

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:

- 1 § 430.41
- 2 (a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and
- 3 confer in person, ~~or~~ by telephone, or by letter with the party who filed the pleading that is subject
- 4 to demurrer for the purpose of determining whether an agreement can be reached that would
- 5 resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or
- 6 answer is filed, the responding party shall meet and confer again with the party who filed the
- 7 amended pleading before filing a demurrer to the amended pleading.
- 8 (1) As part of the meet and confer process, the demurring party shall identify all of the
- 9 specific causes of action that it believes are subject to demurrer and identify with legal support

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 (h) This section shall remain in effect only until January 1, 2021, and as of that date is
62 repealed, unless a later enacted statute, that is enacted before January 1, 2021, deletes or extends
63 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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