

RESOLUTION 3-07-02

DIGEST

Discovery: Mandatory Disclosures

Adds rule 302 to the California Rules of Court to require pre-trial disclosures.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution adds rule 302 to the California Rules of Court to require pre-trial disclosures. This resolution should be disapproved because, while it could streamline the discovery process by requiring early and specific disclosures by counsel, it conflicts with the Code of Civil Procedure.

This resolution adopts much of the language of Rule 26 of the Federal Rules of Civil Procedure, except subdivision (a)(2) relating to the disclosure of expert testimony. Implementation of Rule 26 appears to have controlled, although not eliminated, filing of clearly unsupportable lawsuits and much of the unnecessary gamesmanship related to discovery in federal practice. The success of Rule 26 suggests that such rules are effective at ensuring that discovery is used for its intended purpose – disclosure -- rather than concealment and oppression.

However, the Judicial Council cannot adopt a rule of court that conflicts with a statute. The rule proposed by this resolution conflicts with various Code of Civil Procedure sections. For instance, Code of Civil Procedure section 2031, subdivision (e), places the duty to request supplemental document production on the responding party. By contrast, this resolution would place the duty "seasonably to amend" on the responding party.

In addition, this resolution refers to a "scheduling conference" and a "scheduling order" at lines 88 and 89 but does not define those terms. It also refers to "subdivision (f)" at line 33, but there is no subdivision (f) in the resolution.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the Judicial Council add Rule 302 to the California Rules of Court to read as follows:

- 1 Rule 302
- 2 (a) Required Disclosures; Methods to Discover Additional Matter.
- 3 (1) Initial Disclosures. Except in categories of proceedings specified in subdivision
- 4 (a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without
- 5 awaiting a discovery request, provide to other parties:
- 6 (A) the name and, if known, the address and telephone number of each individual,
- 7 except for expert witnesses, likely to have discoverable information that the disclosing party may

8 use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the
9 information;

10 (B) a copy of, or a description by category and location of, all documents,
11 datacompilations, and tangible things that are in the possession, custody, or control of the party
12 and that the disclosing party may use to support its claims or defenses, unless solely for
13 impeachment;

14 (C) a computation of any category of damages claimed by the disclosing party, making
15 available for inspection and copying as under Section 2031 of the Code of Civil Procedure the
16 documents or other evidentiary material, not privileged or protected from disclosure, on which
17 such computation is based, including materials bearing on the nature and extent of injuries
18 suffered; and

19 (D) for inspection and copying as under Section 2031 of the Code of Civil Procedure
20 any insurance agreement under which any person carrying on an insurance business may be liable
21 to satisfy part or all of a judgment which may be entered in the action or to indemnify or
22 reimburse for payments made to satisfy the judgment.

23 (E) The following categories of proceedings are exempt from initial disclosure under this
24 subdivision:

25 (i) an action for review on an administrative record;

26 (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or
27 sentence;

28 (iii) an action brought without counsel by a person in custody;

29 (iv) an action to enforce or quash an administrative summons or subpoena;

30 (v) a proceeding ancillary to proceedings in other courts; and

31 (vi) an action to enforce an arbitration award.

32 These disclosures must be made at or within 14 days after the conference pursuant to
33 subdivision (f) unless a different time is set by stipulation or court order, or unless a party objects
34 during the conference that initial disclosures are not appropriate in the circumstances of the action
35 and states the objection in the Rule 302(e) discovery plan. In ruling on the objection, the court
36 must determine what disclosures - if any - are to be made, and set the time for disclosure. Any
37 party first served or otherwise joined after the Rule 302(e) conference must make these
38 disclosures within 30 days after being served or joined unless a different time is set by stipulation
39 or court order. A party must make its initial disclosures based on the information then reasonably
40 available to it and is not excused from making its disclosures because it has not fully completed its
41 investigation of the case or because it challenges the sufficiency of another party's disclosures or
42 because another party has not made its disclosures.

43 (2) Pretrial Disclosures. In addition to the disclosures required by Rule 302(a)(1), a
44 party must provide to other parties and promptly file with the court the following information
45 regarding the evidence that it may present at trial other than solely for impeachment:

46 (A) the name and, if not previously provided, the address and telephone number of each
47 witness, separately identifying those whom the party expects to present and those whom the party
48 may call if the need arises;

49 (B) the designation of those witnesses whose testimony is expected to be presented by
50 means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of
51 the deposition testimony; and

52 (C) an appropriate identification of each document or other exhibit, including summaries
53 of other evidence, separately identifying those which the party expects to offer and those which
54 the party may offer if the need arises.

55 Unless otherwise directed by the court, these disclosures must be made at least 30 days
56 before trial. Within 14 days thereafter, unless a different time is specified by the court, a party
57 may serve and promptly file a list disclosing (i) any objections to the use under Section 2025 of
58 the Code of Civil Procedure of a deposition designated by another party under 302(a)(2)(B), and

59 (ii) any objection, together with the grounds therefor, that may be made to the
60 admissibility of materials identified under Rule 302(a)(2)(C). Objections not so disclosed, other
61 than objections on the ground of relevance or pursuant to Section 352 of the Evidence Code, are
62 waived unless excused by the court for good cause.

