

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 235 (Umberg)
Version: March 14, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
CK

SUBJECT

Civil discovery: sanctions

DIGEST

This bill mandates, rather than allows for, certain initial disclosures to automatically be made in all civil actions, except unlawful detainer and small claims actions, as specified. The bill raises the sanction that courts must impose when it makes certain findings in relation to civil discovery abuses, as specified, to \$1,000.

EXECUTIVE SUMMARY

Existing law provides for various methods of discovery to obtain evidence in connection with civil litigation, including requests for production of documents. If the party propounding such discovery requests believes that responses are inadequate or objections are without merit or are too general, it may file a motion to compel further responses and involve the court in facilitating the exchange of discovery. Generally, such motions must be preceded by a good faith attempt at an informal resolution of the dispute. Courts can impose sanctions for various misuses of the discovery process.

This bill raises the mandatory sanction for specified discovery abuses from \$250 to \$1,000. The court continues to have restricted discretion to excuse such sanctions.

The bill also models the Federal Rules of Civil Procedure by *requiring* certain disclosures of information related to discoverable information to be made by parties in the early stages of nearly all civil cases, absent stipulation by the parties and a court order. Currently such disclosures are only required when stipulated to by the parties and ordered by the court.

The bill is author sponsored. The bill is supported by the Civil Justice Association of California. The bill is opposed by the Consumer Attorneys of California and California Defense Counsel.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, through the Civil Discovery Act, procedures by which parties to a civil action conduct and obtain “discovery,” including by, among other things, oral depositions. (Code Civ. Proc. § 2016.010 et seq.)
- 2) Provides that generally any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017.010.)
- 3) Provides for various forms of discovery, including interrogatories, requests for admission, depositions, requests for physical or mental examinations, and requests for production of documents. The propounding party is authorized, on receipt of a response to various forms of discovery, to move for an order compelling a further response if the propounding party deems the response inadequate or insufficient in some manner. (Code Civ. Proc. §§ 2025.010-2033.740.)
- 4) Identifies various misuses of the discovery process, including:
 - a. persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;
 - b. using a discovery method in a manner that does not comply with its specified procedures;
 - c. employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;
 - d. failing to respond or to submit to an authorized method of discovery;
 - e. making, without substantial justification, an unmeritorious objection to discovery;
 - f. making an evasive response to discovery;
 - g. disobeying a court order to provide discovery;
 - h. making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;
 - i. failing to confer with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, as specified. (Code Civ. Proc. § 2023.010.)
- 5) Authorizes the court to impose various sanctions against anyone engaging in conduct that is a misuse of the discovery process. Such sanctions include:

- a. monetary sanctions, in which the court orders one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct;
 - b. issue sanctions, in which the court orders that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process or orders that the liable party is prohibited from supporting or opposing designated claims or defenses;
 - c. evidence sanctions, in which the court prohibits any party engaging in the misuse of the discovery process from introducing designated matters in evidence;
 - d. terminating sanctions, in which the court strikes out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process; stays further proceedings by that party; dismisses the action, or any part of the action, of that party; or ordering a judgment by default against that party; and
 - e. contempt sanctions, in which the court treats the misuse of the discovery process as a contempt of court. (Code Civ. Proc. § 2023.030.)
- 6) Requires the court, in addition to the above and notwithstanding the outcome of the particular discovery motion, to impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. (Code Civ. Proc. § 2023.020.)
- 7) Requires that a request for a sanction identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought. (Code Civ. Proc. § 2023.040.)
- 8) Requires a court, notwithstanding any other law, and in addition to any other sanctions imposed pursuant to the Civil Discovery Act, to impose a \$250 sanction, payable to the requesting party, upon a party, person, or attorney if, upon reviewing a request for a sanction made pursuant to Section 2023.040 of the Code of Civil Procedure, the court finds certain specified conduct occurred, including failure to respond to discovery requests in good faith, as provided. (Code Civ. Proc. § 2023.050(a).)
- 9) Requires notice to the party, person, or attorney against whom the sanction is proposed to be imposed and opportunity for them to be heard before sanctions can be imposed. Allows a court to excuse the imposition of the sanction required if the court makes written findings that the one subject to the sanction acted with

substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc. § 2023.050(c), (d).)

