JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

ItC SP18-17

Title
Judicial Council–Sponsored Legislation: Civil Discovery Tiers

Proposed Rules, Forms, Standards, or Statutes
Sponsor Code Civ. Proc., §§ 2019.025–2019.028; amend Code Civ. Proc., §§ 93, 94, 2023.010, and 2034.250; amend Evid. Code, § 723

Proposed by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Action Requested
Review and submit comments by October 19, 2018

Proposed Effective Date
January 1, 2021

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Executive Summary and Origin

This legislative proposal from the Civil and Small Claims Advisory Committee would provide for new discovery provisions for general civil cases, setting up three civil case tiers based on the complexity of the case, with each tier having different discovery requirements and limitations. The goal of the proposal is to make discovery more proportional to the value and nature of claims in a case. The proposal is based on the recommendations of the Commission on the Future of California's Court System.

Background

The *Commission on the Future of California's Court System: Report to the Chief Justice* (Futures Commission report), issued in May 2017, included recommendations relating to civil cases. The Civil and Small Claims Advisory Committee has been directed to develop, with input from stakeholders, recommendations to the Judicial Council to implement the recommendations in the report "that existing civil procedures be amended to reduce litigation costs and facilitate the early exchange of information, and [establish] a new tier of cases to increase access to justice and to improve court efficiency, particularly for the growing number of self-represented litigants (SRLs) in civil cases." The recommendations included:

1. Increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000;

2. Creating a new intermediate civil case track with a maximum jurisdictional dollar amount of $250,000; and
3. Streamlining methods of litigating and managing all types of civil cases.[1]

The stated goal in the Futures Commission report "is to reduce the cost of civil litigation at all levels by streamlining litigation procedures, incorporating proportionality concepts into the discovery process, and encouraging the use of technology."[2] The report noted that it will be important to work with stakeholders in developing the details of the procedures, to ensure that the amended procedures be fair and equitable; it also outlined a recommended focus for the changes.[3]

The advisory committee previously circulated a set of proposed statutory amendments relating solely to the limited civil case tier, raising the jurisdictional limit and including unlawful detainer cases that are within that limit in all procedures applicable to limited civil cases, including discovery limits and expedited jury trials.[4] This current proposal is the next step in addressing the civil recommendations in the Futures Commission report. The proposal being circulated in this round focuses on streamlining litigation by changing the discovery process: (1) requiring initial disclosures and document production by all parties early in the litigation, (2) limiting factual discovery according to the value and complexity of the case, and (3) limiting expert witnesses in certain cases. It is expected that the two proposals, following the advisory committee's full consideration of the comments received on both, will eventually be combined into a single set of recommendations to the council.

The Proposal

Rationale for proposal

The advisory committee carefully considered the recommendation in the Futures Commission report to establish a new intermediate jurisdictional case tier, comprised of cases between $50,000 to $250,000, and to set stricter discovery limits, among other things, on cases in that tier. The committee, however, found that trying to implement this recommendation into statute and practice was problematic. By using only dollar amounts to define this new tier, the intermediate tier was likely to include cases that were more complicated than envisioned in that tier (for example, cases involving smaller dollar amounts but also presenting complicated legal issues) while at the same time excluding cases that had higher dollar amounts in controversy, but which were straightforward legally (for example, various business matters and contract cases) and which would be prime candidates for the more limited discovery envisioned in the intermediate

[1] Jud. Branch of Cal., *Commission on the Future of California's Court System: Report to the Chief Justice* (Futures Commission report) (2017), p. 19. The report may be viewed at *http://www.courts.ca.gov/documents/futures-commission-final-report.pdf*.

[2] Futures Commission report, at p. 18.

[3] Futures Commission report, at p. 20.

[4] The details of that proposal are set out in the Invitation to Comment that may be viewed at *http://www.courts.ca.gov/documents/SPR18-11.pdf*.

tier. Similarly, cases in which there is no monetary claim at all, but instead a claim for injunctive or declaratory relief, can vary greatly in complexity and so could not easily be assigned to one tier or the other by putting a dollar value on the claim. There would also be problems with assigning personal injury cases to the intermediate tier because a specified damage amount is rarely pled.

Attorney committee members also expressed due process concerns about requiring parties to litigate a case as an intermediate case (which would cap the damages available at $250,000) and insisted that any such tier would have to be set up to allow parties to "opt in," letting the plaintiff decide whether to file a case as an intermediate case or an unlimited case. Judicial officers on the committee understood this issue but were concerned that an opt-in process could result in courts setting up intermediate civil case departments with few cases winding up in them, resulting in less, rather than greater efficiency.

Ultimately, the committee looked at the goals described in the Futures Commission report—less expensive litigation costs leading to greater access to the courts—and the methods recommended for obtaining those goals. A core part of the recommendations was to decrease the amount and cost of discovery. The recommendations included streamlining civil discovery by, among other things, mandating bilateral early disclosure of factual information supporting claims or defenses, identity of known witnesses, and production of key documents; and limiting depositions, written discovery, and experts based on where a case fell within the proposed three-tier system.[5] The committee eventually concluded that rather than adding another tier to the current civil case jurisdictional structure, it would recommend that the three-tier system be applied directly to the discovery process for civil cases, and that the recommendations within the Futures Commission report be reflected in this way. [6]

The details of the proposed legislation have been extensively considered and discussed by the advisory committee and, while not all members agree on all the provisions, the committee believes, in light of the directive it received from the Chief Justice, that the proposal should be circulated for public comment to obtain wider input from stakeholders, courts, and the public generally.

