

Assembly Bill No. 3078

CHAPTER 171

An act to amend Sections 116.410, 411.20, 1005, 2024, and 2034 of, and to add Section 2016.060 to, the Code of Civil Procedure, relating to procedure.

[Approved by Governor July 15, 2004. Filed with
Secretary of State July 16, 2004.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3078, Committee on Judiciary. Procedure: civil actions.

(1) Existing law sets forth the procedures applicable to civil actions, and provides that any person who is at least 18 years of age, as specified, may be a party to a small claims action.

This bill would additionally permit an emancipated minor to be a party to a small claims action.

(2) Existing law provides for the suspension of proceedings and notification of the parties when a check for the payment of a filing fee is returned without payment.

This bill would revise those provisions for notice by the clerks of the court and suspension of proceedings to apply to underpayment as well. The bill would also require that notice be sent to the person who tendered the payment, and to the party or the party's attorney, as specified.

(3) Existing law provides for the deadlines, by reference to calendar days, for service of specified moving, supporting, and opposing papers regarding motions and other hearings, the deadline for the completion of discovery proceedings prior to trial, and the deadline for a demand for the exchange of information concerning expert witnesses prior to trial.

This bill would revise those deadlines by referring to court days rather than calendar days, and would make other related, clarifying changes.

(4) This bill would also incorporate further changes to the Civil Discovery Act proposed by AB 3081, contingent upon its prior enactment.

The people of the State of California do enact as follows:

SECTION 1. Section 116.410 of the Code of Civil Procedure is amended to read:

116.410. (a) Any person who is at least 18 years of age, or legally emancipated, and mentally competent may be a party to a small claims action.



(b) A minor or incompetent person may appear by a guardian ad litem appointed by a judge of the court in which the action is filed.

SEC. 2. Section 411.20 of the Code of Civil Procedure is amended to read:

411.20. (a) If the clerk accepts for filing a complaint or other first paper, or any subsequent filing, and payment is made by check which is later returned without payment, the clerk shall, by mail, notify the party who tendered the check that he or she has 20 days from the date of mailing of the notice within which to pay the fee, except as provided in subdivision (d), either by cash or by certified check. If a complaint or other first paper, or any subsequent filing, is accompanied by payment in an amount less than the required fee, the clerk shall accept the paper for filing and, by mail, notify the party tendering the check that he or she has 20 days from the date of mailing of the notice within which to pay the amount due, except as provided in subdivision (d). If the person who tendered the check is not a party to the action or proposed action, but only is acting on behalf of a party, the clerk shall notify not only the person who tendered the check, but also the party or that party's attorney if the party is represented. The clerk's certificate as to the mailing of notice pursuant to this section establishes a rebuttable presumption that the fees were not paid. This presumption is a presumption affecting the burden of producing evidence.

(b) The clerk shall void the filing if the party who tendered a returned check or on whose behalf a returned check was tendered, or the party who paid less than the required fee or on whose behalf the fee was paid, has not paid the fee either by cash or certified check within 20 days of the date on which the notice required by subdivision (a) was mailed. Any filing voided by this section can be disposed of without microfilming immediately after the 20 days have elapsed.

(c) If an adverse party files a pleading in response to a complaint, paper or filing referred to in subdivision (a), together with a filing fee, and the original filing is voided pursuant to subdivision (b), the adverse party's filing is not required, and the adverse party's filing fee shall be refunded upon request. If an adverse party tenders a check that is returned without payment, the procedures in subdivisions (a) and (b) shall apply.

(d) If any trial or other hearing is scheduled to be heard prior to the expiration of the 20-day period provided for in subdivision (a), the fee shall be paid prior to the trial or hearing. Failure of the party to pay the fee prior to the trial or hearing date shall cause the court to void the filing and proceed as if it had not been filed.

(e) If the clerk performs a service or issues any document for which a fee is required and payment is made by check which is later returned without payment, or if payment is in an amount less than the required fee,



the court may order further proceedings suspended as to the party for whom the check was tendered. If the court so orders, the clerk shall, by mail, notify the party who tendered the check that proceedings have been suspended until the receipt of payment of the required fee either by cash or by certified check. If the person who tendered the check is not a party to the action or proposed action, but only is acting on behalf of a party, the clerk shall notify not only the person who tendered the check, but also the party or that party's attorney if the party is represented. The clerk's certificate as to the mailing of notice pursuant to this section establishes a rebuttable presumption that the fees were not paid. This presumption is a presumption affecting the burden of producing evidence.

SEC. 3. Section 1005 of the Code of Civil Procedure is amended to read:

1005. (a) Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions:

(1) Notice of Application and Hearing for Writ of Attachment under Section 484.040.

(2) Notice of Application and Hearing for Claim and Delivery under Section 512.030.

(3) Notice of Hearing for Claim of Exemption under Section 706.105.

