

## RESOLUTION 03-05-2008

### DIGEST

#### Consumer Notice: Applicable To All Production Requests

Amends Code of Civil Procedure section 1985.3 to require consumer notice for all civil document requests.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History

Similar to 01-01-03, 01-03-03, and 04-08-04, which were respectively approved, withdrawn, and disapproved. Substantially identical to 11-09-05, which was withdrawn.

#### Reasons:

This resolution amends Code of Civil Procedure section 1985.3 to require consumer notice for all civil document requests. The resolution should be disapproved because it would create an inherent conflict in current law and would impose an undue and unfair burden on litigating parties.

Since this resolution is substantially identical to Resolution 11-09-05 which was disapproved and later withdrawn, and it remains unduly burdensome, it should again be disapproved.

In litigation, propounding parties often do not know whose records will be responsive to document requests. Thus it is the duty of a party responding to objectionable records to protect non-parties from unfair and unlawful disclosures. (*Valley Bank of Nevada v. Superior Ct.* (1975) 15 Cal.3d 653.) Evident throughout the rules of discovery are assurances that third parties are to receive protection from disclosures of confidential information even within the context of litigation. (See, e.g., Code Civ. Proc. §§ 1985, 2025.210.) Amending discovery rules to require litigating parties to prepare notices to consumers for all document requests would unfairly require propounding parties to send notices to consumers with every document request that may seek consumer's records even though the responding party often has the sole knowledge of which consumer's documents are responsive to the requests. Since this resolution imposes an undue burden on propounding parties, it should be disapproved.

This resolution is similar to resolution 03-06-08 which seeks to amend Code of Civil Procedure section 1985.6.

### 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: (1) "Personal
- 3 records" 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  
5 physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist,  
6 acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist,  
7 pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic  
8 laboratory, state or national bank, state or federal association (as defined in Section 5102  
9 of the Financial Code), state or federal credit union, trust company, anyone authorized by  
10 this state to make or arrange loans that are secured by real property, security brokerage  
11 firm, insurance company, title insurance company, underwritten title company, escrow  
12 agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial  
13 Code or exempt from licensure pursuant to Section 17006 of the Financial Code,  
14 attorney, accountant, institution of the Farm Credit System, as specified in Section 2002  
15 of Title 12 of the United States Code, or telephone corporation which is a public utility,  
16 as defined in Section 216 of the Public Utilities Code, or psychotherapist, as defined in  
17 Section 1010 of the Evidence Code, or a private or public preschool, elementary school,  
18 secondary school, or postsecondary school as described in Section 76244 of the  
19 Education Code.

20 (2) “Consumer” means any individual, partnership of five or fewer persons,  
21 association, or trust which has transacted business with, or has used the services of, the  
22 witness or for whom the witness has acted as agent or fiduciary.

23 (3) ~~“Subpoenaing Requesting party”~~ means the person or persons causing a  
24 subpoena duces tecum, a request for identification and production of documents under  
25 Code of Civil Procedure Section 2031, or a deposition notice, accompanied by a request  
26 to produce documents, under Code of Civil Procedure Section 2030 to be issued or  
27 served in connection with any civil action or proceeding pursuant to this code.  
28 ~~“Requesting party”~~, but shall not include the state or local agencies described in Section  
29 7465 of the Government Code, or any entity provided for under Article VI of the  
30 California Constitution in any proceeding maintained before an adjudicative body of that  
31 entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the  
32 Business and Professions Code.

33 (4) “Document request” means a subpoena duces tecum, a request for  
34 identification and production of documents under Code of Civil Procedure Section 2031,  
35 or a deposition notice, accompanied by a request to produce documents, under Code of  
36 Civil Procedure Section 2030.

37 (4~~5~~) “Deposition officer” means a person who meets the qualifications specified  
38 in paragraph (3) of subdivision (d) of Section 2020.

39 (b) Prior to the date called for in the ~~subpoena duces tecum~~ document request for  
40 the production of personal records, the ~~subpoenaing party~~ requesting party shall serve or  
41 cause to be served on the consumer whose records are being sought a copy of the  
42 ~~subpoena duces tecum~~ document request, of the affidavit supporting the issuance of the  
43 subpoena, if any, and of the notice described in subdivision (e), and proof of service as  
44 indicated in paragraph (1) of subdivision (c). This service shall be made as follows:

45 (1) To the consumer personally, or at his or her last known address, or in  
46 accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if  
47 he or she is a party, to his or her attorney of record. If the consumer is a minor, service  
48 shall be made on the minor’s parent, guardian, conservator, or similar fiduciary, or if one  
49 of them cannot be located with reasonable diligence, then service shall be made on any

50 person having the care or control of the minor or with whom the minor resides or by  
51 whom the minor is employed, and on the minor if the minor is at least 12 years of age.

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

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

57 (c) Prior to the production of the records, the ~~subpoenaing party~~ requesting party shall do  
58 either of the following:

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

61 (2) Furnish the witness a written authorization to release the records signed by the  
62 consumer or by his or her attorney of record. The witness may presume that any attorney  
63 purporting to sign the authorization on behalf of the consumer acted with the consent of  
64 the consumer, and that any objection to release of records is waived.