Content of proposal

The proposal would add new provisions at the beginning of the discovery statutes, in Article 1 of Chapter 5 (beginning at section 2019.010[7]) that would do the following:

[5] Futures Commission report, at pp. 20–22.

[6] The committee is seeking specific comments on whether this procedural (rather than jurisdictional) tiering is appropriate and in line with the goal and intent of the Futures Commission report.

[7] All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

- Define three civil case tiers for discovery purposes and provide how cases[8] are assigned to a tier (proposed new § 2019.025);
- Require mandatory bilateral disclosures in all such cases (including production of documents in the first two tiers) (proposed new § 2019.027); [9]
- Provide for sanctions if the initial disclosures are not made or are incomplete (proposed new § 2019.026 and amended § 2023.010);
- Set limits on discovery beyond that disclosure, based on the assigned tier (proposed new § 2019.028);[10] and
- Limit the number of expert witnesses in civil cases assigned to the middle tier (Tier 2) and authorize courts to limit the number of experts in all cases based on several factors, including to ensure that the number is in proportion to the nature or value of the case (proposed amended § 2034.250 and amended Evid. Code, § 723).

The new provisions are discussed below.

Three civil case tiers (§ 2019.025)

Proposed new section 2019.025(a) defines three tiers to which all general civil cases[11] will be assigned for purposes of discovery. Limited civil cases are assigned to Tier 1;[12] cases that are logistically or legally complicated, including but not limited to complex cases, are assigned to Tier 3; and all other cases are assigned to Tier 2. This definition of Tier 2 is somewhat broader than what was recommended for the intermediate tier in the Futures Commission report (e.g., it will include many cases with damage claims worth more than $250,000), because the committee concluded that, in making the new tier procedural rather than jurisdictional—and therefore eliminating the due process concerns—there was no reason not to expand the tier and so strive for more proportional discovery in a greater range of cases.

Under section 2019.025(b), assignment to a civil case tier will be initiated by the plaintiff designating the appropriate tier on a Judicial Council form to be filed with the complaint (most likely a revised version of the *Civil Cover Sheet* (form CM-010)). If a defendant disagrees with the plaintiff's designation, the defendant may file a counter designation, also on a Judicial Council form. The court is to decide, without necessity of hearing, which tier designation is

[8] The new provisions apply only to civil cases other than probate, guardianship, conservatorship, juvenile, or family cases.

[9] The proposal also incorporates this provision by reference in the limited civil case statutes, at proposed section 93, which is one of the statutes relating to limited civil case procedures.

[10] To the extent these limits cover limited civil cases, the proposal also includes these limits in the statutes relating to limited civil case procedures, at proposed section 94.

[11] The statute expressly exempts probate, guardianship, conservatorship, juvenile, and family law cases from its provisions because those types of cases were not addressed in the civil recommendations in the Futures Commission report.

[12] For the purposes of developing this recommendation, the committee has assumed that the jurisdictional cap for limited civil cases will be the increased $50,000 amount in the proposal already circulated for comment.

appropriate. If the court does not set a hearing or issue an order within 30 days of the counter-designation, the case will be assigned to the original tier designated by the plaintiff. At any time during the case, a court on its own or upon the request of a party may change the designation.

Initial disclosures (§ 2019.026)

Requiring each party to make an initial disclosure of factual information and documents was a major part of the recommendation in the Futures Commission report. "The key is that the parties will be provided with more information about the other side's claims without having to initiate formal discovery requests. This shift will reduce costs and permit both sides to evaluate cases early in the process."[13]

The committee discussed this recommendation at great length. Some attorney committee members raised valid arguments in opposition to adding this provision to the discovery statutes. They expressed concerns that, because many cases ultimately resolve without judicial intervention, any law requiring voluntary disclosures of information between the parties early in the case might increase, rather than decrease, the costs and delays associated with civil litigation. The committee addressed this concern, at least partially, by delaying slightly the time for initial exchanges to ensure that the case is at issue before any exchange is required, and by allowing parties that do not agree on the necessity for a formal initial exchange of case information to defer the exchange for up to six months as they attempt to settle the case.

As proposed, under new section 2019.026(a), all cases assigned to a civil case tier must, within 30 days after an answer has been filed, [14] disclose or produce the following:

1. The name, address, and phone number of individuals likely to have discoverable information the party may use to support its claims or defenses.

2. All documents that the disclosing party has and may use to support its claims or defense. (Cases assigned to Tier 3 may describe documents by category and location rather than produce them.)

[13] Futures Commission report, at p. 23. The report also notes that this recommendation comports with the recommendations made to the Conference of Chief Justices by the Civil Justice Improvements Committee, which include recommendations for robust mandatory initial disclosures followed by tailored, proportional discovery. *Id.*, at p. 24.

[14] An exception to this timing is made for unlawful detainer cases, in which the disclosure is to be made within five days after the answer is filed—a time frame parallel to that required for discovery responses in such cases. (Proposed § 2019.02(d).) The committee considered exempting unlawful detainer cases from the initial disclosure requirement. Several members commented that the initial disclosure would be particularly helpful in such expedited cases, while others opined that it would be too burdensome in light of the short time frame involved. The committee concluded that it was appropriate to circulate the proposal without any exemptions, and request comments on whether unlawful detainers or other case types should be exempted from the disclosure requirement.

3. Any insurance agreement that may cover a judgment in the case.

4. In a personal injury case, identity of all health care providers, with the date of treatment and a copy of all records and bills for such treatment.

