

RESOLUTION 02-08-2011

DIGEST

Enlarging Time to Compel Further Responses to Document Demand

Amends Code of Civil Procedure section 2031.310 to extend the time to bring a motion to compel further responses to document requests and provide that such time begins after verified responses are received.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 01-06-2003, which was approved in principle.

Reasons:

This resolution amends Code of Civil Procedure section 2031.310 to extend the time to bring a motion to compel further responses to document requests and provide that such time begins after verified responses are received. This resolution should be approved in principle because it clarifies that the time to file a motion to compel further responses does not start until verified responses are received, and because the extension of time to respond is appropriate given the extensive meet and confer requirements.

Presently, Code of Civil Procedure section 2031.310 provides that a party must bring a motion to compel further responses within "45 days of the service of the response." Parties routinely provide discovery responses noting that the verification of the actual responses will follow. This creates ambiguity under the existing statute, as it is unclear whether a motion to compel must be brought within 45 days of receipt of the unverified responses, or if it can be brought later when the verification is received. Although an unverified discovery response is tantamount to no response at all (see *Appelton v. Superior Court* (1988) 206 Cal.App.3d 632, 636), the current statute is ambiguous as to when this time period begins. (*Standon Co., Inc. v. Superior Court* (1990) 225 Cal.App.3d 898, 903.)

It is important that the time period in which to bring a motion to compel be clearly established, because if a party fails to bring this motion within the requisite time, that party waives the right to compel any responses to the demand. (Code Civ. Proc., § 2031.310, subd. (c); *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 741.) Moreover, this time limit is jurisdictional, such that a court has no authority to grant a late motion, regardless of the circumstances. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.)

Furthermore, an increase in the time period in which to bring a motion to compel from 45 to 60 days is appropriate, as counsel are required to complete an extensive meet and confer process prior to bringing a motion to compel. (Code Civ. Proc., § 2016.040). The extension of this time period ensures that an appropriately exhaustive meet and confer process can take place, in a time period identical to compelling other types of discovery.

This Resolution is related to Resolutions 02-06-2011 and 02-09-2011.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Association recommends that legislation be sponsored to amend Code of Civil Procedure section 2031.310 to read as follows:

1 § 2031.310

2 (a) On receipt of a response to a demand for inspection, copying, testing, or sampling, the
3 demanding party may move for an order compelling further response to the demand if the
4 demanding party deems that any of the following apply:

5 (1) A statement of compliance with the demand is incomplete.

6 (2) A representation of inability to comply is inadequate, incomplete, or evasive.

7 (3) An objection in the response is without merit or too general.

8 (b) A motion under subdivision (a) shall comply with both of the following:

9 (1) The motion shall set forth specific facts showing good cause justifying the discovery
10 sought by the demand.

11 (2) The motion shall be accompanied by a meet and confer declaration under Section
12 2016.040.

13 (c) Unless notice of this motion is given within ~~45~~ 60 days of the service of the verified
14 response, or any supplemental verified response, or on or before any specific later date to which
15 the demanding party and the responding party have agreed in writing, the demanding party
16 waives any right to compel a further response to the demand.

17 (d) In a motion under subdivision (a) relating to the production of electronically stored
18 information, the party or affected person objecting to or opposing the production, inspection,
19 copying, testing, or sampling of electronically stored information on the basis that the
20 information is from a source that is not reasonably accessible because of the undue burden or
21 expense shall bear the burden of demonstrating that the information is from a source that is not
22 reasonably accessible because of undue burden or expense.

23 (e) If the party or affected person from whom discovery of electronically stored
24 information is sought establishes that the information is from a source that is not reasonably
25 accessible because of the undue burden or expense, the court may nonetheless order discovery if
26 the demanding party shows good cause, subject to any limitations imposed under subdivision (g).

27 (f) If the court finds good cause for the production of electronically stored information
28 from a source that is not reasonably accessible, the court may set conditions for the discovery of
29 the electronically stored information, including allocation of the expense of discovery.

