

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1037 (Umberg)
Version: February 15, 2022
Hearing Date: April 5, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Civil discovery: oral depositions: conduct of deposition

DIGEST

This bill requires all participants physically present at a deposition to comply with local health and safety ordinances.

EXECUTIVE SUMMARY

The COVID-19 pandemic required a reexamination of many things we took for granted, such as the ability to gather together in groups. Prior to the pandemic, depositions in civil cases could be taken via remote audiovisual means only with express court permission, and only for third parties; remote depositions of parties were prohibited. After the onset of the pandemic, however, the state pivoted – first via emergency rule, then via SB 1146 (Umberg, Ch. 112, Stats. 2020) to allow remote depositions of any witness, without a court order. To ensure that the quality of evidence obtained at depositions was not unnecessarily compromised, however, SB 1146 allowed participants to opt to appear in-person at a deposition in lieu of appearing remotely.

According to the author and sponsor, there have been problems with in-person participants at depositions refusing to comply with local health and safety requirements. This bill makes clear that any in-person participants are required to follow all local health and safety ordinances. And to avoid further gamesmanship, the author has agreed to amend the bill to require compliance with local health and safety rules and orders.

This bill is sponsored by California Defense Council and the Consumer Attorneys of California. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes procedures for the taking of a deposition in a civil case, including provisions relating to the time, place, and manner in which a deposition may be conducted. (Code Civ. Proc., pt. 4, tit. 4, ch. 9, §§ 2025.010 et seq.)
- 2) Authorizes that a deposition in a civil case may be taken with the deposition officer attending via remote means, at the election of the deponent or the deposing party. (Code Civ. Proc., § 2025.310(a).)
 - a) The election to have the deposition officer attend via remote means does not affect the time, place, and manner requirements for depositions. (Code Civ. Proc., § 2025.310(d).)
- 3) Provides that, in a deposition where the deposition officer attends via remote means, any party or attorney of record may opt to appear at the location of the deponent.
 - a) A court may prohibit a party or attorney of record from appearing at the location of the deponent using the same procedures and with the same requirement of good cause necessary to bar a party or attorney from a fully in-person deposition. (Code Civ. Proc., § 2025.310(b).)

This bill:

- 1) Requires any party or attorney of record who elects to be physically present at a deposition to comply with local health and safety ordinances.

COMMENTS

1. Author's comment

According to the author:

In the event that a party or attorney of record elects to exercise their right under existing law to attend a deposition physically in person, SB 1037 requires all physically present participants to abide by local health and safety ordinances.

Prior to the COVID-19 pandemic, depositions were conducted fully in person. California statute and court rules required the swearing in of the witness to be done in person. When the pandemic started, the Governor's Emergency Order and the Chief Justice's Emergency Rules waived this in person requirement to allow depositions to continue through remote means. These emergency rules were codified by SB 1146 (Umberg, Ch. 112, Stats. 2020), specifically, Section 3 of the bill amended Code of Civil Procedure section 2025.310.

As SB 1146 moved through the legislative process in 2020, some stakeholders insisted on retaining the right to attend in person, thus subdivision (b) was added into the bill. Given the fluid nature of the pandemic, when this right is exercised, health and safety protections are not consistently followed. Therefore, SB 1037 will allow for individuals, who elect to appear in person, to be protected by statute to ensure that they can safely attend the deposition pursuant to local safety rules. The bill will also avoid disputes on safety procedures being brought before a judge which will save valuable time. Instead SB 1037 defers to local safety rules to ensure parties and attorneys can exercise their right to appear in person safely.

2. This bill requires parties and attorneys who attend a deposition in person to comply with all local health and safety ordinances

Before the COVID-19 pandemic, the Code of Civil Procedure imposed strict limits on when a deposition could be conducted through remote means: party depositions could not be conducted remotely under any circumstances and nonparty depositions could be conducted only with express permission from the court. With the onset of COVID-19, however, many parties, attorneys, and court reporters were – understandably – anxious about attending a deposition in a room full of people.

To allow depositions to continue during the pandemic, the Judicial Council of California implemented an emergency rule authorizing remote depositions of a party or nonparty without the need for court authorization.¹ The Legislature subsequently enacted SB 1146 (Umberg, Ch. 112, Stats. 2020). That bill created a statutory framework that allowed the deposition officer, and any other person authorized to attend a deposition, to appear at a deposition remotely and preserved the right of any party or attorney of record to opt to appear in person.² These provisions were intended to protect the health and safety of all persons involved without compromising the quality of the information obtained at depositions.

Since the passage of SB 1146, the severity of the pandemic has waxed and waned. Public health rules on matters such as masking have been amended numerous times in an effort to keep up with the current risks posed by the most active variant(s) of COVID-19. According to the sponsor of the bill, however, parties and participants have refused to comply with local health and safety requirements when attending depositions in person.

This bill is intended to prevent such gamesmanship in depositions. Specifically, this bill amends the remote deposition statute to specify that any person who elects to attend a

¹ See Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 11, repealed effective Nov. 13, 2020.

² See Code Civ. Proc., § 2025.310.

deposition in person must comply with local health and safety ordinances. The author has agreed to amend the bill to strengthen its application, discussed below in Part 3.

3. Amendments

As currently drafted, the bill requires only that a deposition attendee comply with local health and safety “ordinances.” To avoid any dispute over whether a deposition attendee is required to comply with *all* applicable local health and safety rules, the author has agreed to amend the bill as follows:

Amendment

On page 2, in line 4, strike out “ordinances.” and insert “ordinances, rules, and orders.”

4. Arguments in support

According to bill sponsors California Defense Council (CDC) and the Consumer Attorneys of California (CAOC):

As remote depositions continued successfully and efficiently pursuant to the emergency authority, CAOC and CDC sought to amend California statutory law to make permanent remote depositions and co-sponsored SB 1146 (Umberg, Ch. 112, Stats. 2020). During the legislative process, both plaintiff and defense attorneys raised the concern that while they support the option to have fully remote depositions, they must retain the right to appear in person with their client or the deponent, thus subdivision (b) was added to the bill.

SB 1037 will allow for individuals who elect to appear in person to be protected by statute to ensure that they can safely attend the deposition as the law, as proposed to be amended, will require compliance with local safety rules. The bill will also avoid disputes on safety procedures being brought before a judge. Instead, SB 1037 defers to local safety rules to ensure parties and attorneys can exercise their right to appear in person safely. For these reasons our organizations are pleased to co-sponsor SB 1037.

SUPPORT

California Defense Council
Consumer Attorneys of California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: SB 1146 (Umberg, Ch. 112, Stats. 2020) authorized, at the election of the deponent or the deposing party, the conduct of depositions with the deposition officer at a remote location.
