DEPOSITIONS, PROCEEDINGS TO PERPETUATE TESTIMONY, INTERROGATORIES TO PARTIES: THE FEDERAL RULES AND THE CALIFORNIA LAW

[This Comment is one of a series being prepared by the law reviews of California at the request of the State Bar of California to supplement the study being conducted as to the feasibility and desirability of incorporating certain of the Federal Rules of Civil Procedure into California practice.]

The scope of this Comment is limited to depositions, proceedings to perpetuate testimony, and interrogatories to parties. It is intended to present a general survey of the applicable federal rules and interpreting cases, accompanied by a summary of the current California practice as sifted from the statutes and cases. Recommendations and criticisms are held to a minimum, it being left to the reader to draw his own conclusions as to the relative merits and defects of the two systems.

DEPOSITIONS AFTER COMMENCEMENT OF THE ACTION

Whose deposition may be taken; who may take; the prerequisites; the scope

Federal Practice—The basis of the right to take a deposition following the commencement of an action is Federal Rule of Civil Procedure 26(a). Initially it should be noted that the federal rules strictly differentiate between the right to take a deposition and the right to use a deposition. The fact that the deposition of a person may be taken does not necessarily mean that the deposition will subse-

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1 See Comments, 43 CALIF. L. REV. 97 (1955) (sanctions for failure to make discovery); 42 CALIF. L. REV. 829 (1954) (production of documents, inspection and the subpoena duces tecum); Note, 42 CALIF. L. REV. 187 (1954) (physical or mental examinations, and admissions). The Committee on Administration of Justice of the State Bar of California has recently published its conclusions and proposals in 31 CALIF. S.B.J. 204 (1956).

2 Federal Rules of Civil Procedure 26-27, 30-33 are set out in full in the Appendix to this Comment.


4 See Appendix. For consideration of rule 27(a), governing the taking of depositions prior to the commencement of an action, see text at note 151 infra.

quently be admitted as evidence at the trial or hearing. The use of the deposition in such proceedings is governed by the special requirements of rule 26(d) which are considered below.6

As to the mere taking of a deposition, the rules are extremely liberal, especially when compared with the right to take a deposition under California law. Under the federal rules the deponent need not be a party or even a potential witness, for it is the deposition of "any person" that may be taken. Moreover, the deposition may be taken "for the purpose of discovery or for use as evidence in the action or for both purposes,"7 thereby presenting to the deposition seeker almost unlimited grounds for the obtaining of information and evidence through use of the deposition procedure.8 Permission of the court is not required for the taking of a deposition once the action is commenced9 unless the plaintiff serves notice of the taking within twenty days after the filing of the complaint, in which case leave of the court must be secured.10 This twenty-day exception was promulgated to assure the defendant a reasonable opportunity to secure legal counsel and thereby be adequately represented at the deposition proceedings.11

The federal rules were designed to give the contesting parties a wide opportunity to secure information and evidence prior to the trial.12 "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."13 The test is relevancy to the subject matter, not relevancy to the issues framed by the pleadings,14 and it is not necessary to show that the evidence is relevant to the claim or defense of the examining party.15 The broad scope of this provision was emphasized by a 1948 amendment to rule 26(b) which added: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." This wide range of inquiry, coupled with the right to take the deposition of "any person," makes available to the litigants an extremely useful technique for ascertaining facts and establishing the issues of the dispute prior to trial.

The only specific limitation in rule 26 to the scope of the examination, other

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6 See text at note 129 infra.
7 FED. R. CIV. P. 26(a). In Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943), the court said: "[E]xamination before trial may be had not merely for the purpose of producing evidence to be used at the trial, but also for the discovery of evidence, indeed, for leads as to where evidence may be located."
8 However, the federal rules are not broad enough to permit starting a suit which fails to state a cause of action and then taking depositions in hopes of establishing some liability. United States ex rel. Schiff v. Atlantic Basin Iron Works, 53 F. Supp. 268 (E.D.N.Y. 1943).
10 FED. R. CIV. P. 26(a). Rule 26(a) as originally adopted allowed a party to take a deposition without leave of the court only after an answer had been filed. In 1946 the rule was amended, thereby going even beyond the California procedure which requires service of summons or appearance of the defendant. CAL. CODE CIV. PROC. §§ 2020, 2021 (discussed in text starting at note 27 infra, and set out in note 29 infra).
12 4 MoRrE, FEDERAL PRACTICE ¶ 26.02 (2d ed. 1950).
13 FED. R. CIV. P. 26(b).
15 FED. R. CIV. P. 26(b). See Marx v. Chase Nat'l Bank, 117 F.2d 800 (2d Cir. 1941).
than the requirement of relevancy to the subject matter, is that the deponent cannot be examined regarding any privileged matter. The grounds of privilege that are generally recognized at the trial are also applicable to discovery proceedings,16 such as professional privilege,17 privilege from self-incrimination,18 privilege as to matters injurious to public interest,19 and the husband-wife privilege.20

The questioning can also be limited by a court order to prevent harassment and abuse upon a motion made by the deponent or any party under the provisions of rules 30(b), 30(d), and 31(d).21

California Practice—Sections 2020 and 2021 of the California Code of Civil Procedure permit the testimony of a witness to be taken by deposition23 at any time after the service of summons or the appearance of the defendant.24 It is not

10 The court in Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946), said that the law of evidence should determine what is privileged. Fed. R. Civ. P. 43(a) governs the admissibility of evidence at the trial. 4 Moore, Federal Practice ¶ 26.22 (2d ed. 1950); 5 Moore, Federal Practice ¶ 43.07 (2d ed. 1951). Despite this general view there has been a comparative mass of rulings from the district courts and appellate courts defining the permissible scope of inquiry through the use of depositions. See 2 Federal Rules Digest 359–93 (2d ed. 1955). A consideration of all of these decisions interpreting the meaning of “relevant” and “privileged” is beyond the scope of this Comment. Of particular interest, however, is the current definition of the so-called “attorney-client privilege.” See Freedman, Discovery as an Instrument of Justice, 22 Temple L.Q. 174 (1948). In the leading case of Hickman v. Taylor, 329 U.S. 495, 508 (1947), the Supreme Court held that “the protective cloak of privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case, and it is equally unrelated to writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories.” Although thus restricting the scope of the privilege, the Court went on to say: “Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” 329 U.S. at 512. See Note, 62 Harv. L. Rev. 269 (1948).


21 These rules are considered in the text at note 89 infra.

22 Despite its title, an excellent guide to California deposition procedure is found in Medico-legal Aspects of Head, Neck and Back Injuries 337–436 (Univ. of Calif. Ext. 1955).


24 Fed. R. Civ. P. 26 states that a deposition may be taken without leave of the court at anytime after “commencement of the action,” except for the twenty days immediately following the filing of the complaint. See text starting at note 9 supra. The Committee on Administration of Justice of the State Bar of California in its proposed California version of rule 26 has rejected this language, preferring instead to retain the current California practice of requiring a service of summons or appearance of the defendant before permitting a party to take a deposition without leave of the court. Committee on Administration of Justice of the State Bar of California, Report, 31 Calif. S.B.J. 204, 211, 213 (1956).
necessary that an answer be filed,\textsuperscript{25} nor is it necessary, except in special proceedings,\textsuperscript{26} that there have arisen an issue of fact.\textsuperscript{27} Leave of the court is not required for the taking of the deposition once the summons is served or the defendant appears.\textsuperscript{28}

The California practice differs markedly from the federal practice in that in order to take the deposition of a witness within the state the party seeking the deposition must show by affidavit that one of the conditions prescribed by section 2021 is fulfilled.\textsuperscript{29} It is important to note and to distinguish the fact that in California the deposition of a party may be taken regardless of residence or subsequent

\textsuperscript{25} Even a defendant who has appeared may take a deposition though he has not filed an answer. Kibele v. Superior Court, 17 Cal. App. 720, 121 Pac. 412 (1911).

\textsuperscript{26} CAL. CODE CIV. PROC. § 22 defines an action as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." CAL. CODE CIV. PROC. § 23 says, "Every other remedy is a special proceeding." In Boggs v. North Am. Bond & Mortgage Co., 20 Cal. App. 2d 316, 319, 66 P.2d 1253, 1255 (1937) the court said, "The term [special proceeding] does not have a well established meaning and includes all civil remedies in courts of justice which are not ordinary actions, or in other words, any proceeding in a court which was not, under the common law and equity practice, either an action at law or a suit in chancery." Examples of special proceedings: People v. Riley, 37 Cal. 2d 510, 235 P.2d 381 (1951) (sanity hearing); Adoption of Pitcher, 103 Cal. App. 2d 859, 230 P.2d 449 (1951) (adoption proceeding); Van Denburgh v. Goodfellow, 19 Cal. 2d 217, 120 P.2d 20 (1941) (motion by judgment debtor to quash writ of execution); Kummer v. Atkison, 23 Cal. App. 401, 138 Pac. 116 (1913) (application for a writ of mandate).

\textsuperscript{27} CAL. CODE CIV. PROC. §§ 2020, 2021. These sections are set out in full in note 29 infra.

