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New discovery requirements, sanctions, and procedures for 2020

PRODUCTION OF DOCUMENTS, ELECTRONIC EXCHANGE OF INTERROGATORIES AND REQUESTS FOR ADMISSION, AND USE OF FEDERAL DISCOVERY PROCEDURES IN STATE COURTS

In early 2019, Governor Gavin Newsom signed into law three bills affecting discovery procedures in the California courts. While some of the changes will be more impactful than others, it is important to be aware of the revisions that most California civil litigators will confront this year and going forward. The three revisions discussed in this article stem from SB 370, AB 1349, and SB 17. Each of these bills became active law on January 1, 2020.

SB 370: Producing documents in response to an inspection demand

Code of Civil Procedure section 2031.280(a) previously required that "[a]ny documents produced in response to a demand for inspection, copying, testing, or sampling shall either be produced as they are kept in the *usual course of business*, or be organized and labeled to correspond with the categories in the demand" (emphasis added). SB 370 amended this language to now require that "[a]ny documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling *shall be identified with the specific request number to which the documents respond*" (emphasis added). SB 370 eliminated the option to produce documents as they are kept in the usual course of business, and now requires that responding parties take the extra step of identifying to which request the produced documents respond.

Most civil litigators have likely skimmed over Section 2031.280 without much thought about the form in which documents must be produced. Assuming that your opposing counsel is an equal advocate for a swift, relatively trouble-free discovery process, it is common to receive voluminous documents that are organized or indexed to some degree. This may take the form of documents that are Bates-numbered, indexed, or organized sequentially according to the specific discovery request. This is often

See Taft, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2020 Issue

done for the benefit of both parties, so that all counsel may be able to clearly and quickly ascertain which documents pertain to which discovery request. With appropriate indexing and reference to the corresponding inspection demand number, voluminous document productions become much easier to sort and refer to in depositions and at trial.

The document dump

Often, however, litigants may produce voluminous documents without identifying which documents are responsive to which production request. This is because the Code of Civil Procedure previously gave leeway for responding parties to essentially produce a document dump. Since a party was previously only required to produce documents as they are kept "in the usual course of business," parties were afforded the ability to simply turn over the documents in the form that they were maintained. This has presented a serious problem in the era of electronically stored information.

Typically, businesses or other corporate entities will perform searches of their systems for the requested information and simply produce each result or "hit," leaving the requesting party to search through the mound of documents without any semblance of organization. This burden is compounded in the context of a complex civil case, where the responding party is a corporate entity and the number of responsive documents may be in the thousands. Without any obligation on a responding party to indicate which documents pertain to which discovery requests, the propounding party is forced to engage in substantial work sorting through the documents, and is forced to speculate as to which documents are responsive to which requests. This has complicated the discovery process, often resulting in court intervention.

With SB 370, all documents produced in response to a demand will have to be identified with the specific request number to which the documents correspond. The new Section 2031.280 applies to electronically stored information (ESI), as well as physical documents.

While SB 370 may seem long overdue, it is important to recognize the implications that this bill may have. SB 370 may increase costs on responding parties who will now be tasked with sorting through their own documents to determine and identify which materials are responsive to which category demands. This can result in increased requests for extensions of time to respond to discovery, as well as increased objections to production demands. Responding parties are more likely to stand on their objections, too, particularly when the category demand would be overbroad or likely to result in a significant document production, since the costs of litigating the discovery may be less than the costs of indexing and reorganizing a massive number of documents.

Of course, if courts find this to be an increased burden on the responding party, SB 370 may ultimately backfire by forcing propounding parties to further narrow the scope of their requests. Parties are therefore more likely to experience the implications of this bill when serving discovery closer to the discovery cut-off date.

The changes from SB 370 affect all active civil cases, regardless of when that case was filed. This stems from a long-held principle embraced by California courts, which applies legislative changes to all pending actions. (See *Lazelle v. Lovelady* (1985) 171 Cal.App.3d 34, 44 ["Legislative changes in rules of procedure are applicable to pending actions without regard to whether the action accrued before or after the amendment."].)

