

RESOLUTION 04-03-04

DIGEST

Discovery: Designation of Persons Most Knowledgeable

Amends Code of Civil Procedure section 2025 to require a deponent who is not a natural person to identify in writing prior to the deposition the person or persons who will give testimony.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2025 to require a deponent who is not a natural person to identify in writing prior to the deposition the person or persons who will give testimony. This resolution should be approved in principle because, without placing an unreasonable burden on the deponent, it adds an element of fairness and reasonableness to the discovery process.

Under present law, the deposition notice to a party that is not a natural person must only specify with reasonable particularity the matters on which examination is requested. It does not require the deponent to identify prior to the deposition the name of a person or persons who will give testimony as the person most knowledgeable for the deponent. Thus, the noticing party may not learn the actual identity of the deponent(s) until the time of the deposition.

This resolution requires the deponent to provide to the party taking the deposition the name of the person to be designated on behalf of the deponent as the person most knowledgeable three days prior to the date of the deposition. The designation is required to be in writing. Having to identify the name of a person who will give testimony on behalf of the deponent three days prior to the deposition is not a large burden and may avoid unfair surprise, time spend arguing with opposing counsel as to when such designation is required and potential unnecessary court intervention.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2025 to read as follows:

- 1 § 2025
- 2 (a) Any party may obtain discovery within the scope delimited by Section 2017,
- 3 and subject to the restrictions set forth in Section 2019, by taking in California the oral
- 4 deposition of any person, including any party to the action. The person deposed may be a
- 5 natural person, an organization such as a public or private corporation, a partnership, an
- 6 association, or a governmental agency.

7 (b) Subject to subdivisions (f) and (t), an oral deposition may be taken as follows:
8 (1) The defendant may serve a deposition notice without leave of court at any time
9 after that defendant has been served or has appeared in the action, whichever occurs first.

10 (2) The plaintiff may serve a deposition notice without leave of court on any date
11 that is 20 days after the service of the summons on, or appearance by, any defendant.
12 However, on motion with or without notice, the court, for good cause shown, may grant to
13 a plaintiff leave to serve a deposition notice on an earlier date.

14 (c) A party desiring to take the oral deposition of any person shall give
15 notice in writing in the manner set forth in subdivision (d). However, where under
16 subdivision (d) of Section 2020 only the production by a nonparty of business records for
17 copying is desired, a copy of the deposition subpoena shall serve as the notice of
18 deposition. The notice of deposition shall be given to every other party who has appeared
19 in the action. The deposition notice, or the accompanying proof of service, shall list all the
20 parties or attorneys for parties on whom it is served.

21 Where, as defined in subdivision (a) of Section 1985.3, the party giving
22 notice of the deposition is a subpoenaing party, and the deponent is a witness commanded
23 by a deposition subpoena to produce personal records of a consumer, the subpoenaing
24 party shall serve on that consumer (1) a notice of the deposition, (2) the notice of privacy
25 rights specified in subdivision (e) of Section 1985.3 and in Section 1985.6, and (3) a copy
26 of the deposition subpoena.

27 (d) The deposition notice shall state all of the following:

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

29 (2) The date of the deposition, selected under subdivision (f), and the time it will commence.

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

34 (4) The specification with reasonable particularity of any materials or category of
35 materials to be produced by the deponent.

36 (5) Any intention by the party noticing the deposition to record the testimony by
37 audio or video technology, in addition to recording the testimony by the stenographic
38 method as required by paragraph (1) of subdivision (l) and any intention to record the
39 testimony by stenographic method through the instant visual display of the testimony. If
40 the deposition will be conducted using instant visual display, a copy of the deposition
41 notice shall also be given to the deposition officer. Any offer to provide the instant visual
42 display of the testimony or to provide rough draft transcripts to any party which is
43 accepted prior to, or offered at, the deposition shall also be made by the deposition officer
44 at the deposition to all parties in attendance. Any party or attorney requesting the provision
45 of the instant visual display of the testimony, or rough draft transcripts, shall pay the
46 reasonable cost of those services, which may be no greater than the costs charged to any
47 other party or attorney.

48 (6) Any intention to reserve the right to use at trial a video recording of the
49 deposition testimony of a treating or consulting physician or of any expert witness under
50 paragraph (4) of subdivision (u). In this event, the operator of the video camera shall be a
51 person who is authorized to administer an oath, and shall not be financially interested in
52 the action or be a relative or employee of any attorney of any of the parties.

53 If the deponent named is not a natural person, the deposition notice shall

54 describe with reasonable particularity the matters on which examination is requested. In
55 that event, the deponent shall designate by providing a writing to the noticing party,
56 indicating the names and addresses of the individuals who will provide testimony in
57 response to each topic listed in the deposition notice no later than three days prior to the
58 noticed deposition date and produce at the deposition those of its officers, directors,
59 managing agents, employees, or agents who are most qualified to testify on its behalf as to
60 those matters to the extent of any information known or reasonably available to the
61 deponent. A deposition subpoena shall advise a nonparty deponent of its duty to make this
62 designation, and shall describe with reasonable particularity the matters on which
63 examination is requested.

64 If the deponent named is not a natural person, the deposition notice shall
65 describe with reasonable particularity the matters on which examination is requested. In
66 that event, the deponent shall designate and produce at the deposition those of its officers,
67 directors, managing agents, employees, or agents who are most qualified to testify on its
68 behalf as to those matters to the extent of any information known or reasonably available
69 to the deponent. A deposition subpoena shall advise a nonparty deponent of its duty to
70 make this designation, and shall describe with reasonable particularity the matters on
71 which examination is requested.

72 If the attendance of the deponent is to be compelled by service of a
73 deposition subpoena under Section 2020, an identical copy of that subpoena shall be
74 served with the deposition notice.

75 [Subdivisions (e) through (v) remain unchanged.]

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Lawyers' Club of San Diego

STATEMENT OF REASONS

Existing Law: The existing statute indicates that the responding party must “designate” deponents to testify on behalf of the corporation but does not indicate in what way those designations must be made, nor does it specify whether the noticing party is entitled to notice of the identity of the corporate designees prior to the depositions of those individuals.

This Resolution: Would clarify the time when the corporate designees must be designated and remedy the current ambiguity.

The Problem: The currently ambiguous statute provides opportunity for game-playing and causes delay in litigation. The service of a deposition notice seeking the testimony of persons “most knowledgeable” as to various issues is common. Under many circumstances, the parties can agree to an exchange of PMK identities prior to the deposition. This legislative amendment provides for the remediation of the uncooperative element who may contend that the identities will be kept secret until this day of the deposition. Where a responding party claims no statutory right to prior identification of corporate designees, the parties are forced to spend valuable time arguing about this trivial issue and, at times, even seek court intervention. The most productive use of time is to have prior notice of the identity of corporate designees as a matter of statutory right.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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