\textsuperscript{28} See McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 159 P.2d 944 (1945).

\textsuperscript{29} CAL. CODE CIV. PROC. § 2021 provides that: "The testimony of a witness in this State may be taken by deposition in an action at any time after the service of summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding or an officer, member, agent, or employee of a corporation, or the agent or employee of a municipal corporation, which corporation or municipal corporation is a party to the action or proceeding, or an agent or employee of an individual who is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but more than 50 miles distant from the place of trial or hearing by the nearest usual traveled route;

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required;

6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause;

7. When the witness is a subscribing witness to a will and the action is one to contest the will;

8. When the witness is the custodian, or one of the custodians, of hospital records relating to a patient whose physical or mental condition is at issue.\textsuperscript{30} For a discussion of paragraph 6, see Note, 26 So. CALIF. L. REV. 323 (1953). Paragraph 8 was added to the Code of Civil Procedure in 1955. Cal. Stat. 1955, c. 1133. Quaere: Was this provision promulgated solely to permit the preservation of testimony, or was it designed more for discovery purposes?

The requirements for taking the deposition of a witness outside of the state are not as rigid. CAL. CODE CIV. PROC. § 2020 provides that: "The testimony of a witness out of this state may be taken by deposition in the following cases:

1. In an action, at any time after the service of summons, or the appearance of the defendant.

\textsuperscript{30} For a discussion of paragraph 6, see Note, 26 So. CALIF. L. REV. 323 (1953). Paragraph 8 was added to the Code of Civil Procedure in 1955. Cal. Stat. 1955, c. 1133. Quaere: Was this provision promulgated solely to permit the preservation of testimony, or was it designed more for discovery purposes?
availability and appearance at the trial, whereas the taking of the deposition of a non-party witness is subject to limited situations. There is a theoretical basis for this distinction, as was pointed out by the court in the following dictum:

The two types of depositions are distinguishable: one is discovery, the other is not. The fundamental purpose of taking the deposition of a party is to obtain information, to give a party the advantage of knowing prior to the trial what his opponent’s testimony will be, and to serve the very useful purpose of limiting the need of proof of issues by substituting for testimony given at the trial the admissions and the information secured from the adversary before the trial. The basal purpose of taking the depositions of witnesses is to make certain that the testimony will be available at the trial.

However, once the right to take the deposition is established in accordance with section 2021, the California courts do sanction the use of the deposition examination for discovery purposes. The propounding of any question that is relevant to an actual or potential issue of fact is permitted, and the deponent must answer all such questions except those in the realm of privileged information. The scope of inquiry under California law appears to be similar in result to the federal practice.

The enumerated limitations to the right to take the deposition of a non-party witness within the state are not as severe as a cursory glance at section 2021 would perhaps indicate. A witness need only reside out of the county or more than fifty miles from the place of trial to give the litigant the right to take his deposition. Today, this restriction, although important in many instances, is of less significance than in previous years when the population of the state was smaller and possessed less fluidity. In addition, section 2021(6) permits the taking of the deposition of a witness who is the only person who can establish a material fact.

2nd. In a special proceeding, any time after a question of fact has arisen therein.
3rd. Where default has been made by any or all of the defendants.

For the procedure followed to take a deposition outside of the state, see Cal. Code Civ. Proc. §§ 2024-29. These sections are beyond the scope of this Comment. For the taking of depositions of prisoners, see Cal. Code Civ. Proc. §§ 1995-97.

32 Carnation Co. v. Superior Court, 96 Cal. App. 2d 138, 140, 214 P.2d 552, 553 (1950): "It is, of course, immaterial what the motives of the petitioner are if it has a clear legal right to take Dr. Harwell’s deposition. . . . It is not only proper but approved and common practice for parties to take steps for the discovery of evidence they may be required to meet upon trial, and to employ for that purpose the deposition procedure whenever it is available."
33 McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 394-95, 159 P.2d 944, 949 (1945): “Different principles govern the determination of the materiality of evidence sought to be obtained by means of depositions and the admissibility of evidence upon the trial. The relevancy of evidence on the taking of a deposition is to be determined by the subject matter of the action and by the potential as well as the actual issues in the case.”
35 The Committee on Administration of Justice of the State Bar sums up its conclusions as follows: “[T]he scope of inquiry at depositions is not covered by statute in this state and, in the opinion of the Committee, is not clearly established by case law. The scope of inquiry under present state law is probably narrower than that defined in Federal Rule 26.” Committee on Administration of Justice of the State Bar of California, Report, 31 Calif. B.J. 204, 205 (1956).
regardless of residence. This undoubtedly allows, in many cases, the taking of the depositions of a substantial percentage of potential trial witnesses.\[^{36}\]

If the "fundamental purpose" for the taking of the deposition of a witness is to insure the availability of his testimony at the trial,\[^{37}\] then the current California statutes are inconsistent with their objective. It would be supposed that the deposition of a witness could be taken on residence grounds only if he resided beyond the effective range of a subpoena issued by the court in which the action is pending, but such is not the case. Section 2021(2)\[^{38}\] permits the deposition of a non-party witness to be taken if he resides out of the county or if he resides more than fifty miles from the place of trial even though within the county. The subpoena power of the court, on the other hand, extends to the entire county and to any point within 100 miles of the place of trial.\[^{39}\] Thus there is an overlapping area in which a party can both take the deposition of a witness and subsequently subpoena that witness to appear at the trial.\[^{40}\]

In conclusion, it is apparent that the right to take the deposition of a party in California is as broad as it is under the federal rules. The right to take the deposition of a non-party witness in the state, however, is somewhat circumscribed by California law, although in a great many instances it is as extensive and as useful as the right sanctioned by the federal procedure.

**Notice requirements; method of taking**

**Federal Practice**—Under the federal rules a party may take a deposition by the use of either oral examination or written interrogatories.\[^{41}\] When oral examination is used, "reasonable notice in writing" must be given to every other party.\[^{42}\] In ascertaining what is reasonable, many factors are taken into account, such as the location of the parties and witnesses, the site of the deposition proceeding, the number of depositions to be taken, and the date of the commencement of the trial.\[^{43}\]

The notice must state "the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party, upon whom the notice is served, the court may for cause shown enlarge or shorten the time."\[^{44}\] The notice

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\[^{36}\] See 26 So. CALIF. L. REV. 323 (1953).


\[^{38}\] Quoted in note 29 supra.

\[^{39}\] CAL. CODE CIV. PROC. § 1989: "A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than one hundred miles from his place of residence to the place of trial."

\[^{40}\] Apparently the two areas were originally intended to be co-extensive, but subsequent amendment of § 1989 has not been followed by an amendment of § 2021(2). See MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 346 (Univ. of Calif. Ext. 1955).

\[^{41}\] FED. R. CIV. P. 26(a). Rule 26 is set out in full in the APPENDIX.

\[^{42}\] FED. R. CIV. P. 30(a). Rule 30 is set out in full in the APPENDIX.


\[^{44}\] FED. R. CIV. P. 30(a). The Advisory Committee on Rules for Civil Procedure recently proposed the following addition to Rule 30(a): "The court may regulate at its discretion the time and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interest of justice." ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 25 (1955). The Committee stated: The amendment "is intended to emphasize that the power to regulate the order of taking depositions is with the court, and that where a dispute as to priority arises it is to be resolved in terms of the circumstances of the particular case and the interests of justice, rather than by application of a mechanical rule." Id. at 26.
need not give the name of the officer before whom the deposition is to be taken, nor need the notice specify the matters upon which the examination is sought.

The selection by the party seeking the deposition of the place for the conducting of the examination will often depend upon whether the expected deponent is a party to the litigation. If he is not a party, then it is necessary to secure a subpoena to compel his attendance at the deposition proceeding unless the witness agrees to appear voluntarily. A non-party witness can only be required to attend an examination held in the county wherein he resides, or is employed or transacts his business, or in the county wherein he is served, or within forty miles of such service, or at such other convenient place as may be fixed by the court. The subpoena must be issued by the clerk of the district in which the deposition is to be taken. Hence the party seeking the deposition must "go to" the non-party witness.

Such restrictions are not applicable when the deponent is a party to the action. In such a case no subpoena is required, for rule 37(d) provides sanctions if the party fails to appear at the deposition proceeding after having received adequate notice. The location of the place for taking of the deposition of a party is subject to the discretion of the party desiring the deposition. The possibilities for abuse of this right are readily apparent, the geographical size of the United States being what it is. However, abuse of this provision does not appear to be a common occurrence. This is probably a result, at least in part, of the deterring features of rule 30(b), which permits any party to apply to the court for a protective order on the showing of good cause.

At the deposition proceeding the witness is sworn and the officer presiding has the testimony recorded. Often the same person serves as both presiding officer and recorder. All objections made at the time of the examination must be entered upon the deposition, and the evidence objected to is taken subject to these objections. Failure to object to procedural matters will usually result in the objection being waived, whereas substantive objections may be withheld until introduction of the deposition at the trial.