- 10) Authorizes a court, notwithstanding Business and Professions Code section 6068(o)(3), to require an attorney who is sanctioned pursuant to this bill's provisions to report the sanction, in writing, to the State Bar within 30 days of the imposition of the sanction. (Code Civ. Proc. § 2023.050(b).)
- 11) Establishes a rebuttable presumption that a natural person acted in good faith if that person was not represented by an attorney in the action at the time the conduct that is sanctionable occurred. This presumption may only be overcome by clear and convincing evidence. (Code Civ. Proc. § 2023.050(e).)
- 12) Provides that within 45 days of an order of the court following stipulation by all parties to the action, other than unlawful detainer actions or those in the small claims division of the court, the parties shall, without awaiting a discovery request, provide to the other parties an initial disclosure including specified information. (Code Civ. Proc. § 2016.090.)
- 13) Requires a party to make the initial disclosures based on the information then reasonably available to it and to verify such disclosures under penalty of perjury. A party is not excused from making its initial disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. (Code Civ. Proc. § 2016.090(a)(2).)
- 14) Requires a party that has made its initial disclosures or responded to a discovery request, to supplement or correct a disclosure or response in 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, or as ordered by the court. (Code Civ. Proc. § 2016.090(a)(3).)
- 15) Authorizes the above obligations to be enforced by a court on its own motion or the motion of a party to compel disclosure. (Code Civ. Proc. § 2016.090(a)(4).)
- 16) Requires, under federal law, certain initial disclosures to be made by one party to the other parties without awaiting a discovery request in civil litigation in federal courts. (Fed. Rules Civ. Proc., rule 26(a)(1)(A).)
- 17) Provides that it is the duty of an attorney to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the imposition of judicial sanctions against the attorney, except for sanctions for failure to make

discovery or monetary sanctions of less than \$1,000. (Bus. & Prof. Code § 6068(o)(3).)

This bill:

- 1) Provides that the early disclosures laid out in Code of Civil Procedure Section 2016.090 are mandatory unless modified by an order of the court following stipulation of the parties.
- 2) Raises the sanction in Code of Civil Procedure Section 2023.050 from \$250 to \$1,000.

COMMENTS

1. Stated intent of the bill

According to the author:

Discovery is a very important pretrial stage of a trial. It is the process of collecting information in preparation for trial, when both sides engage to collect facts, identify witnesses, and evaluate a case. Unfortunately, the discovery process is often abused by parties, and especially those with more resources – irrespective of the merits of the matter. These abuses lead to disputes that have become increasingly common, expensive, and time consuming. Currently, California law does not condemn strongly enough that abuse of the discovery process will not be tolerated. SB 235 will reduce this discovery abuse by requiring certain initial disclosures to be mandatory and by changing the current suggested sanction to a mandatory \$1,000 minimum sanction imposed on lawyers that: fail to timely respond to a documents request, intent to cause unnecessary delay, and fail to meet and confer to resolved any dispute regarding the request.

2. Overview of the discovery process

The Civil Discovery Act (“the Act”) applies to every civil action and special proceeding of a civil nature, unless there is a statutory exception. (Code Civ. Proc. § 2016.010 et seq.) Discovery is the formal exchange of evidentiary information and materials between parties to a pending action. Generally, the Act permits any party to a civil action to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter in the pending action or to the determination of any motion made in that action, if the matter either is admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017.010.) Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having

knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

The intention of California's broad discovery statutes is to make discovery a "simple, convenient, and inexpensive" means of revealing the truth and exposing false claims, to "educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial," and eliminate surprise. (*Greyhound Corp. v. Superior Court of Merced County* (1961) 56 Cal.2d 355, 376; *Emerson Elec. Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107.) Moreover, California courts have reiterated that discovery provisions are to be liberally construed in favor of disclosure.

Primary devices to conduct discovery include interrogatories, depositions, requests for admissions, and requests for production. If the party propounding such discovery requests believes that responses are inadequate or objections are without merit or are too general, it may file a motion to compel further responses and involve the court in facilitating the exchange of discovery. Generally, such motions must be preceded by a good faith attempt at an informal resolution of each issue presented by the motion to compel and a "meet and confer" declaration must accompany the motion. (Code Civ. Proc. § 2016.040.) In addition, the court is authorized to conduct an informal discovery conference to discuss discovery disputes. (Code Civ. Proc. § 2016.080.)

3. Misuse of the discovery process and sanctions

Civil litigation is rife with discovery abuses, and the discovery process is infamous for the deployment of various bad faith tactics. The Code of Civil Procedure specifically provides a non-exhaustive list of misuses of the discovery process, including:

- persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;
- using a discovery method in a manner that does not comply with its specified procedures;
- employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;
- failing to respond or to submit to an authorized method of discovery;
- making, without substantial justification, an unmeritorious objection to discovery;
- making an evasive response to discovery;
- disobeying a court order to provide discovery;
- making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;

- failing to confer with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, as specified.

(Code Civ. Proc. § 2023.010.)

A court has the authority to impose a variety of sanctions in response to a party's misuse of various discovery methods. (Code Civ. Proc. § 2023.030.) Courts have found that "[w]henever one party's improper actions – even if not 'willful' – in seeking or resisting discovery necessitate the court's intervention in a dispute, the losing party presumptively should pay a sanction to the prevailing party." (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286-1287, citations and quotations omitted.) "A court's decision to impose a particular sanction is subject to reversal only for manifest abuse exceeding the bounds of reason." (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 880, citations and quotations omitted.)

