

## RESOLUTION 03-13-2008

### DIGEST

#### Employee Records: Remedies for Improper Production

Amends Code of Civil Procedure section 1985.6 to impose sanctions against a witness responding to a subpoena duces tecum, if the employee 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Similar to 11-09-05 and 11-12-05, which were both withdrawn.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 employee 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 (l) grants an employee the right to move for sanctions against a responding entity that produces personal records prior to a court's ruling on the employee'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 (m) 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 employee 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 03-11-08 which seeks to amend section 1985.3.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommend 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 terms have the following
- 3 meanings:

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

6 (2) "Employee" means any individual who is or has been employed by a witness  
7 subject to a subpoena duces tecum. "Employee" also means any individual who is or has  
8 been represented by a labor organization that is a witness subject to a subpoena duces  
9 tecum.

10 (3) "Employment records" means the original or any copy of books, documents,  
11 other writings, or electronic data pertaining to the employment of any employee  
12 maintained by the current or former employer of the employee, or by any labor  
13 organization that has  
14 represented or currently represents the employee.

15 (4) "Labor organization" has the meaning set forth in Section 1117  
16 of the Labor Code.

17 (5) "Subpoenaing party" means the person or persons causing a subpoena duces  
18 tecum to be issued or served in connection with any civil action or proceeding, but does  
19 not include the state or local agencies described in Section 7465 of the Government Code,  
20 or any entity provided for under Article VI of the California Constitution in any  
21 proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4  
22 (commencing with Section 6000) of  
23 Division 3 of the Business and Professions Code.

24 (b) Prior to the date called for in the subpoena duces tecum of the production of  
25 employment records, the subpoenaing party shall serve or cause to be served on the  
26 employee whose records are being sought a copy of: the subpoena duces tecum; the  
27 affidavit supporting  
28 the issuance of the subpoena, if any; the notice described in subdivision (e); and proof of  
29 service as provided in paragraph (1) of subdivision (c). This service shall be made as  
30 follows:

31 (1) To the employee personally, or at his or her last known address, or in  
32 accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 2, or, if he  
33 or she is a party, to his or her attorney of record. If the employee is a minor, service shall  
34 be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of  
35 them cannot be located with reasonable diligence, then service shall be made on any  
36 person having the care or control of the minor, or with whom the minor resides, and on the  
37 minor if the minor is at least 12 years of age.

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

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

43 (c) Prior to the production of the records, the subpoenaing party shall either:

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

46 (2) Furnish the witness a written authorization to release the records signed by  
47 the employee or by his or her attorney of record.

48           The witness may presume that the attorney purporting to sign the authorization  
49 on behalf of the employee acted with the consent of the employee, and that any objection  
50 to the release of records is waived.

51           (d) A subpoena duces tecum for the production of employment records shall be  
52 served in sufficient time to allow the witness a reasonable time, as provided in Section  
53 2020.410, to locate and produce the records or copies thereof.

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

67           (f) (1) Any employee whose employment records are sought by a subpoena duces  
68 tecum may, prior to the date for production, bring a motion under Section 1987.1 to quash  
69 or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given  
70 to the  
71 witness and the deposition officer at the locations identified in the subpoena duces tecum  
72 at least five days prior to production. The failure to provide notice to the deposition officer  
73 does not invalidate the motion to quash or modify the subpoena duces tecum but may be  
74 raised by the deposition officer as an affirmative defense in any action for liability for  
75 improper release of records.

76           (2) Any nonparty employee whose employment records are sought by a subpoena  
77 duces tecum may, at least five days prior to the date of production, serve on the  
78 subpoenaing party, the deposition officer, and the witness at the locations identified in the  
79 subpoena duces tecum a written objection that cites the specific grounds on which  
80 production of the employment records should be prohibited.

81           (3) No witness or deposition officer shall ~~be required to~~ produce employment  
82 records after prior to the date of production or receipt of notice that the motion has been  
83 brought by an employee, or after receipt of a written objection from a nonparty employee,  
84 except upon order of the court in which the action is pending or by agreement of the  
85 parties, witnesses, and employees affected.

86           (4) The party requesting an employee's employment records may bring a motion  
87 under subdivision (c) of Section 1987 to enforce the subpoena within 20 days of service of  
88 the written objection. The motion shall be accompanied by a declaration showing a  
89 reasonable and  
90 good faith attempt at informal resolution of the dispute between the party requesting the  
91 employment records and the employee or the employee's attorney.

92           (g) Upon good cause shown and provided that the rights of witnesses and  
93 employees are preserved, a subpoenaing party shall be entitled to obtain an order

94 shortening the time for service of a subpoena duces tecum or waiving the requirements of  
95 subdivision (b) if due diligence by the subpoenaing party has been shown.

96 (h) This section may not be construed to apply to any subpoena duces tecum that  
97 does not request the records of any particular employee or employees and that requires a  
98 custodian of records to delete all information that would in any way identify any employee  
99 whose records are to be produced.

100 (i) This section does not apply to proceedings conducted under Division 1  
101 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5  
102 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200), of the  
103 Labor Code.

104 (j) Failure to comply with this section shall be sufficient basis for the witness to  
105 refuse to produce the employment records sought by subpoena duces tecum.

106 (k) If the subpoenaing party is the employee, and the employee is the only subject  
107 of the subpoenaed records, notice to the employee, and delivery of the other documents  
108 specified in subdivision (b) to the employee, are not required under this section.

109 (l) If the witness produces employee records (a) in violation of this section, (b)  
110 prior to the court ruling on a motion pursuant to section 1987.1, (c) that are not identified  
111 in the subpoena duces tecum, or (d) in violation of a court order, then the consumer may  
112 file a motion against the witness in the action in which the records were produced as  
113 provided by subdivision (m).

114 (m) The court may impose a sanction for violation of subdivision (l) which consists  
115 of, or includes, (a) directives of a nonmonetary value, including all such relief that the  
116 court deems appropriate to remedy such violation, (b) an order directing payment to the  
117 movant of some or all of the reasonable attorney's fees and other expenses incurred as a  
118 direct result of the violation, and (c) an order to pay a penalty into court in an amount  
119 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 1985.6 creates a procedure to restrict the production of an employee'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 1985.6 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 Appeals in Foothill Federal Credit Union v. Superior Court (2007) 155

Cal.App.4<sup>th</sup> 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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