It is provided by rule 26(c) that the examination and cross-examination of the

47 If the party giving notice fails to serve a subpoena on the prospective witness and the witness does not attend, the court can require that the party giving notice pay the expenses incurred by the adverse party and his attorney in appearing at the place designated for the examination. Fed. R. Civ. P. 30(g) (2).
49 Fed. R. Civ. P. 45(d) (1).
50 Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944); 4 Moore, Federal Practice § 26.10 (2d ed. 1950).
51 Fed. R. Civ. P. 37(d): "If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." See Comment, 43 Calif. L. Rev. 97 (1955).
52 See Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132 (1951); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117 (1949). Rule 30(b) is discussed in the text at note 89 infra.
53 Fed. R. Civ. P. 30(c).
54 Ibid.
55 See text starting at note 85 infra.
deponent may proceed as permitted at the trial. This provision does not restrict
the scope of the inquiry of either party, for each party may in turn resort to direct
examination56 since the mere taking of the deposition does not make the deponent
the witness of the taker.57

The parties served with notice need not participate in the oral examination,
but are permitted to submit written interrogatories to the officer, who must read
them to the witness and record the answers verbatim.58 Although not as effective
as oral examination and cross-examination, this procedure can be useful in that an
adverse party can secure from the deponent answers to his questions without in-
curring the expense involved in a physical appearance at the proceedings.

Depositions may also be taken solely through the use of written interroga-
tories.59 This procedure is set out in rule 31. When written interrogatories are used,
notice must be given to every other party. This notice must include the time and
place of the proposed examination, the name and address of the party who is to
answer the interrogatories, and a copy of the questions to be propounded. The
adverse party is given ten days to file cross-interrogatories. Thereupon, the prop-
ery party proposing to take the deposition is given five days to file re-direct interro-
gatories. At the taking of the deposition, the officer in charge must follow the same procedure as
prescribed in rule 30(c), (e), and (f) for the conducting of an oral examination.60

Despite the elaborate provisions of rule 31 the use of written interrogatories
as a method for taking depositions is seldom resorted to, the practitioner prefer-
ring to avail himself of the benefits of direct oral examination. Written interro-
gatories are relied upon in about one out of twenty deposition proceedings,61
usually in those situations where the witness is some distance away62 and is not considered
to be too important to the outcome of the litigation.

The extensive procedural provisions of rules 30 and 31 need not be followed if
the parties so stipulate in writing. Rule 29 specifically permits depositions to be
taken before any person, at any time or place, upon any notice, and in any manner
upon stipulation of the parties.63

California Practice—The California practice, while differing in detail, is gen-
erally parallel to the federal practice except as to the use of written interrogatories.

To take the deposition of a witness who is in the state,64 notice must be given to
the adverse party.65 This provision has been interpreted to mean that the notice

57 FED. R. CIV. P. 26(f).
58 FED. R. CIV. P. 30(c).
59 FED. R. CIV. P. 26(a).
60 Rule 30(c) describes the procedure for taking the deposition; rule 30(e) the procedure
for altering and signing the deposition; rule 30(f) the procedure for certification and filing of
the deposition. These are set out in the APPENDIX.
61 Notes, 36 MINN. L. REV. 364, 379 (1952); Tactical Use and Abuse of Depositions Under
62 See Holtzoff, A Judge Looks at the Federal Rules After Fifteen Years of Use, 15 F.R.D.
155, 166 (1954).
63 FED. R. CIV. P. 29.
64 For the procedure for taking the deposition of a witness outside of the state, see CAL.
CODE CIV. PROC. §§ 2024-29.
65 CAL. CODE CIV. PROC. § 2031: "Either party may have the deposition taken of a witness
in this state, in either of the cases mentioned in section 2021 . . . on serving upon the adverse
party previous notice of the time and place of examination, together with a copy of an affida-
vit, showing that the case is within that section . . . ." The deposition can be used only against
those parties who were given proper notice as prescribed in § 2031. Estate of Short, 7 Cal.
App. 2d 312, 47 P.2d 553 (1935).
must be served upon the attorney of record of the adverse party, if he has one.66

The notice must contain the time and place at which the deposition is to be taken
but need not state the identity of the supervising officer.67

Unlike the federal rules68 the California statute69 is specific as to the notice required. The notice must
be given at least five days prior to the time specified for the taking of the deposition,
plus one day for every one hundred miles of the distance of the place of
examination from the residence of the person to whom notice is given. For cause
shown the court can shorten the time.70 The time can also be reduced by stipula-
tion of the parties.71 Where a defendant has defaulted, the entry of the default is
"deemed to be a waiver of the right to any further notice of any application or
proceeding to take the testimony by deposition in such action or proceeding."

Along with the notice there must be a copy of an affidavit stating that the tak-
ing of the deposition is proper under one of the provisions of section 2021 of the
Code of Civil Procedure.73

The effectiveness of a subpoena issued to compel the appearance of a witness
at the deposition proceedings is restricted to the territorial limits of the county,
or to one hundred miles from the place of trial or hearing, if the witness resides
outside of the county.74 Due to these limitations on the jurisdiction of the court
the party desiring to take the deposition must secure the issuance of a subpoena
from the clerk of the proper court. Depending upon the residence of the witness,
this may or may not be the court in which the action is pending. In 1952 the Cali-
ifornia Supreme Court75 reconciled the apparent inconsistencies of section 1986 of
the Code of Civil Procedure76 so that the following rules now govern the deter-
mination of the proper court for the issuance of the subpoena. Where the witness
resides within the reach of the subpoena of the court in which the action is pending

(1939).
61 See Cal. Code Civ. Proc. § 2031. The deposition may be taken "before a judge or officer
authorized to administer oaths ... " Ibid.
64 Ibid.
65 Ibid.
66 Estate of Short, 7 Cal. App. 2d 512, 47 P.2d 555 (1935). Depositions are often taken
on oral stipulation to avoid the inconvenience of following the formalized procedure. See
MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 349-55 (Univ. of Calif. Ext. 1955).
71 Cal. Code Civ. Proc. § 1986: "1. A subpoena is issued as follows: To require attend-
ance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an
action or proceeding pending therein, it is issued by the clerk of the court in which the action
or proceeding is pending, under the seal of the court, or if there is no clerk or seal then by a
judge or justice of such court; . . . . 3. To require attendance out of court, in cases not provided
for in subdivision one, before a judge, justice, or other officer authorized to administer oaths or
take testimony in any matter under the laws of this state, it is issued by the judge, justice, or
other officer before whom the attendance is required.

"If the subpoena is issued to require attendance before a court, or at the trial of an issue
therein, it is issued by the clerk, as of course, upon the application of the party desiring it.
If it is issued to require attendance before a commissioner or other officer upon the taking of a
deposition, it must be issued by the clerk of the superior court of the county wherein the at-
tendance is required upon the application of the party desiring it upon proper showing by
affidavit to be filed with said clerk.”
—that is, within the county or one hundred miles of the court—the clerk of that court is the proper party to issue the subpoena requiring attendance of the witness within the county or the one hundred mile radius. If the witness resides beyond the reach of the court in which the action is pending, then the subpoena is to be issued by the clerk of the court of the county in which his attendance is required, provided the witness resides in that county or within one hundred miles of that court. Hence the party desiring the deposition must "go to" the witness, and apparently it is immaterial whether the witness is a party or not.

The deposition "must be taken in the form of question and answer"; however, the deposition can be in narrative form where the cross-examining party has notice but fails to appear. Written interrogatories are sanctioned by California law only where the deposition is to be taken outside of the state. In such a case proposed questions are submitted to the court for settlement where the parties fail to agree. On motion of either party, the court in its discretion may direct that the examination be conducted orally.

Protection of the adverse parties and deponent

Federal Practice—The federal rules do not place the adverse party completely at the mercy of the party desiring to take the deposition. The adverse party can object to the form of the notice given by promptly serving a written objection on the party giving the notice. He can object to the qualifications of the officer before whom the deposition is to be taken if he objects before the examination begins "or as soon thereafter as the disqualification becomes known or should be discovered with reasonable diligence." Objections as to relevancy, materiality, and admissibility in evidence generally can be entered at the time of the trial and are not considered waived by failure to object at the deposition proceeding "unless the ground of the objection is one which might have been obviated or removed if presented at that time." On the other hand, procedural objections are considered waived unless made at the taking of the deposition.