5. A description of the types of damage alleged and, if known, a statement of economic damages.

The committee considered, but eventually rejected, the alternative of making the proposed disclosure optional rather than mandatory. The committee also considered not requiring the actual production of documents, allowing parties instead to only identify or describe the relevant documents. Ultimately, the majority of the committee, looking to the Futures Commission report's focus on this disclosure—including the exchange of documents—as being key to its recommended changes, concluded that the proposal to be circulated for comment should include a mandatory disclosure and document production at least for cases in Tiers 1 and 2.[15]

The remaining provisions in proposed section 2019.026 provide for logistical details relating to the initial disclosure:

- The disclosure is to be signed by the party or the party's attorney based on knowledge and belief formed after a reasonable inquiry. (The committee considered but rejected requiring signing under penalty of perjury.)
- The obligation to disclose is not triggered until 30 days after a party appears (to allow for later joining parties).
- The initial disclosures may be deferred for up to six months by stipulation, to allow for settlement discussions.
- All other discovery is stayed until after the propounding party has made its initial disclosure.
- All documents identified in the initial disclosure must be preserved until the end of the case.
- Requests for supplemental disclosures may be made (similar to requests for supplementing interrogatory responses).
- In limited civil cases, the plaintiff may choose to use the Case Questionnaire procedure (§ 90) rather than the initial disclosure procedure here.[16]

Sanctions for failing to disclose (§ 2019.027)

[15] The Futures Commission report did not include a recommendation for an initial disclosure of information in Tier 3 cases, but the committee believes that it will prove as useful there as in other cases to facilitate an early exchange of information.

[16] This was initially included when the committee was considering not requiring the production of documents in these disclosures, which *is* required in the Case Questionnaire process. Even with the production of documents now included in the disclosure process, there is a somewhat different, faster time frame for the Case Questionnaire so the committee concluded that it still makes sense to allow a choice.

This section allows a party to make a motion to compel service of an initial disclosure if one was not provided (§ 2019.027(a)) or of further disclosures if the initial disclosure is incomplete or evasive (§ 2019.028(b)). The court may also award sanctions in appropriate cases, although, other than sanctions for making or opposing a motion to compel without substantial justification, no sanctions may be imposed *except* for failure to obey a court order to provide a disclosure or further information. While it may at some point be appropriate to allow for sanctions simply for failure to provide the initial disclosure, the committee believed that, because this is a new process and a departure from the traditional way discovery has taken place in this state, it would be inappropriate to provide for sanctions at this time for simply failing to make a timely disclosure.

In order to include these sanctions in the general provisions regarding discovery sanctions, the proposal will also amend the statute containing the list of misuses of discovery process for which sanctions are available (§ 2023.010) to include failure to comply with an order to provide an initial disclosure or a supplemental disclosure.

Limitations on discovery (§ 2019.028)

As noted above, decreasing the amount of discovery in civil cases was a large part of the recommendations in the Futures Commission report. In addition to the mandated bilateral exchange of information via the initial disclosure, the specific discovery recommendations in the report included the following:

- For limited civil cases (cases under $50,000):
  - Allow one deposition per side; and
  - Decrease current limits on total written discovery from 35 to 15 or 20.

- For intermediate civil cases (between $50,000 and $250,000):
  - Limit each side to 20 hours of depositions;
  - Limit total written discovery requests to 35; and
  - Permit parties to seek leave of court for additional discovery on showing of good cause and proportionality to value of case.[17]

The recommended discovery limitations were subject to much discussion by the committee, and the committee ultimately decided that they could not recommend them as proposed in the Futures Commission report, for various reasons noted below. Although some committee members remain opposed to the limitations, especially those applicable to the expanded limited civil case tier, the majority of the committee did reach agreement on a set of limitations to circulate for comment.

Limits on each side, rather than on each party. (§ 2019.028(a)) The first provision in this section provides that all the limitations are *by side*, as recommended in the Futures Commission

[17] Futures Commission report, at pp. 20–21.

report, rather than by party. (§ 2019.028(a).) Side is defined as all plaintiffs, all defendants, or all cross-defendants. The goal is to eliminate gamesmanship by parties increasing the amount of discovery permitted by adding additional parties to a case.

This was not a provision that the committee unanimously agreed on. Concerns were raised as to logistics in splitting deposition time and in splitting written discovery requests, particularly among multiple defendants who may well have different interests and may want to use at least some of the discovery against each other. While the proposed statute expressly allows a court to make such determinations when appropriate and even to add on to the limits to ensure fairness in multiparty suits (§ 2019.028(c)), some members raised the issue of this provision placing an unnecessary burden on courts and parties. They also noted that if a party was added to the litigation late, it would be likely that some, or even all, of the permitted discovery would have occurred or been assigned to other parties, and motion practice would be required for the late-arriving party to obtain any discovery. This is an area where the committee is asking for specific comments as to whether the limits should be per side or by party and, if by party, what the limits should be.

Tier 1 discovery limitations (§ 2019.028(a)(1)). Under the proposed statute, each side in a Tier 1 case is limited to the following discovery:

- Seven hours of depositions, with a bump of another three hours per side if there are more than two parties.
- Total written discovery request (interrogatories, requests for admission except for those related to genuineness of documents, and requests for production of documents) limited to 35 or, if more than 2 parties, 45 per side. This limit includes form interrogatories. (This is the same provision as in the current limit in limited civil cases, which requires that form interrogatories be included within the limit.) (See § 94.)
- Other discovery as already permitted, with limitations only being based on current standards of protecting the responding party from unwarranted annoyance, oppression, or undue annoyance and expense, or from discovery out of proportion to the claims in the case.

