RESOLUTION 04-01-2017

DIGEST
Civil Discovery: Informal Requests or Motions for Additional Discovery
Amends California Rules of Court, rules 3.724, 3.737, and 3.728 and Code of Civil Procedure sections 2030.030, 2030.040, 2030.050, 2030.090, 2033.030, 2033.040, 2033.050 and 2033.080 to allow courts to informally address limits on interrogatories and requests for admission, and to otherwise require motions to increase such limits.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 08-03-2016 and 08-04-2016, which were disapproved, and Resolution 13-05-2009, which was approved in principle.

Reasons:
This resolution amends California Rules of Court, rules 3.724, 3.737, and 3.728 and Code of Civil Procedure sections 2030.030, 2030.040, 2030.050, 2030.090, 2033.030, 2033.040, 2033.050 and 2033.080 to allow courts to informally address limits on interrogatories and requests for admission, and to otherwise require motions to increase such limits. This resolution should be disapproved because although excessive interrogatories are a problem, the resolution provides no criteria for courts to apply in ruling on informal requests for additional discovery, and creates the risk that such informal determinations could preclude later motion practice.

Although informal rulings on limits on written discovery at case management conferences might be helpful in some cases, in other cases, such rulings could impinge on the parties' rights. Because the resolution does not explain who has the burden in a request for additional interrogatories or requests for admission at the case management conference, or what factors the court should consider, it is unclear whether a decision at the case management conference would have a preclusive effect on motions the parties might otherwise bring. For example, if the court grants additional interrogatories to one party at the case management conference, it might refuse to hear a noticed motion for a protective order based on excessive interrogatories. Conversely, if the court informally denies additional interrogatories to a party, it might refuse to hear a noticed motion for additional interrogatories based on good cause. Additional difficulty may be created by language in the proposed new subdivision (13) of rule 3.728, to the effect that the court's case management order may address "[w]hether to … grant the parties leave to bring a full motion" regarding additional discovery. This language suggests that a party may lose the opportunity to bring such a motion merely by failing to raise it during the case management conference. Courts in some counties do not currently hold case management conferences, making it unlikely that any parties in such counties would be able to obtain leave to file such a motion.

Moreover, there does not appear to be a basis to treat requests for admission the same as interrogatories. Excessive interrogatories have led to presumptive limits in most other states and in federal court, and thus there may be good reason to shift the burden to the proponent to justify additional interrogatories. However, there has not been similar widespread abuse from excessive

requests for admission, and thus the proposal to similarly shift the burden to proponents for request for admission does not appear to be justified.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rules 3.724, 3.727, and 3.728, and that legislation be sponsored to amend Code of Civil Procedure sections 2030.030, 2030.040, 2030.050, 2030.090, 2033.030, 2033.040, 2033.050, and 2033.080 to read as follows:

Rule 3.724

Unless the court orders another time period, no later than 30 calendar days before the date set for the initial case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:

(1) Resolving any discovery disputes~~, and~~ setting a discovery schedule, and, if necessary, stipulating to the number of special interrogatories and/or requests for admission each party may be allowed in excess of the 35 permitted under statute;

(2) Identifying and, if possible, informally resolving any anticipated motions;

(3) Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;

(4) Identifying the facts and issues in the case that are in dispute;

(5) Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;

(6) Determining whether settlement is possible;

(7) Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability;

(8) Any issues relating to the discovery of electronically stored information, including:

(A) Issues relating to the preservation of discoverable electronically stored information;

(B) The form or forms in which information will be produced;

(C) The time within which the information will be produced;

(D) The scope of discovery of the information;

(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;

(G) How the cost of production of electronically stored information is to be allocated among the parties;

(H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and

(9) Other relevant matters.

Rule 3.727

In any case management conference or review conducted under this chapter, the parties must address, if applicable, and the court may take appropriate action with respect to, the following:

(1) Whether there are any related cases;

(2) Whether all parties named in the complaint or cross-complaint have been served, have appeared, or have been dismissed;

(3) Whether any additional parties may be added or the pleadings may be amended;

(4) Whether, if the case is a limited civil case, the economic litigation procedures under Code of Civil Procedure section 90 et seq. will apply to it or the party intends to bring a motion to exempt the case from these procedures;

(5) Whether any other matters (e.g., the bankruptcy of a party) may affect the court's jurisdiction or processing of the case;

(6) Whether the parties have stipulated to, or the case should be referred to, judicial arbitration in courts having a judicial arbitration program or to any other form of alternative dispute resolution (ADR) process and, if so, the date by which the judicial arbitration or other ADR process must be completed;

(7) Whether an early settlement conference should be scheduled and, if so, on what date;

(8) Whether discovery has been completed and, if not, the date by which it will be completed;

(9) What discovery issues are anticipated, and whether it would be appropriate to permit the parties to propound special interrogatories and/or requests for admission in excess of the 35 allowed under statute;

(10) Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate under Code of Civil Procedure section 598;

(11) Whether there are any cross-complaints that are not ready to be set for trial and, if so, whether they should be severed;

(12) Whether the case is entitled to any statutory preference and, if so, the statute granting the preference;

(13) Whether a jury trial is demanded, and, if so, the identity of each party requesting a jury trial;

(14) If the trial date has not been previously set, the date by which the case will be ready for trial and the available trial dates;

(15) The estimated length of trial;

(16) The nature of the injuries;

(17) The amount of damages, including any special or punitive damages;

(18) Any additional relief sought;

(19) Whether there are any insurance coverage issues that may affect the resolution of the case; and

(20) Any other matters that should be considered by the court or addressed in its case management order.

Rule 3.728

The case management conference must be conducted in the manner provided by local rule. The court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. The order may include appropriate provisions, such as:

(1) Referral of the case to judicial arbitration or other alternative dispute resolution process;

(2) A date for completion of the judicial arbitration process or other alternative dispute resolution process if the case has been referred to such a process;

(3) In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;

(4) Whether the trial will be a jury trial or a nonjury trial;

(5) The identity of each party demanding a jury trial;

(6) The estimated length of trial;

(7) Whether all parties necessary to the disposition of the case have been served or have appeared;

(8) The dismissal or severance of unserved or not-appearing defendants from the action;

(9) The names and addresses of the attorneys who will try the case;

(10) The date, time, and place for a mandatory settlement conference as provided in rule Rule 3.1380;

(11) The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case;

(12) The date, time, and place of any further case management conferences or review;

(13) Whether to permit the parties to propound special interrogatories and/or requests for admission in excess of the 35 allowed under statute, or grant the parties leave to bring a full motion on this issue; and

~~(13)~~ (14) Any additional orders that may be appropriate, including orders on matters listed in rules 3.724 and 3.727.

