

Amendment to 01-08-03

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2019 to read as follows:

1 §2019

2 (a) Any party may obtain discovery by one or more of the following methods:

3 (1) Oral and written depositions.

4 (2) Interrogatories to a party.

5 (3) Inspections of documents, things, and places.

6 (4) Physical and mental examinations.

7 (5) Requests for admissions.

8 (6) Simultaneous exchanges of expert trial witness information.

9 (b) The court shall restrict the frequency or extent of use of these discovery methods if it
10 determines either of the following:

11 (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from
12 some other source that is more convenient, less burdensome, or less expensive.

13 (2) The selected method of discovery is unduly burdensome or expensive, taking into
14 account the needs of the case, the amount in controversy, and the importance of the issues at stake in
15 the litigation.

16 The court may make these determinations pursuant to a motion for a protective order by a
17 party or other affected person. This motion shall be accompanied by a declaration stating facts
18 showing a good faith attempt at an informal resolution of each issue presented by the motion.

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

23 (c) Unless there is a rule of the Judicial Council, or a local court rule or local uniform
24 written policy to the contrary, the methods of discovery may be used in any sequence, and the fact
25 that a party is conducting discovery, whether by deposition or another method, shall not operate to
26 delay the discovery of any other party. However, on motion and for good cause shown, the court
27 may establish the sequence and timing of discovery for the convenience of parties and witnesses and
28 in the interests of justice.

29 (d) In any action alleging the misappropriation of a trade secret under the Uniform Trade
30 Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code),
31 before commencing discovery relating to the trade secret, the party alleging the misappropriation
32 shall identify the trade secret with reasonable particularity subject to any orders that may be
33 appropriate under Section 3426.5 of the Civil Code.

34 (e) Section 1013 shall be applicable to any method of discovery or service of a motion for
35 discovery provided for in this article.

36 (f)(i) In such a case, the responsible party must serve an electronic version of the discovery
37 response, with the written discovery response.

38 (ii) Upon request by the party to whom discovery has been propounded, the party
39 propounding discovery requests must within three (3) days provide to the requesting party an
40 electronic version of the discovery requests.

41 (iii) The electronic version may be provided in any form upon which the parties agree. If
42 the parties are unable to agree on the form, the party propounding the discovery must provide to the
43 party to whom the discovery requests are directed the electronic version of the discovery requests
44 which it used to prepare the discovery requests. Under this provision, a party is not required to

45 create an electronic version or any new version of any document for the purpose of transmission to
46 the other party.

47 (iv) This provision shall not apply to Form Interrogatories approved by the Judicial Council.

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

RESOLUTION 1-08-03

DIGEST

Discovery Requests: Electronic Versions

Amends Code of Civil Procedure section 2019 to establish a method for exchanging discovery requests in electronic format.

RESOLUTIONS COMMITTEE RECOMMENDATIONS

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 2019 to establish a method for exchanging discovery requests in electronic format. This resolution should be disapproved because, while the underlying idea is good, as written it conflicts with other Code of Civil Procedure sections governing discovery.

This resolution, at proposed subdivision (f)(i), seems to require that the parties include both questions and answers in the written response. Because section 2019 applies to all forms of discovery, this new provision would conflict with existing Code of Civil Procedure sections 2030, subdivision (f), 2031, subdivision (g), and 2033, subdivision (f), which all provide that the request, text, item or category of various forms of discovery "need not be repeated."

This resolution should also make the safe harbor for attorneys or litigants without computers much clearer. Finally, this resolution does not address the danger to attorney work product presented when electronic files are exchanged. For instance, with some software all the drafter's deletions, corrections or additions made prior to the final document can be accessed by via the "undo" command. Some courts might consider sending such a document to opposing counsel a waiver of the work product privilege.

SECTION/COMMITTEE REPORT

THE STATE BAR'S COMMITTEE ON ADMINISTRATION OF JUSTICE

Recommendation: **APPROVE AS AMENDED**

Reasons:

The Committee on Administration of Justice believes that the exchange of discovery requests electronically will be a benefit to litigants and the courts, and approves the idea of this resolution in principle. However, proposed subdivision 2019(f)(i) should be stricken entirely. That subdivision suggests that a party propounding discovery may "require" that the responding party provide responses that incorporate the text of the discovery requests. This "requirement" is contrary to the express language of the code provisions governing interrogatories, requests for production, and requests for admission. Code Civ. Proc. § 2030(f) ("Each answer, exercise of option, or objection in the response shall bear the same identifying number or letter and be in the same sequence as the corresponding interrogatory, but the text of that interrogatory need not be repeated."); Code Civ. Proc. § 2031(g) ("Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated"); Code Civ. Proc. § 2033(f) ("Each answer or objection in the response shall bear the same identifying number or letter and be in the same sequence as the corresponding request,

but the text of the particular request need not be repeated.”). Because the language currently proposed for subdivision 2019(f)(i) would create a conflict with other code provisions, that language should be stricken.

