directed by the court.

24 (15) That the deposition be sealed and thereafter opened only on order of the court.

25 (16) That examination of the deponent be terminated. If an order terminates the
26 examination, the deposition shall not thereafter be resumed, except on order of the court.

27 (c) The party, deponent, or any other affected natural person or organization that seeks
28 a protective order regarding the production, inspection, copying, testing, or sampling of
29 electronically stored information on the basis that the information is from a source that is
30 not reasonably accessible because of undue burden or expense shall bear the burden of
31 demonstrating that the information is from a source that is not reasonably accessible
32 because of undue burden or expense.

33 (d) If the party or affected person from whom discovery of electronically stored
34 information is sought establishes that the information is from a source that is not
35 reasonably accessible because of undue burden or expense, the court may nonetheless
36 order discovery if the demanding party shows good cause, subject to any limitations
37 imposed under subdivision (f).

38 (e) If the court finds good cause for the production of electronically stored information
39 from a source that is not reasonably accessible, the court may set conditions for the

1 discovery of the electronically stored information, including allocation of the expense of
2 discovery.

3 (f) The court shall limit the frequency or extent of discovery of electronically stored
4 information, even from a source that is reasonably accessible, if the court determines that
5 any of the following conditions exist:

6 (1) It is possible to obtain the information from some other source that is more
7 convenient, less burdensome, or less expensive.

8 (2) The discovery sought is unreasonably cumulative or duplicative.

9 (3) The party seeking discovery has had ample opportunity by discovery in the action to
10 obtain the information sought.

11 (4) The likely burden or expense of the proposed discovery outweighs the likely
12 benefit, taking into account the amount in controversy, the resources of the parties, the
13 importance of the issues in the litigation, and the importance of the requested
14 discovery in resolving the issues.

15 (e)(g) If the motion for a protective order is denied in whole or in part, the court may
16 order that the deponent provide or permit the discovery against which protection was
17 sought on those terms and conditions that are just.

18 (d)(h) The court shall impose a monetary sanction under Chapter 7 (commencing with
19 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
20 opposes a motion for a protective order, unless it finds that the one subject to the sanction
21 acted with substantial justification or that other circumstances make the imposition of the
22 sanction unjust.

23 (i)(1) Notwithstanding subdivision (h), absent exceptional circumstances, the court
24 shall not impose sanctions on any party, deponent, or other affected natural person or
25 organization or any of their attorneys for failure to provide electronically stored
26 information that has been lost, damaged, altered, or overwritten as the result of the
27 routine, good faith operation of an electronic information system.

28 (2) This subdivision shall not be construed to alter any obligation to preserve
29 discoverable information.

30
31 Section 2025.450. (a) If, after service of a deposition notice, a party to the action or an
32 officer, director, managing agent, or employee of a party, or a person designated by an
33 organization that is a party under Section 2025.230, without having served a valid
34 objection under Section 2025.410, fails to appear for examination, or to proceed with it,
35 or to produce for inspection any document, electronically stored information, or tangible
36 thing described in the deposition notice, the party giving the notice may move for an
37 order compelling the deponent's attendance and testimony, and the production for
38 inspection of any document, electronically stored information, or tangible thing described
39 in the deposition notice.

40 (b) A motion under subdivision (a) shall comply with both of the following:

1 (1). The motion shall set forth specific facts showing good cause justifying the
2 production for inspection of any document, electronically stored information, or tangible
3 thing described in the deposition notice.

4 (2) The motion shall be accompanied by a meet and confer declaration under Section
5 2016.040, or, when the deponent fails to attend the deposition and produce the
6 documents, electronically stored information, or things described in the deposition notice,
7 by a declaration stating that the petitioner has contacted the deponent to inquire about the
8 nonappearance.

