

RESOLUTION 04-07-04

DIGEST

Employee Records: Elimination of Notice Requirements at Trial

Amends Code of Civil Procedure section 1985.6 so that consumer notice will not be required for a subpoena seeking employee records at trial which were subpoenaed during discovery.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1985.6 so that consumer notice will not be required for a subpoena seeking employee records at trial which were subpoenaed during discovery. This resolution should be disapproved because it does not consider the realities of litigation and the need to protect the right to privacy.

It is not unusual for months, if not years, to pass between the time the discovery procedure is utilized and trial takes place. "Doe" defendants or new parties may be brought into the action. More importantly, a passage of time suggests that there will be more documents in the employee's file that could be produced. While it is a laudable endeavor to attempt to save time and expense, it is more important to protect the unlawful invasion of an employee's records and rights of privacy. If consumer notice is not provided, there will be no one to determine whether the "same records" are being sought.

The history behind this statute is to protect and preserve the rights of witnesses and consumers. Since the code section has been in effect for almost nine years, it is standard operating procedure to prepare the consumer notice and to calendar the service date based on the trial date.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 1985.6 to read as follows:

- 1 § 1985.6
- 2 (a) For purposes of this section, the following definitions apply:
- 3 (1) "Employment records" means the original or any copy of books, documents,
- 4 other writings, or electronic data pertaining to the employment of any employee
- 5 maintained by the current or former employer of the employee.
- 6 (2) "Employee" means any individual who is or has been employed by a witness
- 7 subject to a subpoena duces tecum.

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

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

16 (b) Prior to the date called for in the subpoena duces tecum of the production of
17 employment records, the subpoenaing party shall serve or cause to be served on the
18 employee whose records are being sought a copy of: the subpoena duces tecum; the
19 affidavit supporting the issuance of the subpoena, if any; and the notice described in
20 subdivision (e), and proof of service as provided in paragraph (1) of subdivision (c). This
21 service shall be made as follows:

22 (1) To the employee personally, or at his or her last known address, or in
23 accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he
24 or she is a party, to his or her attorney of record. If the employee is a minor, service shall
25 be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of
26 them cannot be located with reasonable diligence, then service shall be made on any
27 person having the care or control of the minor, or with whom the minor resides, and on the
28 minor if the minor is at least 12 years of age.

29 (2) Not less than 10 days prior to the date for production specified in the subpoena
30 duces tecum, plus the additional time provided by Section 1013 if service is by mail.

31 (3) At least five days prior to service upon the custodian of the employment
32 records, plus the additional time provided by Section 1013 if service is by mail.

33 (c) Prior to the production of the records, the subpoenaing party shall either:

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

36 (2) Furnish the witness a written authorization to release the records signed by the
37 employee or by his or her attorney of record. The witness may presume that the attorney
38 purporting to sign the authorization on behalf of the employee acted with the consent of
39 the employee, and that any objection to release of records is waived.

40 (d) A subpoena duces tecum for the production of employment records shall be
41 served in sufficient time to allow the witness a reasonable time, as provided in paragraph
42 (1) of subdivision (d) of Section 2020, to locate and produce the records or copies thereof.

43 (e) Every copy of the subpoena duces tecum and affidavit served on an employee
44 or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice,
45 in a typeface designed to call attention to the notice, indicating that (1) employment
46 records about the employee are being sought from the witness named on the subpoena; (2)
47 the employment records may be protected by a right of privacy; (3) if the employee objects
48 to the witness furnishing the records to the party seeking the records the employee shall
49 file papers with the court prior to the date specified for production on the subpoena; and
50 (4) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an
51 attorney should be consulted about the employee's interest in protecting his or her rights of

52 privacy. If a notice of taking of deposition is also served, that other notice may be set forth
53 in a single document with the notice required by this subdivision.

54 (f) Any employee whose employment records are sought by a subpoena duces
55 tecum may, prior to the date for production, bring a motion under Section 1987.1 to quash
56 or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given
57 to the witness and the deposition officer at least five days prior to production. The failure
58 to provide notice to the deposition officer shall not invalidate the motion to quash or
59 modify the subpoena duces tecum but may be raised by the deposition officer as an
60 affirmative defense in any action for liability for improper release of records.

61 Any nonparty employee whose employment records are sought by a subpoena
62 duces tecum may, prior to the date of production, serve on the subpoenaing party, and the
63 deposition officer, the witness a written objection that cites the specific grounds on which
64 production of the employment records should be prohibited.

65 No witness or deposition officer shall be required to produce employment records
66 after receipt of notice that the motion has been brought by an employee, or after receipt of
67 a written objection from a nonparty employee, except upon order of the court in which the
68 action is pending or by agreement of the parties, witnesses, and employees affected.

69 The party requesting an employee's employment records may bring a motion under
70 subdivision (c) of Section 1987 to enforce the subpoena within 20 days of service of the
71 written objection. The motion shall be accompanied by a declaration showing a reasonable
72 and good faith attempt at informal resolution of the dispute between the party requesting
73 the employment records and the employee or the employee's attorney.

74 (g) Upon good cause shown and provided that the rights of witness and employees
75 are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time
76 for service of a subpoena duces tecum or waiving the requirements of subdivision (b)
77 where due diligence by the subpoenaing party has been shown.

78 (h) Nothing contained in this section shall be construed to apply to any subpoena
79 duces tecum which does not request the records of any particular employee or employees
80 and which requires a custodian of records to delete all information which would in any
81 way identify any employee whose records are to be produced.

82 (i) This section shall not apply to proceedings conducted under Division 1
83 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5
84 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200) of the
85 Labor Code.

86 (j) A subpoena duces tecum seeking Personal Records of an Employee for use at
87 trial shall not require compliance with this section where the subpoenaing party, or any
88 other party in the action, has sought identical records in discovery and has previously
89 complied with this section in discovery.

90 (k) Failure to comply with this section shall be sufficient basis for the witness to
91 refuse to produce the employment records sought by subpoena duces tecum.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Requires litigants to comply with employee notice requirements when subpoenaing an employee's records during discovery and again when subpoenaing the same documents for use as evidence at trial.

This Resolution: This language would allow litigants to avoid the cost and added time requirements of giving employee notice when subpoenaing documents for use as evidence at trial when employee notice for identical documents has already been provided during discovery.

The Problem: While the employee notice requirements provide an added measure against unlawful invasion of an employee's privacy, they are time consuming, adding additional time in which the subpoena must be served and burdensome on the litigants as well as the records custodians.

IMPACT STATEMENT:

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

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution should be Disapproved. The Proponent's argument is disingenuous. If the party already obtained the documents during discovery, why would they need to obtain them again for trial. More importantly, this provides a loop hole to avoid alerting an employee that his or her private employment records are being sought by allowing the party to simply obtain them as part of trial rather than through discovery. Purpose of the notice is to provide the employee an opportunity to object and protect their right to privacy. This resolution defeats that important goal. The employees should receive the notice that employee records are being sought so that they are given an opportunity to protect their privacy rights, regardless of whether the documents are being subpoenaed during discovery or at trial.