
UNFINISHED BUSINESS

Bill No: SB 235
Author: Umberg (D)
Amended: 9/1/23
Vote: 21

SENATE JUDICIARY COMMITTEE: 11-0, 4/18/23
AYES: Umberg, Wilk, Allen, Ashby, Caballero, Durazo, Laird, McGuire, Min,
Niello, Wiener

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE FLOOR: 38-0, 5/15/23
AYES: Allen, Alvarado-Gil, Archuleta, Ashby, Atkins, Becker, Blakespear,
Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez,
Grove, Hurtado, Jones, Laird, Limón, McGuire, Menjivar, Min, Newman,
Nguyen, Niello, Ochoa Bogh, Padilla, Portantino, Roth, Seyarto, Skinner, Stern,
Umberg, Wahab, Wiener, Wilk
NO VOTE RECORDED: Rubio, Smallwood-Cuevas

ASSEMBLY FLOOR: 78-0, 9/7/23 - See last page for vote

SUBJECT: Civil discovery

SOURCE: Author

DIGEST: This bill authorizes parties to demand certain initial disclosures to automatically be made in civil actions, except as specified, until January 1, 2027. This bill raises the sanction that courts must impose when it makes certain findings in relation to civil discovery abuses, as specified, to \$1,000.

Assembly Amendments alter the process and scope of the initial disclosures, including the addition of a number of additional exemptions, and place a sunset on the changes made by the bill.

ANALYSIS:

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. (Code Civ. Proc. § 2023.010.) Authorizes the court to impose various sanctions against anyone engaging in conduct that is a misuse of the discovery process. (Code Civ. Proc. § 2023.030.)
- 5) 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 incurred by anyone as a result of that conduct. (Code Civ. Proc. § 2023.020.)
- 6) 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. (Code Civ. Proc. § 2023.040.)
- 7) Requires a court, notwithstanding any other law, and in addition to any other sanctions imposed, 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).)
- 8) 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).)
 - 9) Authorizes a court, notwithstanding Business and Professions Code section 6068(o)(3), to require an attorney who is sanctioned 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).)
 - 10) 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).)
 - 11) 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.)
 - 12) 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).)
 - 13) 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).)

- 14) 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).)
- 15) 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).)
- 16) 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 can be triggered by demand of any party unless modified by stipulation of the parties. The bill provides greater clarity as to what is to be provided and how supplemental demands may be propounded. The bill establishes a number of additional exemptions from these provisions.
- 2) Sunsets the above changes on January 1, 2027.
- 3) Raises the sanction in Code of Civil Procedure Section 2023.050 from \$250 to \$1,000.

Background

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 moves closer to the Federal Rules of Civil Procedure by *requiring* certain disclosures of information related to discoverable information to be made by parties in many civil cases upon demand by a party, absent stipulation by the parties. Currently such disclosures are only required when stipulated to by the parties and ordered by the court. These changes sunset on January 1, 2027.

This bill is author sponsored. This bill is supported by the Civil Justice Association of California.

Comments

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.

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. 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.)

SB 17 (Umberg, Chapter 836, Statutes of 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.

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.

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 authorizes a party to demand these early disclosures in certain civil actions, unless the parties agree otherwise. 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.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, likely minimal state costs, if any. The Judicial Council reports that it cannot precisely predict how these changes in discovery procedures will affect court workload but anticipates that the increased sanction will deter violations of discovery rules, minimizing court time needed to enforce them.

SUPPORT: (Verified 9/7/23)

Civil Justice Association of California

OPPOSITION: (Verified 9/7/23)

None received

ARGUMENTS 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.”

ASSEMBLY FLOOR: 78-0, 9/7/23

AYES: Addis, Aguiar-Curry, Alanis, Alvarez, Arambula, Bauer-Kahan, Bennett, Berman, Boerner, Bonta, Bryan, Calderon, Juan Carrillo, Wendy Carrillo, Cervantes, Chen, Connolly, Megan Dahle, Davies, Dixon, Flora, Mike Fong, Vince Fong, Friedman, Gabriel, Gallagher, Garcia, Gipson, Grayson, Haney, Hart, Holden, Hoover, Irwin, Jackson, Jones-Sawyer, Kalra, Lackey, Lee, Low, Lowenthal, Maienschein, Mathis, McCarty, McKinnor, Muratsuchi, Stephanie Nguyen, Ortega, Pacheco, Papan, Jim Patterson, Joe Patterson, Pellerin, Petrie-Norris, Quirk-Silva, Ramos, Rendon, Reyes, Luz Rivas, Rodriguez, Blanca Rubio, Sanchez, Santiago, Schiavo, Soria, Ta, Ting, Valencia, Villapudua, Waldron, Wallis, Ward, Weber, Wicks, Wilson, Wood, Zbur, Robert Rivas

NO VOTE RECORDED: Bains, Essayli

Prepared by: Christian Kurpiewski / JUD. / (916) 651-4113
9/8/23 10:20:25

**** END ****