

RESOLUTION 11-09-05

DIGEST

Production of Documents: Notice to Consumer

Amends Code of Civil Procedure section 1985.3 to require that a party requesting documents must provide notice to consumers.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to resolution 11-12-05.

Reasons

This resolution amends California Code of Civil Procedure section 1985.3 to require that a party requesting documents must provide notice to consumers. This resolution should be disapproved because it will create an undue burden on the party seeking to ascertain the identity and contact information of the consumers.

The resolution requires a party seeking to obtain consumers records to provide notice to the consumer who is subject to the request. However, typically, only the defendants have access to that information. Frequently, the plaintiff does not have the means to provide the notice to the consumers. The impact on this resolution is that discovery from a party seeking legitimate consumer records will be thwarted because of the undue burden of providing notice to consumers whom the party cannot locate.

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 record" means the original, any copy of books, documents, other writings, or electronic
- 4 data pertaining to a consumer and which are maintained by any "witness" which is a physician,
- 5 dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist,
- 6 veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center,
- 7 clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal
- 8 association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust
- 9 company, anyone authorized by this state to make or arrange loans that are secured by real property,
- 10 security brokerage firm, insurance company, title insurance company, underwritten title company,
- 11 escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code
- 12 or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant,
- 13 institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States
- 14 Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public
- 15 Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private or
- 16 public preschool, elementary school, secondary school, or postsecondary school as described in
- 17 Section 76244 of the Education Code.
- 18 (2) "Consumer" means any individual, partnership of five or fewer persons, association, or trust which
- 19 has transacted business with, or has used the services of, the witness or for whom the witness has
- 20 acted as agent or fiduciary.
- 21 (3) "Subpoenaing-Requesting party" means the person or persons causing a subpoena duces tecum,
- 22 a request for identification and production of documents under Code of Civil Procedure Section 2031,
- 23 or a deposition notice, accompanied by a request to produce documents, under Code of Civil
- 24 Procedure Section 2030 to be issued or served in connection with any civil action or proceeding
- 25 pursuant to this code. "Requesting party", but shall not include the state or local agencies described
- 26 in Section 7465 of the Government Code, or any entity provided for under Article VI of the California
- 27 Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to