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 2019 to read as follows:

- 1 §2019
- 2 (a) Any party may obtain discovery by one or more of the following methods:
- 3 (1) Oral and written depositions.
- 4 (2) Interrogatories to a party.
- 5 (3) Inspections of documents, things, and places.
- 6 (4) Physical and mental examinations.
- 7 (5) Requests for admissions.
- 8 (6) Simultaneous exchanges of expert trial witness information.
- 9 (b) The court shall restrict the frequency or extent of use of these discovery methods if it
- 10 determines either of the following:
- 11 (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from
- 12 some other source that is more convenient, less burdensome, or less expensive.
- 13 (2) The selected method of discovery is unduly burdensome or expensive, taking into
- 14 account the needs of the case, the amount in controversy, and the importance of the issues at stake in
- 15 the litigation.
- 16 The court may make these determinations pursuant to a motion for a protective order by a
- 17 party or other affected person. This motion shall be accompanied by a declaration stating facts
- 18 showing a good faith attempt at an informal resolution of each issue presented by the motion.
- 19 The court shall impose a monetary sanction under Section 2023 against any party, person, or
- 20 attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the
- 21 one subject to the sanction acted with substantial justification or that other circumstances make the
- 22 imposition of the sanction unjust.
- 23 (c) Unless there is a rule of the Judicial Council, or a local court rule or local uniform written
- 24 policy to the contrary, the methods of discovery may be used in any sequence, and the fact that a
- 25 party is conducting discovery, whether by deposition or another method, shall not operate to delay
- 26 the discovery of any other party. However, on motion and for good cause shown, the court may
- 27 establish the sequence and timing of discovery for the convenience of parties and witnesses and in
- 28 the interests of justice.
- 29 (d) In any action alleging the misappropriation of a trade secret under the Uniform Trade
- 30 Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code),
- 31 before commencing discovery relating to the trade secret, the party alleging the misappropriation
- 32 shall identify the trade secret with reasonable particularity subject to any orders that may be
- 33 appropriate under Section 3426.5 of the Civil Code.
- 34 (e) Section 1013 shall be applicable to any method of discovery or service of a motion for
- 35 discovery provided for in this article.
- 36 (f)(i) If a party propounding discovery requires in the body of the discovery propounded that
- 37 the responding party provide responses containing the text of the discovery requests propounded,
- 38 then the party propounding the discovery requests shall, concurrent with service of the discovery
- 39 requests, provide to the responding party an electronic version of the discovery requests.
- 40 (ii) Upon request by the party to whom discovery has been propounded, the party
- 41 propounding discovery requests must within three (3) days provide to the requesting party an
- 42 electronic version of the discovery requests.

43 (iii) The electronic version may be provided in any form upon which the parties agree. If the
44 parties are unable to agree on the form, the party propounding the discovery must provide to the
45 party to whom the discovery requests are directed the electronic version of the discovery requests
46 which it used to prepare the discovery requests. Under this provision, a party is not required to
47 create an electronic version or any new version of any document for the purpose of transmission to
48 the other party.
49 (iv) This provision shall not apply to Form Interrogatories approved by the Judicial Council.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Currently, unless the parties mutually agree, short of spending the time to retype the discovery requests, there is no simple method by which a party can provide responses to discovery requests containing the text of the actual discovery requests.

This Resolution: Modeled after California Rules of Court, rule 342(i), this resolution allows exchange of discovery requests in an electronic format.

The Problem: Sometimes it is easier to look at one document than two. By putting the request and response in the same document, this benefits both the party propounding and responding to discovery from a standpoint of ease of reference. To accomplish the ease of reference, a system needs to be enacted. There is no system. This resolution will expedite a responding party's ability to provide responses to discovery as well as reference responses and requests without having to move back and forth between documents.

IMPACT STATEMENT

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

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COUNTERARGUMENT

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY:

For those who do not have computers, the request is burdensome and particularly onerous for pro per litigants or incarcerated defendants. Since everyone does not have compatible systems or software (MAC v. IBM, Word v. WordPerfect and various versions thereof), receiving an electronic version might not be of any assistance. Additionally, parties to litigation can stipulate to anything insofar as word processing is concerned. Because of the inherent potential for gamesmanship in discovery as it currently exists, this delegation opposes any change of this sort because, one way or another, it allows either the proponent of the discovery or the respondent to add yet another inning to the discovery game.