These limits, on a tier that will be comprised primarily of limited civil cases, are higher than recommended in the Futures Commission report. There was disagreement on this point among the committee members, with some members wanting the limits to be lower, to follow the recommendations of the Futures Commission report, and others asserting that even the existing limited case discovery limits would be too low with the new jurisdictional limit of $50,000.

The objectors noted that with a $50,000 cap, the limited civil case tier (Tier 1) would include more employment law cases with multiple parties and complicated factual situations, with information generally available to defendants but out of the control of the plaintiff, who would need more discovery requests than envisioned by the Futures Commission report, or even as proposed here. Similarly, it was argued by some committee members—as well as by commenters

on the earlier proposal adding unlawful detainer cases to the limited civil procedures—that the current limited civil case discovery limits are often insufficient for unlawful detainer cases. Those commenters noted that unlawful detainers that are actually litigated often require substantial discovery, due to multiple affirmative defenses, with each requiring discovery from several different individuals.

The proposal does include a provision for seeking permission for discovery beyond the express limits, either by stipulation or request of the court (§ 2019.028(b)), as well as for permitting parties to agree to designate a case in a higher tier, but some committee members believe that, if the limits were as recommended in the Futures Commission report, such requests would have to be made in almost every unlawful detainer case and in most employment law cases, and so would be overly burdensome to courts and parties. For that reason, the advisory committee ultimately concluded it should propose the higher limits proposed here. The committee is seeking specific comments on whether the proposed Tier 1 limitations are appropriate for most limited civil cases and what, if any, changes should be made to the proposal.

Tier 2 discovery limitations (§ 2019.028(a)(2)). Under the proposed statute, each side in a Tier 2 case is limited to the following discovery:

- Forty hours of depositions, with a bump for each side of another four hours per additional party if there are more than two parties.
- Fifty total specially prepared written discovery requests (any combination of interrogatories, requests for admission except for those related to genuineness of documents, and requests for production of documents), but if more than two parties are in the case, each side is permitted an additional 10 requests for each additional party.
- Other discovery as already permitted, with the only limitations being based on current standards of protecting the responding party from unwarranted annoyance, oppression, or undue annoyance and expense, or from discovery out of proportion to the claims in the case.

These limits are also higher than those recommended in the Futures Commission report, but the group believed that was appropriate in light of this discovery tier covering a wider range of cases than envisioned in the originally recommended "intermediate" jurisdictional tier. The primary concern raised relating to the limits in this tier is the issue of having the limits on a per side rather than per party basis.

Another issue raised in relation to these limits was whether form interrogatories should be included within the limits. As proposed, the limits for Tier 2 cases do not cover form interrogatories—each party may ask as many of those as desired. This is parallel to the current limit on interrogatories generally, which does not cover form interrogatories. (See 2030.030(a)(2).) The committee is asking for specific comments on this point.

The committee considered, and eventually rejected, providing for parties to ask more written discovery if they included a declaration of good cause for the increased number. The group concluded that the ability to stipulate for more discovery or to seek leave of court, either via informal discovery request or noticed motion (§ 2019.028(b)) was sufficient to cover Tier 2 cases in which more discovery was appropriate. Members were concerned that allowing increases merely by declaration would provide too easy a way for parties to avoid the new limits.

Tier 3 discovery limitations (§ 2019.028(a)(3)). Because the Futures Commission report did not recommend any changes to factual discovery procedures for larger cases, the only provision the subcommittee included for Tier 3 cases was that any limitations—if they were to be applied at all—would be made on a case-by-case basis, either by stipulation of the parties or by case management or discovery conference.

Limits on expert witnesses

The Futures Commission report includes a recommendation that, in the proposed Intermediate Tier cases, each side should be limited to two expert witnesses, as "a further attempt to achieve proportionality," with more witnesses permitted for good cause. This number was chosen based on the assumption that it would apply to cases with claims of $250,000 or less. No further limits were recommended either for limited civil cases (for which depositions of experts are not authorized), or for cases with claims over $250,000.

In considering this recommendation, the committee considered the goal of the Futures Commission to streamline litigation by limiting experts. It also discussed the proliferation of experts in civil litigation today. Some members thought the number of experts appropriate to a case was so fact-specific that it was not possible to fix an arbitrary limit across all cases, or even across case types. They asserted that if a limit were added to the statute, the courts would be burdened by motions showing good cause for more in many cases. It was suggested that a possible alternative was, rather than placing a specific limit on the number of expert witnesses, to amend the current provisions authorizing protective orders limiting the number of expert witnesses (§ 2034.250(b)(1)) to expressly provide that courts could base such limits on, among other things, the nature or value of the claims in the case to ensure the proportionality of discovery in an action.

Other members opined that specific limits are needed if there is to be the kind of paradigm shift envisioned in the Futures Commission report. They likened the proposal to the recent amendments generally limiting depositions to seven hours per witness, except where good cause is shown for longer. While many protested before that change was implemented that it would result in many motions to the court, in practice it has not. Litigants have found ways to work within the new statutory limits, mostly by shortening the depositions or by agreeing between the parties that a longer deposition is needed, with little court involvement required. Proponents of limits on the number of experts believe the same is likely to be true here: that placing a limit in

the statute authorizing the use of experts[18] will result in little court involvement, although it will still be available if needed.

Ultimately, the committee as a whole decided that both proposed amendments be circulated for comment. The proposal does the following:

- Amends Evidence Code section 723 to provide that each side in a Tier 2 case (as defined in proposed Code Civ. Proc., § 2019.025) is limited to calling four experts unless the parties stipulate to more, the court finds good cause for more, or supplemental witnesses are authorized under section 2034.280.