9 (c) In a motion under subdivision (a) relating to the production of electronically stored
10 information, the party or party-affiliated deponent objecting to or opposing the
11 production, inspection, copying, testing, or sampling of electronically stored information
12 on the basis that the information is from a source that is not reasonably accessible
13 because of the undue burden or expense shall bear the burden of demonstrating that the
14 information is from a source that is not reasonably accessible because of undue burden or
15 expense.

16 (d) If the party or party-affiliated deponent from whom discovery of electronically
17 stored information is sought establishes that the information is from a source that is not
18 reasonably accessible because of the undue burden or expense, the court may nonetheless
19 order discovery if the demanding party shows good cause, subject to any limitations
20 imposed under subdivision (f).

21 (e) If the court finds good cause for the production of electronically stored information
22 from a source that is not reasonably accessible, the court may set conditions for the
23 discovery of the electronically stored information, including allocation of the expense of
24 discovery.

25 (f) The court shall limit the frequency or extent of discovery of electronically stored
26 information, even from a source that is reasonably accessible, if the court determines that
27 any of the following conditions exists:

28 (1) It is possible to obtain the information from some other source that is more
29 convenient, less burdensome, or less expensive.

30 (2) The discovery sought is unreasonably cumulative or duplicative.

31 (3) The party seeking discovery has had ample opportunity by discovery in the action to
32 obtain the information sought.

33 (4) The likely burden or expense of the proposed discovery outweighs the likely
34 benefit, taking into account the amount in controversy, the resources of the parties, the
35 importance of the issues in the litigation, and the importance of the requested discovery
36 in resolving the issues.

37 ~~(e)~~ (g)(1) If a motion under subdivision (a) is granted, the court shall impose a monetary
38 sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who
39 noticed the deposition and against the deponent or the party with whom the deponent is

1 affiliated, unless the court finds that the one subject to the sanction acted with substantial
2 justification or that other circumstances make the imposition of the sanction unjust.

3 (2) On motion of any other party who, in person or by attorney, attended at the time and
4 place specified in the deposition notice in the expectation that the deponent's testimony
5 would be taken, the court shall impose a monetary sanction under Chapter 7
6 (commencing with Section 2023.010) in favor of that party and against the deponent or
7 the party with whom the deponent is affiliated, unless the court finds that the one subject
8 to the sanction acted with substantial justification or that other circumstances make the
9 imposition of the sanction unjust.

10 ~~(d)~~(h) If that party or party-affiliated deponent then fails to obey an order compelling
11 attendance, testimony, and production, the court may make those orders that are just,
12 including the imposition of an issue sanction, an evidence sanction, or a terminating
13 sanction under Chapter 7 (commencing with Section 2023.010) against that party
14 deponent or against the party with whom the deponent is affiliated. In lieu of, or in
15 addition to, this sanction, the court may impose a monetary sanction under Chapter 7
16 (commencing with Section 2023.010) against that deponent or against the party with
17 whom that party deponent is affiliated, and in favor of any party who, in person or by
18 attorney, attended in the expectation that the deponent's testimony would be taken
19 pursuant to that order.

20 (i)(1) Notwithstanding subdivisions (g) and (h), absent exceptional circumstances, the
21 court shall not impose sanctions on a party or any attorney of a party for failure to
22 provide electronically stored information that has been lost, damaged, altered, or
23 overwritten as the result of the routine, good faith operation of an electronic information
24 system.

25 (2) This subdivision shall not be construed to alter any obligation to preserve
26 discoverable information.

27
28 Section 2025.460. (a) The protection of information from discovery on the ground that it
29 is privileged or that it is a protected work product under Chapter 4 (commencing with
30 Section 2018.010) is waived unless a specific objection to its disclosure is timely made
31 during the deposition.

32 (b) Errors and irregularities of any kind occurring at the oral examination that might be
33 cured if promptly presented are waived unless a specific objection to them is timely made
34 during the deposition. These errors and irregularities include, but are not limited to, those
35 relating to the manner of taking the deposition, to the oath or affirmation administered, to
36 the conduct of a party, attorney, deponent, or deposition officer, or to the form of any
37 question or answer. Unless the objecting party demands that the taking of the deposition
38 be suspended to permit a motion for a protective order under Sections 2025.420 and
39 2025.470, the deposition shall proceed subject to the objection.