§ 2030.030

(a) A party may propound to another party either or both of the following:

(1) Thirty-five specially prepared interrogatories that are relevant to the subject matter of the pending action.

(2) Any additional number of official form interrogatories, as described in Chapter 17 (commencing with Section 2033.710), that are relevant to the subject matter of the pending action.

(b) Unless otherwise stipulated in writing, ordered by the court, or unless ~~Except as~~ provided ~~in~~ by Section 2030.070, no party shall, as a matter of right, propound to any other party more than 35 specially prepared interrogatories. If the initial set of interrogatories does not exhaust this limit, the balance may be propounded in subsequent sets.

(c) ~~Unless a declaration as described in Section 2030.050 has been made~~, Unless otherwise stipulated in writing, ordered by the court, or provided by Section 2030.070, a party need only respond to the first 35 specially prepared interrogatories served, if that party states an objection to the balance, under Section 2030.240, on the ground that the limit has been exceeded.

§ 2030.040

(a) In considering, whether it would be appropriate to permit a party to ~~Subject to the right of the responding party to seek a protective order under Section 2030.090, any party who attaches a supporting declaration as described in Section 2030.050 may~~ propound a greater number of specially prepared interrogatories to another party, the court may consider ~~if this greater number is warranted because of any of~~ the following factors:

(1) The complexity or the quantity of the existing and potential issues in the particular case.

(2) The financial burden on a party entailed in conducting the discovery by oral deposition.

(3) The expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.

~~(b) If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party shall have the burden of justifying the number of these interrogatories.~~

§ 2030.050

Any party moving the court for leave to propound ~~who is propounding or has propounded~~ more than 35 specially prepared interrogatories to any other party shall ~~attach to each set of those interrogatories~~ submit a declaration containing substantially the following:

DECLARATION FOR ADDITIONAL DISCOVERY

I, _____, declare:

1. I am (a party to this action or proceeding appearing in propria persona) (presently the attorney for _____, a party to this action or proceeding).
2. I am propounding to _____ the attached set of interrogatories.
3. This set of interrogatories will cause the total number of specially prepared interrogatories propounded to the party to whom they are directed to exceed the number of specially prepared interrogatories permitted by Section 2030.030 of the Code of Civil Procedure.
4. I have previously propounded a total of _____ interrogatories to this party, of which _____ interrogatories were not official form interrogatories.
5. This set of interrogatories contains a total of _____ specially prepared interrogatories.
6. I am familiar with the issues and the previous discovery conducted by all of the parties in the case.
7. I have personally examined each of the questions in this set of interrogatories.
8. This number of questions is warranted under Section 2030.040 of the Code of Civil Procedure because _____. (Here state each factor described in Section 2030.040 that is relied on, as well as the reasons why any factor relied on is applicable to the instant lawsuit.)
9. None of the questions in this set of interrogatories is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on _____.

_____

(Signature)

_____

Attorney for

§ 2030.090

(a) When interrogatories have been propounded, the responding party, and any other party or affected natural person or organization may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment,

or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That the set of interrogatories, or particular interrogatories in the set, need not be answered.

~~(2) That, contrary to the representations made in a declaration submitted under Section 2030.050, the number of specially prepared interrogatories is unwarranted~~.

~~(3)~~ (2) That the time specified in Section 2030.260 to respond to the set of interrogatories, or to particular interrogatories in the set, be extended.

~~(4)~~ (3) That the response be made only on specified terms and conditions.

~~(5)~~ (4) That the method of discovery be an oral deposition instead of interrogatories to a party.

~~(6)~~ (5) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a certain way.

~~(7)~~ (6) (That some or all of the answers to interrogatories be sealed and thereafter opened only on order of the court.

(c) If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on terms and conditions that are just.

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, 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.

§ 2033.030

(a) No party shall request, as a matter of right, that any other party admit more than 35 matters that do not relate to the genuineness of documents. If the initial set of admission requests does not exhaust this limit, the balance may be requested in subsequent sets.

(b) ~~Unless a declaration as described in Section 2033.050 has been made~~, Unless otherwise stipulated in writing, or ordered by the court, a party need only respond to the first 35 admission requests served that do not relate to the genuineness of documents, if that party states an objection to the balance under Section 2033.230 on the ground that the limit has been exceeded.

(c) The number of requests for admission of the genuineness of documents is not limited except as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense.

§ 2033.040

~~(a)~~ In considering, whether it would be appropriate to permit a party to ~~Subject to the right of the responding party to seek a protective order under Section 2033.080, any party who attaches a supporting declaration as described in Section 2033.050 may~~ request a greater number of admissions ~~by~~ from another party, the court may consider if the greater number is warranted by the complexity or the quantity of the existing and potential issues in the particular case.

~~(b) If the responding party seeks a protective order on the ground that the number of requests for admission is unwarranted, the propounding party shall have the burden of justifying the number of requests for admission.~~

§ 2033.050

Any party moving the court for leave to request ~~who is requesting or who has already requested~~ more than 35 admissions not relating to the genuineness of documents by any other party shall ~~attach to each set of requests for admissions~~ submit a declaration containing substantially the following words:

DECLARATION FOR ADDITIONAL DISCOVERY

I, _____, declare:

1. I am (a party to this action or proceeding appearing in propria persona) (presently the attorney for _____, a party to this action or proceeding).
2. I am propounding to _____ the attached set of requests for admission.
3. This set of requests for admission will cause the total number of requests propounded to the party to whom they are directed to exceed the number of requests permitted by Section 2033.030 of the Code of Civil Procedure.
4. I have previously propounded a total of _____ requests for admission to this party.
5. This set of requests for admission contains a total of _____ requests.
6. I am familiar with the issues and the previous discovery conducted by all of the parties in this case.
7. I have personally examined each of the requests in this set of requests for admission.
8. This number of requests for admission is warranted under Section 2033.040 of the Code of Civil Procedure because _____. (Here state the reasons why the complexity or the quantity of issues in the instant lawsuit warrant this number of requests for admission.)
9. None of the requests in this set of requests is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on _____.

_____

(Signature)

_____

Attorney for

§ 2033.080

(a) When requests for admission have been made, the responding party may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That the set of admission requests, or particular requests in the set, need not be answered at all.

~~(2) That, contrary to the representations made in a declaration submitted under Section 2033.050, the number of admission requests is unwarranted.~~

~~(3)~~ (2) That the time specified in Section 2033.250 to respond to the set of admission requests, or to particular requests in the set, be extended.

