

RESOLUTION 1-01-03

DIGEST

Consumer Records Subpoenas: Service Sequence and Defining “Custodian”

Amends Code of Civil Procedure section 1985.3 to correct textual errors, define “custodian,” and clarify the sequence and timing of serving subpoenas for consumer records.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 1985.3 to correct textual errors, define “custodian,” and clarify the sequence and timing of serving subpoenas for consumer records. This resolution should be approved in principle because it corrects and clarifies the statute and will help avoid what may be unnecessary and costly procedural errors in obtaining documents for trial.

This resolution defines “custodian” as the custodian of records who is served the subpoena. This is useful because “custodian of records” does not appear to be specifically defined by statute or case law and this definition agrees with the generally understood definition of “custodian” in this context.

This resolution also corrects the erroneous reference in section 1985.3 to what is termed “the additional time provided by section 1013 if service is by mail.” Section 1013 allows service by several different methods, including mail, express mail, overnight mail and facsimile transmission. Therefore, this resolution expands section 1985.3 to include any additional time provided by section 1013 “if service is not made by personal service.”

Finally, this resolution clarifies the sequence of delivery of documents, expanded by the additional time requirement of section 1013, upon the party and the custodian. Specifically, this resolution ensures that the party whose records are sought is served with notice of the subpoena at least five days before the custodian is served. This clarification is important because it ensures the party resisting such discovery will have an opportunity to object or seek appropriate court orders before the custodian releases the documents.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1985.3 to read as follows:

- 1 §1985.3
- 2 (a) For purposes of this section, the following definitions apply:
- 3 (1) "Personal records" means the original, any copy of books, documents, other writings, or
- 4 electronic data pertaining to a consumer and which are maintained by any "witness" which is a
- 5 physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist,
- 6 podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital,
- 7 medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national
- 8 bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal
- 9 credit union, trust company, anyone authorized by this state to make or arrange loans that are secured
- 10 by real property, security brokerage firm, insurance company, title insurance company, underwritten
- 11 title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the
- 12 Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney,

13 accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the
14 United States Code, or telephone corporation which is a public utility, as defined in Section 216 of
15 the Public Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a
16 private or public preschool, elementary school, secondary school, or postsecondary school as
17 described in Section 76244 of the Education Code.

18 (2) "Consumer" means any individual, partnership of five or fewer persons, association, or
19 trust which has transacted business with, or has used the services of, the witness or for whom the
20 witness has acted as agent or fiduciary.

21 (3) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be
22 issued or served in connection with any civil action or proceeding pursuant to this code, but shall not
23 include the state or local agencies described in Section 7465 of the Government Code, or any entity
24 provided for under Article VI of the California Constitution in any proceeding maintained before an
25 adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3
26 of the Business and Professions Code.

27 (4) "Deposition officer" means a person who meets the qualifications specified in paragraph
28 (3) of subdivision (d) of Section 2020.

29 (5) "Custodian" means the custodian of records to whom the subpoena duces tecum for the
30 production of personal records is directed.

31 (b) Prior to the date called for in the subpoena duces tecum for the production of personal
32 records, the subpoenaing party shall serve or cause to be served on the consumer whose records are
33 being sought a copy of the subpoena duces tecum, of the affidavit supporting the issuance of the
34 subpoena, if any, and of the notice described in subdivision (e), and proof of service as indicated in
35 paragraph (1) of subdivision (c). This service shall be made as follows:

36 (1) To the consumer personally, or at his or her last known address, or in accordance with
37 Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his or
38 her attorney of record. If the consumer is a minor, service shall be made on the minor's parent,
39 guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable
40 diligence, then service shall be made on any person having the care or control of the minor or with
41 whom the minor resides or by whom the minor is employed, and on the minor if the minor is at least
42 12 years of age.

43 (2) The documents specified in subdivision (b) shall be served upon the consumer Not less
44 than 15 days prior to the date for production specified in the subpoena duces tecum, plus the
45 additional time provided by Section 1013 if service is not made by mail personal service. Service
46 must be made in the following sequence:

47 (A) The consumer must be served 5 days before the custodian, plus the additional time
48 provided by Section 1013 if service is not made by personal service.

49 (B) The custodian must be served no sooner than 5 days following service upon the
50 consumer, plus the additional time provided by Section 1013 if service upon the consumer was not
51 made by personal service.

52 (3) ~~At least five days prior to service upon the custodian of the records, plus the additional~~
53 ~~time provided by Section 1013 if service is by mail. The custodian shall have no less than 10 days~~
54 ~~after service, plus the additional time provided by Section 1013 if service is not made by personal~~
55 ~~service, to comply with the subpoena. Compliance with the subpoena is subject to the provisions of~~
56 ~~subdivision (c).~~

57 (c) Prior to the production of the records, the subpoenaing party shall do either of the
58 following:

59 (1) Serve or cause to be served upon the witness a proof of personal service or of service by
60 mail attesting to compliance with subdivision (b).