65 (d) A ~~subpoena duces tecum~~ document request for the production of personal  
66 records shall be served in sufficient time to allow the witness a reasonable time, as  
67 provided in paragraph (1) of subdivision (d) of Section 2020, to locate and produce the  
68 records or copies thereof.

69 (e) Every copy of the ~~subpoena duces tecum~~ document request and affidavit, if  
70 any, served on a consumer or his or her attorney in accordance with subdivision (b) shall  
71 be accompanied by a notice, in a typeface designed to call attention to the notice,  
72 indicating that (1) records about the consumer are being sought from the witness named  
73 on the ~~document request~~ subpoena; (2) if the consumer objects to the witness furnishing  
74 the records to the party seeking the records, the consumer must file papers with the court  
75 or serve a written objection as provided in subdivision (g) prior to the date specified for  
76 production on the ~~subpoena~~ document request; and (3) if the party who is seeking the  
77 records will not agree in writing to cancel or limit the ~~subpoena~~ document request, an  
78 attorney should be consulted about the consumer's interest in protecting his or her rights  
79 of privacy. If a notice of taking of deposition is also served with a subpoena duces  
80 tecum, that other notice may be set forth in a single document with the notice required by  
81 this subdivision.

82 (f) A ~~subpoena duces tecum~~ document request for personal records maintained by  
83 a telephone corporation which is a public utility, as defined in Section 216 of the Public  
84 Utilities Code, shall not be valid or effective unless it includes a consent to release,  
85 signed by the consumer whose records are requested, as required by Section 2891 of the  
86 Public Utilities Code.

87 (g) Any consumer whose personal records are sought by a ~~subpoena duces~~  
88 ~~tecum~~ document request and who is a party to the civil action in which this ~~subpoena~~  
89 ~~duces tecum~~ document request is served may, prior to the date for production, bring a  
90 motion under Section 1987.1 to quash or modify the ~~subpoena duces tecum~~ document  
91 request. Notice of the bringing of that motion shall be given to the witness and  
92 deposition officer at least five days prior to production. The failure to provide notice to  
93 the deposition officer shall not invalidate the motion to quash or modify the ~~subpoena~~  
94 ~~duces tecum~~ document request but may be raised by the deposition officer as an  
95 affirmative defense in any action for liability for improper release of records. Any other

96 consumer or nonparty whose personal records are sought by a ~~subpoena duces~~  
97 ~~tecum~~document request may, prior to the date of production, serve on the ~~subpoenaing~~  
98 ~~party~~requesting party the witness, and the deposition officer, a written objection that cites  
99 the specific grounds on which production of the personal records should be prohibited.  
100 No witness or deposition officer shall be required to produce personal records after  
101 receipt of notice that the motion has been brought by consumer, or after receipt of a  
102 written objection from a nonparty consumer, except upon order of the court in which the  
103 action is pending or by agreement of the parties, witnesses, and consumers affected. The  
104 party requesting a consumer's personal records may bring a motion under Section 1987.1  
105 to enforce the ~~document request~~subpoena within 20 days of service of the written  
106 objection. The motion shall be accompanied by a declaration showing a reasonable and  
107 good faith attempt at informal resolution of the dispute between the party requesting the  
108 personal records and the consumer or the consumer's attorney.

109 (h) Upon good cause shown and provided that the rights of witnesses and  
110 consumers are preserved, a ~~subpoenaing party~~requesting party shall be entitled to obtain  
111 an order shortening the time for service of a ~~subpoena duces tecum~~document request or  
112 waiving the requirements of subdivision (b) where due diligence by the ~~subpoenaing~~  
113 ~~party~~requesting party has been shown.

114 (i) Nothing contained in this section shall be construed to apply to any ~~subpoena~~  
115 ~~duces tecum~~document request which does not request the records of any particular  
116 consumer or consumers and which requires a custodian of records to delete all  
117 information which would in any way identify any consumer whose records are to be  
118 produced.

119 (j) This section shall not apply to proceedings conducted under Division 1  
120 (commencing with Section 50), Division 4 (commencing with Section 3200), Division  
121 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200)  
122 of the Labor Code.

123 (k) Failure to comply with this section shall be sufficient basis for the witness to  
124 refuse to produce the personal records sought by a ~~subpoena duces tecum~~document  
125 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 consumer records records to give notice to the consumer whose records are sought if the party issues a subpoena duces tecum to obtain the records.

This Resolution: Requires parties who obtain consumer records to give notice to the consumer whose records are sought if the party obtains the records through 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 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.

**IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** Margaret J. Grover

**COUNTERARGUMENT**

**ORANGE COUNTY BAR ASSOCIATION**

This proposed Amendment renders an already cumbersome process even more cumbersome by requiring the party serving a request for production of documents to a party employer to also give notice to any employee who might be affected by it. The problem is that the propounding party often will not know the identity of the consumer whose records might be included in the production, much less the address to which notice must be given. If an employee has placed his or her confidential records in the hands of his or her employer, the employee's expectation is that the employer will maintain that confidentiality and any concomitant rights of privacy. Counsel for the party employer can do so by simply objecting to the production of those records on privacy grounds. This does not unduly burden the employer, while the proposed amendment will significantly burden the propounding party. The proposed amendment is simply not needed.