~~(4)~~ (3) That a trade secret or other confidential research, development, or commercial information not be admitted or be admitted only in a certain way.

~~(5)~~ (4) That some or all of the answers to requests for admission be sealed and thereafter opened only on order of the court.

(c) If the motion for a protective order is denied in whole or in part, the court may order that the responding party provide or permit the discovery against which protection was sought on terms and conditions that are just.

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, 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.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Currently written discovery suffers from a number of egregious inefficiencies. First, because the Rule of 35 (limiting special interrogatories and requests for admission to no more than 35 per party), can be defeated by an attorney signing a simple "Declaration of Necessity," the Rule of 35 has become virtually meaningless. In the language of our time: it's a fake rule. That means, as a practical matter attorneys can, and often do, propound as much written discovery as they want creating huge burdens on the opposition—some of them purposeful and strategic, some of them accidental and careless.

Second, because there is more written discovery, there is more written discovery to fight about. In litigation we increasingly see tomb-like meet and confer letters, e-mail threads that go on for dozens of pages, and massive motions attaching two-inch-thick separate statements. Instead of fighting about a dozen special interrogatories, for example, we are fighting about hundreds of them.

The third inefficiency occurs because in the status quo the only way to minimize the numerosity of written discovery is for the responding party (i.e. the victim party, not the propounding party) to move for a protective order. The protective order itself creates even more motion practice, burdening the underfunded California courts, and driving up costs even further.

The original flaw may be slight—a crack in the Rule of 35—but it has huge downstream consequences.

The Solution: The multi-pronged solution offered here simultaneously strengthens the Rule of 35 while providing the parties a streamlined way to seek additional discovery when they really need it. First, the proposed resolution mandates the parties will meet and confer at the beginning

of the case as part of their Case Management Statement obligations to discuss discovery numerosity. The parties meet and confer prior to the CMC anyway. At this point the parties can stipulate to allowing each other additional written discovery.

Next, even if the parties fail to stipulate, they are given a second opportunity at the Case Management Conference to convince the Court that they need additional written discovery beyond 35. Again the CMC will occur anyway. Discussing this issue now creates virtually no additional burden. If the federal system is any guide, the court will resolve the issue then and there. The goal is to make motions for protective orders on this question effectively obsolete.

Finally, for those rare cases in which the issue cannot be easily resolved and additional briefing would be useful, the parties may request, and the court may grant leave for a full motion. In that case, the resolution language preserves the same standard as has been in effect for decades, but with one change. The resolution language places the burden of proof, not on the recipient of the discovery, but rather on the propounding party to show that additional discovery beyond 35 is appropriate. The rule of equity is simple: if you want more discovery your burden is to explain why.

Similar to Resolutions 10-11-2000, 10-12-2000, 11-03-2005, and 13-05-2009, which were approved in principle.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: B. Douglas Robbins

RESOLUTION 04-02-2017

DIGEST
Civil Procedure: Elimination of Separate Statement Requirement for Discovery Motions
Amends California Rules of Court, rule 3.1345 to eliminate the requirement for separate statements in discovery motions unless ordered by the court or instructed by local rule.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 09-07-2011 and 08-05-2016, which were disapproved.

Reasons:
This resolution amends California Rules of Court, rule 3.1345 to eliminate the requirement for separate statements in discovery motions unless ordered by the court or instructed by local rule. This resolution should be disapproved because separate statements are useful to at least some judges, and the process of creating them clarifies and narrows the issues ultimately to be decided in such motions.

The ultimate point of separate statements is to put the question/request, response, and analysis all in a concise compendium that enables quick analysis of each issue, allowing for a thoughtful and comprehensive ruling.

The resolution appears to assert that separate statements provide no value, that judges and court personnel do not have time to make use of the statement. The resolution further suggests that the court does not look at them individually, but rather in groups, and that the actual responses are in the movant's declaration, suggesting that the solution might be to amend the discovery law to list the question with the response in the first instance.

Rule 3.1345 has been in place since 1984. If its utility were in question, it would have been repealed or amended, or there would be a body of evidence of concerns about it, neither of which is the case. If a trial court feels that the requirements of the rule are unnecessary, pursuant to rule 3.20, perhaps an appropriate solution would be to amend rule 3.1345 to allow trial courts to opt out of separate statements through a local rule promulgated pursuant to rule 10.613, rather than forcing the change on courts that do not desire it.

As a note, Resolution 09-07-2011 sought to eliminate the necessity of separate memoranda of points and authorities when a separate statement is filed in support of a discovery motion, and 08-05-2016 sought to add a requirement for an opposition separate statement. Both of these resolutions were disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 3.1345 to read as follows:

Rule 3.1345

~~(a) Separate statement required~~

Unless ordered by the court or instructed by local rule, no ~~Any~~ motion involving the content of a discovery request or the responses to such a request need ~~must~~ be accompanied by a separate statement. ~~The motions that require a separate statement include a motion:~~

~~(1) To compel further responses to requests for admission;~~

~~(2) To compel further responses to interrogatories;~~

~~(3) To compel further responses to a demand for inspection of documents or tangible things;~~

~~(4) To compel answers at a deposition;~~

~~(5) To compel or to quash the production of documents or tangible things at a deposition;~~

~~(6) For medical examination over objection; and~~

~~(7) For issue or evidentiary sanctions.~~

~~(b) Separate statement not required~~

~~A separate statement is not required when no response has been provided to the request for discovery.~~

~~(c) Contents of separate statement~~

~~A separate statement is a separate document filed and served with the discovery motion or opposition that provides all the information necessary to understand each discovery request and all the responses to it that are at issue. The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Material must not be incorporated into the separate statement by reference. The separate statement must include--for each discovery request (e.g., each interrogatory, request for admission, deposition question, or inspection demand) to which a further response, answer, or production is requested--the following:~~

~~(1) The text of the request, interrogatory, question, or inspection demand;~~

~~(2) The text of each response, answer, or objection, and any further responses or answers;~~

~~(3) A short and concise statement, by movant, of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute;~~

~~(4) A short and concise statement by the opponent to the motion, of the factual and legal reasons for not compelling further responses, answers, or production as to each matter in dispute;~~

~~(4)~~ ~~(5)~~ ~~If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it;~~

~~(5)~~ ~~(6)~~ ~~If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth; and~~

~~(6)~~ ~~(7)~~ ~~If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.~~

~~(d) Identification of interrogatories, demands, or requests~~

~~A motion concerning interrogatories, inspection demands, or admission requests must identify the interrogatories, demands, or requests by set and number.~~

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Separate statements as currently mandated by the Rules of Court for discovery motions are virtually useless.

