

Memorandum 2006-08

**Civil Discovery Improvements: Subpoenaed Consumer Records
(Discussion of Issues)**

This memorandum continues the Commission's work on civil discovery. It addresses an inquiry made by a member of the Commission, William Weinberger, relating to Code of Civil Procedure Section 1985.3. That section imposes special procedural requirements when a litigant seeks to subpoena records of a "consumer."

The term "consumer" is defined by the statute as "any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary." The issue raised is why the definition of "consumer" includes a partnership of five or fewer persons, but does not include a limited liability company with five or fewer members.

This memorandum presents background information, provides preliminary analysis of the issue, and discusses other relevant considerations. The Commission needs to decide whether to pursue the matter further.

(For administrative convenience, we have created a new classification — Study J-506 — for the Commission's continuing work on civil discovery.)

CODE OF CIVIL PROCEDURE SECTION 1985.3

In litigation, a party will frequently issue a subpoena to someone for a record relating to a third person. For example, a litigant might issue a subpoena to a hospital for a record relating to a patient, or to a financial institution for a record relating to a customer.

As a general rule, a litigant may subpoena this kind of record without providing advance notice to the person that is the subject of the record. See Code Civ. Proc. § 1985. There are many statutory exceptions to this rule, and the courts have also fashioned exceptions based on the right to privacy in Article 1, Section 1 of the California Constitution. See *Gilbert v. City of San Jose*, 114 Cal. App. 4th 606, 7 Cal. Rptr. 3d 692 (2003), and other cases collected in *Gilbert*.

The subpoenaing of a record containing arguably private information involves the balancing of competing considerations. On the one hand, advance notice to the subject of a subpoenaed record allows the subject an opportunity to challenge disclosure of information that may be protected by a right of privacy. On the other hand, requiring notice (and a corresponding opportunity to be heard) every time a record is subpoenaed would substantially burden judicial resources and cause significant litigation delay.

Code of Civil Procedure Section 1985.3, enacted in 1980, is an example of a statute that requires advance notice to the subject of a subpoenaed record in specified circumstances. (The full text of the section is attached as an Exhibit.) According to at least two courts, the section was enacted to protect a consumer's right to privacy under Article I, Section 1 of the California Constitution. See *Lantz v. Superior Court*, 28 Cal. App. 4th 1839, 1848, 34 Cal. Rptr. 2d 358 (1994); *Sasson v. Katash*, 146 Cal. App. 3d 119, 124, 194 Cal. Rptr. 46 (1983).

The statute applies whenever a litigant seeks to subpoena a "personal record" of a consumer. The term "personal record" is statutorily defined; it generally includes any record maintained by a medical provider, financial institution, attorney, accountant, telephone corporation, or school. The statute requires the subpoenaing party to provide advance notice of the subpoena to the consumer that is the subject of the record before the date specified for production of the record. The section further provides the consumer an opportunity to object to production of the record, and relieves a subpoenaed person who is notified of an objection from complying with the subpoena, in the absence of agreement or court order.

Failure to comply with the procedural requirements of Section 1985.3 permits a record holder to refuse to produce the subpoenaed records. Code Civ. Proc. § 1985.3(k). Non-compliance may also subject a litigant to some type of sanction (although the statutory basis for imposition is somewhat unclear), and at least theoretically could result in civil liability. See *Mansell v. Otto*, 108 Cal. App. 4th 265, 133 Cal. Rptr. 2d 276 (2003).

DEFINITION OF "CONSUMER" IN SECTION 1985.3

The definition of "consumer" in Section 1985.3 has remained unchanged since the section's enactment in 1980. The staff's review of the legislative history of the statute shed no direct light on the rationale or origin of the definitional language.

As best as we can tell, the language was likely a consolidation and modification of two definitions that were a part of the “California Right to Financial Privacy Act” (Gov’t Code §§ 7460-7493), enacted four years earlier. That act regulates release of a customer record by a financial institution in response to a request from a state or local agency.

In 1980, the definitions in that Act provided:

For the purposes of this chapter:

....

