

RESOLUTION 10-11-2002

DIGEST

Motions: Deadlines for Filing Opposition and Reply

Amends Code of Civil Procedure section 1005 to clarify when papers opposing a motion are to be filed.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends Code of Civil Procedure section 1005 to clarify when papers opposing a motion are to be filed. This resolution should be disapproved because it shortens the time for parties to draft reply papers and for the court to consider the merits of motions.

At one time, section 1005 required that opposition papers be filed five court days and that reply papers be filed two court days prior to the hearing date. It was amended to require that oppositions to motions be filed 10 calendar days prior to the hearing date and that reply papers be filed five calendar days prior to the hearing. With the change from court days to calendar days, the due date for opposition and reply briefs may now fall on a weekend or holiday. Although the proponent alleges that there is an ambiguity as to when the opposition or reply papers are due when the due date falls on a weekend or holiday, that ambiguity was long ago resolved by case law. (See *Steele v. Bartlett* (1941) 18 Cal.2d 573; *Hutchins v. County Clerk of Merced County* (1934) 140 Cal.App. 348.) Moreover, if there is an ambiguity in need of clarification, the proponent is moving the deadline in the wrong direction, shortening the time for the trial judge and staff to consider both responding and reply papers.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 1005 as follows:

- 1 §1005
- 2 (a) Written notice shall be given, as prescribed in subdivision (b), for the following motions:
- 3 (1) Notice of Application and Hearing for Writ of Attachment under Section 484.040.
- 4 (2) Notice of Application and Hearing for Claim and Delivery under Section 512.030.
- 5 (3) Notice of Hearing for Claim of Exemption under Section 706.105.
- 6 (4) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.
- 7 (5) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.
- 8 (6) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section 1043 of the
- 9 Evidence Code.
- 10 (7) Notice of Hearing of Third-Party Claim pursuant to Section 720.320.
- 11 (8) Motion for an Order to Attend Deposition more than 150 miles from deponent's residence
- 12 pursuant to paragraph (3) of subdivision (e) of Section 2025.

13 (9) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the Government
14 Code.

15 (10) Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions
16 pursuant to Section 473.5.

17 (11) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.

18 (12) Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.

19 (13) Any other proceeding under this code in which notice is required and no other time or
20 method is prescribed by law or by court or judge.

21 (b) Unless otherwise ordered or specifically provided by law, all moving and supporting papers
22 shall be served and filed at least 21 calendar days before the hearing. The moving and supporting
23 papers served shall be a copy of the papers filed or to be filed with the court. However, if the
24 notice is served by mail, the required 21-day period of notice before the hearing shall be
25 increased by five calendar days if the place of mailing and the place of address are within the
26 State of California, 10 calendar days if either the place of mailing or the place of address is
27 outside the State of California but within the United States, and 20 calendar days if either the
28 place of mailing or the place of address is outside the United States, and if the notice is served by
29 facsimile transmission, express mail, or another method of delivery providing for overnight
30 delivery, the required 21-day period of notice before the hearing shall be increased by two
31 calendar days. Section 1013, which extends the time within which a right may be exercised or an
32 act may be done, does not apply to a notice of motion, papers opposing a motion, or reply
33 papers governed by this section. All papers opposing a motion so noticed shall be filed with the
34 court and a copy served on each party at least 10 calendar days, and all reply papers at least five
35 calendar days before the hearing. Notwithstanding any other provision of this section, all papers
36 opposing a motion and all reply papers shall be served by personal delivery, facsimile
37 transmission, express mail, or other means consistent with the provisions of Sections 1010, 1011,
38 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not
39 later than the close of the next business day after the time the opposing papers or reply papers, as
40 applicable, are filed. If any of these dates fall on a Saturday, Sunday or holiday as specified in
41 Section 10, the last day shall be the next succeeding court day.

42 The court, or a judge thereof, may prescribe a shorter time.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: The general Code of Civil Procedure statute on notice and motions does not take into account the problem of deadlines falling on court holidays or weekends.

This Resolution: This resolution eliminates the uncertainty in existing law by clarifying that the deadline for notices and motions falls on the next court day when it would otherwise fall on a court holiday or weekend.