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77 Under these rules it is possible that two or more superior courts might issue subpoenas for attendance in their respective counties. See MEDICOLEAL ASPECTS OF HEAD, NECK AND BACK INJURIES 359 (Univ. of Calif. Ext. 1955).
78 CAL. CODE CIV. PROC. § 2006: "Depositions must be taken in the form of question and answer. The words of the witness must be written down, in the presence of the witness, by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into longhand by the person who took it down. Such officer and the person taking down such testimony must be disinterested persons unless otherwise stipulated by the parties. When completed, it must be carefully read to or by the witness and corrected by him in any particular, if desired, by writing or causing his corrections to be written in the body or margin of or at the bottom of the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said correction. If the parties agree in writing to any other mode, the mode agreed upon must be followed."
79 Pralus v. Pacific Gold and Silver Mining Co., 35 Cal. 30 (1868).
81 When a deposition of a non-resident witness is sought, "either party may initiate a proceeding for the taking of a deposition of such a witness either upon written interrogatories or upon oral examination, but ... in either case the trial court is vested with the discretion, after a hearing as provided in section 2025 [Code Civ. Proc.], to direct the mode in which the examination is to be taken." Hopkins v. Superior Court, 105 Cal. App. 133, 135, 286 Pac. 1053, 1054 (1930).
82 FED. R. CIV. P. 32(a). Rule 32 is set out in the APPENDIX.
83 FED. R. CIV. P. 32(b).
84 FED. R. CIV. P. 32(c) (1).
85 FED. R. CIV. P. 32(c) (2). All objections made at the time of the examination to the qualifications of the officer, or to the manner of taking the deposition, or to the evidence pre-
To limit the use of the liberal deposition provisions of the federal rules as a method of harassment or abuse, or otherwise in bad faith, certain additional remedies are available to the deponent and adverse parties. Prior to oral examination either the deponent or a party can seek relief before the court in which the action is pending. On the showing of "good cause" the court can limit the scope of the examination, change the time, place, or method of taking, or make any other order "which justice requires to protect the party or witness from annoyance, embarrassment, or oppression," including an order that the deposition not be taken at all. Such orders are discretionary and subject to review only on appeal from the final judgment in the action. Where no objections are filed, the deposition is taken as if by order of the court.

The court has the same discretionary power, on a proper showing, when a motion is filed objecting to written interrogatories. The motion may be made by either the deponent or a party, but the motion must be made prior to the taking of the deposition.

Rule 30(d) provides that at any time during the oral examination a party or deponent can make a motion to terminate or limit the examination. The motion can be made either in the court in which the action is pending or in the court in which the deposition is being taken. This availability of the local district court, as well as the court in which the action is pending, saves time and expense to the parties. "Upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party," the court may limit or terminate the examination, or make any order permitted under rule 30(b). These protective rules were designed more

sented, or to the conduct of the party, and any other objection to the proceedings, must be noted by the officer upon the deposition, and the evidence objected to shall be taken subject to the objections. Fed. R. Civ. P. 30(c).

Fed. R. Civ. P. 30(b). In Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31 (S.D.N.Y. 1954), the court said that in order to limit the scope of discovery before examination under rule 30(b) a clear showing of bad faith in the projected examination is required. The Advisory Committee on Rules for Civil Procedure recommended that the words "undue expense" be added to rule 30(b) so that its last provisions would read as follows: "The court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression." Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 25 (1955).

67 Being within the discretion of the trial court, the decision is not ordinarily subject to review in a mandamus proceeding. National Bondholders Corp. v. McClintic, 99 F.2d 595 (4th Cir. 1938).

68 Harris v. Twentieth Century Fox Film Corp., 139 F.2d 571, 572 (2d Cir. 1943): "Under Rule 30(a) and (b), a party desiring to take a deposition may give notice and the court, upon motion of the other party, may make an order that the deposition shall not be taken. Since plaintiff made no such motion, this case must be considered as if the court had directed the depositions to be taken." For discussion of the sanctions imposed by the federal rules for non-compliance, see Comment, 43 Calif. L. Rev. 97 (1955).


70 Ibid. This provision has been criticized insofar as it requires that a deponent object to the interrogatories prior to the holding of the examination. "[T]he proper practice should be that the interrogatories should not be shown to the deponent in the advance of the taking of his deposition, except upon consent of the parties, and that the deponent should be allowed to make a motion for a protective order during the taking of the deposition, as provided in Rule 30(d) for the making of a similar motion by a deponent on oral examination." 4 Moore, Federal Practice ¶ 31.06 (2d ed. 1950).

71 E.g., the court in Heiner v. North Am. Coal Corp., 3 F.R.D. 64 (W.D. Pa. 1942), limited the scope of an examination where it found that "the examination, with its constant repetitions of matters incompetent for admission in evidence, was not only oppressive to the defendant, but, considering the results, was altogether too expensive to the debtor, and too greatly promotive of delay in ending the long-delayed proceeding." Id. at 65.
to deter improper utilization of the broad discovery procedures than to prevent
the taking of depositions altogether.\textsuperscript{92} A common procedure in the district courts
is not to limit the scope of the examination prior to the taking of the deposition,
but, instead, to wait until the examination is underway, when its scope and pur-
poses are more apparent, before taking any action to restrain the party seeking the
deposition from engaging in abusive practices.\textsuperscript{93}

With one major exception the federal deposition-discovery procedures have
been noted for the absence of continued abuse. Most writers have concluded that
harassment, though occasionally encountered, is not a common practice.\textsuperscript{94} This
has been attributed to the proper use by the district courts of the power to issue
protective orders upon application by a deponent or adverse party\textsuperscript{95} and to the
fact that harassment in most situations is usually not economically feasible to
either litigant so that as a result any attempt at abuse is self-limiting.\textsuperscript{96}

The major area of abuse, where the federal discovery procedure has been ex-
tensively criticized, is in civil anti-trust actions.\textsuperscript{97} The litigation of a "big case"
is by its very nature expensive and complex.\textsuperscript{98} The superimposing of the pre-trial
discovery practices upon the inherently complicated proceedings can easily be, and
often is, a fertile field for abuse and harassment. One writer has commented that
even the mere use of a given discovery technique can itself constitute an abuse.\textsuperscript{99}
Apparently the reason that the rules have not operated effectively is that the dis-
trict court judge is unable to draw the line in the pre-trial stages of the litigation;
that is, the issues being so sweeping and the facts so complex, the task of restrict-

\begin{itemize}
  \item See Krier v. Muschel, 29 F. Supp. 482 (S.D.N.Y. 1940); Stankewicz v. Pillsbury Flour
    Mills Co., 26 F. Supp. 1003 (S.D.N.Y. 1939); Tactical Use and Abuse of Depositions Under
  \item Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn. L. Rev. 633
    (1952); Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132
    (1951); Wright, Wegner, & Richardson, The Practicing Attorney's View of the Utility of Dis-
    covery, 12 F.R.D. 97 (1952); Tactical Use and Abuse of Depositions Under the Federal Rules,
    59 Yale L.J. 117 (1949).
  \item Holtzoff, A Judge Looks at the Federal Rules After Fifteen Years of Use, 15 F.R.D. 155
    (1954). For a contrary, but apparently minority view, see statement of George P. Dike in
    The Practical Operation of Federal Discovery, A Symposium on the Use of Depositions and
  \item Wright, Wegner, & Richardson, The Practicing Attorney's View of the Utility of Dis-
    covery, 12 F.R.D. 97, 100 (1952); The Practical Operation of Federal Discovery, A Symposium
    on the Use of Depositions and Discovery Under the Federal Rules, 12 F.R.D. 131 (1952)
    (testimony of William H. Speck at 138).
  \item Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132 (1951);
    Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117 (1949);
    The Practical Operation of Federal Discovery, A Symposium on the Use of Depositions and
    Discovery Under the Federal Rules, 12 F.R.D. 131 (1952) (testimony of Albert R. Connelly
    at 142 and of Judge Guy Bard at 157).
  \item See McAllister, The Big Case: Procedural Problems in Anti-trust Litigation, 64 Harv.
    L. Rev. 27 (1950); Dessien, The Trial of Economic and Technological Issues of Fact, 58 Yale
    L.J. 1019, 1242 (1949); Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41 (1952); Proce-
    dure in Anti-Trust and Other Protracted Cases, 13 F.R.D. 62 (1952) (Report adopted by the
    Judicial Conference of the United States).
  \item McAllister, The Big Case: Procedural Problem in Anti-trust Litigation, 64 Harv. L.
    Rev. 27 (1950). "Such an abuse will occur, for example, when a party uses one procedure
    though another would accomplish the same result more efficiently; when a procedure is used
    that duplicates a purpose achieved another way; when two procedures are used though one
    will do the work; and when, if two or more procedures are needed, they are not used in such
    a way as will facilitate the work which must be done by the other party." Id. at 32.
\end{itemize}
ing the fields of discovery is almost insurmountable. It cannot be denied that adequate discovery is essential to the successful determination of anti-trust actions and that the current procedure is often extremely beneficial. But the problem remains yet to be solved.

California Practice—The rights of the adverse party and deponent are not as extensive in California as they are under the federal rules. To prevent the taking of the deposition in California, should the notice be deemed insufficient, the proper technique is to file a motion to quash the service of subpoena. Once the deposition is taken, the cases are not consistent on whether an objection to a defect in the notice must be made by a motion to suppress the deposition upon discovery of the defect or at the time of trial. However, it seems to be proper to raise the objection at the trial. Should the objecting party appear and participate at the deposition proceedings, defects in the notice are considered waived and no objection will be recognized. Also, the parties can waive any defect by stipulation.

Objections to the qualifications of the supervising officer and to the competency of the witness may be made at the trial unless the adverse party appears and participates at the taking of the deposition, or unless the parties have stipulated otherwise. The deposition is taken “subject to all legal exception,” and may be attacked at the trial on any valid ground, such as relevancy or competency of testimony. Objections to the form of the questions, however, must be made at the time the deposition is taken.

