

**LOS ANGELES COUNTY BAR ASSOCIATION
PROPOSED AMENDMENT TO RESOLUTION 10-5-2002
Proponent: Beverly Hills Bar Association**

Discovery Motions: Separate Statements by Electronic Media

41 ~~(e) A separate statement filed and served with a discovery motion must be served~~
42 ~~both (i) in the form of a document, and (ii) in the form of a computer diskette or other~~
43 ~~computer readable media acceptable to the recipient, either in PDF format or in a format~~
44 ~~agreed to by the parties in writing. A person may agree in writing that the separate~~
45 ~~statement need not be so served, or to accept service of the separate statement in a~~
46 ~~different manner. Any person whose prior pleadings have been prepared exclusively on a~~
47 ~~typewriter or other non-computerized machine, and whose separate statement is so~~
48 ~~prepared, may serve the separate statement in document form only.~~

41 (e) Upon request, a party must within 3 days provide to any other party or the court
42 an electronic version of its separate statement. The electronic version may be provided in
43 any form upon which the parties agree. If the parties are unable to agree on the form, the
44 responding party must provide to the requesting party the electronic version of the
45 separate statement which it used to prepare the document filed with the court. Under this
46 provision, a party is not required to create an electronic version or any new version of
47 any document for the purpose of transmission to the requesting party.

(Proposed amendment language underlined; language proposed to be deleted stricken.)

RESOLUTION 10-05-2002

DIGEST

Discovery Motions: Separate Statements by Electronic Media

Amends California Rules of Court, rule 335, to require that separate statements filed in support of motions to compel further discovery responses be served in both paper and electronic form.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends California Rules of Court, rule 335, to require that separate statements filed in support of motions to compel further discovery responses be served in both paper and electronic form. This resolution should be disapproved because it allows the opposing party to dictate the type of format in which the separate statement is to be served.

The provision in the resolution that allows the opposing party to demand a certain format will place an unreasonable burden on the moving party. For example, if the opposing party demands that the separate statement be served in a word-processing format that the moving party does not own, the moving party would have to purchase whatever software would be required to meet the requirements of the opposing party's demand and thereby comply with the rule.

In addition, word processing programs and other electronic media are still evolving and are not foolproof. For example, the recipient of an electronic document could invade an opposing attorney's work product by using the "undo" feature to reveal all past revisions. Although there are methods to protect against this type of invasion, not all practitioners have the necessary technological expertise to ensure that the electronic documents they transmit will be secure.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the Judicial Council amend California Rules of Court, rule 335, to read as follows:

- 1 Rule 335
- 2 (a) Any motion involving the content of a discovery request or the responses to such a
- 3 request shall be accompanied by a separate statement. The motions that require a separate
- 4 statement include:
- 5 (1) a motion to compel further responses to requests for admission;
- 6 (2) a motion to compel further responses to interrogatories;
- 7 (3) a motion to compel further responses to a demand for inspection of
- 8 documents or tangible things;
- 9 (4) a motion to compel answers at a deposition;

10 (5) a motion to compel or to quash the production of documents or tangible things at a
11 deposition;

12 (6) a motion for medical examination over objection; and

13 (7) a motion for issue or evidentiary sanctions.

14 (b) A separate statement is not required when no response has been provided to the
15 request for discovery.

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

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

25 (2) the text of each response, answer, or objection, and any further responses or
26 answers;

27 (3) a statement of the factual and legal reasons for compelling further responses,
28 answers, or production as to each matter in dispute;

29 (4) if necessary, the text of all definitions, instructions, and other matters required to
30 understand each discovery request and the responses to it;

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

35 (6) if the pleadings, other documents in the file, or other items of discovery are relevant
36 to the motion, the party relying on them shall summarize each relevant document.

37 (d) A motion concerning interrogatories, inspection demands, or admission requests
38 shall identify the interrogatories, demands, or requests by set and number.

39 (e) A separate statement filed and served with a discovery motion must be served both
40 (i) in the form of a document, and (ii) in the form of a computer diskette or other computer
41 readable media acceptable to the recipient, either in PDF format or in a format agreed to by the
42 parties in writing. A person may agree in writing that the separate statement need not be so
43 served, or to accept service of the separate statement in a different manner. Any person whose
44 prior pleadings have been prepared exclusively on a typewriter or other non-computerized
45 machine, and whose separate statement is so prepared, may serve the separate statement in
46 document form only.

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: The existing law does not require the service of a separate statement filed in support of a discovery motion to include service in the form of a computer diskette.

This Resolution: Requires a party serving a separate statement in support of a discovery motion to serve the separate statement in document form and on computer diskette. Allows a party to stipulate that a computer diskette need not be served. The resolution contains a provision which exempts persons whose prior pleadings have been prepared exclusively on a typewriter or other non-computerized machine, and whose separate statement is so prepared, from serving the statement on computer diskette.

The Problem: Because the separate statement must set forth the discovery request, the response given, and the legal and factual reasons why a further response is warranted, it is often a very lengthy document, particularly in complex litigation matters. The person opposing the motion must type the moving party's entire separate statement into the opposing separate statement, so as to provide the Court with the moving party's statement and the opposing party's responses in one cohesive document. Because opposition to a discovery motion is generally due eleven days after service (if served by hand), lengthy separate statements can impose a great burden on a person opposing the motion. The proposed rule will greatly decrease the burden, time and expense incurred by parties to a litigation and their counsel in opposing a discovery motion, while imposing minimal burden on the moving party.

IMPACT STATEMENT

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

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COUNTER ARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

Unlike the case with motions for summary judgment or summary adjudication of issues, there is no requirement that a party opposing a discovery motion prepare a separate statement in response to the moving party's separate statement. Thus, there is no reason to require the moving party on a discovery motion to serve a computerized version of the separate statement.

SACRAMENTO COUNTY BAR ASSOCIATION

Because the proposed resolution is exclusively for the convenience of the non-moving party or parties, it is appropriate that no additional burden is imposed on the moving party to accommodate the needs of the non-moving party or parties who desire the electronic version of the separate statement in support of a discovery motion. Nevertheless, this resolution seeks to impose the burden to provide the electronic version of its work product, in the first instance, on the moving party, as well as require the moving party to create a new version (or versions) of its separate statement in order to provide the other parties with versions acceptable to them.

Presumably the moving party would be exposed to sanctions, including possible denial of its motion, if it does not provide the electronic version (or versions) acceptable to the recipient at the time of service of the motion. If there are multiple opposing parties, the moving party would be required to ascertain, prior to serving its motion, the desires of all of the parties and to produce potentially multiple different electronic versions of the separate statement for service. If it fails in any aspect, the moving party risks sanctions or other penalties if any other party deems the electronic version served to be unacceptable.

This is a particularly onerous burden to impose on the moving party, especially given that the moving party would be subsidizing the other parties by providing them, free of charge, with work product for which it has incurred significant fees, thereby saving the non-moving party or parties from incurring similar fees in opposing the motion. The proposed resolution also will needlessly increase the work of the courts to police whether the moving party has adequately complied with the service requirement.