

RESOLUTION 03-04-2008

DIGEST

Discovery: Automatic Discovery Sanctions

Amends Code of Civil Procedure sections 2023.030, subdivision (a), 2030.290, subdivision (c), 2030.300, subdivision (d), 2030.310, subdivision (d), 2031.300, subdivision (c), 2031.310, subdivision (d), 2031.320, subdivision (b), and 2033.290, subdivision (d) to divest the court of discretion in imposing monetary sanctions on unsuccessful parties compelling discovery.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to 04-11-07, which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure sections 2023.030, subdivision (a), 2030.290, subdivision (c), 2030.300, subdivision (d), 2030.310, subdivision (d), 2031.300, subdivision (c), 2031.310, subdivision (d), 2031.320, subdivision (b), and 2033.290, subdivision (d) to divest the court of discretion in imposing monetary sanctions on unsuccessful parties compelling discovery. This resolution should be disapproved because it strips the court of all discretion concerning whether to impose monetary sanctions, and it draws an arbitrary distinction between written and non-written discovery.

Each of these Code of Civil Procedure sections state that the court shall impose monetary sanctions against a party or attorney making an unsuccessful motion to compel, unless the court finds that there is “substantial justification or that other circumstances make the imposition of the sanction unjust.” This resolution would deprive the court of *all* discretionary authority, even in circumstances that the court found did not warrant sanctions. The author’s rationale is that written discovery is often abused by parties, and that a mandatory imposition of sanctions will deter such abuse. However, this is not entirely true. There are many situations where a party must legitimately file a motion to compel because the other party refuses to properly and/or completely respond to legitimate discovery requests. If monetary sanctions on unsuccessful motions are mandatory, with absolutely no discretion, it will deter parties who do not abuse the discovery system from filing legitimate motions to compel for fear that they will be sanctioned. This means that on all “close calls,” a non-abusing party must risk being sanctioned to bring a motion to compel because he or she has the burden of proof. While it is true that some parties and attorneys misuse the discovery system, this resolution does not solve the problem.

Also, the resolution makes an arbitrary distinction between written and non-written discovery. Parties who are predisposed to abuse the discovery process will not do so only with written discovery, but also with other discovery mechanisms. Therefore, this resolution will not be able to stop the discovery abuses it seeks to curb.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend the Civil Discovery Act as follows:

1 § 2023.030

2 (a) The court may impose a monetary sanction ordering that one engaging in the
3 misuse of the discovery process, or any attorney advising that conduct, or both pay the
4 reasonable expenses, including attorney's fees, incurred by anyone as a result of that
5 conduct. The court may also impose this sanction on one unsuccessfully asserting that
6 another has engaged in the misuse of the discovery process, or on any attorney who
7 advised that assertion, or on both. ~~If a monetary sanction is authorized by any provision of~~
8 ~~this title, the court shall impose that sanction unless it finds that the one subject to the~~
9 ~~sanction acted with substantial justification or that other circumstances make the~~
10 ~~imposition of the sanction unjust.~~

11

12 § 2030.290

13 (c) The court shall impose a monetary sanction under Chapter 7 (commencing with
14 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
15 opposes a motion to compel a response to interrogatories ~~unless it finds that the one subject~~
16 ~~to the sanction acted with substantial justification or that other circumstances make the~~
17 ~~imposition of the sanction unjust.~~ If a party then fails to obey an order compelling answers,
18 the court may make those orders that are just, including the imposition of an issue sanction,
19 an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section
20 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary
21 sanction under Chapter 7 (commencing with Section 2023.010).

22

23 § 2030.300

24 (d) The court shall impose a monetary sanction under Chapter 7 (commencing with
25 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
26 opposes a motion to compel a further response to interrogatories, ~~unless it finds that the~~
27 ~~one subject to the sanction acted with substantial justification or that other circumstances~~
28 ~~make the imposition of the sanction unjust.~~

29

30 § 2030.310

31 (d) The court shall impose a monetary sanction under Chapter 7 (commencing with
32 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
33 opposes a motion to deem binding an initial answer to an interrogatory, ~~unless it finds that~~
34 ~~the one subject to the sanction acted with substantial justification or that other~~
35 ~~circumstances make the imposition of the sanction unjust.~~

36

37 § 2031.300

38 (c) The court shall impose a monetary sanction under Chapter 7 (commencing with
39 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
40 opposes a motion to compel a response to an inspection demand, ~~unless it finds that the~~
41 ~~one subject to the sanction acted with substantial justification or that other circumstances~~
42 ~~make the imposition of the sanction unjust.~~ If a party then fails to obey the order
43 compelling a response, the court may make those orders that are just, including the
44 imposition of an issue sanction, an evidence sanction, or a terminating sanction under
45 Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to this sanction,
46 the court may impose a monetary sanction under Chapter 7 (commencing with Section
47 2023.010).

