

RESOLUTION 04-06-04

DIGEST

Discovery of Consumer and Employee Records: Notice to Consumers and Employees
Amends Code of Civil Procedure section 2019 to make the notice provisions of Code of Civil Procedure sections 1985.3 and 1985.6 applicable to all discovery methods.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2019 to make the notice provisions of Code of Civil Procedure sections 1985.3 and 1985.6 applicable to all discovery methods. This resolution should be disapproved because the resolution is unworkable in many, if not most, situations in which the problem arises.

The protection of the privacy rights of employees and consumers should not be dependent upon the particular discovery method involved. However, frequently, perhaps usually, the party seeking the information will not know the identity of some or all of the individuals involved and therefore could not provide the needed notice. A more workable solution might require the producing party to give the notice. This resolution, however, would place litigants in the untenable position of giving notice to people whom the other party is refusing to identify.

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
- 10 methods if it determines either of the following:
- 11 (1) The discovery sought is unreasonably cumulative or duplicative, or is
- 12 obtainable from some other source that is more convenient, less burdensome, or less
- 13 expensive.

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

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

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

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

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

36 (e) Sections 1985.3 and 1985.6, which require notices to consumers and
37 employees prior to production of consumer records and employment records, shall be
38 applicable to any method of discovery provided for in this article.

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

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Requires parties who obtain consumer records or employment records to give notice to the consumer or employee whose records are sought if the party issues a subpoena duces tecum to obtain the records.

This Resolution: Requires parties who obtain consumer records or employment records to give notice to the consumer or employee whose records are sought if the party obtains the records through discovery methods other than a subpoena duces tecum, such as a request for identification and production of documents under Code of Civil Procedure Section 2031 or a deposition notice, accompanied by a request to produce documents, under Code of Civil Procedure Section 2030.

The Problem: Consumers and employees expect that their records are confidential. California Code of Civil Procedure Sections 1985.3 and 1985.6 acknowledge the confidential nature of these records and provides consumers and employees with notice, and an opportunity to object, when a third party is seeking their records in litigation. That right arises, however, only when the party seeking the documents uses a subpoena duces tecum. When the entity holding the records is a party to the lawsuit, typically the records are produced without the consumer or employee receiving notice or having any right to protect their privacy. The individual's right of privacy should not rise and fall upon the method of discovery chosen. This bill would close that loophole by requiring that consumers and employees receive notice whenever their records are being sought.

IMPACT STATEMENT

This resolution affects California Code of Civil Procedure Sections 1985.3 and 1985.6.

AUTHOR AND/OR PERMANENT CONTACT: Margaret J. Grover, Haight, Brown & Bonesteel, LLP, 100 Bush Street, 27th Floor, San Francisco, California 94104, telephone (415) 986-7700, fax (415) 986-6945, e-mail mgrover@hbblaw.com

RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution should not be adopted because it would create an easily-abused procedural quagmire. This resolution, if adopted, would modify the general discovery statute, C.C.P. § 2019, by simply adopting the procedures of C.C.P. §§ 1985.3 and 1985.6 for "any method of discovery" authorized by Section 2019, even though the language of Sections 1985.3 and 1985.6 is specifically tailored to third-party subpoenas. Applying those statutes to interrogatories, requests for admission, exchanges of expert witness information, and the other methods of discovery authorized by Section 2019 introduces a high level of ambiguity and procedural uncertainty into the discovery statutes.

Additionally, this resolution could lead to a great deal of tactical gamesmanship by party opponents during the discovery process that could bog the courts down in minor discovery disputes. For example, Sections 1985.3(g) and 1985.6(f) create automatic stays on document productions if an individual third party consumer/employee objects; the stays persist until the subpoenaing party obtains a court order overruling those objections. Applying those statutes to all routine discovery requests between parties to a case could easily tempt an unscrupulous party to orchestrate a series of objections from its employees or consumers to stall discovery of otherwise relevant documents, thereby dramatically increasing the cost of litigation by forcing the requesting party to file motion after motion to overrule those objections.

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution should be Disapproved. The proposed resolution seeks to interject additional privacy protections into first party discovery, but need specific tailoring for CCP section 2019; it should not incorporate sections 1985.3 and 1985.6 by reference. The resolution also imposes an improper burden on subpoenaing party who may not have sufficient information upon which to serve notice. Party/Witness from whom information being sought is likely in the better position to have contact information. Further, under *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, party from whom information is being sought is required to provide such notice to consumers.