  The committee agreed that in light of proposed Tier 2 encompassing a broader range of cases than originally envisioned by the Futures Commission in making its recommendations, more than two witnesses per side would be needed in many of the cases. The proposed limits would be by side, paralleling the other proposed civil discovery tier limits. The proposal also takes into consideration the possibility of a need to supplement the list of experts should the other side identify witnesses in different subject areas.

- Amends Code of Civil Procedure section 2034.250(b)(6) to provide that, in any case, the factors for the court to consider on a motion for a protective order reducing the number of experts designated by a party or a side include whether the number is in proportion to the value or nature of the case, whether there were experts disclosed in an area where the "expertise" is not necessary or helpful to the trier of fact, and where one or more of the designated experts are cumulative or redundant.

  This amendment would provide guidance for courts in following this statute whether or not the proposed amendment to the Evidence Code is enacted. It would apply in all cases and is not limited to Tier 2 cases as the other proposed amendment is.

Some members of the committee believe that the amendment to the Code of Civil Procedure is all that is necessary to address any issues with over-designation of experts in a case. Others believe that the proposed amendment to the Evidence Code section is also needed to make the kind of change envisioned by the Futures Commission. The committee is asking for specific comments on whether the proposed amendments should be made to Evidence Code section 723, to Code of Civil Procedure section 2034.250(b), or to both.

[18] Because any limitation on the number of expert witnesses is not in and of itself a discovery provision, but rather a provision regarding the use of witnesses at trial, the committee determined that a proposed legislative amendment expressly limiting that number would be in the Evidence Code sections on expert witnesses, in the statutory provision that already provides that a court may limit the number of expert witnesses to be called by any party at trial. (See Evid. Code, § 723.)

Limited civil case statutes

The provisions regarding case questionnaires (proposed § 93) have been amended to provide that the case questionnaire process is an alternative to the initial disclosure. The provisions regarding what discovery is permitted (proposed § 94) have been amended to provide that the discovery limits are per side and to amend the discovery provisions to repeat those stated in the new provisions for Tier 1 cases. The proposed amendments would repeat (rather than simply cross-reference) all the applicable discovery limits, in order to have all provisions relating to limited civil cases in one place, thus making them easier for self-represented parties to find and follow.

Alternatives Considered

Alternatives reflected in the proposal

The most significant alternative considered by the committee was whether to recommend a jurisdictional tier for cases between $50,000 and $250,000, as recommended in the Futures Commission report. As discussed above, the committee ultimately decided that increasing the limited civil jurisdictional level and then using the proposed tiers to focus on the recommended changes to the discovery statutes would be a more effective way of achieving the goals of the report. The committee is seeking specific comments on this point.

In addition, the committee considered several alternatives to the specific provisions in the proposal, as discussed above, including whether to define Tier 2 purely monetarily (to be comprised only of cases with damage claims under $250,000); whether to make the initial disclosure voluntary rather than mandatory; whether to have the discovery limits apply on a per party basis rather than per side; whether the actual limits should be lower, or higher, especially for Tier 1 cases; whether form interrogatories should be considered within the limits on written discovery; and how limits should be placed on experts. Comments are welcome on all the alternatives considered.

Alternatives not reflected in the proposal

The committee also considered two alternatives, discussed below, that did not ultimately result in proposals. Comments are welcome on these points also.

Written expert reports. The Futures Commission report included a recommendation that the method for discovery of experts be changed in high value cases—which the report suggested as those cases with damages alleged of over $1 million—by requiring that trial experts in those cases provide written reports with a detailed disclosure of their opinions and the facts supporting them. The goal was to make depositions in those cases more efficient. The written reports either could be in place of or in addition to the disclosure declaration currently required under section 2034.260(c). The Futures Commission report did not include recommendations for the specific contents or the timing of the reports, leaving that to the advisory committee, but in considering this issue, the Futures Commission looked to the provisions of the Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., rule 26(a)(2)(b)) on this point, so the committee did the same. In light of the change in tiers in the current proposal, the committee also considered whether the

proposed amendment would be applicable to all Tier 3 cases, as well as considering whether it should apply to cases with claims of over $1 million.

Ultimately, the committee declined to make a proposal on this point. The committee concluded that written reports were extremely expensive for parties to have experts prepare and would add to the cost of litigation rather than decreasing it. Members with experience in federal court opined that the written reports required in federal cases did not actually help make depositions more efficient. The committee also concluded that in Tier 3 cases in which such reports might prove helpful, an exchange of reports could be agreed to by the parties or requested from the court at a case management or discovery conference.

Other discovery statutes. Should the proposed civil case discovery tier statutes be enacted, other discovery statutes may ultimately need minor amendments to reflect the changes in discovery procedures for cases assigned to civil case tiers. However, the statutory provisions regarding each discovery method that is limited or in some way restricted by the provisions in the proposal currently begin with a section that notes that any party may obtain discovery using that method "subject to the restrictions set forth in Chapter 5 (commencing with § 2019.010)."[19] Because this is the chapter that will contain the proposed new statutes, use of each discovery method would—by this clause—be subject to the restrictions in the new statutes. The committee concluded that while further amendments may eventually be appropriate to provide more notice to the parties, and can be considered should the proposed legislation be enacted, there is no need to propose such amendments at this time.

