

## RESOLUTION 11-12-05

### DIGEST

#### Production of Documents: Notice to Employee

Amends Code of Civil Procedure section 1985.6 to require a party seeking to acquire employment records to give notice to the employee.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

Similar to resolution 11-09-05.

#### Reasons:

This resolution amends Code of Civil Procedure section 1985.6 to require a party seeking to acquire employment records give notice to the employee. This resolution should be disapproved in principle because it will create an undue burden on the party seeking to acquire the employment records.

The resolution requires a party seeking to obtain employment records to provide notice to the employee who is subject to the request. However, typically, only the employer, frequently a defendant in the litigation, has access to the information necessary to give such notice. Under the present statute, a responding party objects and asserts the privacy interests of these third parties as a means of thwarting production. The impact of this resolution is that discovery to employers seeking legitimate relevant employment records will be thwarted because of the undue burden of providing notice to employees whom plaintiff cannot locate. The proposed amendment to Section 1985.6 will thus cause an unreasonable increase to parties in both time and money without accomplishing the stated objectives of preserving the privacy interests of the involved employee.

### 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 1985.6 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, other  
4 writings, or electronic data pertaining to the employment of any employee maintained by the current  
5 or former employer of the employee.  
6           (2) "Employee" means any individual who is or has been employed by a witness subject to a  
7 ~~subpoena duces tecum document request.~~  
8           (3) "~~Subpoenaing~~ Requesting party" means the person or persons causing a ~~subpoena~~  
9 ~~duces tecum~~, a request for identification and production of documents under Code of Civil Procedure  
10 Section 2031, or a deposition notice, accompanied by a request to produce documents, under Code  
11 of Civil Procedure Section 2030 to be issued or served in connection with any civil action or  
12 proceeding. Requesting party shall, but shall not include the state or local agencies described in  
13 Section 7465 of the Government Code, or any entity provided for under Article VI of the California  
14 Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to  
15 Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.  
16           (4) "Deposition officer" means a person who meets the qualifications specified Section  
17 2020.420.  
18           (5) "Document request" means a subpoena duces tecum, a request for identification and  
19 production of documents under Code of Civil Procedure Section 2031, or a deposition notice,  
20 accompanied by a request to produce documents, under Code of Civil Procedure Section 2030.  
21           (b) Prior to the date called for in the ~~subpoena duces tecum of document request for the~~  
22 production of employment records, the ~~subpoenaing requesting~~ party shall serve or cause to be  
23 served on the employee whose records are being sought a copy of: the ~~subpoena duces tecum~~

24 document request; the affidavit supporting the issuance of the subpoena, if any; and the notice  
25 described in subdivision (e), and proof of service as provided in paragraph (1) of subdivision (c).  
26 This service shall be made as follows:

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

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

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

37 (c) Prior to the production of the records, the ~~subpoenaing~~ requesting party shall either:

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

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

44 (d) A ~~subpoena duces tecum~~ document request for the production of employment records  
45 shall be served in sufficient time to allow the witness a reasonable time, as provided in Section  
46 2020.420, to locate and produce the records or copies thereof.

47 (e) Every copy of the ~~subpoena duces tecum~~ document request and affidavit served on an  
48 employee or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice,  
49 in a typeface designed to call attention to the notice, indicating that (1) employment records about  
50 the employee are being sought from the witness named on the ~~subpoena~~ document request; (2) the  
51 employment records may be protected by a right of privacy; (3) if the employee objects to the  
52 witness furnishing the records to the party seeking the records the employee shall file papers with  
53 the court prior to the date specified for production on the ~~subpoena~~ document request; and (4) if the  
54 ~~subpoenaing~~ requesting party does not agree in writing to cancel or limit the ~~subpoena~~ document  
55 request, an attorney should be consulted about the employee's interest in protecting his or her rights  
56 of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a  
57 single document with the notice required by this subdivision.

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

65 Any nonparty employee whose employment records are sought by a ~~subpoena duces tecum~~  
66 document request may, prior to the date of production, serve on the ~~subpoenaing~~ requesting party,  
67 and the deposition officer, and the witness a written objection that cites the specific grounds on  
68 which production of the employment records should be prohibited.

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

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

78 (g) Upon good cause shown and provided that the rights of witnesses and employees are  
79 preserved, a subpoenaing requesting party shall be entitled to obtain an order shortening the time for  
80 service of a ~~subpoena duces tecum~~ document request or waiving the requirements of subdivision (b)  
81 where due diligence by the subpoenaing requesting party has been shown.  
82 (h) Nothing contained in this section shall be construed to apply to any ~~subpoena duces~~  
83 ~~tecum~~ document request which does not request the records of any particular employee or  
84 employees and which requires a custodian of records to delete all information which would in any  
85 way identify any employee whose records are to be produced.  
86 (i) This section shall not apply to proceedings conducted under Division 1 (commencing with  
87 Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section  
88 6100), or Division 4.7 (commencing with Section 6200) of the Labor Code.  
89 (j) Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the  
90 employment records sought by ~~subpoena duces tecum~~ document request.

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

PROPONENT: Bar Association of San Francisco

#### STATEMENT OF REASONS

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

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

The Problem: Employees expect that their personnel records are confidential. California Code of Civil Procedure Section 1985.6 acknowledges the confidential nature of these records and provides 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 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 employees receive notice whenever their records are being sought.

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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