(c) The term “person” means an individual, partnership, corporation, association, trust or any other legal entity.

(d) The term “customer” means any person who has transacted business with or has used the services of a financial institution or for whom a financial institution has acted as a fiduciary.

Government Code § 7465. The “California Right to Financial Privacy Act” thus provided privacy protection, under specified circumstances, to individuals as well as *all* types of business entities.

The staff could find no legislative history indicating why the Legislature chose a different approach in enacting Section 1985.3, providing privacy protection to associations, trusts, and small partnerships, but denying the protection to corporations and large partnerships. (The staff has not attempted to contact organizations that took positions on the legislation, such as the Department of Consumer Affairs. We could take that step if the Commission decides to pursue this matter further.)

Pre-existing statutory definitions of the term “consumer” are also no help in explaining why the Legislature chose to define the term “consumer” in Section 1985.3 as it did. At the time Section 1985.3 was enacted (as well as at present), other code sections defined the term “consumer” as (1) an individual or natural person; (2) a “person” (typically defined elsewhere to include an individual as well as all types of business entities), or (3) in Business and Professions Code Section 21500, an “individual, firm, partnership, association, or corporation.”

LIMITED LIABILITY COMPANIES

In 1994, California recognized the limited liability company (“LLC”) as a discrete business entity, enacting the California Limited Liability Company Act. 1994 Cal. Stat. ch. 1200. An LLC operates in much the same way as a partnership. The primary difference, as the name implies, is that the personal liability of an

LLC member for the debts or actions of the LLC or other LLC members is limited.

Pending Issue

Despite the passage of the California Limited Liability Company Act, the definition of “consumer” in Section 1985.3 continues to specifically include a “partnership of five or fewer persons,” but does not expressly include an LLC of five or fewer persons. Is there a good reason for the different treatment, or should the two types of entities be treated the same way?

In hope of finding insight on that point, the staff examined the legislative history of the California Limited Liability Company Act and related legislation.

Legislative History of the Limited Liability Company Act and Related Legislation

The California Limited Liability Company Act had a companion bill (1994 Cal. Stat. ch. 1010) that arguably bears on the issue raised. The companion bill amended more than one hundred code sections that defined the term “person” in a listing fashion, to add a reference to “limited liability company.” For example, Business and Professions Code Section 302 was amended to read:

302. For the purposes of this chapter:

....
(d) “Person” means an individual, partnership, corporation, limited liability company, association, or other group, however organized.

The two bills also amended a handful of other “laundry list” definitions to add a reference to limited liability companies, including definitions of the terms “licensee” (Bus. & Prof. Code § 7500.1(n)), “participating party” (Health & Safety Code § 37912(g)), and “employer” (Unemp. Ins. Code § 13005(a)).

The bills did *not* add “limited liability company” to the definition of the term “consumer” in any code section. However, at the time, Business and Professions Code Section 21500 (referred to above) was the only code section (other than Section 1985.3) defining the term “consumer” in a listing fashion.

Still, the companion bill did amend Business and Professions Code Section 21500 in a manner that may or may not reveal legislative intent on this issue. Prior to the 1994 amendment, Section 21500 in its entirety read:

21500. As used in this article:
(a) “Person” means an individual, firm, partnership, association, or corporation engaged in the business of selling watches.

(b) "Consumer" means an individual, firm, partnership, association or corporation who buys for his or her own use, or for the use of another, but not for resale.

As part of 1994 Cal. Stat. ch. 1010, the Legislature amended the definition of "person" in subdivision (a) of Section 21500 to add "limited liability company." However, the definition of "consumer" in subdivision (b) of the section was *not* amended.

Based on the parallels between the two subdivisions of Section 21500, and, more importantly, the inclusion of both partnerships and corporations in subdivision (b)'s definition of consumer, it seems likely the Legislature's failure to add "limited liability company" to that definition was merely an oversight. If so, one could conclude the failure to add the reference to the definition in Section 1985.3(a)(2) was a similar oversight.