Fiscal and Operational Impacts

Because the proposal focuses on discovery between the parties, the primary impact will be on litigants and their counsel. The committee expects that, in the long run, the proposal will lessen the amount of court appearances required for discovery motions but acknowledges that there may be more motions filed when the statutes are first implemented, and litigants are not yet accustomed to the disclosure requirements and the new limitations. Some additional judicial officer review may also be required at the beginning of cases in which parties do not agree on which tier the case should be assigned to. If the statutes are enacted, the advisory committee intends to develop forms to make the process for designation of civil case tier by parties clear and straightforward, and to facilitate the initial disclosures. For this reason, the proposal includes a deferred operative date of January 1, 2021.

[19] See §§ 2025.010 (depositions); 2030.010 (interrogatories); 2031.010 (requests for production of documents or things); and 2033.010 (requests for admission).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

1. Does the proposal appropriately address the stated goals of the Futures Commission report?
2. Would a voluntary initial disclosure be a better idea than the proposed mandatory disclosure (proposed § 2019.026), and would it be as effective in decreasing time spent on discovery?
3. Should the limitations on discovery in Tier 1 and Tier 2 cases be per side (proposed § 2019.028) or by party?
4. Do the proposed limitations for Tier 1 cases (proposed § 2019.028(a)(1)) provide appropriate discovery for most civil cases likely to be assigned to that tier (i.e., limited civil cases)? If not, what limitations should be recommended: lower limits as in the Futures Commission report or higher limits?
5. Should unlawful detainer cases or any other case types be carved out of the proposed discovery limitations on Tier 1 cases or of the initial disclosure requirements and, if so, should other limitations or requirements be proposed for those case types?
6. Do the proposed limitations for Tier 2 cases (proposed § 2019.028(b)(2)) provide sufficient discovery of most civil cases likely to be assigned to that tier? If not, what limitations should be recommended?
7. Should the limitations on written discovery requests in Tier 2 cases apply only to specially prepared interrogatories, or should form interrogatories also be counted with the total number?
8. Should the recommendation in the Futures Commission report limiting expert witnesses be reflected with a specific limitation on the number of expert witnesses in Tier 2 cases (proposed Evid. Code, § 723) or as guidance to the courts that the number in all cases should be proportional to the nature or value of the claims in the case (as in § 2034.250)? Or should both provisions be recommended?

The advisory committee has considered but is declining to proceed with the following recommendations from the Futures Commission report for the reasons discussed above, and welcomes comments on its decisions:

9. The advisory committee is declining to propose a separate jurisdictional tier for cases with damage claims between $50,000 and $250,000.
10. The advisory committee is declining to propose that written reports be required of expert witnesses in high-value cases.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and

procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would one year from the enactment of the proposed legislation until its effective date provide sufficient time for implementation? Or, should additional time be requested?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Code Civ. Proc., §§ 93, 94, 2019.25–2019.28, 2023.010, and 2034.250; Evid. Code, § 723, at pages 16–24
2. Link A: Jud. Branch of Cal., *Commission on the Future of California's Court System: Report to the Chief Justice* (Futures Commission report) (2017), at *http://www.courts.ca.gov/documents/futures-commission-final-report.pdf*

Code of Civil Procedure sections 2019.25–2019.28 would be sponsored, and Code of Civil Procedure sections 93, 94, 2023.010, and 2034.250, and Evidence Code section 723 would be amended, effective January 1, 2021, to read:

Code of Civil Procedure
Part 1
Title 1
Chapter 5.1

93.

(a) The parties in limited civil cases shall complete and serve initial disclosures as provided in Chapter 5 of Title 4 of Part 4 (commencing with Section 2019.010), unless the plaintiff ~~has the option to~~ serves case questionnaires with the complaint, using forms approved by the Judicial Council. The questionnaires served shall include a completed copy of the plaintiff's completed case questionnaire and a blank copy of the defendant's case questionnaire. If the plaintiff chooses this procedure, parties need not complete the initial disclosures in Chapter 5.

(b)–(e) * * *

(f) This section shall become operative January 1, 2021.

94.

Discovery is permitted only to the extent provided by this section and Section 95, and as provided for Tier 1 cases in Chapter 5 of Title 4 of Part 4 (commencing with Section 2019.010). This discovery shall comply with the notice and format requirements of the particular method of discovery, as provided in Title 4 (commencing with Section 2016.010) of Part 4. ~~As to each adverse party, a party~~ Each side in the case may use the following forms of discovery:

(a) Any combination of 35, or if there are more than 2 parties, 45 of the following:

(1) Interrogatories (with no subparts) under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4.

(2) Demands to produce documents or things under Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4.

(3) Requests for admission (with no subparts) under Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4.

(b) ~~One oral or written~~ Seven hours, or if there are more than two parties, 10 hours of deposition under Chapter 9 (commencing with Section 2025.010)~~,~~ or Chapter 10 (commencing with Section 2026.010) ~~or Chapter 11 (commencing with Section 2028.010)~~ of Title 4 of Part 4. ~~For purposes of this subdivision, a deposition of an~~

~~organization shall be treated as a single deposition even though more than one person may be designated or required to testify pursuant to Section 2025.230.~~

(c)–(e) * * *

(f) This section shall become operative January 1, 2021.

Part 4
Title 4
Chapter 5

2019.025.

(a) For purposes of discovery, all civil cases except probate, guardianship, conservatorship, juvenile, and family law cases are assigned to one of three civil tiers based on case characteristics, as follows:

(1) *Tier 1: Case Characteristics*. This tier is comprised of all limited civil cases, unless the parties have stipulated to Tier 2 discovery or any party by motion has shown that it is impracticable to litigate a case under the limitations of this tier. Trial is expected to take two days or less.

