

RESOLUTION 03-11-2008

DIGEST

Consumer Records: Remedies for Improper Production

Amends Code of Civil Procedure section 1985.3 to impose sanctions against a witness responding to a subpoena duces tecum, if the consumer disagrees with the manner, time, or scope of the production.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Similar to 11-09-05 and 11-12-05, which were both withdrawn.

Reasons:

This resolution amends Code of Civil Procedure section 1985.3 to impose sanctions against a witness responding to a subpoena duces tecum, if the consumer disagrees with the manner, time, or scope of the production. This resolution should be disapproved because it imposes penalties against a witness who inadvertently produces more personal information than is being sought pursuant to a subpoena duces tecum.

This resolution adds two subdivisions. Subdivision (m) grants a consumer the right to move for sanctions against a responding entity that produces personal records prior to a court's ruling on the consumer's objection, produces personal records in violation of the law or court order, or produces personal records not identified in the subpoena duces tecum. Subdivision (n) specifies the types of sanctions the court may impose against the responding entity.

The proposed language "produces personal records not identified in the subpoena duces tecum" is problematic because a producing witness who in good faith attempts to respond to a subpoena for a category of documents can be sanctioned if the consumer asserts that the documents were not specifically "identified" in the subpoena. This will create a situation where the producing entities will make it a blanket policy not to produce any documents to avoid the possibility of sanctions. This is poor public policy because it will increase the cost of litigation in general, and discovery in particular.

This resolution is similar to 03-13-08 which seeks to amend section 1985.5.

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 records" means the original, any copy of books, documents, other
4 writings, or electronic data pertaining to a consumer and which are maintained by any
5 "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor,
6 physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary
7 clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center,
8 clinical or diagnostic laboratory, state or national bank, state or federal association (as
9 defined in Section 5102 of the Financial Code), state or federal credit union, trust
10 company, anyone authorized by this state to make or arrange loans that are secured by
11 real property, security brokerage firm, insurance company, title insurance company,
12 underwritten title company, escrow agent licensed pursuant to Division 6 (commencing
13 with Section 17000) of the Financial Code or exempt from licensure pursuant to Section
14 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System,
15 as specified in Section 2002 of Title 12 of the United States Code, or telephone
16 corporation which is a public utility, as defined in Section 216 of the Public Utilities
17 Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private
18 or public preschool, elementary school, secondary school, or postsecondary school as
19 described in Section 76244 of the 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 party" means the person or persons causing a subpoena duces
24 tecum to be issued or served in connection with any civil action or proceeding pursuant to
25 this code, but shall not include the state or local agencies described in Section 7465 of the
26 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
28 pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and
29 Professions Code.

30 (4) "Deposition officer" means a person who meets the qualifications specified
31 in Section 2020.420.

32 (b) Prior to the date called for in the subpoena duces tecum for the production
33 of personal records, the subpoenaing party shall serve or cause to be served on the
34 consumer whose records are being sought a copy of the subpoena duces tecum, of the
35 affidavit supporting the issuance of the subpoena, if any, and of the notice described in
36 subdivision (e), and proof of service as indicated in paragraph (1) of subdivision (c). This
37 service shall be made as follows:

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

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

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

50 (c) Prior to the production of the records, the subpoenaing party shall do either
51 of the following:

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

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

58 (d) A subpoena duces tecum for the production of personal records shall be
59 served in sufficient time to allow the witness a reasonable time, as provided in Section
60 2020.410, to locate and produce the records or copies thereof.

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

73 (f) A subpoena duces tecum for personal records maintained by a telephone
74 corporation which is a public utility, as defined in Section 216 of the Public Utilities
75 Code, shall not be valid or effective unless it includes a consent to release, signed by the
76 consumer whose records are requested, as required by Section 2891 of the Public Utilities
77 Code.

78 (g) Any consumer whose personal records are sought by a subpoena duces
79 tecum and who is a party to the civil action in which this subpoena duces tecum is served
80 may, prior to the date for production, bring a motion under Section 1987.1 to quash or
81 modify the subpoena duces tecum. Notice of the bringing of that motion shall be given to
82 the witness and deposition officer at the locations identified in the subpoena duces tecum
83 at least five days prior to production. The failure to provide notice to the deposition
84 officer shall not invalidate the motion to quash or modify the subpoena duces tecum but
85 may be raised by the deposition officer as an affirmative defense in any action for
86 liability for improper release of records.