Since all questions asked at the deposition proceeding are subject to objections on legal grounds, a witness need not answer a given question until the court rules that the question is proper and should be answered. Either the subscribing officer or the party seeking the deposition can take the initiative in securing a court order to compel the deponent to answer a given question. Before the court order can issue, a hearing must be held at which time the merit of the objection.

102 In Mills v. Dunlap, 3 Cal. 94 (1853), a motion before the trial was made to suppress the deposition on the grounds of inadequacy of notice. The court held that the motion was prematurely made and that the proper time for objection would be at the time the deposition was offered at the trial. Compare the following dictum in Kelly v. Ning Yung Benevolent Ass'n, 2 Cal. App. 460, 467, 84 Pac. 321, 324 (1905): “If the defendant had sustained any injury by reason of insufficient notice, it should not have waited until the trial before making the objection, but should have promptly moved the court to suppress the deposition.” However, the defendant was not injured, for his attorney had appeared and participated in the examination.
103 E.g., Estate of Short, 7 Cal. App. 2d 512, 47 P.2d 555 (1935).
104 Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770 (1908).
105 Estate of Short, 7 Cal. App. 2d 512, 47 P.2d 555 (1935).
107 Brooks v. Crosby, 22 Cal. 42 (1863).
108 CAL. CODE CIV. PROC. § 2032.
111 CAL. CODE CIV. PROC. § 2032. E.g., leading questions go to the form of the interrogatory, and, therefore, objections to such questions must be raised, if at all, at the deposition proceeding. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (1899).
of the witness is passed upon. The witness cannot be punished for his original refusal to answer but is liable only if he subsequently disobeys a court order directing him to answer.

It is not clear whether the trial court has any discretionary power, upon application by an adverse party, to terminate or postpone the taking of a deposition, for section 2021 provides that a deposition may be taken at any time after summons has been served or the defendant has appeared. Two divergent lines of cases have developed— one finding in the trial court some discretionary authority as part of its inherent power to exercise "reasonable control over all proceedings connected with the litigation before it," the other holding that once the requirements of section 2021 are fulfilled, the right to take the deposition is absolute. The more recent cases seem to follow the latter view, but it cannot be said with certainty that the contrary decisions have been affirmatively overruled.

Thus it is seen that the rights of the deponent and adverse party in California are not as precisely defined as under the federal rules. It is arguable that the necessity for extensive discretionary control by the trial court is not as great in California as in the federal courts. One reason for this is that in California, unlike the rule in the federal practice, the party desiring to take the deposition of an adverse party cannot indiscriminately select the place for the taking of the deposition, thereby imposing upon the adverse party the burden of expending valuable time and money in traveling. Because of the limitation on the territorial reach of the subpoena in California, the party desiring the deposition must seek out the adverse party. As a result, there is less possibility of continued harassment. Another restriction on the party desiring to take the deposition within the state is section 2021, which enumerates the specific instances in which a deposition may be taken. However, as noted above, once section 2021 is found applicable, the scope of inquiry and discovery permitted in California is, in most respects, as sweeping as that licensed by the federal rules, and it therefore may well be said that the trial court ought to be vested with enough discretionary power to prevent abusive use of the deposition procedure.

The use of the deposition at the trial or hearing

Federal Practice—Although the right to take depositions under the federal rules is very broad, the right to use them is sharply limited to definite enumerated

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114 Ibid.
116 CAL. CODE CIV. PROC.
117 See text at note 22 supra.
118 See 19 So. CALIF. L. REV. 83 (1945).
120 Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 878 (1949); McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 159 P.2d 944 (1945); San Francisco Gas & Elec. Co. v. Superior Court, 155 Cal. 30, 99 Pac. 359 (1908).
121 See the concurring opinion of Justice Carter in Brown v. Superior Court, 34 Cal. 2d 559, 566, 212 P.2d 878, 882 (1949).
122 CAL. CODE CIV. PROC. See note 31 supra.
123 See text at note 32 supra.
instances. The rules distinguish between the use of the deposition of a non-party witness, the use of the deposition of a party, and the general use of the deposition of either for impeachment purposes.

Rule 26(d) sets forth the conditions under which the deposition of a non-party witness may be used, such as death or sickness of the witness, inability to subpoena the witness, location of the witness beyond one hundred miles from the place of trial, or under such exceptional circumstances as to make it desirable, in the interest of justice, to allow the deposition to be used. This provision does not restrict the use by an adverse party of the deposition of a party or of any one who at the time of the taking of the deposition was an officer, director, or managing agent of a public or private corporation, association, or partnership, which is a party. Such a deposition may be used by an adverse party for any purpose.

Any party, not just the taker of the deposition, may use a deposition at the trial or hearing, so far as admissible under the rules of evidence, against any party who was present or represented at the taking of the deposition or who had due notice thereof. Moreover, it is specifically provided in rule 26(d)(1) that any deposition may be used by any party to impeach the testimony of a deponent who appears as a witness at the trial or hearing.

A party does not make a deponent his own witness by the mere taking of his deposition. The deponent, if he is not an adverse party to the litigation, becomes the witness of the party introducing the deposition as evidence at the time the deposition is introduced unless the deposition is used solely for impeachment purposes. If the deponent is an adverse party, the introduction of his deposition does not have that effect, for the rules permit the deposition of an adverse party to be used for any purpose. It should also be noted that although it is permissible to introduce in evidence only a part of a deposition, an adverse party may require the introduction of all of it "which is relevant to the part introduced, and any party may introduce any other parts." California Practice—The procedure in California is substantially the same. As under the federal rules, a distinction is made between the use of the deposition of a witness, the use of the deposition of a party, and the use generally of a deposition for the purpose of impeachment. Any party can use a deposition at the trial "against any party giving or receiving the notice, subject to all legal exceptions."
If the deposition was originally taken on the grounds that the witness resided out of the county, or that he resided more than fifty miles from the place of trial or hearing, or that the witness is about to leave the county, or that the witness was too infirm to attend, then, before the deposition can be used as evidence, "proof must be made at the trial that the witness continues to be absent or infirm, or is dead." Similarly, if the deposition was taken on the grounds that the witness was the only one who could establish a material fact, the deposition cannot be introduced as evidence if the witness's presence can be procured at the trial. The rule is different when the deposition of an adverse party is involved. Such a deposition can be introduced as evidence if the witness's presence can be procured at the trial that the witness continues to be absent or infirm, or is dead. The deposition thus introduced, had conferred with defendant's counsel and had left town with counsel's consent, must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in evidence notwithstanding the personal appearance of the adverse party. Wolters v. Rossi, 175 Cal. App. 509, 288 P.2d 900 (1954). But in Wulferdinger v. Pickwick Stages System, 105 Cal. App. 509, 288 Pac. 93 (1930), the court said that the deposition of a party could be read in evidence notwithstanding the personal appearance of the party at the trial, provided "it contained anything material to the issues which were not covered by her oral examination at the trial... The permission to read the deposition of a witness... when he is a party to the action and all the material evidence therein has been fully covered by an examination of the witness at the trial is discretionary with the court." Id. at 512, 288 Pac. at 94.

It has been held error to permit a party to introduce in evidence only selected portions of the deposition of his own witness, but the appellate courts will not reverse where the admission is considered harmless. Either party can introduce the deposition in evidence, the deposition being considered the evidence of the party reading it. However, according to the California Code of Civil Procedure, the party offering the deposition of an adverse party is not bound by the testimony therein.

134 See CAL. CODE CIV. PROC. § 2032. See note 132 supra. Apparently, the sound discretion of the trial court determines the amount of proof that is necessary. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961 (1917). The presentation of such proof can be waived by failure of the adverse party to object. Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143 (1899).
135 CAL. CODE CIV. PROC. § 2021(6). In Jameson v. Tully, 178 Cal. 380, 173 Pac. 577 (1918), the court upheld the refusal of the trial court to permit the defendant to read a deposition in evidence where it was shown that the witness was in town an hour before the deposition was introduced, had conferred with defendant's counsel and had left town with counsel's consent with no attempt being made to detain her.
136 See CAL. CODE CIV. PROC. § 2032.
137 Nelson v. Marks, 126 Cal. App. 2d 261, 271 P.2d 900 (1954). But in Wulferdinger v. Pickwick Stages System, 105 Cal. App. 509, 288 Pac. 93 (1930), the court said that the deposition of a party could be read in evidence notwithstanding the personal appearance of the party at the trial, provided "it contained anything material to the issues which were not covered by her oral examination at the trial... The permission to read the deposition of a witness... when he is a party to the action and all the material evidence therein has been fully covered by an examination of the witness at the trial is discretionary with the court." Id. at 512, 288 Pac. at 94.
138 See note 134 supra.
139 Estate of Boselly, 178 Cal. 715, 175 Pac. 4 (1918).
140 Bank of Orland v. Fimnell, 133 Cal. 475, 56 Pac. 976 (1901).
141 Mettheer v. Smith, 156 Cal. 572, 105 Pac. 735 (1909). In this case the court found that the evidence introduced was not necessary to the establishment of the plaintiff's case and, therefore, refused to reverse, holding the error to be harmless.
142 CAL. CODE CIV. PROC. §§ 2022, 2032.
143 CAL. CODE CIV. PROC. § 2055 reads: "A party to the record of any civil action or proceeding... may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse wit-
COMMENT

By the terms of section 2022 the court may exclude the deposition from evidence if it appears that the taking of the deposition was "in any material respect unfair." In an early interpretation of the predecessor of this statute the court said that at least something is left to the discretion of the court in excluding depositions on the grounds of unfairness. Further interpretations of this statute have not been forthcoming.