1 (c) Objections to the competency of the deponent, or to the relevancy, materiality, or
2 admissibility at trial of the testimony or of the materials produced are unnecessary and
3 are not waived by failure to make them before or during the deposition.

4 (d) If a deponent objects to the production of electronically stored information on the
5 grounds that it is from a source that is not reasonably accessible because of undue burden
6 or expense and that the deponent will not search the source in the absence of an
7 agreement with the deposing party or court order, the deponent shall identify in its
8 objection the types or categories of sources of electronically stored information that it
9 asserts are not reasonably accessible. By objecting and identifying information of a type
10 or category of source or sources that are not reasonably accessible, the deponent
11 preserves any objections it may have relating to that electronically stored information.

12 ~~(d)~~(e) If a deponent fails to answer any question or to produce any document,
13 electronically stored information, or tangible thing under the deponent's control that is
14 specified in the deposition notice or a deposition subpoena, the party seeking that answer
15 or production may adjourn the deposition or complete the examination on other matters
16 without waiving the right at a later time to move for an order compelling that answer or
17 production under Section 2025.480.

18 (f) Notwithstanding subdivision (a), if a deponent notifies the party that took a
19 deposition that electronically stored information produced pursuant to the deposition
20 notice or subpoena is subject to a claim of privilege or of protection as attorney work
21 product, as described in Section 2031.285, the provisions of Section 2031.285 shall
22 apply.

23
24 Section 2025.480. (a) If a deponent fails to answer any question or to produce any
25 document, electronically stored information or tangible thing under the deponent's control
26 that is specified in the deposition notice or a deposition subpoena, the party seeking
27 discovery may move the court for an order compelling that answer or production.

28 (b) This motion shall be made no later than 60 days after the completion of the record
29 of the deposition, and shall be accompanied by a meet and confer declaration under
30 Section 2016.040.

31 (c) Notice of this motion shall be given to all parties and to the deponent either orally at
32 the examination, or by subsequent service in writing. If the notice of the motion is given
33 orally, the deposition officer shall direct the deponent to attend a session of the court at
34 the time specified in the notice.

35 (d) In a motion under subdivision (a) relating to the production of electronically stored
36 information, the deponent objecting to or opposing the production, inspection, copying,
37 testing, or sampling of electronically stored information on the basis that the information
38 is from a source that is not reasonably accessible because of the undue burden or expense
39 shall bear the burden of demonstrating that the information is from a source that is not
40 reasonably accessible because of undue burden or expense.

1 (e) If the deponent from whom discovery of electronically stored information is sought
2 establishes that the information is from a source that is not reasonably accessible because
3 of the undue burden or expense, the court may nonetheless order discovery if the
4 deposing party shows good cause, subject to any limitations imposed under subdivision
5 (g).

6 (f) If the court finds good cause for the production of electronically stored information
7 from a source that is not reasonably accessible, the court may set conditions for the
8 discovery of the electronically stored information, including allocation of the expense of
9 discovery.

10 (g) The court shall limit the frequency or extent of discovery of electronically stored
11 information, even from a source that is reasonably accessible, if the court determines that
12 any of the following conditions exists:

13 (1) It is possible to obtain the information from some other source that is more
14 convenient, less burdensome, or less expensive.

15 (2) The discovery sought is unreasonably cumulative or duplicative.

16 (3) The party seeking discovery has had ample opportunity by discovery in the action to
17 obtain the information sought.

18 (4) The likely burden or expense of the proposed discovery outweighs the likely
19 benefit, taking into account the amount in controversy, the resources of the parties, the
20 importance of the issues in the litigation, and the importance of the requested discovery
21 in resolving the issues.

