

RESOLUTION 04-02-05

DIGEST

Pleadings: Sanctions for Bad Faith Amendment After Meet and Confer

Amends Code of Civil Procedure section 472 to allow for recovery of attorneys' fees and costs after a party amends pleadings after a demurrer is filed.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 472 to allow for recovery of attorneys' fees and costs after a party amends pleadings after a demurrer is filed. This resolution should be disapproved because the language does not accomplish the intended results and the resolution would potentially accomplish the exact opposite of what it purports to accomplish.

Preliminarily, the language of the resolution is confusing. It states that the sanctions could be imposed if, after an unsuccessful meet and confer process, and after a demurrer is filed, an amended complaint which "includes" the defects addressed in the meet and confer process is filed. Such *inclusion* could simply be the complaining party wanting judicial review of the issue. The intent probably was to permit sanctions if the complaining party *eliminates* the language that could have obviated the need to have filed the demurrer.

Furthermore, there is no "meet and confer" requirement for demurrers, so imposing the possibility of sanctions for engaging in what proves to be unsuccessful meet and confer efforts could chill any voluntary efforts. Moreover, requiring the meet and confer process could lead to gamesmanship among attorneys. The process could ultimately waste the time and resources of attorneys and judges, which is opposite to the result the resolution seeks to accomplish.

TEXT OF RESOLUTION

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

- 1 § 472
- 2 (a) Any pleading may be amended once by the party of course, and without costs, at any time
- 3 before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon,
- 4 by filing the same as amended and serving a copy on the adverse party, and the time in which the
- 5 adverse party must respond thereto shall be computed from the date of notice of the amendment.
- 6 (b) Should meet and confer efforts, subsequently confirmed in writing, prove unsuccessful,
- 7 thereby necessitating the filing of a demurrer and/or motion to strike, and a party thereafter files an
- 8 amended pleading which includes the defects presented in the meet and confer process, the court shall
- 9 impose a monetary sanction against any party, person, or attorney for necessitating the filing of the
- 10 demurrer and/or motion to strike unless it finds that the one subject to the imposition of sanctions acted
- 11 with substantial justification.
- 12 (c) A motion for sanctions shall be accompanied by a declaration stating facts showing a
- 13 reasonable and good faith attempt at an informal resolution of each issue presented by the demurrer
- 14 and/or motion to strike.

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: Currently, the law is that a party may amend their pleading once as a matter of right. (Code Civ. Proc., ' 472.) Thus, if a plaintiff files a complaint, and a demurrer and/or motion to strike is filed, plaintiff may file an amended pleading, thereby making the demurrer and/or motion to strike moot (assuming the amended pleading was filed prior to the hearing on the demurrer and/or motion to strike). Consequently, the defendant incurs exorbitant attorneys= fees and costs for none, despite met and confer efforts by defendant indicating the deficiencies in the pleading and requesting amendments (even clearly deficient pleadings).

This Resolution: Seeks to modify Code of Civil Procedure section 472 to allows for recovery of attorneys= fees and costs should a party amend their pleadings after a party prepared and filed a demurrer and/or motion to strike despite meet and confer efforts proved unsuccessful.

The Problem: One of the intended purposes of litigation is to minimize gamesmanship and enhance professional courtesy and cooperation. At the same time, parties must consider, objectively, their pleadings, and whether it comports with existing law.

Therefore, at times, counsel attempts to meet and confer regarding certain pleadings and pointing out deficiencies for the purpose of avoiding the costs of preparing and filing a demurrer and/or motion to strike. More times than not, counsel disregards the meet and confer efforts, thereby necessitating the costly task of preparing and filing a demurrer and/or motion to strike. However, instead of opposing the demurrer and/or motion to strike, counsel files an amended pleading, which most times incorporates the subject of the meet and confer efforts. As such, a lot of time and money would have been saved should counsel take the meet and confer seriously. Clients get angry when this happens because they incur the costs for naught.

Thus, this proposed litigation would hopefully curb this needless and expensive exercise by channeling accountability on deficient pleadings. More importantly, this amendment would make counsel actually think about the pleadings they are submitting. As such, this proposed resolution instills a meet and confer requirement prior to filing a demurrer. If a party refuses to meet and confer or amend their pleading, thereby necessitating preparation of a demurrer and/or motion to strike, and the party later amends the complaint prior to the hearing on the demurrer and/or motion to strike, then the party is subject to sanctions (assuming the amended pleading incorporated the subject of the meet and confer). The proposed change is therefore in the interest of equity and judicial economy.

IMPACT STATEMENT:

This resolution does not affect any other laws.

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RESPONSIBLE FLOOR DELEGATE: Alexander S. Gareeb

COUNTERARGUMENTS

BAR ASSOCIATION OF SAN FRANCISCO

Code of Civil Procedure Section 472 permits the amendment of a pleading before answer or demurrer, or after demurrer but before hearing thereon. This resolution proposes to add two new subsections providing for sanctions for amending a pleading without "substantial justification" after a demurrer is filed. The

proposal would allow a defendant, after being served with a complaint, to demand a meet and confer session with the plaintiff to point out alleged errors in the complaint. If thereafter 1) the plaintiff

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution is bad policy. Presently, there is no requirement that parties meet and confer prior to filing a demurrer. In most cases, there is insufficient time to adequately meet and confer prior to the deadline for filing a responsive pleading. Since the defendant has 30 days to file a responsive pleading, by the time a defendant retains counsel and counsel sends a meet and confer letter to plaintiff, there is very little time for plaintiff to file an amended complaint. While the meet and confer process is helpful, a plaintiff should not be sanctioned for heeding the advice of defendant but failing to do so within the time required for defendant to file a responsive pleading.

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would decrease collegiality among attorneys and cause more divisiveness and enmity. It would also discourage substantive meet and confer efforts lest the pleading party be found to have changed the pleadings (prior to the hearing) in accordance with the suggested changes by opposing counsel.