

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 937 (Ochoa Bogh)
Version: February 7, 2022
Hearing Date: March 29, 2022
Fiscal: No
Urgency: No
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SUBJECT

Subpoenas: business records

DIGEST

This bill authorizes service of deposition subpoenas seeking the production of business records to be served by overnight delivery, facsimile transmission, or electronic means. The bill extends the corresponding deadline for compliance, as provided.

EXECUTIVE SUMMARY

The Civil Discovery Act provides various mechanisms to achieve its purposes, including interrogatories, requests for admission, and requests for production of documents. The parties may use these tools to obtain discovery regarding any relevant matter that is either admissible or likely to lead to evidence that is admissible. The goal is to provide the parties simple, practical, and inexpensive access to information to inform its position in any matter.

Currently, parties must personally serve deposition subpoenas seeking the production of business records. In response to concerns that personal delivery can be burdensome for both the party serving the request and the responding business, this bill additionally allows for service by overnight delivery, fax, or other electronic means. However, the business must first expressly consent in writing to receive service by such means. The law also prescribes the timeline for responding to such requests. This bill extends the deadline by two days when the subpoena is served by means other than personal delivery.

This bill is sponsored by the Conference of California Bar Associations. It is supported by the California District Attorneys Association. There is no known opposition.

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.” (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 et seq.)
- 4) Requires the service of a subpoena to be made by delivering a copy, or a ticket containing its substance, to the witness personally. (Code Civ. Proc. § 1987(a).)
- 5) Requires a deposition subpoena that commands only the production of business records for copying to designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item, and to specify the form in which any electronically stored information is to be produced, if a particular form is desired. (Code Civ. Proc. § 2020.410(a).)
- 6) Provides that a deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it. It shall be directed to the custodian of those records or another person qualified to certify the records. It shall command compliance in accordance with Section 2020.430 of the Code of Civil Procedure on a date that is no earlier than 20 days after the issuance, or 15 days after the service, of the deposition subpoena, whichever date is later. (Code Civ. Proc. § 2020.410(c).)
- 7) Provides that when a subpoena *duces tecum* is served upon the custodian of records or other qualified witness of a business in a civil action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or

other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the subpoena within 15 days after the receipt of the subpoena or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness. (Evid. Code § 1560.)

This bill:

- 1) Authorizes a deposition subpoena that commands only the production of business records for copying to be served by overnight delivery, fax, or electronic means if the business expressly consents in writing.
- 2) Extends the time for compliance with a subpoena served by such methods by two days.

COMMENTS

1. The Civil Discovery Act

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.)

2. Easing service requirements

Primary devices to conduct discovery include interrogatories, depositions, requests for admissions, and requests for production. One method involves deposition subpoenas that command the production of business records. Such subpoenas must designate the business records to be produced either by specifically describing each individual item

or by reasonably particularizing each category of item, and shall specify the form in which any electronically stored information is to be produced, if a particular form is desired. (Code Civ. Proc. § 2020.410.) Currently, such subpoenas must be personally served on the business.

The purpose of personal service is to ensure that a party over which the court seeks to exercise jurisdiction has in fact been properly notified. This bill allows service of this specific type of subpoena to be served by overnight delivery, fax, or electronic means. However, to continue to ensure no prejudice comes to the business being subpoenaed, these additional methods of service can only be effectuated after the business provides express written consent to receive service in the relevant manner. The bill also extends the period for complying with the subpoena by two days.

This promotes the goals of the Act to create a simple and convenient process by allowing for more accessible and less burdensome forms of service where agreed to by the relevant parties involved.

3. Stated intent of the bill

According to the author:

In many cases, California laws surrounding the delivery of court documents are outdated. They were written in a time prior to the electronic age we are living in now. As such, in many instances the law requires delivery of court documents to be done in person only. Technological advances over the years have made this unnecessary, more costly for litigants and third parties whose documents are sought, and inefficient. This is the case when it comes to the service of business records subpoenas. In person delivery can be very burdensome for both parties involved in these situations. Businesses are required to have someone available at all times who can accept a subpoena on behalf of the business. The party to the lawsuit issuing the subpoena has to find a time when someone is available at the business to accept the subpoena and then travel to the business to deliver. For a smaller business, in person service may not be practical or feasible. As a result of the COVID-19 pandemic, more and more businesses are moving to remote work models permanently. In fact, many businesses operate completely remotely without any employees on site. This makes in person delivery even more of a challenge. Senate Bill 937 allows for delivery of business records subpoenas by facsimile transmission, overnight delivery, or electronic means if the subpoenaed party consents. If the business accepts service by one of these methods, it has two additional days to produce the requested records. This bill will bring the methods of service into the modern era, improving civil litigation efficiency, saving the parties time and money,

and streamlining service on businesses that do not have a method of accepting personal service.

SUPPORT

California Conference of Bar Associations (sponsor)
California District Attorneys Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 1037 (Umberg, 2022) requires all physically present participants in a deposition to comply with local health and safety ordinances. This bill is currently in the Senate Judiciary Committee.

AB 2961 (Assembly Judiciary Committee, 2022) requires a person represented by counsel, who has appeared in an action or proceeding, to accept electronic service of a notice or document that may be served by mail, express mail, overnight delivery, or fax, as specified. An unrepresented person would need to consent to receive electronic service. The bill additionally requires a court to electronically transmit to a person subject to mandatory electronic service any document issued by the court that the court is required to transmit, deliver, or serve, as specified. This bill is currently in the Assembly Judiciary Committee.

Prior Legislation:

SB 241 (Umberg, Ch. 214, Stats. 2021) enacted the 2021 California Court Efficiency Act, which, among other things, established a statutory framework for conducting court proceedings in civil cases through the use of remote technology and required courts to electronically transmit documents issued by the court, as specified.

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 provides that a party may 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.

SB 1574 (Senate Judiciary Committee, Ch. 72, Stats. 2012) updated the Civil Discovery Act with respect to electronically stored information.