The Solution: As a general rule, separate statements should be eliminated in discovery motions. For those rare exceptions when the court feels it wants to comb through a four-inch thick separate statement it can just as easily order the parties to produce one (likely a more useful *joint* separate statement) prior to hearing.

Responding to Counterarguments:
Some argue that the court likes separate statements. But this is more folklore than reality. The dirty little secret about separate statements is that when a research attorney or judge has to wade through six to nine discovery motions in any given day, they just do not have time to read a 200 page separate statement for each motion. Talk to your own contacts at the court to confirm. Perhaps this is why some federal courts in California do not allow the parties to file separate statements without leave of court. *See* N.D. Cal. L.R. 56-2.

Some argue the only way to understand discovery arguments is one at a time as listed in a separate statement. But this is almost never how discovery arguments are laid out. Virtually all argumentation regarding discovery responses occurs in groups. For example, responses 2-20 might involve a privilege issue. Responses 22-35 might implicate the right of privacy. And responses 60-75 might raise a question of who bears the cost of retrieving data from a server. These arguments are more cogently made as groups in a memorandum of points and authorities rather than broken out one-by-one. Consider the privilege argument (responses 2-20 in this hypothetical). It would be repeated eighteen-times in the separate statement. Do we imagine the court is really reading this argument eighteen times looking for the one or two iterations that add or subtract a sub-argument? No, this is not happening. Nor should it.

Some argue the separate statement is the only location for a clear list of the requests and responses. But, again, this presumes the court is reading through hundreds of these requests and responses analyzing them one by one. This is not how the court looks at these motions. Rather it groups the responses and examines them at an issue level. The actual discovery responses are attached to the movant's declaration, in any event, providing the court a reference point. Moreover, if the problem is that responses to discovery are difficult to understand unless the respondent recapitulates the original request or question, then the correct answer seems to be to amend the discovery act to require respondents to list out the request or question right in the text of their responses in the first place. Trying to fix this problem, after the fact, in a massive separate statement does not really fix the original problem.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

Proponent is correct – the solution to the problems caused by Separate Statements is not to eliminate them entirely but rather to simply make it mandatory that the responding party restate the question and then provide a response, and also require that the propounding parties and responding parties provide the questions and answers document in electronic form as is required in a Motion for Summary Judgment to make preparation of the responses and the Separate Statement easier. The purpose of the Separate Statement is not to argue why the Motion should be granted—that is for the Points and Authorities—but rather it is for the convenience of the Court. If there is no Separate Statement, the Court must find the question, or worse yet questions, in wherever the questions are lodged, then find the answers, and then go back and find the argument. The Separate Statement puts this together in one single location. Nor can the Points and Authorities replace the Separate Statement. Quite often the questions and answers have slight differences and there is simply not enough room in a Points and Authorities to deal with that detail. To rule, the Court must look at every question and response, even if they are in a single group, to understand the argument. The Separate Statement makes this more convenient.

RESOLUTION 04-03-2017

DIGEST
Evidence Code: Inadmissibility of Hearing Officer's Testimony
Amends Evidence Code section 703.5 to clarify the types of proceedings in which a person who previously presided over a quasi-judicial proceeding is prohibited from testifying.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Evidence Code section 703.5 to clarify the types of proceedings in which a person who previously presided over a quasi-judicial proceeding is prohibited from testifying. This resolution should be disapproved because it presumes, contrary to principles of statutory construction, that the Legislature intended section 703.5 to sweep as broadly as the privileges governed by the definitions it seeks to incorporate.

Section 703.5 prohibits the presiding officer in any judicial or quasi-judicial proceeding, arbitration or mediation, from testifying at a subsequent civil proceeding about any statement, conduct or decision occurring in connection with the prior proceeding except under certain enumerated circumstances. It does not define "civil proceeding." This resolution seeks to incorporate the broad definition that applies to the privileges found in Division 8. But those definitions expressly "do not govern the construction of any other division." (Evid. Code §900.) This includes Division 6, where section 703.5 is found. The policy underlying privileges was deemed to require recognition in all proceedings of any nature in which testimony can be compelled. (Cal. Law Rev. Com. com., Evid. Code §910 (1965), p. 1152.) This resolution, by embracing a definition of "proceeding" that expressly applies only to Division 8, confuses rather than clarifies what is intended.

Because section 703.5 is found in Division 6, which addresses witnesses, it is governed by the more general definitions found in Division 2, which define "civil action" as including "civil proceedings" (Evid. Code §120), but does not provide a definition for the latter term. Under principles of statutory construction, it must be presumed the Legislature did not intend the definitions in Division 8 to apply to section 703.5. Had the Legislature intended to treat section 703.5 as a privilege, governed by the definitions in sections 901 and 902, it would have placed it in Division 8. If a definition of "civil proceeding" is needed in section 703.5, it should be placed within Division 6.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 703.5 to read as follows:

§ 703.5

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding <u>as defined in Sections 901 and 902</u> as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of 2 of Division 8 of the Family Code.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

<u>The Problem</u>: Evidence Code section 703.5 prevents a judge, a person presiding over a judicial or quasi-judicial proceeding, an arbitrator or a mediator from testifying in a subsequent civil proceeding as to anything that occurred or was said in the proceeding over which he or she presided. The term "civil proceeding" is not defined, however. It is, therefore, unclear whether section 703.5 bars testimony of a judge or quasi-judicial officer as to the matters listed in the section in a quasi-judicial proceeding, such as an administrative hearing, hospital professional peer review, or arbitration.

Evidence Code section 901 defines "proceeding" as "any action, hearing, investigation, inquest or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." Section 902 defines a "civil proceeding" as "any proceeding except a criminal proceeding." But under section 900, these definitions apply only to the privileges in Division 8 of the Evidence Code and "do not govern the construction of any other division." Section 703.5 is in a different division, Division 6.

<u>The Solution</u>: Amend section 703.5 to incorporate the definition of "civil proceeding" in sections 901 and 902. That definition is clear and comprehensive. By incorporating it, section 703.5 will assures that, except as the section provides, a judge or other person it describes cannot be compelled to testify in a non-criminal proceeding of any kind about a statement, conduct, decision, or ruling in a prior proceeding.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Jay-Allen Eisen

RESOLUTION 04-04-2017

DIGEST
Costs: Entry of Costs Following Motion to Strike or Tax Costs
Amends rule 3.1700 of the California Rules of Court to provide for entry of costs upon determination of a motion to strike or tax costs.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends rule 3.1700 of the California Rules of Court to provide for entry of costs upon determination of a motion to strike or tax costs. This resolution should be disapproved because the issue it seeks to address is not significant in actual practice.

