

RESOLUTION 03-09-2008

DIGEST

Civil Discovery: Service of Deposition Notice

Amends Code of Civil Procedure section 2025.240 to require service of deposition notices on parties who have not yet appeared, if the deposition notice seeks the non-appearing party's information or records.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE (with Recommended Amendments)

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2025.240 to require service of deposition notices on parties who have not yet appeared, if the deposition notice seeks the non-appearing party's information or records. This resolution should be approved in principle with recommended amendments because it closes a loophole in the law where plaintiffs can seek third party discovery on defendants without serving a notice to consumer on the same defendant.

For clarification purposes, Line 4 of the proposed resolution should be amended to read as follows: “. . . a party who has been served but has not yet appeared”

The current state of the law is such that a plaintiff can serve deposition notices twenty days after serving the summons on, or appearance by, any defendant. (Code Civ. Proc., § 2025.210, subd. (b).) Code of Civil Procedure section 2025.240, subdivision (a) only requires the plaintiff to serve deposition notices on a “party who has appeared in the action.” However, most defendants do not appear on a matter within twenty days of receiving the summons because they have thirty days, after service of the summons, to file their responsive pleading. (Code Civ. Proc., §§ 430.10 and 430.40, subd. (a).) Therefore, a plaintiff can serve any defendant with the summons, wait twenty days, and then serve deposition notices on third parties, such as banks, schools, etc. seeking information on any defendant, without serving the as-of-yet-non-appearing defendant(s) with a notice to consumer. This creates an unfair situation where the plaintiff can procure personal information about the defendant, without any notice to the defendant, just because the defendant is preparing his or her responsive pleading within the statutory thirty-day window. Had plaintiff served the very same deposition notices on third parties *after* the defendant appeared, the plaintiff would have to give notice to the defendant and file a notice to consumer.

This resolution would remedy the situation where a plaintiff can gain unfair advantage over a defendant, even though the defendant is acting diligently within the statutory time limits.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure Section 2025.240 as follows:

1 § 2025.240

2 (a) The party who prepares a notice of deposition shall give the notice to every
3 other party who has appeared in the action. If the deposition is for the purpose of
4 obtaining information or records concerning a party who has not yet appeared and whose
5 default has not yet been entered, the party preparing the notice of deposition shall also give
6 notice to such non-appearing party. The deposition notice, or the accompanying proof of
7 service, shall list all the parties or attorneys for parties on whom it is served.

8 (b) If, as defined in subdivision (a) of Section 1985.3 or subdivision (a) of Section
9 1985.6, the party giving notice of the deposition is a subpoenaing party, and the deponent
10 is a witness commanded by a deposition subpoena to produce personal records of a
11 consumer or employment records of an employee, the subpoenaing party shall serve on
12 that consumer or employee all of the following:

13 (1) A notice of the deposition.

14 (2) The notice of privacy rights specified in subdivision (e) of Section 1985.3 or in
15 subdivision (e) of Section 1985.6.

16 (3) A copy of the deposition subpoena.

17 (c) If the attendance of the deponent is to be compelled by service of a deposition
18 subpoena under Chapter 6 (commencing with Section 2020.010), an identical copy of that
19 subpoena shall be served with the deposition notice.

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

PROPONENT: ORANGE COUNTY BAR ASSOCIATION

STATEMENT OF REASONS:

Existing Law: Permits a ten day loophole for a Plaintiff to issue a Deposition Subpoena to a third party without providing notice to any defendant. Specifically, pursuant to CCP §2025.210(b), a plaintiff may serve a deposition notice on any date that is 20 days after service of the summons on, or appearance by, any defendant. Section 2025.240(a) presently requires the plaintiff to provide notice of the Deposition Subpoena only to those parties who have appeared. “The party who prepares a notice of deposition shall give the notice to every other party who has appeared in the action.”

This Resolution: Ensures that a party who has not had the opportunity to appear and who is not in default shall have the opportunity to protect their privacy interests. It also ensures that at least one adverse party has the opportunity to protect adversarial interests in the event all parties have been served, but none have yet made an appearance.

The Problem: Under existing law, a plaintiff can obtain confidential records and documents from third parties if a defendant has been named, but not yet served, or has been served but has not yet appeared. More particularly, in cases involving multiple defendants, under CCP §2025.210(b) a plaintiff may serve the summons and complaint on defendant 1, wait 20 days, and then serve a Deposition Subpoena on a third party seeking production of defendant 2’s confidential records. Under the current statute, the plaintiff is not required to provide defendant

1 or defendant 2 with notice because no defendants have actually appeared. Further, this problem is not alleviated in cases involving multiple defendants who are adverse to one another if the plaintiff serves defendant 1 (who has then made an appearance), but not defendant 2 (who has been served but the deadline to appear has not yet expired). In such case, plaintiff and defendant 1 may be advantaged by a third party's production of records pertaining to defendant 2, and defendant 2, who may have every intention of vigorously defending itself, will not have any opportunity to object. This is particularly problematic when the documents sought from the third party are bank records or tax records of a defendant which is a corporation or organization. The plaintiff is not required to provide any Notice to Consumer under CCP §1985.3 to a party that is a corporation or organization. Therefore, unless the third party notifies the defendant that their records are being sought, the plaintiff is able to conduct third party discovery without any notice of any kind.

The opportunity to conduct ex parte third party discovery is in direct contravention of the California Supreme Court's holding in *California Shellfish, Inc. v. United Shellfish Co.* (1997) 56 Cal. App. 4th 16 which holds that the discovery statutes are designed to "ensur[e] that no discovery is conducted unless some adverse party has notice of the litigation, and of the particular discovery proceeding, and the opportunity to protect adversarial interests." Id. at 23.

IMPACT STATEMENT:

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

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