AB 1349: Providing for the exchange of interrogatories, requests for admission, and the responses thereto in an electronic format

AB 1349 reflects the trend by lawmakers to encourage swifter, more efficient discovery through the use of electronic media. Under the prior Code of Civil Procedure, each discovery response was required to include the same number or letter as the preceding discovery request, and to be in the same sequence as the corresponding discovery request. However, responding parties were not required to repeat the text of the particular interrogatory or request for admission itself within the responses. Similarly, parties have been allowed to serve discovery by hard mail and with no obligation to provide the electronic versions of the same discovery, even when those electronic versions existed. AB 1349 has amended these procedures.

AB 1349 revises Code of Civil Procedure sections 2030.210 (Interrogatories) and 2033.210 (Requests for Admission) by providing that the electronic versions of discovery be provided to the opposing party upon request. (Code Civ. Proc., §§ 2030.210, subd. (d), 2033.210, subd. (e).)

Parties propounding or responding to interrogatories and/or requests for admission can request the propounding party to provide the discovery in electronic format, if the document was originally created in electronic format, which then must be provided to the requesting party within three court days. (Code Civ. Proc., §§ 2030.210, subd. (d), 2033.210, sub. (e).) However, if the interrogatories or requests were not created in an electronic format, a party is not required to provide them in this form merely for the purpose of transmission to the requesting party. (Code Civ. Proc., §§ 2030.210, subd. (d)(5), 2033.210, subd. (e)(5).)

Interestingly, AB 1349 also added a procedure for transmission of electronic versions of the responses to interrogatories and requests for admission: "Upon request by the propounding party after receipt of the responses to the [interrogatories/requests for admission], the responding party shall provide the responses in an electronic format to the propounding party within three court days of the request." (Code Civ. Proc., §§ 2030.210, subd. (d)(2), 2033.210, subd. (e)(2).) This will be useful to propounding parties should they have a need to move to compel further responses – it will save time in creating the separate statements required by California Rules of Court Rule 3.1345. Again, an exception

See Taft, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2020 Issue

exists if the responses were not created in an electronic format. (Code Civ. Proc., §§ 2030.210, subd. (d)(5), 2033.210, subd. (e)(5).)

The interrogatories, requests, or responses may be provided in any format agreed upon by the parties, and AB 1349 provides that if the parties are unable to agree on a format, they shall be provided in plain text format. (Code Civ. Proc., §§ 2030.210, subd. (d)(3), 2033.210, subd. (e)(3).)

AB 1349 did not provide any procedures for the transmission of electronic versions of requests or responses to inspection demands. Code of Civil Procedure section 2031.210, subdivision (c) continues to require only that "[e]ach statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated."

In this digital age, these changes should come as no surprise, and are likely favored by many. However, it is important to be mindful that many of these practices are now requirements.

SB 17: Allowing for the use of federal discovery procedures in state courts, and providing the availability of new sanctions for failing to produce responsive documents

SB 17 added sections 2016.090 and 2023.050 to the Code of Civil Procedure, providing new authority for discovery sanctions and the ability of parties to stipulate to use discovery procedures mirroring those in the Federal Rules of Civil Procedure.

Code of Civil Procedure section 2023.050

Civil litigants are likely to incur the greatest effect with Section 2023.050, since it requires the imposition of $250 in sanctions, in addition to any other sanctions imposed, if the court finds any of the following:

The party, person, or attorney did not respond in good faith to a request for production of documents made pursuant to Section 2020.010, 2020.410, 2020.510, or 2025.210, or to an inspection demand made pursuant to Section 2031.010.

The party, person, or attorney produced requested documents within seven days of a scheduled hearing on a motion to compel pursuant to Section 2025.450, 2025.480, or 2031.320.

The party, person, or attorney failed to confer with the party or attorney requesting the documents in a reasonable and good faith attempt to informally resolve a dispute concerning the discovery requests.