The costs are entered when the time for filing a motion has past. Plainly, in those cases when a motion has been filed, costs are held in abeyance pending a ruling on the motion by the court. When the court rules, as in the case of any motion, then those are the costs the clerk enters. As a result, this change in the law is unnecessary.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 3.1700 to read as follows:

Rule 3.1700

(a) Claiming costs

(1) Trial costs

A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case.

(2) Costs on default

A party seeking a default judgment who claims costs must request costs on the Request for Entry of Default (Application to Enter Default) (form CIV-100) at the time of applying for the judgment.

(b) Contesting costs

(1) Striking and taxing costs

Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as

provided in Code of Civil Procedure section 1013. If the cost memorandum was served electronically, the period is extended as provided in Code of Civil Procedure section 1010.6(a)(4).

(2) Form of motion

Unless objection is made to the entire cost memorandum, the motion to strike or tax costs must refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs and must state why the item is objectionable.

(3) Extensions of time

The party claiming costs and the party contesting costs may agree to extend the time for serving and filing the cost memorandum and a motion to strike or tax costs. This agreement must be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the times for serving and filing the cost memorandum or the notice of motion to strike or tax costs for a period not to exceed 30 days.

(4) Entry of costs

After the time has passed for a motion to strike or tax costs or ~~for~~ upon filing an order determining that motion, the clerk must immediately enter the costs on the judgment.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Rule of Court 3.1700(b)(4) is currently so unclear as to be indecipherable. It requires the clerk to enter the pre-judgment costs claimed in a memorandum of costs "[a]fter the time has passed for a motion to strike or tax costs or for determination of that motion." But there is no time "for determination" of a motion to strike or tax costs. Code of Civil Procedure section 689.050 provides that costs are added to the judgment either upon the filing of an order allowing costs or, if no motion to tax is filed, upon expiration of time for making the motion. But no statute or rule of court provides a deadline for making a determination on a motion to strike or tax. The existing rule, therefore, requires the clerk to enter costs after passage of a non-existent time.

Even if there were a time limit for determining such a motion, the rule does not provide what happens if the motion isn't decided by the deadline. Is the motion deemed denied (as with a new trial motion) and the full amount of costs claimed awarded? Or is the motion deemed granted and the cost memorandum stricken, or disputed items deleted or reduced?

The Solution: In subsection (b)(4) of rule 3.1700, delete "for" and insert the proposed new language. The rule will then provide that the clerk shall enter the costs on the judgment either after the time for a motion to strike or tax has passed, or, consistent with section 689.050, "upon filing an order determining that motion." This comports with the judicial rule, "Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the court clerk enters the costs on the judgment *after the amount is determined*." *Chodos v. Borman* (2015) 239 Cal.App.4th 707, 715 (italics added).

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Jay-Allen Eisen

RESOLUTION 04-05-2017

DIGEST
Enforcement of Judgments: Collecting Judgments from all California Jurisdictions
Amends Code of Civil Procedure section 699.520 to clarify a discrepancy between Judicial Council Form EJ130 and the authorizing statute.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 699.520 to clarify a discrepancy between Judicial Council Form EJ130 and the authorizing statute. This resolution should be approved in principle because the discrepancy presents collections problems for creditors with small claims judgments or administrative agency judgments.

A judgment creditor can collect on a judgment by using Judicial Council Form EJ130 to issue a Writ of Execution which the county sheriff or marshal enforces. This Judicial Council form allows enforcement of judgments issued by trial courts with jurisdiction over unlimited, limited, small claims actions, and by other California tribunals such as the California Department of Labor Standards Enforcement ("DLSE"). The authorizing statutes for Judicial Council Form EJ130 are Code of Civil Procedure sections 699.520, 712.010, 715.010 and Government Code section 6103.5 ("authorizing statutes").

The problem is that Code of Civil Procedure section 699.520, the only authorizing statute which lists the types of judgments available for enforcement through the use of Judicial Council Form EJ130, only mentions judgments in unlimited and limited civil cases. But the Judicial Council Form EJ130, if filled out correctly, issues a Writ of Execution for judgments issued by all tribunals including the small claims courts and administrative agencies such as the DLSE. This is a discrepancy that should be corrected so that collections efforts are not hampered.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 699.520 to read as follows:

§ 699.520

The writ of execution shall require the levying officer to whom it is directed to enforce the money judgment and shall include the following information:

(a) The date of issuance of the writ.

(b) The title of the court where the judgment is entered and the cause and number of the action.

(c) The name and address of the judgment creditor and the name and last known address of the judgment debtor. If the judgment debtor is other than a natural person, the type of legal

entity shall be stated.

(d) The date of the entry of the judgment and of any subsequent renewals and where entered in the records of the court.

(e) The total amount of the money judgment as entered or renewed, together with costs thereafter added to the judgment pursuant to Section 685.090 and the accrued interest on the judgment from the date of entry or renewal of the judgment to the date of issuance of the writ, reduced by any partial satisfactions and by any amounts no longer enforceable.

(f) The amount required to satisfy the money judgment on the date the writ is issued.

(g) The amount of interest accruing daily on the principal amount of the judgment from the date the writ is issued.

(h) Whether any person has requested notice of sale under the judgment and, if so, the name and mailing address of that person.

(i) The sum of the fees and costs added to the judgment pursuant to Section 6103.5 or 68511.3 of the Government Code, and which is in addition to the amount owing to the judgment creditor on the judgment.

(j) Whether the writ of execution includes any additional names of the judgment debtor pursuant to an affidavit of identity, as defined in Section 680.135.

(k) A statement indicating whether the case is limited, ~~or~~ unlimited, small claims, or other originating jurisdiction.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: This corrects an inconsistency between an authorizing code section and a judicial counsel form. The inconsistency creates an inability to enforce a judgment for back wages in the administrative arena. About 15% of judgments issued by the Department of Labor Standards Enforcement (DLSE) are actually collected. Of the estimated $30 million in wages, less than $5 million are collected. (http://www.labor.ucla.edu/publication/hollow-victories-the-crisis-in-collecting-unpaid-wages-for-californias-workers/). Once DLSE issues a judgment, it is filed with the Superior Court. A Form EJ-130 or Writ of Execution is used for collection by the party seeking to enforce the judgment. The box which indicates the origin of the judgment is located to the right-hand side just below the caption and offers these options for origin: “limited, unlimited, small claims, or other___”. In the “other” blank you insert the originating jurisdiction, for example “Other DLSE”. CCP § 699.520 authorizes the judicial council form; the Writ of Execution. There is a conflict in the language of the form and the CCP. The code does not provide for small claims and other judgments, which impacts employees seeking to collect on wage judgments against employers, but it also impacts those seeking to enforce small claims judgments and other administrative agencies judgments.

