

RESOLUTION 06-04-2013

DIGEST

Civil Procedure: Amendment of Pleadings Without Leave of Court

Amends Code of Civil Procedure section 472 to require that where a demurrer has been filed, a party seeking to amend once as a matter of course must do so at least three court days before the hearing.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

Identical to Resolution 11-07-2012, which was disapproved and similar to Resolution 05-08-2012, which was approved in principle.

Reasons:

This resolution amends Code of Civil Procedure 472 to require that where a demurrer has been filed, a party seeking to amend once as a matter of course must do so at least three court days before the hearing. This resolution should be disapproved because it does not allow court staff sufficient time to contend with the inflow of paperwork.

If a demurrer has been filed, current law allows the filing of an amended complaint up to the time of the hearing. Proponent wishes to establish a three-day limit before the hearing for the filing of a first amended complaint. Given the nine-day deadline to file opposition to the demurrer, counsel for the demurring party will have analyzed the opposition and be prepared to decide whether to argue for sustaining the demurrer or file a first amended complaint. Preparation time by both court staff and counsel will be saved by requiring that a first amended complaint be filed and no later than 10 calendar days before the hearing date.

While attorneys strive to avoid last minute filings, they are unavoidably endemic in the practice. In this day of staff shortages due to the financial crisis, the clerks and research attorneys must have as much time as possible to prepare for hearings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 472 to read as follows:

- 1 § 472
- 2 Any pleading may be amended once by a party of course, and without costs, at any time
- 3 before the answer or demurrer is filed, or after demurrer and at least 3 court days before the trial
- 4 of the issue of law thereon, by filing the same as amended and serving a copy on the adverse
- 5 party, and the time in which the adverse party must respond thereto shall be computed from the
- 6 date of notice of the amendment.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Existing law allows a party to file an amended pleading after a demurrer is set for hearing, and is typically used by a plaintiff as an alternative to filing opposition to a demurrer (hereinafter, references are to a First Amended Complaint or “FAC”). The FAC can be submitted up until the time of the hearing without notice to the adverse party or to the court of plaintiff’s intent to do so.

Often, plaintiff files the FAC the day before the hearing, or even at the hearing. This results in a waste of court resources, and leaves the demurring attorney left to speculate as to whether the plaintiff will file a FAC, rendering the demurrer moot or whether a court appearance on the demurrer is necessary.

This Solution: This resolution would mandate that a party who elects to amend “once as a matter of course” do so at least 3 court days prior to the hearing on demurrer. Where a FAC is filed but not received by defendant prior to the hearing and defendant’s attorney needlessly prepares for and attends the hearing, only to discover that his demurrer has been ordered off-calendar as moot. The amendment will provide the demurring party with notice that the scheduled hearing is placed off-calendar (and allow counsel to adjust his schedule accordingly).

From the Court’s perspective, the judge/research attorney must either wait until the last minute to work up and prepare a tentative ruling on an unopposed demurrer or draft an order, only to find that plaintiff has filed a FAC. That results in a waste of judicial resources. Additionally, a plaintiff often submits his FAC to the filing window or uses fax filing. When that occurs, the hearing judge is often unaware that the pleading has been amended and may actually enter a (void) ruling on the demurrer.

The party electing to amend will not be prejudiced. An opposition to a demurrer is due 9 court days prior to the hearing. Under the subject proposal, the plaintiff would still have additional time to edit the original pleading.

This resolution would require a party who elects to respond to a demurrer by way of a FAC to act at least 3 court days prior to the hearing.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Erin Noonan

COUNTER-ARGUMENT(S) TO RESOLUTION 06-04-2013

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

We agree with the proponent's concern to the point where we propounded a similar resolution last year. However, we still entirely disagree with the "but no later than 3 court days" before trial language, as, at least in our jurisdiction, that would make the problem worse. In our county, the practice is that the plaintiff/cross-complainant will file the amended pleading in lieu of opposition to a law and motion matter, rendering that matter moot as of that date. This resolution would codify the ability of the plaintiff/cross-complainant to delay such a filing even further. If such a filing is allowed at all, it should be required sooner, rather than later.

SAN DIEGO COUNTY BAR ASSOCIATION

This Resolution is identical to 11-07-2012 which the Conference, Rescom and the SDCBA Delegation voted to Disapprove.

This resolution should be disapproved because it does not adequately resolve the problem identified, because in most cases the court will already have expended resources in working up a tentative ruling on the demurrer by the time the amended complaint reaches the department. Likewise, the demurring party would have already incurred the cost of preparing a reply, even if simply to note no timely opposition.

This resolution also allows the non-demurring party to effectively delay the proceedings by waiting till just before the hearing to file the amended pleading. This is especially so where in some counties motion dates are running four to eight months out from when the demurrer was filed and served.