(2) *Tier 2: Case Characteristics*. These are cases of intermediate complexity. They are likely to have more than minimal documentary evidence and more than a few witnesses. They are likely to include, but may not include, expert witnesses. They are likely to involve multiple theories of liability and may involve compulsory cross-complaints. Trial is expected to take no more than two weeks. This is the presumptive tier for unlimited civil cases, and all cases that do not easily fit within Tiers 1 and 3 belong here.

(3) *Tier 3: Case Characteristics*. These are cases that are logistically or legally complicated or complex. Complicated cases may have multiple parties on each side, involve more multiple cross-complaints, seek substantial injunctive or equitable relief, or raise novel or difficult legal questions requiring additional discovery to present the issue. Cases requiring management of a large number of factual or expert witnesses or separately represented parties are likely Tier 3 cases. This tier also includes cases designated as complex cases, such as class actions, antitrust, multiparty commercial, construction defect cases, substantial products liability cases, mass torts, and coordinated proceedings. Cases involving less than $250,000 in damages normally will not be considered Tier 3 cases unless one or more of the factors listed above are present.

(b) Cases are assigned to tiers as follows:

(1) A plaintiff shall designate the tier described in (a) that a case belongs in by filing and serving with the initial complaint a form in which the plaintiff designates the appropriate tier.

(2) If the defendant or other party disagrees with the designation, that party may file and serve no later than its first appearance a form designating the action as belonging within a different tier and with a showing of good cause for the different designation. The court shall decide, as soon as practicable and without necessity of hearing, which tier the case is assigned to. If the court does not set a hearing or issue an order within 30 days, the case will be assigned to the tier in the original designation.

(3) The court may at any time on its own motion assign a case to a tier other than the one designated by a party.

(4) At any time after the case has been assigned to a civil case tier, either side may for good cause request reassignment to a different tier.

(c) The Judicial Council shall by January 2021 adopt rules and forms as appropriate to implement this section and all other statutes adopted at the same time relating to civil case tiers.

(d) This section shall become operative January 1, 2021.

2019.026.

(a) Within 30 days after an answer has been filed, all parties in cases assigned to a civil tier pursuant to Section 2019.025 must serve on all other parties an initial disclosure on a form prescribed by the Judicial Council providing or attaching the following:

(1) The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

(2) For inspection or copying, all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment, except that in Tier 3 cases a party may instead provide a description by category and location of all such documents, electronically stored information, and tangible things that are not provided.

(3) For inspection or copying, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(4) In a personal injury case, identify by name and address each physician, dentist, or other health care provider who treated the plaintiff, and the dates of treatment, and provide a copy of all medical records, bills, and evidence of payment.

(5) A description of the type of damages claimed and, if known, a statement of economic damages incurred.

(b) Each initial disclosure must be signed by an attorney of record in the attorney's own name or by the party personally. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete as to the information then known or explaining why it cannot by reasonable effort be complete.

(c) A party's obligation to provide an initial disclosure is not triggered until 30 days after the party has made an appearance in the action.

(d) Notwithstanding the time frame in subdivision (a), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159), the initial disclosure shall be made within five days after an answer has been filed.

(e) Parties may stipulate to continue the date for disclosures for up to 120 days for the purpose of conducting settlement discussions or mediation. Any further continuance may be obtained by application to the court with a showing of good cause or requested at a case management conference.

(f) Further discovery is stayed until the propounder of the discovery request has served its initial disclosure.

(g) Parties shall not destroy and must preserve all items that are identified or that fall within the categories identified in the initial disclosure until the case has been completed.

(h) A party may propound a request for a supplemental disclosure to elicit any later acquired information bearing on a previously made disclosure twice before the initial setting of the trial date and, subject to the time limits on discovery, once after the initial setting of the trial date.

(i) In any limited civil case in which a Case Questionnaire as provided for in Article 2 (commencing with Section 90) of Chapter 5.1 of Title 1 of Part 1 was completed and served by the plaintiff with the complaint, the completed Case Questionnaires shall take the place of the initial disclosure required in this section.

(j) This section shall become operative January 1, 2021.

2019.027.

(a) If a party unreasonably fails to serve a timely initial disclosure, the following applies:

(1) Any other party may move for an order compelling such disclosure.

(2) The court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an initial disclosure without substantial justification.

(3) If the court orders a party to provide an initial disclosure and a party then fails to obey the order, the court may make those orders that are just, including the imposition of an issue sanction or evidentiary sanction. In an exceptional case, a terminating sanction under Chapter 7 (commencing with Section 2023.010) may be imposed. Before imposing a terminating sanction, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(b) On receipt of an initial disclosure, the following applies:

(1) Any party may move for an order compelling further disclosure if the moving party deems that the initial disclosure is evasive or incomplete.

(2) A motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(3) Unless notice of this motion is given within 45 days of the service of the signed disclosure, or any supplemental signed disclosure, or on or before any specific later date to which a moving party and the responding party have agreed in writing, all parties waive any right to compel any further disclosure.

(4) The court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further initial disclosure without substantial justification.

(5) If the court orders a party to provide a supplemental disclosure and a party then fails to obey the order, the court may make those orders that are just, including the imposition of an issue sanction or evidentiary sanction. In an exceptional case, a terminating sanction under Chapter 7 (commencing with Section 2023.010) may be imposed. Before imposing a terminating sanction, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(c) This section shall become operative January 1, 2021.

2019.28.