The Solution: This resolution seeks to clarify the authorizing statue with the intent of the judicial council that the form EJ-130, may be used to enforce judgments from limited, unlimited, small claims or other originating jurisdictions. This resolution seeks to correct the discrepancy by adding language from the judicial council form to the authorizing statute, allowing all judgments to be collected by the sheriff after being issued by the superior court through the writ as intended by the judicial counsel.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Erin Stratte

RESOLUTION 04-06-2017

DIGEST
Legal Malpractice: Tolling Statute of Limitations Pending Mandatory Fee Arbitration
Amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration. This resolution should be approved in principle because it encourages settlement and protects clients from unknowingly waiving their rights.

Under existing law, the statute of limitations for a client's claim against her/his attorney is one year for any cause of action except actual fraud, which has a four-year statute of limitations. Tolling under section 340.6 is strictly limited, and therefore, since the attorney's injury-causing error happens by definition during the representation, the one-year statute of limitations most commonly begins as soon as the attorney-client relationship ends. This leaves clients with little time to evaluate and pursue a malpractice claim.

Since clients who are injured by their attorney are also often unhappy with their bill, there is often a fee dispute between the parties. Because the statute of limitations for fee disputes is governed by contract, not section 340.6, attorneys, who are savvy to their clients' short statute of limitations, wait one year before making their demand for Mandatory Fee Arbitration. This bars the client from seeking any affirmative relief against the attorney. This resolution does not change that scenario; it does not resurrect a dead claim.

This resolution changes the scenario where an attorney institutes Mandatory Fee Arbitration before the client's statute of limitations expires. In that situation, the client (who is often unrepresented) can mistakenly believe that either their malpractice claim will be adjudicated as part of the arbitration, or that the statute of limitations will be tolled while they work to resolve their disputes with their former counsel. Some attorneys will even discuss global settlement, knowing that the statute is running. Consequently, clients can unknowingly lose their right to affirmative relief against an attorney who injured them.

Alternatively, clients who are aware of their short statute of limitations must file a lawsuit against their attorney before the Fee Arbitration is over to preserve their rights. This means that the parties must simultaneously litigate in two different forums, which is inefficient, discourages settlement, and can result in inconsistent rulings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 340.6 to read as follows:

§ 340.6

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury.

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(5) A dispute between the lawyer and client concerning fees, costs, or both is pending resolution under Business & Professions Code Sections 6200-6206. As used in this subsection, "pending" means from the date a request for arbitration is filed until 30 days after receipt of notice of the award of the arbitrators, or receipt of notice that the arbitration is otherwise terminated, whichever comes first.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Mandatory Fee Arbitration ("MFA")provides an alternative to court involvement in the resolution of fee disputes between clients and attorneys. While Business & Professions Code §6206 tolls the time for filing a civil action regarding a dispute subject to MFA until 30 days after an award is served or the is otherwise terminated, it does not toll the statute of limitations regarding a client's action against an attorney for legal malpractice. Moreover, section 6201(d)(2) provides that a client waives their right to MFA if the client files an action

against the attorney for alleged malpractice.

The problem is that while MFA is designed to be a speedy process, depending on when MFA is first requested, the complexity of the fee dispute, and the caseload of the program where the fee dispute is being handled, the MFA proceeding may not be resolved by the time the one-year malpractice statute of limitations expires. This situation forces clients to make a difficult choice of whether to (a) file a complaint against the attorney to preserve a malpractice claim, which will in turn waive the pending MFA proceeding, or (b) risk having their malpractice claim barred by the one-year malpractice statute of limitations.

The Solution: Amend Code of Civil Procedure section 340.6(a) to add a new subsection (5) which expressly provides that statute of limitations regarding a client's malpractice claim is tolled during the pendency of a fee dispute between the attorney and client under the MFAA.

IMPACT STATEMENT
This resolution would impact/expand tolling pursuant to Business & Professions Code section 6206.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Kenneth E. Bacon.

RESOLUTION 04-07-2017

DIGEST
Civil Rights: Recording Police Action
Adds Civil Code section 52.8 to provide a specific statutory right of action against any person who interferes with the audio or visual recording of police action or a crime scene.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 12-01-2012, which was approved in principle, and Resolution 01-10-2016, which was disapproved.

Reasons:
This resolution adds Civil Code section 52.8 to provide a specific statutory right of action against any person who interferes with the audio or visual recording of police action or a crime scene. This resolution should be disapproved because it is unnecessary, vague and overly broad.

Citizen recordings of police conduct have increased public scrutiny and law enforcement's use of both dashboard and body cameras. In response, California (acting on Resolution 12-01-2012) amended Penal Code sections 69 and 148 in 2015 to expressly exclude photographing or recording an officer from the definitions of criminal interference. This resolution goes further, providing a civil right of action for denial or interference with visual or sound recording of a "Police Action" or "Crime Scene." The recorder would be entitled to actual damages of no less than $1,000 and reasonable attorney fees as determined by the court.

State and federal courts have found First Amendment protection for recording officers in the course of their duties. (*Fordyce v. City of Seattle* (9th Cir. 1995) 55 F.3d 46, 439; *Glik v. Cunniffe* (1st Cir. 2001) 655 F.3d 78, 82; see also *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1074-1081.) This provides a right to seek damages under 42 U.S.C., section 1983 for any violation. Under this resolution, there would be no liability only if it can be shown by a preponderance of the evidence that the denial or interference with the right to record "actually interfere[d]" with the "Police Action." This creates a conflict with the standards for section 1983 liability. For example, if the recorder repeatedly refuses to move away from a crime scene, an officer may constitutionally arrest him or her based on a reasonable belief he or she is interfering. (See, e.g., *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1330.) Yet under the resolution, the officer would have to affirmatively defend a lawsuit by showing the recording actually posed a material impediment to the police action.

Additionally, the definition of "Police Action" is vague. It references "similar law enforcement activities," which under principles of statutory construction, would imply something other than "questioning, citing, detaining or arresting another person." "Crime Scene" is overly broad. It lacks an exception for private property. This resolution would permit a cause of action against someone who refuses entry to a home if "Police Action" is occurring inside.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code section 52.8 as follows.

§ 52.8

(a) Definitions

(1) A Police Action includes, but is not limited to, any situation in which a law enforcement officer is engaged or attempting to engage in questioning, citing, detaining or arresting another person, or otherwise engaged in similar law enforcement activities.