48

49 § 2031.310

50 (d) The court shall impose a monetary sanction under Chapter 7 (commencing with
51 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
52 opposes a motion to compel further response to an inspection demand, ~~unless it finds that~~
53 ~~the one subject to the sanction acted with substantial justification or that other~~
54 ~~circumstances make the imposition of the sanction unjust.~~

55

56 § 2031.320

57 (b) The court shall impose a monetary sanction under Chapter 7 (commencing with
58 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
59 opposes a motion to compel compliance with an inspection demand, ~~unless it finds that the~~
60 ~~one subject to the sanction acted with substantial justification or that other circumstances~~
61 ~~make the imposition of the sanction unjust.~~

62

63 § 2033.290

64 (d) The court shall impose a monetary sanction under Chapter 7 (commencing with
65 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or
66 opposes a motion to compel further response, ~~unless it finds that the one subject to the~~
67 ~~sanction acted with substantial justification or that other circumstances make the~~
68 ~~imposition of the sanction unjust.~~

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS:

Existing Law: Allows courts discretion to refrain from imposing a monetary sanction on the unsuccessful party or attorney involved with a motion to compel concerning written discovery where the court finds substantial justification or other circumstances.

This Resolution: Eliminates such discretion by requiring courts to impose a monetary sanction on the unsuccessful party to a motion to compel concerning written discovery in all cases. Courts would still be free to set the appropriate amount of such a sanction, and to determine who,

if anyone, is the unsuccessful party. This change would not apply to motions concerning protective orders, depositions, or physical or mental examinations.

The Problem: Written discovery in civil litigation is often misused, both offensively and defensively by parties, and abuse of the discovery rules is widespread. In order to deter such abuses, under the current law, courts are supposed to impose a monetary sanction on the unsuccessful party or attorney involved in a motion to compel, unless there are exceptional circumstances that apply. In other words, imposition of a monetary sanction on the losing party is supposed to be the norm, not the exception. In practice, courts rarely impose a sanction for anything but the worst practices.

This resolution seeks to curb abuses of written discovery by restoring the original intent of the rules. Imposition of a monetary sanction would now be mandatory in all cases of motions to compel involving written discovery. However, courts would retain the discretion to set the appropriate amount of such a sanction, which undoubtedly would involve taking into account the justification or other circumstances that led to the motion. Courts would also retain the discretion to determine who, if anyone, is the unsuccessful party.

The law on motions concerning protective orders, depositions, or physical or mental examinations would not be changed because special circumstances often apply to those particular discovery tools.

IMPACT STATEMENT:

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

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RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENTS

THE BAR ASSOCIATION OF SAN FRANCISCO

We share the proponent's frustration with the reluctance of some trial courts to impose sanctions in obvious cases of discovery abuse. However, removing all discretion from judges is not the answer. If the discovery statutes were amended as the proponent suggests, the only discretion the court would retain would be as to the amount of the sanctions. Although a court could impose nominal sanctions in lesser instances of abuse, the resolution does not make that clear. Litigants and judges should have better guidance from discovery statutes than simply an unspoken hint that nominal amounts, instead of potentially ruinous sanctions, could be awarded. The statutes maintain a proper balance in their present form and should not be amended as this resolution proposes.

ORANGE COUNTY BAR ASSOCIATION

The Resolution fails in principle and on its own terms. It assumes that some party to a discovery dispute should be punished, even where there was substantial justification for the non-prevailing party's position. Although the Resolution purports to be aimed at discovery abuses, it instead targets something different: substantially justified advocacy. As a matter of principle, neither a party nor counsel should be sanctioned for taking a substantially justified position; likewise, sanctions should not be mandated where the totality of circumstances renders the imposition of sanctions unjust. The Resolution would place a lawyer in an intolerable dilemma: breach his or her duty to his client by not taking a position that had substantial justification or face the possibility of mandatory sanctions for doing so. The Resolution is intended to have a chilling effect on advocacy, and should be rejected in principle.

The Resolution also fails on its own terms. Notwithstanding its stated intent to make sanctions mandatory, the Resolution does not actually place the courts under a mandate to issue meaningful sanctions. The Statement of Reasons indicates that the Resolution would vest the courts with the discretion to decide the amount of sanctions, allowing courts to award nominal sanctions, which likely would not have a deterrent effect. Even more fundamentally, the Statement of Reasons indicates the courts would have discretion to decide "who, if anyone, is the unsuccessful party," allowing a court to rule that neither party was the unsuccessful party and subject to sanctions. Judges currently unwilling to issue sanctions will do nothing more than award nominal sanctions, or make a determination that there was no unsuccessful party.

SAN DIEGO COUNTY BAR ASSOCIATION

Sanctions are not appropriate in every case. The Courts must retain the discretion to decide when a sanction is proper. Imposing the risk of mandatory sanctions on any party who brings or opposes a motion to compel will only discourage and chill the assertion of positions attorneys believe in good faith are meritorious, are warranted under the law, and should be taken in the interest of their clients. Losing a discovery motion, in and of itself, should not be a sufficient basis for the award of sanctions.