

## RESOLUTION 05-01-2014

### DIGEST

#### Discovery: Expert Writings

Amends Code of Civil Procedure sections 2026.010 and 2034.460 to require a designated trial expert to produce documents at deposition without a subpoena.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 01-04-2003, which was approved in principle.

#### Reasons:

This resolution amends Code of Civil Procedure sections 2026.010 and 2034.460 to require a designated trial expert to produce documents at deposition without a subpoena. This resolution should be approved in principle, because it clarifies the method for obtaining reliance documents from a trial expert.

Current law provides for parties to produce discoverable reports and writings, but is silent as to the parties' obligations to produce expert reliance materials. This resolution would allow a party to obtain documents from other parties' experts by means of the same notice currently used to require a party to produce a trial expert for deposition.

The resolution could benefit from amendment. The proposed change to section 2026.010, subdivision (c) is potentially problematic, in that it purports to require a nonparty to appear without a subpoena, rather than (as in the current section 2034.460, subdivision (a)) compelling the party to produce the expert. The proposed modification to section 2034.460, subdivision (a) appears to achieve the proponent's result, while avoiding the issue of compelling a non-party to appear. If only that section were amended, the current reference in section 2026.010, subdivision (c) to use of "any process and procedures" required and available in the state of the deposition would require modification, but might benefit from being more narrowly tailored to carve out section 2034.460, rather than requiring all experts to appear and produce all documents, including electronically stored information.

One possible alternative would be to include changes such as those from Resolution 01-04-2003, which was approved in principle by the Conference. That resolution made a modification similar to that proposed here to section 2034.460, but also added a provision to the section (since recodified as section 2034.300) governing exclusion of experts, to the effect that an expert's opinion could be excluded at the time of trial if the party failed to "[p]roduce at that expert's deposition the materials or categories of materials specified in the notice of the expert's deposition under subdivision (i)."

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 2026.010 and 2034.460 to read as follows:

#### § 2026.010

- 1 (a) Any party may obtain discovery by taking an oral deposition, as described in Section
- 2 2025.010, in another state of the United States, or in a territory or an insular possession subject

3 to its jurisdiction. Except as modified in this section, the procedures for taking oral depositions in  
4 California set forth in Chapter 9 (commencing with Section 2025.010) apply to an oral  
5 deposition taken in another state of the United States, or in a territory or an insular possession  
6 subject to its jurisdiction.

7 (b) If a deponent is a party to the action, an expert retained and designated as an expert by  
8 a party, or an officer, director, managing agent, or employee of a party, the service of the  
9 deposition notice is effective to compel that deponent to attend and to testify, as well as to  
10 produce any document, electronically stored information, or tangible thing for inspection,  
11 copying, testing, or sampling. The deposition notice shall specify a place in the state, territory, or  
12 insular possession of the United States that is within 75 miles of the residence or a business  
13 office of a deponent.

14 (c) If the deponent is not a party to the action, an expert retained and designated as an  
15 expert by a party, or an officer, director, managing agent, or employee of a party, a party serving  
16 a deposition notice under this section shall use any process and procedures required and available  
17 under the laws of the state, territory, or insular possession where the deposition is to be taken to  
18 compel the deponent to attend and to testify, as well as to produce any document, electronically  
19 stored information, or tangible thing for inspection, copying, testing, sampling, and any related  
20 activity.

21  
22 § 2034.460

23 (a) The service of a proper deposition notice accompanied by the tender of the expert  
24 witness fee described in Section 2034.430 is effective to require the party employing or retaining  
25 the expert to produce the expert for the deposition, and for that expert to produce documents  
26 identified in the deposition notice without subpoena.

27 (b) If the party noticing the deposition fails to tender the expert's fee under Section  
28 2034.430, the expert shall not be deposed at that time unless the parties stipulate otherwise.

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

**PROPONENT:** Bar Association of Northern San Diego County

### **STATEMENT OF REASONS**

The Problem: Existing law is unclear whether a Notice of Taking Deposition is sufficient to compel an expert witness to also bring documents to the deposition. Pursuant to Code of Civil Procedure section 2034.460(a) service of a proper deposition notice, accompanied by an expert witness fee, obligates the party designating such expert to produce him or her for deposition. It is unclear whether the notice may be coupled with a demand that the expert produce documents. Code of Civil Procedure section 2034.410 states the deposition of a listed trial expert shall be governed by Section 2025.010, *et seq.*, and Section 2025.280 requires a deposition subpoena for production of a nonparty deponent's records.

The Solution: This Resolution clarifies Code of Civil Procedure sections 2026.010 and 2034.460 so that a proper deposition notice would require a party's retained and designated expert witness to produce documents at the deposition without the need for a subpoena.

### **LEGISLATIVE HISTORY**

Not known.

### **IMPACT STATEMENT**

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

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