63 (4) Form of Disclosures; Filing. Unless the court orders otherwise, all disclosures under
64 Rules 302(a)(1) through (3) must be made in writing, signed, and served.

65 U disclosure as required by Rule 302(a). The provisions of Section 2023 of the Code of Civil
66 Procedure apply to the award of expenses incurred in relation to the motion.

67 (c) Timing and Sequence of Discovery. Except in categories of proceedings exempted
68 from initial disclosure under Rule 302(a)(1)(E), or when authorized under these rules or by order
69 or agreement of the parties, a party may not seek discovery from any source before the parties
70 have conferred as required by Rule 302(e)

71 (d) Supplementation of Disclosures and Responses. A party who has made a disclosure
72 under subdivision (a) or responded to a request for discovery with a disclosure or response is
73 under a duty to supplement or correct the disclosure or response to include information thereafter
74 acquired if ordered by the court or in the following circumstances:

75 (1) A party is under a duty to supplement at appropriate intervals its disclosures under
76 subdivision (a) if the party learns that in some material respect the information disclosed is
77 incomplete or incorrect and if the additional or corrective information has not otherwise been
78 made known to the other parties during the discovery process or in writing.

79 (2) A party is under a duty seasonably to amend a prior response to an interrogatory,
80 request for production, or request for admission if the party learns that the response is in some
81 material respect incomplete or incorrect and if the additional or corrective information has not
82 otherwise been made known to the other parties during the discovery process or in writing.

83 (e) Meeting of Parties; Planning for Discovery. Except in categories of proceedings
84 exempted from initial disclosure under Rule 302(a)(1)(E) or when otherwise ordered, the parties
85 must, as soon as practicable and in any event at least 21 days before a scheduling conference is
86 held or a scheduling order is due, confer to consider the nature and basis of their claims and
87 defenses and the possibilities for a prompt settlement or resolution of the case, to make or
88 arrange for the disclosures required by Rule 302(a)(1), and to develop a proposed discovery
89 plan that indicates the parties' views and proposals concerning:

90 (1) what changes should be made in the timing, form, or requirement for disclosures
91 under Rule 302(a), including a statement as to when disclosures under Rule 302(a)(1) were made
92 or will be made

93 (2) the subjects on which discovery may be needed, when discovery should be
94 completed, and whether discovery should be conducted in phases or be limited to or focused
95 upon particular issues;

96 (3) what changes should be made in the limitations on discovery imposed under these
97 rules or by local rule, and what other limitations should be imposed; and

98 (4) any other orders that should be entered by the court under Rule 302(b).

99 The attorneys of record and all unrepresented parties that have appeared in the case are
100 jointly responsible for arranging the conference, for attempting in good faith to agree on the
101 proposed discovery plan, and for submitting to the court within 14 days after the conference a
102 written report outlining the plan. A court may order that the parties or attorneys attend the
103 conference in person.

104 (g) Signing of Disclosures.

105 (1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(2) shall be
106 signed by at least one attorney of record in the attorney's individual name, whose address shall be
107 stated. An unrepresented party shall sign the disclosure and state the party's address. The
108 signature of the attorney or party constitutes a certification that to the best of the signer's
109 knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete
110 and correct as of the time it is made.

111 (2) If without substantial justification a certification is made in violation of the rule, the
112 court, upon motion or upon its own initiative, shall impose upon the person who made the
113 certification, the party on whose behalf the disclosure, request, response, or objection is made, or
114 both, an appropriate sanction, which may include an order to pay the amount of the reasonable
115 expenses incurred because of the violation, including a reasonable attorney's fee.

116

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Permits discovery as a matter of course in such manner, sequence, and type as each party may elect, subject only to the constraints of the California Civil Discovery Act of 1986.

Cal. Code Civ. Proc. § 2019(c) provides, in pertinent part:

Unless there is a rule of the Judicial Council, or a local court rule or local uniform written policy to the contrary, the methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or another method, shall not operate to delay the discovery of any other party.

This Resolution: Proposes rulemaking by the Judicial Council pursuant to the authority granted by Section 2019(c).

The Problem: Discovery has become an exercise in gamesmanship. Originally designed to avoid “trial by ambush,” it has become a series of ambushes unnecessarily driving up the cost of litigation and thereby restricting access to justice. The Federal courts have long experimented with, and more recently have adopted as a matter of national practice, a scheme of mandatory disclosures, including early disclosures that must take place before any formal discovery commences. This resolution proposes to adopt that practice.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENT

ORANGE COUNTY BAR

This Resolution is based upon at least three false premises: (1) the Judicial Council can adopt discovery requirements by rule which are contrary to the Discovery Act of 1986 (CCP §§ 2016-2036); (2) the Federal requirement for early and mandatory full disclosure is a good idea; (3) adoption of this rule will preclude “gamesmanship” in all California discovery procedures. Contrary to the proponent’s claim, CCP § 2019(c) does not grant any authority for the Judicial Council to adopt such a sweeping change to the Discovery Act. Moreover, Federal discovery leads to more expensive litigation tactics and more abuses by litigants; it creates an early expense which often precludes economical settlement because of the large up-front costs and fees incurred by the parties.