(2) A Crime Scene is a physical area designated by one or more law enforcement officers where evidence regarding a crime is being preserved, collected, photographed or examined.

(b) Unless otherwise prohibited by law, all persons shall have the right to visually or sound record a Police Action or Crime Scene, unless by a preponderance of evidence doing so actually interferes with the conduct of a Police Action or the preservation of a Crime Scene. The act of visually or sound recording a Police Action or Crime Scene by itself shall not constitute interference.

(c) Any person or persons who denies or interferes with the right to visually or sound record a Police Action or Crime Scene is liable for each offense for the actual damages, but in no case less than $1,000, and reasonable attorney's fees as may be determined by the court, suffered by the person denied the right guaranteed by subsection (b) above.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Recent events involving cell phone visual or audio recording of the use of force by law enforcement officers have demonstrated the importance of this relatively new technology in providing reliable evidence of the actions of the law enforcement officers. Furthermore, incidences have been reported in the media where law enforcement officers demanded that witnesses stop recording, confiscated the recording device, and/or even detained or arrested the person making the recording. Indeed, in 2015 it was necessary for the Legislature to enact and Governor Brown to sign Senate Bill 411 making it clear that it is not a crime to record police activity, and the courts have held that people have a First Amendment right to record police action. Nevertheless, people who attempt to record police action and are wrongly prevented from doing so, have no clear right to bring a civil action to recover damages for such wrongful acts, a right which may be the most effective deterrent of such conduct.

The Solution: If recording police action is not a crime and one has a constitutional right to do so, a person should also be able to enforce that right. The resolution grants that right.
A version of this resolution was disapproved in 2016, most likely based on ResCom's objections. Those objections have been met. In order for a person to be wrongfully denied the right to record police action, the resolution now provides that the person engaged in recording must not be violating any other law, such as trespass. The provision for treble damages, which ResCom

characterized as punitive, has been removed. In its present form, the resolution should be unobjectionable.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 04-08-2017

DIGEST
Discovery: Supplemental Requests for Admission
Amends Code of Civil Procedure section 2033.220 to allow supplemental requests for admissions where original responses assert lack of information or knowledge.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 04-02-2014, which was approved in principle, and Resolution 01-07-2003, which was withdrawn.

Reasons:
This resolution amends Code of Civil Procedure section 2033.220 to allow supplemental requests for admissions where original responses assert lack of information or knowledge. This resolution should be disapproved because the identified problem is adequately addressed by existing sanctions for failure to admit facts that are subsequently proven, and the proposed changes could interfere with that remedy.

Unlike other forms of discovery, the purpose of requests for admission is not to "uncover information," but to "eliminate the need for proof." (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.) Because requests for admission are designed to streamline issues for trial, failure to admit facts that later have to be proven is presumptively sanctionable, up to the amount of attorney fees and costs incurred in proving those facts. (Code. Civ. Proc., § 2033.420.) There is no exception for failures to admit that are based on lack of information or knowledge. (*Ibid.*) Cost recovery is available even against the prevailing party at trial. (*Smith v. Circle P. Ranch Co.* (1978) 87 Cal.App.3d 267, 274.) Given the fairly severe penalties for requiring the propounding party to prove a fact that was the subject of a request for admission, a responding party already has every incentive to stipulate to facts once information or knowledge allowing and admission has been gained.

The procedure in the resolution could interfere with the propounding party's ability to obtain sanctions. If the responding party initially fails to admit a fact, presumably the propounding party will engage in discovery and investigation aimed at gathering evidence to prove that fact. However, if, in response to a final supplemental request for admission, the responding party finally admits the fact in question, the propounding party might lose the ability to collect the costs of obtaining proof. The absence of this deterrent could needlessly increase the cost of litigation over issues that ultimately are not disputed. Because adequate incentives for admission exist, and supplemental requests for admission could impair the ability to obtain sanctions, the resolution should be disapproved.

In addition, because it borrows language from Code of Civil Procedure sections 2030.070 and 2031.050, the resolution perpetuates an existing problem with supplemental discovery requests. The resolution, like those sections, would effectively allow only one supplemental request in

counties where initial trial dates are set very early in litigation. Thus, the resolution would benefit from amendments similar to those proposed for sections 2030.070 and 2031.050 in Resolution 06-09-2015, which was approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2033.220 to read as follows:

§ 2033.220

(a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits.

(b) Each answer shall:

(1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party.

(2) Deny so much of the matter involved in the request as is untrue.

(3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge.

(c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.

(d) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, then the propounding party may propound a supplemental request for admission twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with section 2024.010), once after the initial setting of a trial date.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Whereas a party may request a supplemental response to interrogatories and demand for production of documents, no comparable provision exists in CCP Section 2033 to allow for a supplemental request for admission if a responding party gives lack of information or knowledge as a reason for a failure to admit. The inability to seek a supplemental response either admitting or denying the fact in issue inhibits the parties' ability to narrow the disputed issues for trial.

The Solution: This resolution would permit supplemental requests for admission on similar terms to those set forth in CCP sections 2030 and 2031 dealing with interrogatories and demands for production of documents.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Russell S. Kohn, Esq.

RESOLUTION 04-09-2017

DIGEST
Public Contracts: Attorneys' Fees
Adds Public Contract Code section 4115 to allow for attorneys' fees awards in certain disputes between subcontractors and prime contractors on public projects.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Public Contract Code section 4115 to allow for attorneys' fees awards in certain disputes between subcontractors and prime contractors on public projects. This resolution should be disapproved because it does not fully justify the proposed deviation from section 1021 of the Code of Civil Procedure, known as the American Rule, that each party pays its own attorneys' fees.

California law generally adheres to the American Rule, codified at section 1021 of the Code of Civil Procedure under which each side bears its own attorneys' fees in any litigation. (See, e.g., *Ahoub v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 644.) The major exceptions to the rule are found in the civil rights context, in order to encourage victims to bring meritorious suits or to extend the law. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 46.) Parties to a contract also frequently agree that the prevailing party in any dispute arising from the contract is entitled to reasonable attorneys' fees. Here, however, the disputes will usually involve business-entities, and there is no policy reason for a one-sided attorneys' fee provision in favor of subcontractors, and prime contractors under certain circumstances. Furthermore, subcontractors are free to include an attorneys' fee provision in their proposal for the contract in question, which would protect them in the event that the prime contractor improperly employs a different subcontractor.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add Public Contract Code Section 4115 to read as follows:

§ 4115

In any action in a court of appropriate jurisdiction by a subcontractor against a prime contractor alleging violation of Section 4107(a), the subcontractor shall be awarded reasonable attorney's fees upon prevailing in such action. The prime contractor shall be awarded reasonable attorney's fees upon a finding by the court that the action was not brought in good faith.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under the "Subletting and Subcontracting Fair Practices Act" (Public Contract Code 4100 et seq.), a prime contractor whose bid on a public works project is accepted by the awarding agency, may not substitute a person as subcontractor in place of the subcontractor listed in the original bid.