61 (2) Furnish the witness a written authorization to release the records signed by the consumer
62 or by his or her attorney of record. The witness may presume that any attorney purporting to sign the
63 authorization on behalf of the consumer acted with the consent of the consumer, and that any
64 objection to release of records is waived.

65 (d) A subpoena duces tecum for the production of personal records shall be served in

66 sufficient time to allow the witness a reasonable time, as provided in paragraph (1) of subdivision (d)
67 of Section 2020, to locate and produce the records or copies thereof.

68 (e) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer or
69 his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface
70 designed to call attention to the notice, indicating that (1) records about the consumer are being
71 sought from the witness named on the subpoena; (2) if the consumer objects to the witness
72 furnishing the records to the party seeking the records, the consumer must file papers with the court
73 or serve a written objection as provided in subdivision (g) prior to the date specified for production
74 on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or
75 limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or
76 her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set
77 forth in a single document with the notice required by this subdivision.

78 (f) A subpoena duces tecum for personal records maintained by a telephone corporation
79 which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not be valid or
80 effective unless it includes a consent to release, signed by the consumer whose records are requested,
81 as required by Section 2891 of the Public Utilities Code.

82 (g) Any consumer whose personal records are sought by a subpoena duces tecum and who is
83 a party to the civil action in which this subpoena duces tecum is served may, prior to the date for
84 production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum.
85 Notice of the bringing of that motion shall be given to the witness and deposition officer at least five
86 days prior to production. The failure to provide notice to the deposition officer shall not invalidate
87 the motion to quash or modify the subpoena duces tecum but may be raised by the deposition officer
88 as an affirmative defense in any action for liability for improper release of records.

89 Any other consumer or nonparty whose personal records are sought by a subpoena duces
90 tecum may, prior to the date of production, serve on the subpoenaing party the witness, and the
91 deposition officer, a written objection that cites the specific grounds on which production of the
92 personal records should be prohibited.

93 No witness or deposition officer shall be required to produce personal records after receipt of
94 notice that the motion has been brought by consumer, or after receipt of a written objection from a
95 nonparty consumer, except upon order of the court in which the action is pending or by agreement of
96 the parties, witnesses, and consumers affected.

97 The party requesting a consumer's personal records may bring a motion under Section
98 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall
99 be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution
100 of the dispute between the party requesting the personal records and the consumer or the consumer's
101 attorney.

102 (h) Upon good cause shown and provided that the rights of witnesses and consumers are
103 preserved, a subpoenaing party shall be entitled to obtain an order shortening the time for service of
104 a subpoena duces tecum or waiving the requirements of subdivision (b) where due diligence by the
105 subpoenaing party has been shown.

106 (i) Nothing contained in this section shall be construed to apply to any subpoena duces
107 tecum which does not request the records of any particular consumer or consumers and which
108 requires a custodian of records to delete all information which would in any way identify any
109 consumer whose records are to be produced.

110 (j) This section shall not apply to proceedings conducted under Division 1 (commencing
111 with Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with
112 Section 6100), or Division 4.7 (commencing with Section 6200) of the Labor Code.

113 (k) Failure to comply with this section shall be sufficient basis for the witness to refuse to
114 produce the personal records sought by a subpoena duces tecum.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Provides for a particular procedure that must be followed when a party to litigation seeks the personal records of a "consumer" litigant. The law has very specific timing sequences that must be followed in connection with service of the consumer notice and subpoena duces tecum. However these timing sequences are not correctly stated or adequately explained in the current text of the law.

This Resolution: Corrects errors in the text of the existing law and clarifies how the sequence and timing of service, of the consumer notice and subpoena duces tecum and related documents, upon the consumer and the deposition officer must take place.

The Problem: Currently Code of Civil Procedure section 1985.3, subdivision (b)(2), specifies that the consumer must be served at least 10 days before the date for production specified in the subpoena duces tecum. This is an error. There is a 5/10 day rule which applies and which must be followed in order to comply with the law. Accordingly, the number of days between service upon the consumer and the subpoena production date can never be less than 15 days. Subdivision (b) also makes several references to "custodian", but "custodian" is never defined in the statute. This resolution defines that term at new subdivision (a)(5). Although the law requires a very particular timing and sequence of service, it never really explains it. One is forced to go to a practice guide in order to know what it is that the law is asking them to do. This resolution clarifies the exact sequence and timing for service. The current law also uses the phrase "plus the additional time provided by Section 1013 if service is by mail." This is misleading and can result in errors in calculations because alternative service is not always by mail, and each form of alternative service has its own specific time that must be added for the purpose of calculating when responses or the next event in a sequence is due. This resolution corrects this error by stating that the additional time specified in Section 1013 applies when service is not made by personal service. Amending the law as suggested will eliminate service errors and make the law easier to understand and follow.

IMPACT STATEMENT

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

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