30 (g) The court shall limit the frequency or extent of discovery of electronically stored
31 information, even from a source that is reasonably accessible, if the court determines that any of
32 the following conditions exists:

33 (1) It is possible to obtain the information from some other source that is more
34 convenient, less burdensome, or less expensive.

35 (2) The discovery sought is unreasonably cumulative or duplicative.

36 (3) The party seeking discovery has had ample opportunity by discovery in the action to
37 obtain the information sought.

38 (4) The likely burden or expense of the proposed discovery outweighs the likely benefit,
39 taking into account the amount in controversy, the resources of the parties, the importance of the
40 issues in the litigation, and the importance of the requested discovery in resolving the issues.

41 (h) Except as provided in subdivision (j), the court shall impose a monetary sanction
42 under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who
43 unsuccessfully makes or opposes a motion to compel further response to a demand, unless it
44 finds that the one subject to the sanction acted with substantial justification or that other
45 circumstances make the imposition of the sanction unjust.

46 (i) Except as provided in subdivision (j), if a party fails to obey an order compelling
47 further response, the court may make those orders that are just, including the imposition of an
48 issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing
49 with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a
50 monetary sanction under Chapter 7 (commencing with Section 2023.010).

51 (j)(1) Notwithstanding subdivisions (h) and (i), absent exceptional circumstances, the
52 court shall not impose sanctions on a party or any attorney of a party for failure to provide
53 electronically stored information that has been lost, damaged, altered, or overwritten as the result
54 of the routine, good faith operation of an electronic information system.

55 (2) This subdivision shall not be construed to alter any obligation to preserve
56 discoverable information.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Under existing law, a party waives the right to compel further responses to requests for production if a motion to compel is not filed within 45 days of the service of responses to requests for production.

This Resolution: This resolution will expand the 45-day period to 60 days and specify that the period will not begin to run until verified responses are served.

The Problem: It is common practice for parties to serve unverified responses to requests for production with a promise to provide verifications “as soon as possible.” Currently, it is not clear whether a propounding party is at risk of losing his right to compel further responses if he chooses to wait for promised verifications. Because an unsworn response is tantamount to no response at all (see *Appelton v. Superior Court* (1988) 206 Cal.App.3d 632, 636), it should be clear that the time for a motion to compel does not begin to run until the requests for production have been verified.

In addition, the 45-day period was established before the current trend of courts requiring extensive meet-and-confer. Because a party can easily create mischief during the meet-and-confer process by engaging in dilatory conduct, the extra time is warranted.

In addition, this resolution will bring the motion-to-compel time frame in line with the time-frame for bringing a motion to compel answers or production of documents post-deposition. (Code Civ. Proc., § 2025.480.) The 60-day time-frame has not proved problematic in the context

of compelling deposition responses and it is thus unlikely to prove problematic if applied to requests for production.

In summary, this resolution will help decrease abuses of the discovery process.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND PERMANENT CONTACT: Lilys D. McCoy, McCoy, Turnage & Robertson, LLP, 5469 Kearny Villa Road, Suite 206, San Diego, California 92123, (858) 300-1900, (858) 300-1910(fax), ldm@mtrlaw.com

RESPONSIBLE FLOOR DELEGATE: Lilys D. McCoy

Resolution 02-08-11 – Enlarging Time to Compel Further Responses to Document Demand

**The State Bar of California’s Committee on Administration of Justice
RECOMMENDATION: DISAPPROVE**

The State Bar’s Committee on Administration of Justice (CAJ) believes the current 45-day period is sufficient, and generally provides enough time to review a response and file a motion to compel, if needed. Moreover, the statute specifically provides that the parties can agree to extend the date, and that is often the result when the parties are engaged in the meet-and-confer process. CAJ does not see a benefit to extending the period from 45 to 60 days.

Disclaimer

This position is only that of the State Bar of California’s Committee on Administration of Justice. This position has not been adopted by the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.