For the most part, then, the California law is analogous to the procedure set forth in the federal rules as to the right to use a deposition at the trial or hearing.

DEPOSITIONS PRIOR TO ACTION:
PROCEEDINGS TO PERPETUATE TESTIMONY

Federal Practice—In addition to the deposition procedures discussed above, the federal rules provide in rule 27(a) a simplified method for the perpetuation of testimony prior to the commencement of a civil action. The rule provides that to take a deposition prior to the starting of the action the party desiring the deposition must file "a verified complaint in the United States district court of the district of the residence of any expected adverse party." The petition must show that: (1) the petitioner expects to be a party to an action in a federal court but is presently unable to bring it; (2) the subject matter of the expected action and his interest therein; (3) the facts he desires to establish; (4) the names or descriptions and addresses of expected adverse parties; and (5) the names and addresses of the persons to be examined and the substance of the testimony expected to be elicited from each. It must also appear that it is beyond the control of the petitioner presently to bring the action. At least twenty days prior to the hearing each expected adverse party must be served with notice and a copy of the petition.47

"If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories." Unlike depositions pending action, it is apparently for the court to decide whether oral examination or written interrogatories are to be used. What circumstances show a possible "failure or delay of justice" is a matter for the discretion of the district court. Once the court order is made the deposition must be taken in accordance with the federal rules applicable to the taking of depositions.

ness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence..." In Weir v. New York Life Ins. Co., 91 Cal. App. 222, 266 Pac. 996 (1928), the court included the introduction of the deposition of an adverse party as within section 2055.

144 Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183 (1886).
145 FED. R. CIV. P. 27(a) (1).
146 FED. R. CIV. P. 27(a) (2). The notice must be served in the manner provided in rule 4(d) for the service of summons.
147 FED. R. CIV. P. 27(a) (3).
148 FED. R. CIV. P. 27(a) (3). For oral examination, rule 30 applies; for depositions taken through the use of written interrogatories, rule 31 controls.
Rule 27(a) "does not limit the power of a court to entertain an action to perpetuate testimony." 152 Hence, the perpetuation of testimony is still possible through the filing of an original bill in accordance with traditional equity practices. 153 Rule 27(a), however, affords a "simple ancillary or auxiliary remedy to which the usual federal jurisdictional and venue requirements do not apply." 154 It should be noted that under rule 27(a)(4) if the deposition to perpetuate testimony is taken in accordance with the federal rules "or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court . . . ." Thus, there are three methods for the perpetuation of testimony: the method provided by the state law, the method provided by rule 27(a), and the traditional bill in equity to perpetuate testimony.

Whether the deposition is taken in accordance with the federal rules or in accordance with the law of the state in which it was taken, the use of the deposition at a subsequent trial or hearing is subject to the same rights and restrictions as a deposition taken after the commencement of an action as provided in rule 26(d). 155

It is important to note, especially when comparing the federal procedure with the California procedure, that the requirements set forth in rule 27(a) follow in general substance the former equity practice. 156 The rule was intended to apply only to situations where testimony might be lost to a prospective litigant unless taken immediately. 157 It was not framed as a discovery device and therefore cannot be used to seek out information upon which to base a complaint. 158 Depositions for discovery purposes are permitted only after the commencement of the action. 159

California Practice—The California Code of Civil Procedure provides in sections 2083 to 2089 a procedure for the perpetuating of testimony by the taking of depositions prior to the commencement of an action. This is its label, but its practical scope and effect extends far beyond the mere perpetuation of testimony, going considerably beyond the practices permitted by the federal rules. The present procedure to perpetuate testimony is analogous to the former bill in equity in name only, having developed in recent years into a device more for the seeking of information than for the preservation of testimony. 160

In California it is necessary to file a verified petition in a superior court. 161

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152 Fed. R. Civ. P. 27(c).
153 For an outline of the procedure followed, see 7 CYCLOPEDIA OF FEDERAL PROCEDURE 239-44 (2d ed. 1951). See 4 MOORE, FEDERAL PRACTICE § 27.21 (2d ed. 1950), for examples of situations in which use of an action to perpetuate would be more beneficial than the procedure permitted by rule 27.
154 Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946).
155 Fed. R. Civ. P. 27(a) (4). Rule 26(d) is considered in the text at note 126 supra.
156 Mosseller v. United States, 158 F.2d 380 (2d Cir. 1946).
157 Petition of Ferbauf, 3 F.R.D. 89 (S.D.N.Y. 1943).
159 Petition of Ferbauf, 3 F.R.D. 89, 91 (S.D.N.Y. 1943): "Rule 26, and not rule 27, provides the method for discovering facts and that rule may be availed of only after action has been commenced."
160 See Comment, 3 STAN. L. REV. 530 (1951). For a concise review of current California law and procedure, see MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIEs 437-59 (Univ. of Calif. Ext. 1955).
161 CAL. CODE CIV. PROC. § 2084: "The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:
1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,
Apparently the petitioner can file in any superior court of the state, for there is no mention of any venue requirements in the statute. Selection of a court by the petitioner, however, will necessarily be influenced by the residence of the witness and the territorial limits of the subpoena, for a person cannot be compelled to appear as a witness out of the county in which he resides unless the distance be less than one hundred miles from his place of residence to the place of the examination.269

Unless the petitioner requires a subpoena duces tecum,265 the petition need only contain the following statements,266 and no more:265 (1) that the petitioner either expects to be a party to an action in this state, or, if no suit is anticipated, that the petitioner needs to prove or establish title, marriage, descent, heirship or any other matter which may later be material to establish; (2) the names and places of residence of the witness to be examined; and (3) a general outline of the facts to be proved. The motive of the petitioner is immaterial.266 It is not necessary that the petitioner show that there is some danger that the evidence will be lost, nor need he establish that he is unable to bring the action immediately,267 as was essential in the former equity practice,268 and as is still required under the federal rules.260 It has been the rule that once these statutory prerequisites are met, nothing more is required of the petitioner.270 Unlike the federal rules, which vest in the district court discretionary power to issue an order that a deposition be taken “if the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice . . . ,”271 the California superior court judge must make

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2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved.”


266 If a subpoena duces tecum is also desired, the contents of the affidavit must be more extensive. See CAL. CODE CIV. PROC. § 2090, discussed in Comment, 42 CALIF. L. REV. 187 (1954).

267 CAL. CODE CIV. PROC. § 2084.

268 Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 298 Pac. 1001 (1931).

269 Christ v. Superior Court, 211 Cal. 593, 296 Pac. 612 (1931).


271 Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 345, 298 Pac. 1001, 1003 (1931).

"Under the equity practice . . . depositions to perpetuate testimony could only be taken upon the filing of the bill for that purpose and it was necessary to allege: (1) the reason for the perpetuation of the testimony; (2) complainant's right, title or interest in the matter or thing to which the evidence relates; (3) defendant claims some interest in the subject matter of the controversy; (4) the subject matter of the controversy; (5) the inability of a party seeking to perpetuate the testimony to bring action immediately regarding the matter involved; (6) the names of the witnesses; (7) the facts concerning which the examination is sought; and (8) the danger of the evidence being lost. . . . Of the eight requirements under the old practice only three are found in our statute . . . .” Compare the similar provisions in the federal rules. FED. R. CIV. P. 27(a)(1); see Appendix.

272 FED. R. CIV. P. 27(a)(1).

273 MacLeod v. Superior Court, 115 Cal. App. 2d 180, 251 P.2d 728 (1952); Tone v. Superior Court, 111 Cal. App. 2d 110, 244 P.2d 13 (1952). In Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 378 (1949), is found the following dictum which might indicate some hesitation on the part of the court: “There is no express statutory requirement that the applicant for an order to perpetuate testimony must show that he has an actual or potential cause of action and it is not entirely clear from the cases whether such a showing is essential.” Id. at 563, 212 P.2d at 881.

