

RESOLUTION 3-06-2002

DIGEST

Discovery: Expands Definition of Abuse of Discovery.

Amends Code of Civil Procedure section 2023 to provide that misuses of the discovery process include conduct that impedes, delays or frustrates the fair examination of a deponent in a deposition.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

Reasons:

This resolution amends Code of Civil Procedure section 2023 to provide that misuses of the discovery process include conduct that impedes, delays or frustrates the fair examination of a deponent. This resolution should be disapproved because it is unnecessary.

Section 2023, subdivision (a), already provides that unreasonable discovery tactics constitute discovery abuse. “Failing to respond or submit to an authorized method of discovery” (*id.*, subd. (a)(4)) and “[m]aking, without substantial justification, an unmeritorious objection to discovery” (*id.*, subd. (a)(5)) are both specifically mentioned and are both clearly applicable to a deponent and the deponent’s counsel. This resolution will encourage attorneys to file sanction motions for the allegedly improper defense of a deponent without resolving the central issue of attorneys’ misconduct in depositions.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 2023 to read as follows:

- 1 §2023
- 2 (a) Misuses of the discovery process include, but are not limited to, the following:
- 3 (1) Persisting, over objection and without substantial justification, in an attempt to
- 4 obtain information or materials that are outside the scope of permissible discovery.
- 5 (2) Using a discovery method in a manner that does not comply with its specified
- 6 procedures.
- 7 (3) Employing a discovery method in a manner or to an extent that causes
- 8 unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
- 9 (4) Failing to respond or to submit to an authorized method of discovery.
- 10 (5) Making, without substantial justification, an unmeritorious objection to discovery.
- 11 (6) Making an evasive response to discovery.
- 12 (7) Disobeying a court order to provide discovery.
- 13 (8) Making or opposing, unsuccessfully and without substantial justification, a motion

14 to compel or to limit discovery.

15 (9) Failing to confer in person, by telephone, or by letter with an opposing party or
16 attorney in a reasonable and good faith attempt to resolve informally any dispute concerning
17 discovery, if the section governing a particular discovery motion requires the filing of a
18 declaration stating facts showing that such an attempt has been made. Notwithstanding the
19 outcome of the particular discovery motion, the court shall impose a monetary sanction
20 ordering that any party or attorney who fails to confer as required pay the reasonable
21 expenses, including attorney's fees, incurred by anyone as a result of that conduct.

22 (10) Engaging in conduct which unreasonably impedes, delays or otherwise frustrates
23 the fair examination of a deponent, during or in connection with an oral deposition authorized
24 by any provision of this article.

25 (b) To the extent authorized by the section governing any particular discovery method
26 or any other provision of this article, the court, after notice to any affected party, person, or
27 attorney, and after opportunity for hearing, may impose the following sanctions against
28 anyone engaging in conduct that is a misuse of the discovery process.

29 (1) The court may impose a monetary sanction ordering that one engaging in the
30 misuse of the discovery process, or any attorney advising that conduct, or both pay the
31 reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.
32 The court may also impose this sanction on one unsuccessfully asserting that another has
33 engaged in the misuse of the discovery process, or on any attorney who advised that
34 assertion, or on both. If a monetary sanction is authorized by any provision of this article, the
35 court shall impose that sanction unless it finds that the one subject to the sanction acted with
36 substantial justification or that other circumstances make the imposition of the sanction unjust.

37 (2) The court may impose an issue sanction ordering that designated facts shall be
38 taken as established in the action in accordance with the claim of the party adversely affected
39 by the misuse of the discovery process. The court may also impose an issue sanction by an
40 order prohibiting any party engaging in the misuse of the discovery process from supporting
41 or opposing designated claims or defenses.

42 (3) The court may impose an evidence sanction by an order prohibiting any party
43 engaging in the misuse of the discovery process from introducing designated matters in
44 evidence.

45 (4) The court may impose a terminating sanction by one of the following orders:

46 (A) An order striking out the pleadings or parts of the pleadings of any party engaging
47 in the misuse of the discovery process.

48 (B) An order staying further proceedings by that party until an order for discovery is
49 obeyed.

50 (C) An order dismissing the action, or any part of the action, of that party.

51 (D) An order rendering a judgment by default against that party.

52 (5) The court may impose a contempt sanction by an order treating the misuse of the
53 discovery process as a contempt of court.

54 (c) A request for a sanction shall, in the notice of motion, identify every person, party,

55 and attorney against whom the sanction is sought, and specify the type of sanction sought.
56 The notice of motion shall be supported by a memorandum of points and authorities, and
57 accompanied by a declaration setting forth facts supporting the amount of any monetary
58 sanction sought.

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60 (Proposed new language underlined, language to be deleted stricken.)

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PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Code of Civil Procedure Section 2023 does not specifically identify impeding, delaying or otherwise frustrating the taking of deposition as an abuse of discovery.

This Resolution: Specifically identifies as an abuse of discovery conduct which impedes, delays or otherwise frustrates the fair examination of a deponent during or in connection with an oral deposition.

The Problem: With the ever-increasing costs and abuses related to the discovery process, this provision is necessary to deter litigants and non-party witnesses from engaging in conduct intended to delay, impede or frustrate the fair examination of a deponent, by specifically including such conduct with other the other specific conduct sanctionable under Code of Civil Procedure Section 2023. This is aimed at reducing said conduct, which should in turn reduce law and motion practice as related to said conduct.

IMPACT STATEMENT

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

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COUNTER ARGUMENT

ORANGE COUNTY BAR ASSOCIATION

This proposal, obviously intended as a companion to 3-05-2002, should also be rejected. First it will do little to cure the defects in 3-05-2002 as the party terminating the objection should be able to rely on the presumption in the earlier proposal as a basis for his/her “substantial justification” in terminating the deposition. This addition will not, therefore, provide a cure for the inherent defects in 3-05-2002. As an independent addition to an ever-growing list of sanctionable conduct, this recommendation is both unnecessary and ambiguous. C.C.P. Section 2023 already authorizes sanctions for making unmeritorious objections to discovery (a)(5), and for employing a discovery method in a manner undue burden and expense(a)(3). The proposed sanctionable conduct of “unreasonable impedes” and “frustrates the fair examination” is hopelessly ambiguous, yet another vehicle to increase costs to clients in discovery hearings and appellate proceedings. It is recommended that this proposal be rejected.