These potential sanctions apply to inspection demands served in written discovery pursuant to Code of Civil Procedure section 2031.010, to document requests included in a deposition notice pursuant to Code of Civil Procedure section 2025.210, and to nonparty discovery, including requests for documents in business record and deposition subpoenas pursuant to Code of Civil Procedure sections 2020.410 and 2020.510.

Prior to SB 17, California courts already had the authority to impose monetary sanctions in an amount to their discretion against any party that engaged in "conduct that is a misuse of the discovery process." (Code Civ. Proc., § 2023.030, subd. (a).) These misuses of the discovery process included failure to respond or to submit to an authorized method of discovery and failure to confer with an opposing party in a reasonable and good faith attempt. (Code Civ. Proc., § 2023.010, subds. (d, i).) Monetary sanctions were also already specifically available against parties who unsuccessfully brought or opposed a motion to compel compliance with an inspection demand (Code Civ. Proc., § 2031.320, subd. (b)) and against deponents who failed to produce a requested document at deposition. (Code Civ. Proc., § 2025.480).)

Section 2023.050 is intended to supplement these provisions, and to provide an additional basis for obtaining sanctions for the failure to produce responsive documents. Importantly, this new code section also provides the potential for a reportable event to the State Bar: "Notwithstanding paragraph (3) of subdivision (o) of Section 6068 of the Business and Professions Code, the court may, in its discretion, require an attorney who is sanctioned pursuant to subdivision (a) to report the sanction, in writing, to the State Bar within 30 days of the imposition of the sanction." This supersedes the general rule in Business and Professions Code section 6068, subdivision (o)(3) that sanctions for failure to make discovery and monetary sanctions of less than $1,000 did not need to be reported to the State Bar.

Consistent with other provisions of the Code of Civil Procedure, section 2023.050 does give courts the ability to deny the imposition of sanctions if the party subject to the sanction acted with substantial justification, or if other circumstances would make the imposition of the sanction unjust. (Code Civ. Proc., § 2023.050, subd. (c).) Importantly, although a court's rulings are typically set forth in a written order or ruling, the Code clarifies that this finding of substantial justification must be in writing, which is a requirement not in similar Code provisions. (*Ibid.*)

The seemingly stringent new rule does provide protections to unrepresented persons by providing that a rebuttable presumption will exist that a natural person acted in good faith if that person was not represented in the action at the time that the sanctionable conduct occurred. This presumption will only be overcome by clear and convincing evidence, and it will only apply to "natural persons." (Code Civ. Proc., § 2023.050, subd. (e).)

In summary, section 2023.050 provides additional incentives for parties and nonparties alike to comply with their obligations to produce documents by providing a strong likelihood of a monetary sanction for those that do not, and even the combined possibility of a sanctions report to the State Bar. This latter possibility may be the additional push needed to discourage gamesmanship in the discovery process.

Code of Civil Procedure section 2016.090

The second of SB 17's changes adds Code of Civil Procedure section 2016.090, authorizing a court, upon

See Taft, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2020 Issue

stipulation by *all* of the parties, to order the exchange of initial disclosures by all parties without awaiting a discovery request. These initial disclosure requirements mirror the federal counterpart. For those parties that stipulate to the new optional rule, the initial disclosures will need to include names and contact information of those likely to have discoverable information, along with the subjects of that information, unless the use would be solely for impeachment; a copy, or a description by category and location, of documents that support the party's claims or defenses, unless the use would be solely for impeachment; any pertinent insurance agreements; and any agreement regarding potential indemnification. (Code Civ. Proc., § 2016.090, subd. (a).)

Similar to federal discovery rules, Section 2016.090 requires that parties participating in this procedure "shall supplement or correct a disclosure or response […] [i]n a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect and the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process."

Indeed, the optional nature of Section 2016.090 reflects a relatively minor change as it can only mandate initial disclosures "upon order of the court following stipulation by *all* parties to the action." This optional procedure, however, should not be minimized. If SB 17 is well received by Courts and litigants, and is found to streamline the discovery process, the bill could quickly be transformed into a compulsory measure in the not too distant future.

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