22 ~~(d)~~(h) Not less than five days prior to the hearing on ~~this a~~ motion under this section ,
23 the moving party shall lodge with the court a certified copy of any parts of the
24 stenographic transcript of the deposition that are relevant to the motion. If a deposition is
25 recorded by audio or video technology, the moving party is required to lodge a certified
26 copy of a transcript of any parts of the deposition that are relevant to the motion.

27 ~~(e)~~(i) If the court determines that the answer or production sought is subject to
28 discovery, it shall order that the answer be given or the production be made on the
29 resumption of the deposition.

30 ~~(f)~~(j) The court shall impose a monetary sanction under Chapter 7 (commencing with
31 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
32 opposes a motion to compel an answer or production, unless it finds that the one subject
33 to the sanction acted with substantial justification or that other circumstances make the
34 imposition of the sanction unjust.

35 ~~(g)~~(k) If a deponent fails to obey an order entered under this section, the failure may be
36 considered a contempt of court. In addition, if the disobedient deponent is a party to the
37 action or an officer, director, managing agent, or employee of a party, the court may
38 make those orders that are just against the disobedient party, or against the party with
39 whom the disobedient deponent is affiliated, including the imposition of an issue
40 sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing

1 with Section 2023.010). In lieu of or in addition to this sanction, the court may impose a
2 monetary sanction under Chapter 7 (commencing with Section 2023.010) against that
3 party deponent or against any party with whom the deponent is affiliated.

4 (l)(1) Notwithstanding subdivisions (j) and (k), absent exceptional circumstances, the
5 court shall not impose sanctions on a deponent or any attorney of a deponent for failure to
6 provide electronically stored information that has been lost, damaged, altered, or
7 overwritten as the result of the routine, good faith operation of an electronic information
8 system.

9 (2) This subdivision shall not be construed to alter any obligation to preserve
10 discoverable information.

11
12 **[Oral Depositions Outside of California]**
13

14 Section 2026.010. (a) Any party may obtain discovery by taking an oral deposition, as
15 described in Section 2025.010, in another state of the United States, or in a territory or an
16 insular possession subject to its jurisdiction. Except as modified in this section, the
17 procedures for taking oral depositions in California set forth in Chapter 9 (commencing
18 with Section 2025.010) apply to an oral deposition taken in another state of the United
19 States, or in a territory or an insular possession subject to its jurisdiction.

20 (b) If a deponent is a party to the action or an officer, director, managing agent, or
21 employee of a party, the service of the deposition notice is effective to compel that
22 deponent to attend and to testify, as well as to produce any document, electronically
23 stored information, or tangible thing for inspection and copying. The deposition notice
24 shall specify a place in the state, territory, or insular possession of the United States that
25 is within 75 miles of the residence or a business office of a deponent.

26 (c) If the deponent is not a party to the action or an officer, director, managing agent, or
27 employee of a party, a party serving a deposition notice under this section shall use any
28 process and procedures required and available under the laws of the state, territory, or
29 insular possession where the deposition is to be taken to compel the deponent to attend
30 and to testify, as well as to produce any document, electronically stored information, or
31 tangible thing for inspection, copying, and any related activity.

32 (d) A deposition taken under this section shall be conducted in either of the following
33 ways:

34 (1) Under the supervision of a person who is authorized to administer oaths by the laws
35 of the United States or those of the place where the examination is to be held, and who is
36 not otherwise disqualified under Section 2025.320 and subdivisions (b) to (f), inclusive,
37 of Section 2025.340.

38 (2) Before a person appointed by the court.

39 (e) An appointment under subdivision (d) is effective to authorize that person to
40 administer oaths and to take testimony.