87 Any other consumer or nonparty whose personal records are sought by a
88 subpoena duces tecum may, at least five days prior to the date of production, serve on the
89 subpoenaing party, the witness, and the deposition officer at the locations identified in the
90 subpoena duces tecum, a written objection that cites the specific grounds on which
91 production of the personal records should be prohibited.

92 No witness or deposition officer shall ~~be required to~~ produce personal records
93 prior to the date of production or after receipt of notice that the motion has been brought

94 by a consumer, or after receipt of a written objection from a nonparty consumer, except
95 upon order of the court in which the action is pending or by agreement of the parties,
96 witnesses, and consumers affected.

97 The party requesting a consumer's personal records may bring a motion under
98 Section 1987.1 to enforce the subpoena within 20 days of service of the written objection.
99 The motion shall be accompanied by a declaration showing a reasonable and good faith
100 attempt at informal resolution of the dispute between the party requesting the personal
101 records and the consumer or the consumer's attorney.

102 (h) Upon good cause shown and provided that the rights of witnesses and
103 consumers are preserved, a subpoenaing party shall be entitled to obtain an order
104 shortening the time for service of a subpoena duces tecum or waiving the requirements of
105 subdivision (b)
106 where due diligence by the subpoenaing party has been shown.

107 (i) Nothing contained in this section shall be construed to apply to any subpoena
108 duces tecum which does not request the records of any particular consumer or consumers
109 and which requires a custodian of records to delete all information which would in any
110 way identify any consumer whose records are to be produced.

111 (j) This section shall not apply to proceedings conducted under Division 1
112 (commencing with Section 50), Division 4 (commencing with Section 3200), Division
113 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200),
114 of the Labor Code.

115 (k) Failure to comply with this section shall be sufficient basis for the witness to
116 refuse to produce the personal records sought by a subpoena duces tecum.

117 (l) If the subpoenaing party is the consumer, and the consumer is the only
118 subject of the subpoenaed records, notice to the consumer, and delivery of the other
119 documents specified in subdivision (b) to the consumer, is not required under this section.

120 (m) If the witness produces personal records (a) in violation of this section, (b)
121 prior to the court ruling on a motion pursuant to section 1987.1, (c) that are not identified
122 in the subpoena duces tecum, or (d) in violation of a court order, then the consumer may
123 file a motion against the witness in the action in which the records were produced as
124 provided by subdivision (n). section.

125 (n) The court may impose a sanction for violation of subdivision (m) which
126 consists of, or includes, (a) directives of a nonmonetary value, including all such relief
127 that the court deems appropriate to remedy such violation, (b) an order directing payment
128 to the movant of some or all of the reasonable attorney's fees and other expenses incurred
129 as a direct result of the violation, and (c) an order to pay a penalty into court in an amount
130 sufficient to deter repetition of the violation of this section or comparable conduct.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Although Code of Civil Procedure section 1985.3 creates a procedure to restrict the production of a consumer's personal records, it does not substantively restrict or otherwise

impose a penalty upon a witness for arbitrarily producing these records without statutory authorization. There is currently no remedy available to a consumer if its rights are violated by a witness.

This Resolution: Would modify section 1985.3 by (a) barring a witness from prematurely producing documents, (b) barring a witness from producing documents while a motion that was filed under section 1987.1 remains pending and (c) creating a statutory remedy if the witness violates this section, as modified.

The Problem: The proposed Amendment is ripe at this time as the legislative modifications were invited by the Court of Appeal in Foothill Federal Credit Union v. Superior Court (2007) 155 Cal.App.4th 632. In that case, the court granted Foothill Federal's writ petition and sustained its demurrer to the consumer's cause of action for invasion of privacy and intentional infliction of emotional distress based on the litigation privilege.

In a concurring opinion, Justice Earl Johnson Jr. wrote:

"I concur in the judgment and write separately for the sole purpose of urging the Legislature to provide an effective means capable of enforcing the provisions it enacted which purport to require financial institutions to protect the privacy interests of consumers. Although many or most such institutions may elect to voluntarily abide by Code of Civil Procedure section 1985.3, after this opinion they will feel no compulsion to do so. The parties and their lawyers involved in the litigation itself are subject to various unpleasant consequences – such as monetary or evidentiary sanctions – for unlawful behavior in the litigation context. But financial institutions which violate section 1985.3 face no such possibilities.

As there is "no right without a remedy," there is no legal duty without a sanction for ignoring that duty. Otherwise the duty is only a moral duty, the violator of which risks nothing but a guilty conscience. Thus, I urge the Legislature to create – or recreate – the sanction and the remedy for this important aspect of the right to privacy in California."

IMPACT STATEMENT:

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

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