

RESOLUTION 11-10-05

DIGEST

Civil Procedure: Shortened Time for Expert Exchange and Disclosure

Amends Code of Civil Procedure sections 2034.220, 2034.230 and 2034.280 to shorten the time for exchange of expert designations and disclosure in forcible entry/detainer and unlawful detainer cases.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure sections 2034.220, 2034.230 and 2034.280 to shorten the time for exchange of expert designations and disclosure in forcible entry/detainer and unlawful detainer cases. This resolution should be disapproved because the dates specified would impose an unfair disadvantage on defendants.

Forcible entry/detainer and unlawful detainer are summary proceedings. Once filed and served, the defendant has five days to answer. (Code of civil procedures section 1167.3.) If plaintiff serves a request the next day, trial will be set within 26 days of the original service. If plaintiff serves notice of the trial date on the same day as requested, defendant would be expected to find, consult, retain and designate an expert two days later. An oral deposition could be scheduled three days later. Thus a defendant could be required to provide an expert for deposition and depose the opposing expert, all within 11 days of service. Plaintiff, on the other hand, would have as much time as needed before filing suit to retain an expert, have that person examine the premises under the provisions of a lease or tenancy agreement and prepare a comprehensive report before the expert's deposition is taken. Given that experts are restricted in trial testimony to that given in deposition, this gives landlords too great an advantage in trial.

The contemplated time frame of a summary proceeding is simply too short to accommodate expert testimony under Code of Civil Procedure section 2034. If the case is complicated enough to require expert testimony, either the parties should agree on a reasonable time frame under Code of Civil Procedure section 1170.5, subdivision (b) or the court should set a reasonable date under section 1170.5, subdivision (c).

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 2034.210, 2034.220, 2034.230, and 2034.280 as follows:

1 § 2034.210

2 After the setting of the initial trial date for the action, except in a forcible entry, forcible
3 detainer or unlawful detainer action after service of summons, any party may obtain discovery by
4 demanding that all parties simultaneously exchange information concerning each other's expert trial
5 witnesses to the following extent:

6 (a) Any party may demand a mutual and simultaneous exchange by all parties of a list
7 containing the name and address of any natural person, including one who is a party, whose oral or
8 deposition testimony in the form of an expert opinion any party expects to offer in evidence at the
9 trial.

10 (b) If any expert designated by a party under subdivision (a) is a party or an employee of a
11 party, or has been retained by a party for the purpose of forming and expressing an opinion in
12 anticipation of the litigation or in preparation for the trial of the action, the designation of that witness
13 shall include or be accompanied by an expert witness declaration under Section 2034.260.

14 (c) Any party may also include a demand for the mutual and simultaneous production for
15 inspection and copying of all discoverable reports and writings, if any, made by any expert described
16 in subdivision (b) in the course of preparing that expert's opinion.

17
18 § 2034.220

19 Any party may make a demand for an exchange of information concerning expert trial
20 witnesses without leave of court. A party shall make this demand no later than the 10th day after the
21 initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date,
22 except in a forcible entry, forcible detainer or unlawful detainer action, in which case the demand may
23 be made any time before trial.

24
25 § 2034.230

26 (a) A demand for an exchange of information concerning expert trial witnesses shall be in
27 writing and shall identify, below the title of the case, the party making the demand. The demand shall
28 state that it is being made under this chapter.

29 (b) The demand shall specify the date for the exchange of lists of expert trial witnesses,
30 expert witness declarations, and any demanded production of writings. The specified date of
31 exchange shall be 50 days before the initial trial date, or 20 days after service of the demand,
32 whichever is closer to the trial date, except in a forcible entry, forcible detainer, or unlawful detainer
33 action, in which case the specified date of exchange shall be no earlier than two days after service of
34 notice of the trial date, unless the court, on motion and a showing of good cause, orders an earlier or
35 later date of exchange.

36
37 § 2034.280

38 (a) Within 20 days after the exchange described in Section 2034.260, except in a forcible
39 entry, forcible detainer or unlawful action, in which case within five days after the exchange described
40 in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert
41 witness list containing the name and address of any experts who will express an opinion on a subject
42 to be covered by an expert designated by an adverse party to the exchange, if the party
43 supplementing an expert witness list has not previously retained an expert to testify on that subject.

44 (b) This supplemental list shall be accompanied by an expert witness declaration under
45 subdivision (c) of Section 2034.260 concerning those additional experts, and by all discoverable
46 reports and writings, if any, made by those additional experts.

47 (c) The party shall also make those experts available immediately for a deposition under
48 Article 3 (commencing with Section 2034.410), which deposition may be taken even though the time
49 limit for discovery under Chapter 8 (commencing with Section 2024.010) has expired.

50 (d) In a forcible entry, forcible detainer or unlawful action, an oral deposition shall be
51 scheduled for a date at least three days after service of the deposition notice.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Has no provision for special deadlines for the disclosure and exchange of expert witness information in forcible entry, forcible detainer, or unlawful detainer actions.

This Resolution: Would create shortened deadlines for expert disclosure and discovery in such actions.

The Problem: The exchange of expert witness information benefits the courts and parties by narrowing issues for trial. However, because forcible entry, forcible detainer and unlawful actions are summary proceedings set on no more than 20 days notice (Code Civ. Proc., ' 1170.5), the statutory exchange is generally not available. Shortened timelines should be instituted for the disclosure and discovery of expert witnesses in such summary proceedings.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution.

IMPACT STATEMENT

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

AUTHOR AND/OR PERMANENT CONTACT: Steven S. Rosenthal, 1388 Sutter Street, Suite 521, San Francisco, CA 94109; telephone (415) 928-7300; email: ssrlaw@pacbell.net.

RESPONSIBLE FLOOR DELEGATE: Steven S. Rosenthal

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The formalities of demand, exchange and deposing of experts should not be extended to unlawful detainer actions; precisely because they are and should remain summary proceedings