1 (f) On request, the clerk of the court shall issue a commission authorizing the
2 deposition in another state or place. The commission shall request that process issue in
3 the place where the examination is to be held, requiring attendance and enforcing the
4 obligations of the deponents to produce documents and electronically stored information
5 and answer questions. The commission shall request that process issue in the place
6 where the examination is to be held, requiring attendance and enforcing the obligations of
7 the deponents to produce documents and answer questions. The commission shall be
8 issued by the clerk to any party in any action pending in its venue without a noticed
9 motion or court order. The commission may contain terms that are required by the
10 foreign jurisdiction to initiate the process. If a court order is required by the foreign
11 jurisdiction, an order for a commission may be obtained by ex parte application.

12
13 Section 2027.010. (a) Any party may obtain discovery by taking an oral deposition, as
14 described in Section 2025.010, in a foreign nation. Except as modified in this section, the
15 procedures for taking oral depositions in California set forth in Chapter 9 (commencing
16 with Section 2025.010) apply to an oral deposition taken in a foreign nation.

17 (b) If a deponent is a party to the action or an officer, director, managing agent, or
18 employee of a party, the service of the deposition notice is effective to compel the
19 deponent to attend and to testify, as well as to produce any document, electronically
20 stored information, or tangible thing for inspection and copying.

21 (c) If a deponent is not a party to the action or an officer, director, managing agent or
22 employee of a party, a party serving a deposition notice under this section shall use any
23 process and procedures required and available under the laws of the foreign nation where
24 the deposition is to be taken to compel the deponent to attend and to testify, as well as to
25 produce any document, electronically stored information, or tangible thing for inspection,
26 copying, and any related activity.

27 (d) A deposition taken under this section shall be conducted under the supervision of
28 any of the following:

29 (1) A person who is authorized to administer oaths or their equivalent by the laws of the
30 United States or of the foreign nation, and who is not otherwise disqualified under
31 Section 2025.320 and subdivisions (b) to (f), inclusive, of Section 2025.340.

32 (2) A person or officer appointed by commission or under letters rogatory.

33 (3) Any person agreed to by all the parties.

34 (e) On motion of the party seeking to take an oral deposition in a foreign nation, the
35 court in which the action is pending shall issue a commission, letters rogatory, or a letter
36 of request, if it determines that one is necessary or convenient. The commission, letters
37 rogatory, or letter of request may include any terms and directions that are just and
38 appropriate. The deposition officer may be designated by name or by descriptive title in
39 the deposition notice and in the commission. Letters rogatory or a letter of request may be
40 addressed: "To the Appropriate Judicial Authority in [name of foreign nation]."

1
2 **[Depositions in Out-of-State Actions]**
3

4 Section 2029.200. In this article:

5 (a) "Foreign jurisdiction" means either of the following:

6 (1) A state other than this state.

7 (2) A foreign nation.

8 (b) "Foreign subpoena" means a subpoena issued under authority of a court of record of
9 a foreign jurisdiction.

10 (c) "Person" means an individual, corporation, business trust, estate, trust, partnership,
11 limited liability company, association, joint venture, public corporation, government, or
12 governmental subdivision, agency, or instrumentality, or any other legal or commercial
13 entity.

14 (d) "State" means a state of the United States, the District of Columbia, Puerto Rico, the
15 Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession
16 subject to the jurisdiction of the United States.

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

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

20 (2) Produce and permit inspection, ~~and~~ copying, testing, or sampling of designated
21 books, documents, records, electronically stored information, or tangible things in the
22 possession, custody, or control of the person.

23 (3) Permit inspection of premises under the control of the person.
24

25 **[Production of Documents, Electronically Stored Information, Tangible Things,
26 Land and Other Property]**
27

28 Chapter 14

29 Inspection, Copying, Testing, Sampling, and Production of Documents, Electronically
30 Stored Information, Tangible Things, Land, and Other Property

Item LEG11-01 Response Form

Title: Civil Law: Proposed Clean-Up Legislation on the Discovery of Electronically Stored Information (Amendments to the Code of Civil Procedure)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: www.courts.ca.gov/policyadmin-invitationstocomment.htm

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Policy Coordination and Liaison Committee. All comments will become part of the public record of the council's action.