On the other hand, Section 21500 consists entirely of two similarly patterned definitions. This fact suggests that the addition of "limited liability company" to only one of the two definitions may have been intentional, and the failure to amend the second definition (of the term "consumer") was *not* an oversight.

The legislative history of the LLC bills is thus inconclusive regarding whether the Legislature deliberately decided not to include an LLC in Section 1985.3's definition of "consumer," or simply overlooked the issue.

POLICY CONSIDERATIONS FOR DISTINGUISHING BETWEEN A PARTNERSHIP AND AN LLC IN SECTION 1985.3

Is there a policy basis for distinguishing between a partnership of five or fewer persons and an LLC of five or fewer persons in Section 1985.3's definition of consumer? Is that an appropriate line to be drawn in balancing privacy interests against burden on litigants and the courts?

The Legislature seems to have enacted Section 1985.3 as a statutory application of the right to privacy provision in the California Constitution. Most cases interpreting this right involve an individual; case law is unclear as to whether the provision applies at all to a business entity. Compare *H & M Associates v. City of El Centro*, 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392 (1980) (historic rationale of provision equally applicable to business entity) with *Roberts v. Gulf Oil Corp.*, 147 Cal. App. 3d 770, 791-794, 195 Cal. Rptr. 393 (1983) (reference to use of term "people" in provision and legislative history indicate provision intended to apply only to individual); see also W. Wegner, R. Fairbank

& N. Epstein, *California Practice Guide: Civil Trials and Evidence, Evidence* §§ 8:2706-8:2708.1 (2005).

If the constitutional right to privacy extends only to an individual, then perhaps there is a logical basis for distinguishing between a partnership and an LLC in Section 1985.3. In most instances partners in a partnership are individuals, and a general partner in a partnership is personally liable for all debts of the partnership. Therefore, disclosing a record that revealed a partnership debt would reveal a potential financial obligation of an individual, and arguably intrude on that individual's constitutional right to privacy. In contrast, because a member of an LLC is not personally liable for the debts of an LLC, disclosing a record revealing an LLC debt would not reveal any individual's financial obligation, and thus may not be an equivalent constitutional violation.

But there are problems with this line of argument. For example, the argument fails to explain why the Legislature included within the definition of "consumer" in Section 1985.3 only a partnership of five or fewer persons, instead of any partnership. Similarly, if Section 1985.3 was intended only to protect the privacy of an individual, it is difficult to understand why the definition includes an "association." The term "association" is not defined in the section, but it is generally afforded an extremely broad meaning, including nearly every type of business entity other than a corporation. See e.g., Corp. Code § 18035(a) ("'Unincorporated association' means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.")

The staff is thus unsure whether there is a legitimate policy basis for distinguishing in Section 1985.3's definition of "consumer" between a partnership of five or fewer persons and an LLC of five or fewer persons. If the Commission decides to further investigate the possibility of adding small LLCs to that statutory definition, we should encourage comment on the relevant policy considerations.

As explained below, however, the staff is wary about wading any deeper into this matter.

ADVISABILITY OF FURTHER STUDYING THE
DEFINITION OF “CONSUMER” IN SECTION 1985.3

Before investing further resources into clarifying the definition of “consumer” in Section 1985.3, the Commission should consider the political landscape.

Since Section 1985.3 was enacted in 1980, many other statutes and rules affecting consumers have been enacted in California. See, e.g., Bus. & Prof. Code § 6451 (service of paralegals); Civ. Code § 1795.90(a) (motor vehicle warranties); Pub. Res. Code § 42493(b) (cell phone recycling); Pub. Util. Code § 848(a) (financing utility recovery). The term “consumer” has been defined differently in different contexts, and has been a topic of debate in drafting the legislation. The proper definition was hotly disputed, for instance, in preparing the Ethics Standards for Neutral Arbitrators (see Standard 2(e)).

There has also been a growing emphasis on protecting financial privacy, culminating in the controversial enactment of the California Financial Information Privacy Act (SB 1 (Speier), 2003 Cal. Stat. ch. 241). Again, the area is much debated and sharply politicized.