(4) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.

(5) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.

(6) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section 1043 of the Evidence Code.

(7) Notice of Hearing of Third-Party Claim pursuant to Section 720.320.

(8) Motion for an Order to Attend Deposition more than 150 miles from deponent's residence pursuant to paragraph (3) of subdivision (e) of Section 2025.

(9) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the Government Code.

(10) Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions pursuant to Section 473.5.

(11) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.

(12) Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.

(13) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.



(b) Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. The moving and supporting papers served shall be a copy of the papers filed or to be filed with the court. However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States, and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days. Section 1013, which extends the time within which a right may be exercised or an act may be done, does not apply to a notice of motion, papers opposing a motion, or reply papers governed by this section. All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing.

The court, or a judge thereof, may prescribe a shorter time.

(c) Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This subdivision applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in subdivision (a).

The court, or a judge thereof, may prescribe a shorter time.

SEC. 4. Section 2016.060 is added to the Code of Civil Procedure, to read:

2016.060. When the last day to perform or complete any act provided for in this title falls on a Saturday, Sunday, or holiday as specified in Section 10, the time limit is extended until the next court day closer to the trial date.

SEC. 5. Section 2024 of the Code of Civil Procedure is amended to read:

2024. (a) Except as otherwise provided in this section, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial



of the action. If either of these dates falls on a Saturday, Sunday, or holiday as specified in Section 10, the last day shall be the next court day closer to the trial date. As used in this section, discovery is considered completed on the day a response is due or on the day a deposition begins. Except as provided in subdivision (e), a continuance or postponement of the trial date does not operate to reopen discovery proceedings.

(b) The time limit on completing discovery in an action to be arbitrated under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 is subject to Judicial Council Rule. After an award in a case ordered to judicial arbitration, completion of discovery is limited by Section 1141.24.

(c) This section does not apply to (1) summary proceedings for obtaining possession of real property governed by Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, in which discovery shall be completed on or before the fifth day before the date set for trial except as provided in subdivisions (e) and (f), or (2) eminent domain proceedings governed by Title 7 (commencing with Section 1230.010) of Part 3.

(d) Any party shall be entitled as a matter of right to complete discovery proceedings pertaining to a witness identified under Section 2034 on or before the 15th day, and to have motions concerning that discovery heard on or before the 10th day, before the date initially set for the trial of the action. If either of these days falls on a Saturday, a Sunday, or a holiday as specified in Section 10, the last day shall be the next court day closer to the trial date.

(e) On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

In exercising its discretion to grant or deny this motion, the court shall take into consideration any matter relevant to the leave requested, including, but not limited to, the following:

- (1) The necessity and the reasons for the discovery.
- (2) The diligence or lack of diligence of the party seeking the discovery or the hearing of a discovery motion, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier.
- (3) Any likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party.



(4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or to reopen discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) Parties to the action may, with the consent of any party affected by it, enter into an agreement to extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial of the action has been set. This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date. In no event shall this agreement require a court to grant a continuance or postponement of the trial of the action.

(g) When the last day to perform or complete any act provided for in this article falls on a Saturday, Sunday, or holiday as specified in Section 10, the time limit is extended until the next court day closer to the trial date.

SEC. 6. Section 2034 of the Code of Civil Procedure is amended to read:

2034. (a) After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(1) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

(2) If any expert designated by a party under paragraph (1) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under paragraph (2) of subdivision (f).

(3) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in paragraph (2) in the course of preparing that expert's opinion.

This section does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.



(b) Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date. If this day falls on a Saturday, a Sunday, or a holiday as specified in Section 10, the last day shall be the next court day closer to the trial date.

(c) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this section.

The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange. If this day falls on a Saturday, a Sunday, or a holiday as specified in Section 10, the last day shall be the next court day closer to the trial date.

(d) The party demanding an exchange of information concerning expert trial witnesses shall serve the demand on all parties who have appeared in the action.

(e) 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 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

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) That the demand be quashed because it was not timely served.
- (2) That the date of exchange be earlier or later than that specified in the demand.
- (3) That the exchange be made only on specified terms and conditions.
- (4) That the production and exchange of any reports and writings of experts be made at a different place or at a different time than specified in the demand.
- (5) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the



designation of any experts as described in paragraph (2) of subdivision (a) be made by any side so created.

(6) That a party or a side reduce the list of employed or retained experts designated by that party or side under paragraph (2) of subdivision (a).

If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(1) The exchange of expert witness information shall include either of the following:

(A) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(B) A statement that the party does not presently intend to offer the testimony of any expert witness.

(2) If any witness on the list is an expert as described in paragraph (2) of subdivision (a), the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(A) A brief narrative statement of the qualifications of each expert.

(B) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(C) A representation that the expert has agreed to testify at the trial.

(D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

(E) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

(g) If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in paragraph (3) of subdivision (a), all parties shall produce



and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in paragraph (2) of subdivision (a).