274 FED. R. CIV. P. 27(a)(3). “What circumstances show a possible failure or delay of justice sufficient to call for the issuance of an order is obviously a matter for the sound discretion of the district court.” Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946).
the order if the three statutory requirements are fulfilled, and it has been held that
mandamus is the proper remedy where the trial court fails to issue an order allowing
the examination.\textsuperscript{172} Not to be ignored, however, is section 2084.2, which was
added to the Code of Civil Procedure in 1953.\textsuperscript{173} This statute establishes some
limitation on what was formerly an almost unbridled right to take the deposition.\textsuperscript{174}
The judge who signs the order allowing the examination may now impose, in his
discretion, "reasonable conditions" to provide "reasonable protection" to the
parties expectant or witness. The scope of this discretionary power has yet to be
determined by the courts.\textsuperscript{175}

Upon the granting of the petition, the judge must prescribe the time and man-
ner of giving notice.\textsuperscript{176} The methods allowed the court are enumerated in section
2084.1 of the Code of Civil Procedure. Generally, known parties expectant residing
within the state must be personally served with notice of the time and place of
the taking of the deposition. If the parties expectant are unknown or if they are
residing out of the state, service by publication is permitted. The procedure fol-
lowed at the examination is set forth in section 2086 of the Code of Civil Procedure
and is very similar to the general statutory provision which governs the taking of
depositions after the commencement of the action.\textsuperscript{177}

Section 2088 provides that if, after the deposition is taken, a trial is had be-
tween the parties named in the petition as parties expectant, or between their suc-
cessors in interest, the deposition may be used at the trial by either party upon
proof that the witness cannot be found or is unable to give testimony, due to age,
insanity, or other infirmity. The use of the deposition is "subject to all legal ob-
jections,"\textsuperscript{178} and when read in evidence has the same effect as the oral testimony
of the witness.\textsuperscript{179} The deposition may also be used in litigation "between any parties
wherewith it may be material to establish the facts which such depositions prove, or
tend to prove."\textsuperscript{180} The meaning and effect of this provision is not clear, and appar-
ently the appellate courts of California have not had occasion to consider it.\textsuperscript{181}

As a result of the literal interpretation given by the courts to the relatively few

\textsuperscript{172}Tone v. Superior Court, 111 Cal. App. 2d 110, 244 P.2d 13 (1952).
\textsuperscript{173} Cal. Stat. 1953, c. 1077: "In order to protect the party expectant and any witness from
abuse of process, the judge who signs the order allowing the examination may impose such
reasonable conditions, in addition to those in this chapter provided, as in his discretion will
provide reasonable protection to such party expectant or witness. The judge may, in his dis-
cretion, order the deposition to be sealed when returned to the clerk, to be opened thereafter
only upon order of the court."
\textsuperscript{174} In MacLeod v. Superior Court, 115 Cal. App. 2d 180, 251 P.2d 728 (1952), two of the
three justices concurred in the following: "The statute, as written, permits a proceeding brought
for the sole purpose of annoying, harassing or embarassing another, or for some ulterior object.
It permits one who does not have a cause of action to indulge in a meddlesome fishing expe-
dition. . . . It should not be permitted. But the remedy lies in the field of legislation, and not
in the creation of exception or qualification under the guise of interpretation of the statute." Id.
at 185, 251 P.2d at 731.
\textsuperscript{175} Quaere: In the imposing of "reasonable conditions" may the judge entirely prohibit
the taking of the deposition?
\textsuperscript{176} CAL. CODE CIV. PROC. § 2084.1.
\textsuperscript{177} See CAL. CODE CIV. PROC. §§ 2006, 2032, discussed at notes 78 and 132 supra.
\textsuperscript{178} CAL. CODE CIV. PROC. § 2086.
\textsuperscript{179} CAL. CODE CIV. PROC. § 2089.
\textsuperscript{180} CAL. CODE CIV. PROC. § 2088.
\textsuperscript{181} It would appear that any party could introduce the deposition of any person "when
material to establish the facts which such depositions prove" and that the elements of notice
to the parties and of privity between the parties who appeared at the deposition proceeding
and the parties at the trial are unnecessary.
requirements found in sections 2083 to 2089 of the Code of Civil Procedure the proceeding to perpetuate testimony has developed into an extremely valuable discovery procedure in California. The anomaly in the current California law is that once the action is pending the above procedure is no longer available. The party, then, is left only with the right to take depositions under the limited circumstances of section 2021, with discovery being but an ancillary result after the restrictions of section 2021 are overcome. As a consequence, the California practice is the exact reverse of the federal practice, the latter limiting depositions prior to an action to those instances where it is necessary in the interest of justice to preserve testimony while permitting an almost unlimited use of depositions for discovery purposes once the action is commenced.

**DEPOSITIONS PENDING APPEAL**

*Federal Practice*—The procedure for the taking of a deposition pending appeal is concisely set forth in rule 27(b). When an appeal from a district court judgment is pending, or, if no appeal has been taken, the time for an appeal has not expired, a party who desires to take the testimony of a witness must make a motion in the district court in which the judgment was rendered. The motion must show three things: (1) the names and addresses of the persons to be examined; (2) the substance of the testimony expected to be elicited from each; and (3) the reasons for perpetuating their testimony. Unlike the taking of a deposition pending an action, leave of the court is necessary to take a deposition pending appeal. If the court finds that the perpetuation of the testimony is proper “to avoid a failure or delay of justice,” then it may allow the taking of the deposition. Thereupon, the procedure followed at the taking the deposition is the same as that prescribed for depositions taken in pending actions.

There are several situations in which the litigant would desire to perpetuate the testimony of a witness pending an appeal. Between the time of the appeal and the subsequent taking of testimony at a new trial, should one be necessary, a considerable period of time may elapse. To prevent the loss of the testimony it might be essential in such a situation to preserve the testimony through the taking of depositions. Once the deposition is taken, it may subsequently be used in the same manner as a deposition taken in a pending action.

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182 See Comment, 3 STAN. L. REV. 530 (1951).
183 New York Cas. Co. v. Superior Court, 30 Cal. App. 2d 130, 133, 85 P.2d 965, 966 (1938): "Proceedings to 'perpetuate' testimony will not lie when the action is already pending and depositions can be taken under section 2021 of the Code of Civil Procedure."
184 See the discussion on the subject of depositions pending action in text starting at note 28 supra.
185 See 4 *Moore, Federal Practice* § 27.21 (2d ed. 1950).
186 See rule 26(d), discussed in text starting at note 125 supra.
The right to take a deposition pending appeal is clearly a limited one, subject to the sound discretion of the district court. The rule was designed as an extension of the right to perpetuate testimony and is to be restricted to those instances where the perpetuation of testimony is necessary "to avoid a failure or delay of justice." California Practice—The right to take a deposition pending appeal in California is less restrictive in many respects than the practice under the federal rules.

If the party desiring to take a deposition can establish that one of the conditions required by sections 2020 or 2021 of the Code of Civil Procedure exist, then a deposition may be taken "at any time after the service of summons or the appearance of the defendant." At an early date, the California Supreme Court said, "The language is very sweeping and comprehensive and clearly includes, if taken literally, all the time that an action is pending . . . ." The right to take a deposition does not terminate upon the rendering of a judgment by the trial court but continues until the final determination of the action. California, then, does not make the distinction made in the federal rules between the right to take a deposition before judgment and the right to take a deposition after judgment but pending appeal. It must be remembered, however, that in order to take a deposition within the state of California it is necessary to come within one of the restrictive conditions required by section 2021 of the Code of Civil Procedure, which, as noted above, somewhat handicaps the party desiring the deposition.

Since no distinction is made in California between the two types of depositions, the deposition taken pending appeal may be used in the same manner as a deposition taken before the judgment was rendered. This means that the deposition may be used in subsequent litigation between the same parties or their privies or successors in interest, provided the same subject matter is involved.

INTERROGATORIES TO PARTIES

Rule 33 of the Federal Rules of Civil Procedure offers to the litigant an additional method of obtaining evidence and information prior to the commencement of the trial. Rule 33 permits the submission of written interrogatories to an adverse party to secure such information as is available to that party. It is important to distinguish the use of written interrogatories under rule 33 from the use of written interrogatories under rule 31. The latter are used as a method of submitting questions to be asked and answered at a deposition proceeding. Written interrogatories under rule 33 are not to be used at a deposition proceeding but are merely to be answered in writing by the party receiving the questions.

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190 Advisory Committee Note to rule 27(b), quoted in 4 Moore, Federal Practice 27.01[3] (2d ed. 1950).
191 Fed. R. Civ. P. 27(b). No published cases were found interpreting this rule.
192 See text starting at note 1 supra.
195 Moran v. Superior Court, 38 Cal. App. 2d 328, 100 P.2d 1096 (1940). Cal. Code Civ. Proc. § 1049: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."
196 See text starting at note 28 supra.
197 See text starting at note 131 supra.
199 Rule 31 is considered starting in text at note 59 supra.
At any time after the commencement of the action any party may serve written interrogatories. Unlike the deposition procedure, which allows "any person" to be questioned, written interrogatories under rule 33 can only be submitted to an adverse party or to an officer or agent of a public or private corporation, partnership, or association that is an adverse party. Leave of the court is not required unless the service of the interrogatories is within ten days after the commencement of the action.

The scope of inquiry permitted is as extensive as that allowed under rule 26(b), which governs the taking of depositions. The interrogatories are proper if they have any relation to the subject matter of the action, and the questions are not limited to eliciting only testimony that is admissible as evidence. They are also used to seek information, secure evidence, and narrow the issues.