The Problem: When a procedural deadline falls on a weekend or court holiday, attorneys must meet the notice and hearing requirements by filing before the weekend or holiday to insure that they do not run afoul of the rule.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Robert H. Lynn

COUNTERARGUMENTS

BEVERLY HILLS BAR ASSOCIATION

Section 1005 was last amended in 1999 by a bill sponsored by the Judicial Council and supported by the California Judges Association and the Contra Costa Superior Court, without opposition. (Stats. 1999, ch. 43, § 1 [A.B. 1132 (Ackerman)].) The bill passed the Assembly 76-0 and the Senate 39-0. The 1999 amendment increased the notice period from 15 to 21 days, clarified the extensions of the notice period for various types of service to be “calendar days,” increased the lead time for filing opposition papers from five court days to 10 calendar days before the hearing, and increased the lead time for filing reply papers from two court days to five calendar days before the hearing. The purpose for the change was to afford the courts “additional time to read and study the papers” and to “ensure that the parties receive the papers, particularly reply papers, in a timely fashion.” (*See* Assembly Bill Analysis, A.B. 1132, p. 2.)

This resolution attempts to wreck the balance carefully developed by the 1999 amendment for the avowed purpose of addressing a non-existent problem. Contrary to the assertion of the proponent, there is no uncertainty in existing law. The statute requires that various actions occur *at least* a specified number of days before the hearing. In other words, if the action date occurs on a court holiday, including weekends (*see* CAL. CODE CIV. PROC. §§ 10, 135), count *backwards* to the next court day. Thus, as the statute now prescribes, an action deadline will never fall on a holiday or weekend. The proponent offers no policy rationale whatsoever for defeating the purpose of the 1999 amendment. In the absence of a real problem and without any policy rationale for the suggested change, this resolution should be defeated.

ORANGE COUNTY BAR ASSOCIATION

This Resolution directly conflicts with a 1999 amendment to Code of Civil Procedure section 1005 which was enacted to ensure that courts have adequate time to review and consider all papers filed in support of or in opposition to any motion.

Specifically, Assembly Bill No. 1132 (“AB1132”) was enacted in 1999 to amend section 1005 so as to increase the number of days prior to a hearing that all papers relating to a motion must be filed. AB1132 was sponsored by the Judicial Council of California and its purpose was to, *inter alia*, “allow courts additional time to read and study the papers, which is often difficult under the current schedule.” (Sen. Judiciary Com., Analysis of Assem. Bill No. 1132 (1999-2000 Reg. Sess.), June 8, 1999.)

Previously, all motions had to be filed at least 15 calendar days prior to the hearing, and all opposition and reply briefs had to be filed at least 5 court days and 2 court days, respectively, prior to the hearing. AB1132 amended section 1005 to increase these time frames to 21 calendar days, 10 calendar days, and 5 calendar days, respectively. By providing that all papers must be filed “at least” a set number of days prior to the hearing, section 1005 unambiguously requires that, if the last day to file a motion, opposition, or reply brief falls on a weekend or a court holiday, then such papers must be filed on the last court day prior to the filing deadline. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2001) p.9(I)-58, ¶9:140.5 citing *Steele v. Barlett* (1941) 18 Cal.2d 573, 574.).

The “at least” language in section 1005 therefore ensures that, in all situations, the courts are provided with no less than 5 calendar days after receiving the reply brief to review and research all papers in support of and in opposition to a motion. However, this Resolution would render section 1005 internally inconsistent by retaining the “at least” language, but nonetheless allowing a motion, opposition, or reply brief to be filed nearer in time to the hearing if the last day to file such papers falls on a weekend or a court holiday.

As stated above, in sponsoring AB1132, the Judicial Council unequivocally declared that the courts need additional time to review and research the law and motion papers they receive. However, in contravention of this need, this Resolution would actually reduce the amount of time the courts have to review and research the papers filed in connection with a motion in a significant number of cases. For example, this Resolution would allow a reply brief in support of a motion that is set for hearing on a Thursday or a Friday, to be filed only three or four days, respectively, prior to the hearing. The loss of this day or two is greatly magnified by the fact that many judges often hear a dozen or more motions on their weekly law and motion calendar.

SACRAMENTO COUNTY BAR ASSOCIATION

Proposed Resolution 10-11-2002 sacrifices adequate notice to opposing counsel and sufficient time judicial review for the convenience of counsel filing motion papers. It does not take into

account the requirements of adequate notice and opportunity to respond, nor permit the court adequate time to read and consider the motion so it may render an informed decision based upon all the papers filed. With increasing law and motion workloads for each judge, the proposed rule change would require the court to suspend its decision making process on all pending motions until the reply briefs are received (as late as one day before the hearing). When moving, opposing and reply papers are due filed and served 21, 10 and five days before a hearing date, respectively, counsel must count backward from the hearing date to determine the date for filing and service. When the due date falls on a weekend or holiday, counsel must roll-back the actual filing and service date to the preceding (**not** the following) court day.