28 Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.
29 (4) "Document request" means a subpoena duces tecum, a request for identification and production
30 of documents under Code of Civil Procedure Section 2031, or a deposition notice, accompanied by a
31 request to produce documents, under Code of Civil Procedure Section 2030.
32 (45) "Deposition officer" means a person who meets the qualifications specified in paragraph (3) of
33 subdivision (d) of Section 2020.
34 (b) Prior to the date called for in the ~~subpoena duces tecum~~ document request for the production of
35 personal records, the ~~subpoenaing party~~ requesting party shall serve or cause to be served on the
36 consumer whose records are being sought a copy of the ~~subpoena duces tecum~~ document request, of
37 the affidavit supporting the issuance of the subpoena, if any, and of the notice described in
38 subdivision (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service
39 shall be made as follows:
40 (1) To the consumer personally, or at his or her last known address, or in accordance with Chapter 5
41 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his or her attorney
42 of record. If the consumer is a minor, service shall be made on the minor=s parent, guardian,
43 conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then
44 service shall be made on any person having the care or control of the minor or with whom the minor
45 resides or by whom the minor is employed, and on the minor if the minor is at least 12 years of age.
46 (2) Not less than 10 days prior to the date for production specified in the ~~subpoena duces tecum~~
47 document request, plus the additional time provided by Section 1013 if service is by mail.
48 (3) At least five days prior to service upon the custodian of the records, plus the additional time
49 provided by Section 1013 if service is by mail.
50 (c) Prior to the production of the records, the ~~subpoenaing party~~ requesting party shall do either of the
51 following:
52 (1) Serve or cause to be served upon the witness a proof of personal service or of service by mail
53 attesting to compliance with subdivision (b).
54 (2) Furnish the witness a written authorization to release the records signed by the consumer or by
55 his or her attorney of record. The witness may presume that any attorney purporting to sign the
56 authorization on behalf of the consumer acted with the consent of the consumer, and that any
57 objection to release of records is waived.
58 (d) A ~~subpoena duces tecum~~ document request for the production of personal records shall be served
59 in sufficient time to allow the witness a reasonable time, as provided in paragraph (1) of subdivision
60 (d) of Section 2020, to locate and produce the records or copies thereof.
61 (e) Every copy of the ~~subpoena duces tecum~~ document request and affidavit, if any, served on a
62 consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice,
63 in a typeface designed to call attention to the notice, indicating that (1) records about the consumer
64 are being sought from the witness named on the ~~document request~~ subpoena; (2) if the consumer
65 objects to the witness furnishing the records to the party seeking the records, the consumer must file
66 papers with the court or serve a written objection as provided in subdivision (g) prior to the date
67 specified for production on the ~~subpoena~~ document request; and (3) if the party who is seeking the
68 records will not agree in writing to cancel or limit the ~~subpoena~~ document request, an attorney should
69 be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of
70 taking of deposition is also served with a subpoena duces tecum, that other notice may be set forth in
71 a single document with the notice required by this subdivision.
72 (f) A ~~subpoena duces tecum~~ document request for personal records maintained by a telephone
73 corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not be
74 valid or effective unless it includes a consent to release, signed by the consumer whose records are
75 requested, as required by Section 2891 of the Public Utilities Code.
76 (g) Any consumer whose personal records are sought by a ~~subpoena duces tecum~~ document request
77 and who is a party to the **civil** action in which this ~~subpoena duces tecum~~ document request is served
78 may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the
79 ~~subpoena duces tecum~~ document request. Notice of the bringing of that motion shall be given to the
80 witness and deposition officer at least five days prior to production. The failure to provide notice to
81 the deposition officer shall not invalidate the motion to quash or modify the ~~subpoena duces~~
82 ~~tecum~~ document request but may be raised by the deposition officer as an affirmative defense in any
83 action for liability for improper release of records. Any other consumer or nonparty whose personal
84 records are sought by a ~~subpoena duces tecum~~ document request may, prior to the date of

85 production, serve on the ~~subpoenaing party~~requesting party the witness, and the deposition officer, a
86 written objection that cites the specific grounds on which production of the personal records should
87 be prohibited. No witness or deposition officer shall be required to produce personal records after
88 receipt of notice that the motion has been brought by consumer, or after receipt of a written objection
89 from a nonparty consumer, except upon order of the court in which the action is pending or by
90 agreement of the parties, witnesses, and consumers affected. The party requesting a consumer's
91 personal records may bring a motion under Section 1987.1 to enforce the document
92 request~~subpoena~~ within 20 days of service of the written objection. The motion shall be
93 accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of
94 the dispute between the party requesting the personal records and the consumer or the consumer's
95 attorney.
96 (h) Upon good cause shown and provided that the rights of witnesses and consumers are preserved,
97 a ~~subpoenaing party~~requesting party shall be entitled to obtain an order shortening the time for
98 service of a ~~subpoena duces tecum~~document request or waiving the requirements of subdivision (b)
99 where due diligence by the ~~subpoenaing party~~requesting party has been shown.
100 (i) Nothing contained in this section shall be construed to apply to any ~~subpoena duces~~
101 ~~tecum~~document request which does not request the records of any particular consumer or
102 consumers and which requires a custodian of records to delete all information which would in any
103 way identify any consumer whose records are to be produced.
104 (j) This section shall not apply to proceedings conducted under Division 1 (commencing with Section
105 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section 6100), or
106 Division 4.7 (commencing with Section 6200) of the Labor Code.
107 (k) Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the
108 personal records sought by a ~~subpoena duces tecum~~document request.

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

PROPOSER: Bar Association of San Francisco

STATEMENT OF REASONS

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

This Resolution: Would require parties who obtain consumer records to give notice to the consumer regardless of what discovery method is used to obtain the records.

The Problem: Consumers expect that their records are confidential. California Code of Civil Procedure Section 1985.3 acknowledges the confidential nature of these records and provides consumers 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 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 receive notice whenever their records are being sought, regardless of the method used to obtain those records.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution.

IMPACT STATEMENT

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

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