(a) Discovery in cases assigned to a tier pursuant to Section 2019.025 is limited per side as stated below. A "side" is defined as plaintiffs collectively, defendants collectively, and third-party defendants collectively.

(1) *Tier 1 cases*. Each side in a Tier 1 case is permitted:

(A) Seven total hours of fact witness depositions under Chapter 9 (commencing with Section 2025.010) or Chapter 10 (commencing with Section 2026), or if there are more than two parties, then 10 hours total.

(B) Any combination of 35, or if there are more than 2 parties, 45 of the following:

(1) Interrogatories (with no subparts), under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4, (interrogatories on Judicial Council forms are counted within this limitation;

(2) Requests for production of documents or things under Chapter 14 (commencing with Section 2033.010) of Title 4 of Part 4, and

(3) Requests for admission (with no subparts) under Chapter 16 (commencing with section 2033.010) of Title 4 of Part 4 other than request for admission of the genuineness of documents.

(C) Requests for admission of the genuineness of documents.

(D) Deposition subpoena duces tecum requiring the person to mail copies of documents, books, or records to the party or party's counsel along with an affidavit complying with Section 1561 of the Evidence Code; and

(E) Physical or mental examination under Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4.

Discovery methods listed in (C)–(E) are limited only as justice requires to protect the responding party from unwarranted annoyance, oppression, or undue annoyance and expense, or from discovery out of proportion to the claims in the case.

(2) *Tier 2 cases*. Each side in a Tier 2 case is permitted:

(A) Forty total hours of fact witness depositions, and, if there are more than two parties, an additional four hours per party.

(B) Any combination of 50 of the following, unless there are more than two parties. If there are more than two parties, each side is permitted an additional 10 requests per each additional party:

(1) Interrogatories (with no subparts), under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4, other than those described in iii;

(2) Requests for production of documents or things under Chapter 14 (commencing with Section 2033.010) of Title 4 of Part 4; and

(3) Requests for admission (with no subparts) under Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4, other than requests for admissions of the genuineness of documents.

(C) Interrogatories propounded on Judicial Council forms.
(D) Requests for admission of the genuineness of documents.
(E) Deposition subpoena duces tecum requiring the person to mail copies of documents, books, or records to the party or party's counsel along with an affidavit complying with Section 1561 of the Evidence Code.
(F) Physical or mental examination under Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4.

Discovery methods listed in (C)–(F) are limited only as justice requires to protect the responding party from unwarranted annoyance, oppression, or undue annoyance and expense, or from discovery out of proportion to the claims in the case.

(3) *Tier 3 cases*. Any limitations on discovery in a Tier 3 case beyond those stated elsewhere in the Civil Discovery Act, commencing at Title 4 of Part 4 may be set by the court at a case management or discovery conference, or by agreement of the parties.

(b) (1) To obtain discovery beyond the limits on discovery established in (a), a party shall either:

(A) By noticed motion or at an informal discovery conference, request leave of court for discovery beyond tier limits, stating whether the limits for discovery have already been met and setting forth why the additional discovery is necessary and proportional to the claims in the case, attaching that discovery, or in the case of a request for deposition, describing the anticipated discovery; or

(B) File a stipulation of the parties, for each category of discovery for which the limit of discovery has been requested, that discovery beyond tier limits is necessary and proportional to the claims in the case.

(2) A request or stipulation under (1) must be filed before the close of standard discovery and before serving a discovery request that reaches or exceeds the limit imposed by (a) on any category of discovery.

(3) The court retains the power to disapprove any such stipulation.

(c) Notwithstanding the total limits on deposition hours and written discovery requests set out in (a):

(1) In a case with more than one party on a side, the court may for good cause further increase a side's allowed hours for fact witness depositions, allocate the allowed deposition hours among the parties on a side, or take any other action necessary to provide each party on a side with a reasonable opportunity to conduct deposition discovery;

(2) Additional examination time ordered for the reasons set forth in section 2025.480 does not count against the tier limits; and

(3) If the configuration of sides as defined in (a) provides more deposition time or written discovery to one group of parties with common interests than another group of parties with common interests, the court may for good cause adjust how (a) allocates the totality of deposition time or written discovery it allows between those sides.

(d) This section shall become operative January 1, 2021.

Chapter 7

2023.010.

Misuses of the discovery process include, but are not limited to, the following:

(a)–(f) * * *

(g) Disobeying a court order to provide discovery, including an order to provide an initial disclosure or to supplement an initial disclosure under Section 2019.026.

(h)–(i) * * *

Chapter 18

2034.250.

(a) A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

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

(1)–(5) * * *

(6) That a party or a side reduce the list of employed or retained experts designated by that party or side under subdivision (b) of Section 2034.210 if the number of experts is inappropriate or out of proportion to the nature or value of the case; if one or more of the experts has been designated to testify in an area in which special knowledge, skill, experience, training, or education is unnecessary or would not likely assist the trier of fact; if the experts designated are redundant or otherwise cumulative; or for other good cause.

(c)–(d) * * *

Evidence Code
Division 6
Chapter 3

723.

(a) The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

(b) In civil cases assigned to Tier 2 in Chapter 5 of Title 4 of Part 4 of the Code of Civil Procedure (commencing with Section 2019.010), each side is limited to calling four expert witnesses, except that more witnesses may be permitted in the following circumstances:

(1) All parties have stipulated to additional experts;

(2) The court finds good cause for additional witnesses; or

(3) Supplemental witnesses are identified under Code of Civil Procedure section 2034.280.

(c) This section shall become operative January 1, 2021.