The answering party has fifteen days in which to answer, but upon a showing of good cause the court may extend or shorten the time. Should the answering party have any objection to the questions submitted he must present these in writing within ten days after the service of the interrogatories. A hearing must then be held, the answers to the interrogatories being deferred until the objections are resolved. The burden of persuading the court that a question is improper is upon the objecting party, and the court is vested with a broad discretion in passing upon the objection. Objections based upon oppression, irrelevancy, and privilege have been recognized by the courts.

The answers of the adverse party must be in writing and given under oath. Some courts have held the interrogatories to be continuing even though not expressly so stated and have held it to be the duty of the answering party to file a subsequent answer when further relevant information is obtained. Such a practice is questionable, and not all courts have been willing to place such a burden on the answering party. However, where the answers given are considered insufficient the court may order additional answers to compensate for the deficiency.

Rule 33 allows written interrogatories to be served even though the deposition of the answering party has been previously taken. The rule gives the court discretionary power to make such protective orders "as justice may require." More-
over, the rule permits a deposition of the answering party to be taken after the service and answering of the written interrogatories—the court again having the discretionary power to take necessary protective measures in the interest of justice.217

The number of interrogatories that may be served is not specifically limited by the federal rules except to the extent that "justice requires to protect the party from annoyance, expense, embarrassment, or oppression."218 It is clear that the court has wide discretionary powers, for rule 33 allows the court to make any order provided for in rule 30(b),219 thereby permitting the court to modify, limit, or even prohibit entirely the questioning. Subject to this discretionary power, the right to interrogate the adverse party is liberally construed.220

The answers to the written interrogatories may be used at the trial or hearing to the same extent that the deposition of an adverse party may be used, as provided in rule 26(d).221

Written interrogatories to the parties have proved to be a very popular device with practitioners; they are found in most all types of litigation in the federal courts.222 It is an extremely useful method to reduce surprise223 and to narrow the subject of the controversy.224 The procedure, however, is not without its abuses. The scope of inquiry permitted is the same as that allowed in the taking of a deposition after commencement of the action. Hence, the interrogatories may inquire into any matter not privileged which is relevant to the subject matter involved.225 This extensive range of inquiry, coupled with the fact that the burden of seeking out the desired information is upon the answering party, can result in the submission of interrogatories for purposes other than discovery. This is particularly evident in litigation involving complex economic and factual issues—such as anti-trust and patent actions—where control by the trial judge is exceedingly difficult.226

Besides the possibility of abuse, there are other disadvantages to the use of written interrogatories to the parties. For example, the advantage of direct oral examination is lost; the adverse party can read and reflect on the questions and his answers before replying; the party submitting the interrogatories must formulate his questions before he has received an answer to any of them.227 Nevertheless, interrogatories to the parties are widely accepted, and are generally consid-

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219 This rule is discussed in text at note 86 supra.
222 Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1142 (1951); Note, 36 Minn. L. Rev. 364 (1952).
225 For a discussion of rule 26(b) which governs the scope of inquiry, see text at note 13 supra.
226 McAllister, The Big Case: Procedural Problems in Anti-trust Litigation, 64 Harv. L. Rev. 27 (1950); Speck, The Use of Discovery in United States District Court, 60 Yale L.J. 1132 (1951).
COMMENT

ered to afford one of the best means yet devised for inexpensively narrowing the
issues. 228

California has no procedure comparable to that provided by federal rule 33.

Wallace R. Peck

APPENDIX

Federal Rules of Civil Procedure

RULE 26. DEPOSITIONS PENDING ACTION

(a) When Depositions May Be Taken. Any party may take the testimony of any person,
including a party, by deposition upon oral examination or written interrogatories for the
purpose of discovery or for use as evidence in the action or for both purposes. After commence-
ment of the action the deposition may be taken without leave of court, except that leave,
granted with or without notice, must be obtained if notice of the taking is served by the plain-
tiff within 20 days after commencement of the action. The attendance of witnesses may be
compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in
accordance with these rules. The deposition of a person confined in prison may be taken only
by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule
30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is
relevant to the subject matter involved in the pending action, whether it relates to the claim
or defense of the examining party or to the claim or defense of any other party, including the
existence, description, nature, custody, condition and location of any books, documents, or other
tangible things and the identity and location of persons having knowledge of relevant facts.
It is not ground for objection that the testimony will be inadmissible at the trial if the testi-
mony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Examination and Cross-Examination. Examination and cross-examination of depo-
nents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory
proceeding, any part or all of a deposition, so far as admissible under the rules of evidence,
may be used against any party who was present or represented at the taking of the deposition
or who had due notice thereof, in accordance with any one of the following provisions:

1. Any deposition may be used by any party for the purpose of contradicting or im-
peaching the testimony of deponent as a witness.

2. The deposition of a party or of any one who at the time of taking the deposition was
an officer, director, or managing agent of a public or private corporation, partnership, or asso-
ciation which is a party may be used by an adverse party for any purpose.

3. The deposition of a witness, whether or not a party, may be used by any party for any
purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater
distance than 100 miles from the place of trial or hearing, or is out of the United States, unless
it appears that the absence of the witness was procured by the party offering the deposition;
or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or im-
prisonment; or 4, that the party offering the deposition has been unable to procure the attend-
ance of the witness by subpoena; or 5, upon application and notice, that such exceptional cir-
cumstances exist as to make it desirable, in the interest of justice and with due regard to the
importance of presenting the testimony of witnesses orally in open court, to allow the deposi-
tion to be used.

4. If only part of a deposition is offered in evidence by a party, an adverse party may
require him to introduce all of it which is relevant to the part introduced, and any party may
introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and,
when an action in any court of the United States or of any state has been dismissed and another
action involving the same subject matter is afterward brought between the same parties or their
representatives or successors in interest, all depositions lawfully taken and duly filed in the
former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be
made at the trial or hearing to receiving in evidence any deposition or part thereof for any

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reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action
(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party.

The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought; 2, the subject matter of the expected action and his interest therein; 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 26(d).

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and
thereupon the depositions may be taken and used in the same manner and under the same
conditions as are prescribed in these rules for depositions taken in actions pending in the
district court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an
action to perpetuate testimony.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any
person upon oral examination shall give reasonable notice in writing to every other party to the
action. The notice shall state the time and place of taking the deposition and the name and
address of each person to be examined, if known, and if the name is not known, a general de-
scription sufficient to identify him or the particular class or group to which he belongs. On
motion of any party upon whom the notice is served, the court may for cause shown enlarge
or shorten the time.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking
a deposition by oral examination, upon motion seasonably made by any party or by the person
to be examined and upon notice and for good cause shown, the court in which the action is
pending may make an order that the deposition shall not be taken, or that it may be taken only
at some designated place other than that stated in the notice, or that it may be taken only
on written interrogatories, or that certain matters shall not be inquired into, or that the scope
of the examination shall be limited to certain matters, or that the examination shall be held
with no one present except the parties to the action and their officers or counsel, or that after
being sealed the deposition shall be opened only by order of the court, or that secret processes,
developments, or research need not be disclosed, or that the parties shall simultaneously file
specified documents or information enclosed in sealed envelopes to be opened as directed by the
court; or the court may make any other order which justice requires to protect the party or
witness from annoyance, embarrassment, or oppression.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is
to be taken shall put the witness on oath and shall personally, or by some one acting under his
direction and in his presence, record the testimony of the witness. The testimony shall be
taken stenographically and transcribed unless the parties agree otherwise. All objections made
at the time of the examination to the qualifications of the officer taking the deposition, or to
the manner of taking it, or to the evidence presented, or to the conduct of any party, and any
other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence
objected to shall be taken subject to the objections. In lieu of participating in the oral examina-
ton, parties served with notice of taking a deposition may transmit written interrogatories to
the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the
deposition, on motion of any party or of the deponent and upon a showing that the examina-
tion is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass,
or oppress the deponent or party, the court in which the action is pending or the court in the
district where the deposition is being taken may order the officer conducting the examination
to cease forthwith from taking the deposition, or may limit the scope and manner of the taking
of the deposition as provided in subdivision (b). If the order made terminates the examination,
it shall be resumed thereafter only upon the order of the court in which the action is pending.
Upon demand of the objecting party or deponent, the taking of the deposition shall be sus-
pended for the time necessary to make a motion for an order. In granting or refusing such
order the court may impose upon either party or upon the witness the requirement to pay such
costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the
deposition shall be submitted to the witness for examination and shall be read to or by him,
unless such examination and reading are waived by the witness and by the parties. Any changes
in form or substance which the witness desires to make shall be entered upon the deposition by
the officer with a statement of the reasons given by the witness for making them. The deposi-
tion shall then be signed by the witness, unless the parties by stipulation waive the signing or
the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the
witness, the officer shall sign it and state on the record the fact of the waiver or of the illness
or absence of the witness or the fact of the refusal to sign together with the reason, if any,
given therefor; and the deposition may then be used as fully as though signed, unless on a
motion to suppress under Rule 32(d) the court holds that the reasons given for the refusal to
sign require rejection of the deposition in whole or in part.
(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 31. Depositions of Witnesses Upon Written Interrogatories

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Rule 32. Effect of Errors and Irregularities in Depositions

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.
(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

**Rule 33. Interrogatories to Parties**

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them, and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.