Such sanctions can take the form of *evidence sanctions*, where a court limits the offending party from introducing certain evidence, or *issue sanctions*, where the court simply accepts certain facts to be established against that party. (Code Civ. Proc. § 2023.030.) The court can take even more aggressive approaches to discovery abuse by treating it as a *contempt* of court or issuing *terminating sanctions* that strike out the pleadings of a party, or result in dismissal of the action or entry of a default judgment.

In addition to those sanctions, the court may also order monetary sanctions. The court can order one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both, to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. (Code Civ. Proc. § 2023.030(a).)

Monetary sanctions can also be imposed against one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. When such sanctions are authorized, the court is required to impose that sanction unless it finds that "the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The court is also required to impose monetary sanctions against any party or attorney who fails to confer as required. Such party must be ordered to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. (Code Civ. Proc. § 2023.020.)

SB 17 (Umberg, Ch. 836, Stats. 2019) was introduced in response to claims that discovery disputes had become increasingly more common, expensive and time consuming. The author argued that then-existing California law did not "send a strong message that abuse of the discovery process will not be tolerated." To address those identified challenges, SB 17 allows a party to request and *requires* a court to impose a monetary sanction of \$250 if the court finds any of the following:

- the party, person, or attorney did not respond in good faith to a request for the production of documents, as specified;
- the party, person, or attorney produced the requested documents within seven days before the court was scheduled to hear a motion to compel production of the records that is filed by the requesting party as a result of the other party, person, or attorney's failure to respond in good faith; or
- the party, person, or attorney failed to confer in person, by telephone, or by letter with the party or attorney requesting the documents in a reasonable and good faith attempt to resolve informally any dispute concerning the request. (Code Civ. Proc. § 2023.050(a).)

The sanction in Section 2023.050 can only be imposed after notice and an opportunity to be heard is afforded to the liable party. The sanction is payable to the requesting party and is in addition to any other sanctions imposed pursuant to existing law. The court is further authorized to require the liable party to report the sanction to the State Bar within 30 days, notwithstanding the requirement under existing law that an attorney report sanctions "except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000)." (Bus. & Prof. Code § 6068(o)(3).)

This bill increases the near mandatory sanction in Section 2023.050 to \$1,000. This further strengthens the hammer on discovery abuse in this context.

4. Initial disclosures

Rule 26 of the Federal Rules of Civil Procedure provides for certain required disclosures at the outset of civil litigation in federal courts. Pursuant to Rule 26, a party must provide certain information to the other parties of the action even before a discovery request is propounded. Such required initial disclosures include:

- the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

- any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(Fed. Rules Civ. Proc., rule 26(a)(1)(A).)

Seeking to mirror this procedural rule, SB 17, discussed above, initially required each party, within 45 days after service of any answer in a civil action and without awaiting a discovery request, to provide to the other parties initial disclosures that include specified information, all of which would be required pursuant to Rule 26. However, the bill eventually only required such disclosures after the parties all stipulated to it and the court ordered it. The discretionary early disclosure statute is found in Section 2016.090 of the Code of Civil Procedure.

Similar to Rule 26, the party must make its initial disclosures pursuant to Section 2016.090 based on the information then reasonably available to it and is not excused from making the disclosures simply because it has not fully investigated the case, it challenges the sufficiency of another party's disclosures, or another party has not made its disclosures. A party must verify the required disclosures as true and correct under penalty of perjury.

After making these initial disclosures or providing responses to discovery requests, a party must supplement or correct a disclosure or response 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. These provisions are also found in Rule 26.

This bill now mandates these early disclosures in civil actions, unless the parties agree otherwise and the court so orders. The author argues that the purpose of requiring initial disclosure is to expedite the discovery process, reduce the expense of litigation, and facilitate the early resolution of litigation.

Requiring initial disclosures provides certain efficiencies to the litigation process. It may provide a party a better sense of the case for or against it and thereby expedite the resolution of the dispute. Such disclosures also obviate the need to engage in the lengthy, and often costly, discovery process for each piece of relevant information.

However, such required disclosures may prove overly burdensome on certain parties in certain cases, creating a high hurdle at the outset of litigation that may undermine meritorious claims. Rule 26 specifically exempts nine different proceedings from its requirements. This bill maintains the existing exemptions in Section 2016.090 – unlawful detainer actions and actions in small claims court.

5. Stakeholder positions

Writing in support, the Civil Justice Association of California argues:

Discovery is a cornerstone of civil litigation. Adherence to the process helps to ensure cases are resolved in a timely manner. Undue delays in the discovery process, particularly those that are intentional, should thus be met with stricter penalties.