(h) Within 20 days after the exchange described in subdivision (f), any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject. This supplemental list shall be accompanied by an expert witness declaration under paragraph (2) of subdivision (f) concerning those additional experts, and by all discoverable reports and writings, if any, made by those additional experts. The party shall also make those experts available immediately for a deposition under subdivision (i), which deposition may be taken even though the time limit for discovery under Section 2024 has expired.

(i) On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Sections 2025, 2026, 2027, and 2028 apply to a deposition of a listed trial expert witness except as follows:

(1) The deposition of any expert described in paragraph (2) of subdivision (a) shall be taken at a place that is within 75 miles of the courthouse where the action is pending. However, on motion for a protective order by the party designating an expert witness, and on a showing of exceptional hardship, the court may order that the deposition be taken at a more distant place from the courthouse.

(2) A party desiring to depose any expert witness, other than a party or employee of a party, who is either (A) an expert described in paragraph (2) of subdivision (a) except one who is a party or an employee of a party, (B) a treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words or symbols are, or (C) an architect, professional engineer, or licensed land surveyor, who was involved with the original project design or survey for which he or she is asked to express an opinion within his or her expertise and relevant to the action or proceeding, shall pay the expert's reasonable and customary hourly or



daily fee for any time spent at the deposition from the time noticed in the deposition subpoena or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, whether or not the expert is actually deposed by any party attending the deposition. If any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel. However, the hourly or daily fee shall not exceed the fee charged the party who retained the expert except where the expert donated his or her services to a charitable or other nonprofit organization. A daily fee shall only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition. In a worker's compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay this fee.

The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party designating the expert. If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert. The party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

(3) The service of a proper deposition notice accompanied by the tender of the expert witness fee described in paragraph (2) is effective to require the party employing or retaining the expert to produce the expert for the deposition. If the party noticing the deposition fails to tender the expert's fee under paragraph (2), the expert shall not be deposed at that time unless the parties stipulate otherwise.

(4) If a party desiring to take the deposition of an expert witness under this subdivision deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. This motion shall be accompanied by a declaration stating facts showing a reasonable and



good faith attempt at an informal resolution of each issue presented by the motion. Notice of this motion shall also be given to the expert. In any such attempt at an informal resolution, either the party or the expert shall provide the other with (A) proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation, (B) the total number of times the presently demanded fee has ever been charged and received by that expert, and (C) the frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

In addition to any other facts or evidence, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall be based upon (A) proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation, (B) the total number of times the presently demanded fee has ever been charged and received by that expert, and (C) the frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion. Provisions (B) and (C) shall apply to actions filed after January 1, 1994. The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination.

Upon a determination that the fee demanded by that expert is unreasonable, and based upon the evidence and factors considered, the court shall set the fee of the expert providing testimony.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(j) Except as provided in subdivisions (k), (l), and (m), on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

- (1) List that witness as an expert under subdivision (f).
- (2) Submit an expert witness declaration.
- (3) Produce reports and writings of expert witnesses under subdivision (g).
- (4) Make that expert available for a deposition under subdivision (i).



(k) On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to (1) augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained, or (2) amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give. This motion shall be made at a sufficient time in advance of the time limit for the completion of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The demand, and all expert witness lists and declarations exchanged in response to it, shall be lodged with the court when their contents become relevant to an issue in any pending matter in the action. The court shall grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in subdivision (f) on all other parties who have appeared in the action. Leave shall be conditioned on the moving party making the expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information,



unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust.

(l) On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date. This motion shall be made a sufficient time in advance of the time limit for the completion of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court shall grant leave to submit tardy expert witness information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party (1) failed to submit that information as the result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter served a copy of the proposed expert witness information described in subdivision (f) on all other parties who have appeared in the action. This order shall be conditioned on the moving party making that expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(m) A party may call as a witness at trial an expert not previously designated by that party if: (1) that expert has been designated by another party and has thereafter been deposed under subdivision (i), or (2) that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the



foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion.

(n) The demand for an exchange of information concerning expert trial witnesses, and any expert witness lists and declarations exchanged shall not be filed with the court. The party demanding the exchange shall retain both the original of the demand, with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged in response to the demand until six months after final disposition of the action. At that time, all originals may be destroyed unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

SEC. 7. Section 4 of this bill incorporates the substance of changes to the Civil Discovery Act proposed by this bill and AB 3081. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2005, (2) each bill affects provisions of the Civil Discovery Act, and (3) this bill is enacted after AB 3081, in which case Sections 2024 and 2034 of the Code of Civil Procedure, as amended by this bill, shall remain operative only until the operative date of AB 3081, at which time Section 4 of this bill shall become operative, and Sections 5 and 6 of this bill shall cease to be operative.