The staff therefore fears that attempting to clarify whether an LLC qualifies as a “consumer” for purposes of Section 1985.3 might turn out to be politically difficult, perhaps too divisive for the Commission to successfully pursue. We recommend that **the Commission either (1) drop the issue and devote its resources to other matters, or (2) consult in some manner with the Assembly and Senate Judiciary Committees or their staff before pursuing the issue further.** The Commission needs to be careful to use its resources wisely. As between the two recommended alternatives, however, the staff does not have a strong preference.

OTHER CONCERNS REGARDING THE DEFINITION OF
“CONSUMER” IN SECTION 1985.3

In deciding whether to further pursue this matter, the Commission should take into account that there are additional aspects of the definition of “consumer” in Section 1985.3 that may also warrant study. For example,

- The term “association” in the definition is ambiguous. If read literally, the inclusion of the term makes Section 1985.3 applicable to virtually every subpoenaed record.
- Limiting the protection of Section 1985.3 to a partnership by reference to five or fewer “persons” may be problematic. Although the term “person” is not defined in Section 1985.3, it is defined by

Code of Civil Procedure Section 17 to include corporations as well as natural persons, and is defined across most other codes to include all forms of business entities. Thus, at the present time a partnership of several multi-national corporations is entitled to the privacy protection of Section 1985.3, while a small family partnership consisting of six relatives is not.

- The statute makes no provision for how a litigant seeking to subpoena a record can reliably ascertain (in advance of issuing the subpoena) whether a business entity that is the subject of a record is a partnership, association, or trust, as opposed to some other business entity.
- Even after a litigant ascertains that an entity is a partnership, determining the number of partners in the partnership at the time the record is subpoenaed (particularly without the benefit of the subpoenaed record) may be difficult.
- The statute does not make clear how to treat an excluded business entity (e.g., a large partnership or corporation) whose *members or employees* are “consumers.” Subdivision (a)(1) of the section indicates that the provisions of the section apply to subpoenaed records “*pertaining to*” a consumer. If a subpoena were served on a health insurer, seeking the records of a corporate employer (which would quite likely include health records of the corporation’s *employees*), would the advance notice requirements of Section 1985.3 apply? If so, who should receive service of the notice?
- It may be important to consider how *other* small business entities, such as a close corporation with five or fewer owners, should be treated for purposes of Section 1985.3.

The existence of these issues helps demonstrate a need for studying the definition of “consumer” in Section 1985.3. It might be that at the present time courts are adjudicating subpoena challenges not intended by the Legislature, and litigants and custodians of records are simply making their best guesses as to the applicability of the statute (while at risk for sanction or civil liability). However, we have essentially no information on the extent to which these are significant real problems as opposed to only theoretical concerns.

More importantly, these issues might further complicate what may already be a difficult matter to address. Even if the Commission were to propose legislation solely clarifying the status of an LLC for purposes of Section 1985.3, the Commission could still get caught up in debates over these other issues.

Respectfully submitted,

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Exhibit

Code Civ. Proc. § 1985.3. Subpoena of consumer records

1985.3. (a) For purposes of this section, the following definitions apply:

(1) "Personal records" means the original, any copy of books, documents, other writings, or electronic data pertaining to a consumer and which are maintained by any "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code.

(2) "Consumer" means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.

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

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

(b) Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum, of the affidavit supporting the issuance of the subpoena, if any, and of the notice

described in subdivision (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service shall be made as follows:

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

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

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

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

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

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

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

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

(f) A subpoena duces tecum for personal records maintained by a telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, shall not be valid or effective unless it includes a consent to release,

signed by the consumer whose records are requested, as required by Section 2891 of the Public Utilities Code.

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

Any other consumer or nonparty whose personal records are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party the witness, and the deposition officer, a written objection that cites the specific grounds on which production of the personal records should be prohibited.

No witness or deposition officer shall be required to produce personal records after receipt of notice that the motion has been brought by consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.

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

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

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

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

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