Compliance with discovery rules promotes fairness to all parties to a dispute and makes the best use of the court's valuable time.

California Defense Counsel write in opposition:

Unfortunately, SB 235 suggests a one-size-fits-all approach, which would apply to every civil action in the state courts. While the approach might work for small, single-issue cases like motor vehicle accidents, the proposal will break down when applied to complex, discovery-heavy cases like products, employment, construction defect, and many others. We are very concerned that overburdened state trial court judges will routinely order initial disclosures in every civil case, without any meaningful evaluation by counsel for the parties, leaving us little or no time to assemble the massive amounts of discovery required by the bill. This is especially true of electronic discovery.

In contrast with the state system where trial judges simply do not have the resources to conduct active case management, the federal rules contain an entire regime during the discovery phase of litigation. For example, the federal courts stay discovery until the court holds an initial case management conference. No analog exists in the state system, except for 20 days after service of the complaint. Then, the federal courts schedule an initial case management conference, typically 90-120 days after filing. This gives counsel time to work with clients to identify digital evidence on company servers as well as digital evidence on the personal devices of employees, etc.

Writing in an oppose-unless-amended position, the Consumer Attorneys of California (CAOC) lay out a series of amendments to address their concerns. They highlight the core provisions:

Three of the essential changes CAOC seeks are: (1) how this new process for early exchange of information is triggered, (2) what duties the parties have to follow up or supplement automatically, and (3) the addition of a sunset.

First, counsel for both a plaintiff or defendant may not have all of the necessary information as early in the case as the statute is currently drafted. For example, if a plaintiff comes to an attorney with their statute of limitations at risk of running out, that attorney must file the complaint and preserve their client's rights immediately. SB 235 would impose on that attorney a requirement to, as early as 45 days in to the case, collect and review all of the information demand in the proposed statute. Similarly, defense counsel also may be brought into a case after a complaint has been filed and would then not have enough time to comply with the new statute. CAOC proposes that either party can trigger the initiation of this process by issuing a demand and then any party that has appeared in the case must comply with the statute within 60 days.

Second, our amendments propose changing current subsection (a)(3) which requires automatic supplementation of documents to instead track the existing language of CCP 2030.070. This change is necessary to ensure that all discovery is uniform and there is not a duty to supplement for some types of discovery but not all. Currently, California law does not impose any ongoing duty to supplement (unlike federal law). The *Biles v. Exxon Mobil Corp.*, 124 Cal.App.4th 1315 (2004) case, as you can see from the opening paragraph copied below, makes it clear that no such duty exists in California.

"In deciding this appeal we deconstruct a civil discovery "urban legend" that a responding party has an affirmative duty to supplement responses to interrogatories if and when new information comes into that party's possession, particularly if the party reserved the right to amend or supplement the earlier responses."

If the statute goes into effect we are open to discussing increasing this duty to become a duty to automatically supplement before the sunset date. However, this large deviation from current procedures should be done on an incremental basis.

Third, given the nature of this change CAOC seeks to add a three year sunset to allow for further discussion in the legislature as the statute is implemented.

The author has indicated his intent to take many of the amendments suggested by CAOC should the bill move forward and to continue to engage with all interested stakeholders on outstanding concerns.

SUPPORT

Civil Justice Association of California

OPPOSITION

California Defense Counsel
Consumer Attorneys of California

RELATED LEGISLATION

Pending Legislation: SB 554 (Cortese, 2023) reinstates the law providing for informal discovery conferences upon order of the court after stipulation by the parties. This bill is currently pending before this Committee.

Prior Legislation:

SB 17 (Umberg, Ch. 836, Stats. 2019) *See* Comments 3 & 4.

SB 370 (Umberg, Ch. 208, Stats. 2019) eliminated the options for the form in which documents are to be produced in discovery and requires that any documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling be identified with the specific request number to which the documents respond.

AB 1349 (Oberholte, Ch. 190, Stats. 2019) requires parties to provide certain discovery requests and responses thereto in an electronic format within three court days of the request, except as specified. It also authorizes a party to provide the requested electronic materials in any format, and may transmit the document by any method, as agreed upon by the parties, except as specified.

AB 2230 (Berman, Ch. 317, Stats. 2018) provides that in lieu of a separate statement in connection with a motion to compel further responses to discovery requests, the court may allow the moving party to submit a concise outline of the discovery request and each response in dispute.

AB 383 (Chau, Ch. 189, Stats. 2017) gives courts discretion to hold informal discovery conferences upon request of a party or on their own motion to discuss disputed discovery issues. It provides the procedures and timelines for such conferences. The outcome of such a discovery conference does not preclude the filing of any discovery motion or prejudice the disposition of such a motion.