The prime contractor has a statutory duty toward the subcontractor, and confers the right on the listed subcontractor to perform the subcontract. That right may be enforced by an action for damages against the prime contractor to recover the benefit of the bargain the listed subcontractor would have realized had he not wrongfully been deprived of the subcontract.

Notwithstanding the right of the subcontractor to bring an action against the prime contractor for damages, there is no provision in the Public Contract Code for awarding attorneys' fees in such action. The subcontractor very often has limited resources to litigate against a prime contractor, which in many instances may have unlimited resources to defend against such action. Without a provision for attorneys' fees, the subcontractor may be reluctant to even commence such an action, notwithstanding an obvious violation by the prime contractor because the attorneys' fees incurred may exceed the amount of the award.

The Solution: This Resolution would allow recovery of attorney's fees to the prevailing subcontractor, and allow for recovery of attorney's fees by the prime contractor upon a finding that the action was not brought in good faith. It would in effect level the playing field, and may deter a prime contractor from electing to pay a 10% penalty rather than retaining the original subcontractor, thus preventing bid shopping and bid peddling.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: David R. Moore

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation would approve Resolution 04-09-2017 in principle if amended on line 5 to change the words “brought in bad faith” to “frivolous.” The SDCBA Delegation supports the primary purpose of the Resolution and the limitation on a reciprocal right of a prime contractor to recover attorney’s fees, but objects to the introduction of a new standard of “good faith” versus the well tested “frivolous” standard used in similar attorney fee statutes.

The SDCBA Delegation also notes that additional amendments may be necessary to address whether this proposed new section is intended to supplant any contractual attorney fee provision or to function in the absence of any attorney fee provision.

RESOLUTION 04-10-2017

DIGEST
Demurrer: Permit Meet and Confer by Letter
Amends Code of Civil Procedure section 430.41 to allow attorneys to meet and confer by letter prior to filing a demurrer.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 430.41 to allow attorneys to meet and confer by letter prior to filing a demurrer. This resolution should be approved in principle because communication by letter is a practical, recognized and effective means to communicate the reasons for a demurrer in an informal attempt to obviate the need to demur, as contemplated by the meet and confer provision.

The current version of the statute requires parties to meet and confer in person or by telephone in an informal effort to address and resolve objections to the pleading which would be the subject of a demurrer. Presumably, this is predicated on the presupposition that the parties would more likely reach a resolution of the issue through direct and contemporaneous communication in-person or by phone. Yet the in-person and/or telephonic meet and confer requirement presents challenges because of attorney availability and amount of material, and the details and analysis which may need to be covered. In some cases talking may actually frustrate the prospect of a reasoned resolution where an emotionally-neutral written exposition, setting forth the legal analysis, may be more effective. The Discovery Act generally allows for the meet and confer process for discovery disputes to be completed in writing, despite the fact that it can prolong the process. In addition, communications may be further fostered through email as well.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.41 to read as follows:

§ 430.41

(a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person, ~~or~~ by telephone, or by letter with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading.

(1) As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support

the basis of the deficiencies. The party who filed the complaint, cross-complaint, or answer shall provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency.

(2) The parties shall meet and confer at least five days before the date the responsive pleading is due. If the parties are not able to meet and confer at least five days prior to the date the responsive pleading is due, the demurring party shall be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer. The 30-day extension shall commence from the date the responsive pleading was previously due, and the demurring party shall not be subject to default during the period of the extension. Any further extensions shall be obtained by court order upon a showing of good cause.

(3) The demurring party shall file and serve with the demurrer a declaration stating either of the following:

(A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer.

(B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith.

(4) Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer.

(b) A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer.

(c) If a court sustains a demurrer to one or more causes of action and grants leave to amend, the court may order a conference of the parties before an amended complaint or cross-complaint or a demurrer to an amended complaint or cross-complaint, may be filed. If a conference is held, the court shall not preclude a party from filing a demurrer and the time to file a demurrer shall not begin until after the conference has concluded. Nothing in this section prohibits the court from ordering a conference on its own motion at any time or prevents a party from requesting that the court order a conference to be held.

(d) This section does not apply to the following civil actions:

(1) An action in which a party not represented by counsel is incarcerated in a local, state, or federal correctional institution.

(2) A proceeding in forcible entry, forcible detainer, or unlawful detainer.

(e) (1) In response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action. The three-amendment limit shall not include an amendment made without leave of the court pursuant to Section 472, provided the amendment is made before a demurrer to the original complaint or cross-complaint is filed.

(2) Nothing in this section affects the rights of a party to amend its pleading or respond to an amended pleading after the case is at issue.

(f) Nothing in this section affects appellate review or the rights of a party pursuant to Section 430.80.

(g) If a demurrer is overruled as to a cause of action and that cause of action is not further amended, the demurring party preserves its right to appeal after final judgment without filing a further demurrer.

(h) This section shall remain in effect only until January 1, 2021, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2021, deletes or extends that date.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: The current statute, effective January 1, 2016, requires that prior to filing a demurrer the demurring party shall meet and confer with the party who filed the pleading that is subject to demurrer, in an attempt to resolve the objections. Currently, Code of Civil Procedure section 430.41 only permits the parties to meet by telephone or in person. This is often impracticable. Counsels' offices may be widely separated and attorneys often have very busy schedules. More importantly, as currently drafted this statute encourages gamesmanship. Specifically, the resisting attorney may avoid telephone calls and generally make him/herself unavailable for meetings. While such tactics are anticipated by the statute (see, §§430.41(a)(2) and 430.41(a)(3)(B)) it does not provide a clear solution. The current statute places control of the meet and confer process in the hands of the resisting party and thereby creates an undue burden for the demurring party and a difficult case management problem for the Court.

The Solution: This Resolution would permit counsel to meet and confer by letter. This duplicates the meet and confer requirements under the Discovery Act. See, Code of Civil Procedure section 2023.010(i) (making "[f]ailing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery... " a misuse of the discovery process). This Resolution will allow the party seeking to file a demurrer the option of meeting by letter, which he/she can achieve whether or not the resisting party refuses to meet or take calls. This will place control of the process on the party that bears the burden of achieving the meet and confer, and consequently relieve the court of the need to craft individual solutions to such gamesmanship.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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