

RESOLUTION 01-01-2006

DIGEST

Summary Judgment: Calculation of Time

Amends Code of Civil Procedure section 437c, subdivision (b) to change the time frame for filing summary judgment oppositions and reply briefs.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 437c, subdivision (b) to change the time frame for filing summary judgment oppositions and reply briefs. This resolution should be approved in principle because it resolves a potential conflict in the law.

Under current law, oppositions and replies to motions for summary judgment filed pursuant to Code of Civil Procedure section 437c must be filed no less than fourteen days and five days, respectively, before the date of the motion hearing. This resolution amends Code of Civil Procedure section 437c, subdivision (b) to require that oppositions and replies be filed no less than fourteen court days and five court days, respectively, before the date of the hearing. This modification is beneficial because it resolves a potential conflict with California Rules of Court, rule 345, which provides that “[w]ritten objections [to evidence] must be filed and served no later than 4:30 p.m. on the third court day preceding the hearing.”

Because Rule 345 (read in conjunction with Rule 343) is calculated utilizing court days, as opposed to calendar days, it is conceivable that objections to the evidence in a reply would be required to be filed on the same day or even before the reply is filed. While objections could still be made orally at the hearing, such objections might not be considered as carefully by a court as those that were submitted in writing prior to the hearing. Moreover, while the proposed amendment would shorten the time frame for opposing a motion for summary judgment, opposing parties would still have adequate time under the current rules to oppose motions for summary judgment.

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 437c to read as follows:

- 1 §437c
- 2 (a) Any party may move for summary judgment in any action or proceeding if it is
- 3 contended that the action has no merit or that there is no defense to the action or proceeding.
- 4 The motion may be made at any time after 60 days have elapsed since the general

5 appearance in the action or proceeding of each party against whom the motion is directed or
6 at any earlier time after the general appearance that the court, with or without notice and
7 upon good cause shown, may direct. Notice of the motion and supporting papers shall be
8 served on all other parties to the action at least 75 days before the time appointed for
9 hearing. However, if the notice is served by mail, the required 75-day period of notice shall
10 be increased by five days if the place of address is within the State of California, 10 days if
11 the place of address is outside the State of California but within the United States, and 20
12 days if the place of address is outside the United States, and if the notice is served by
13 facsimile transmission, Express Mail, or another method of delivery providing for overnight
14 delivery, the required 75-day period of notice shall be increased by two court days. The
15 motion shall be heard no later than 30 days before the date of trial, unless the court for good
16 cause orders otherwise. The filing of the motion shall not extend the time within which a
17 party must otherwise file a responsive pleading.

18 (b)(1) The motion shall be supported by affidavits, declarations, admissions,
19 answers to interrogatories, depositions, and matters of which judicial notice shall or may be
20 taken. The supporting papers shall include a separate statement setting forth plainly and
21 concisely all material facts which the moving party contends are undisputed. Each of the
22 material facts stated shall be followed by a reference to the supporting evidence. The failure
23 to comply with this requirement of a separate statement may in the court's discretion
24 constitute a sufficient ground for denial of the motion.

25 (2) Any opposition to the motion shall be served and filed not less than 14 court
26 days preceding the noticed or continued date of hearing, unless the court for good cause
27 orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations,
28 admissions, answers to interrogatories, depositions, and matters of which judicial notice
29 shall or may be taken.

30 (3) The opposition papers shall include a separate statement that responds to each of
31 the material facts contended by the moving party to be undisputed, indicating whether the
32 opposing party agrees or disagrees that those facts are undisputed. The statement also shall
33 set forth plainly and concisely any other material facts that the opposing party contends are
34 disputed. Each material fact contended by the opposing party to be disputed shall be
35 followed by a reference to the supporting evidence. Failure to comply with this requirement
36 of a separate statement may constitute a sufficient ground, in the court's discretion, for
37 granting the motion.

38 (4) Any reply to the opposition shall be served and filed by the moving party not
39 less than five court days preceding the noticed or continued date of hearing, unless the court
40 for good cause orders otherwise.

41 (5) Evidentiary objections not made at the hearing shall be deemed waived.

42 (6) Except for subdivision (c) of Section 1005 relating to the method of service of
43 opposition and reply papers, Sections 1005 and 1013, extending the time within which a
44 right may be exercised or an act may be done, do not apply to this section.

45 (7) Any incorporation by reference of matter in the court's file shall set forth with
46 specificity the exact matter to which reference is being made and shall not incorporate the
47 entire file.

48 (c) The motion for summary judgment shall be granted if all the papers submitted
49 show that there is no triable issue as to any material fact and that the moving party is entitled

50 to a judgment as a matter of law. In determining whether the papers show that there is no
51 triable issue as to any material fact the court shall consider all of the evidence set forth in the
52 papers, except that to which objections have been made and sustained by the court, and all
53 inferences reasonably deducible from the evidence, except summary judgment may not be
54 granted by the court based on inferences reasonably deducible from the evidence, if
55 contradicted by other inferences or evidence, which raise a triable issue as to any material
56 fact.

57 (d) Supporting and opposing affidavits or declarations shall be made by any person
58 on personal knowledge, shall set forth admissible evidence, and shall show affirmatively
59 that the affiant is competent to testify to the matters stated in the affidavits or declarations.
60 Any objections based on the failure to comply with the requirements of this subdivision
61 shall be made at the hearing or shall be deemed waived.

62 (e) If a party is otherwise entitled to a summary judgment pursuant to this section,
63 summary judgment may not be denied on grounds of credibility or for want of cross-
64 examination of witnesses furnishing affidavits or declarations in support of the summary
65 judgment, except that summary judgment may be denied in the discretion of the court,
66 where the only proof of a material fact offered in support of the summary judgment is an
67 affidavit or declaration made by an individual who was the sole witness to that fact; or
68 where a material fact is an individual's state of mind, or lack thereof, and that fact is sought
69 to be established solely by the individual's affirmation thereof.

70 (f)(1) A party may move for summary adjudication as to one or more causes of
71 action within an action, one or more affirmative defenses, one or more claims for damages,
72 or one or more issues of duty, if that party contends that the cause of action has no merit or
73 that there is no affirmative defense thereto, or that there is no merit to an affirmative defense
74 as to any cause of action, or both, or that there is no merit to a claim for damages, as
75 specified in Section 3294 of the Civil Code, or that one or more defendants either owed or
76 did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be
77 granted only if it completely disposes of a cause of action, an affirmative defense, a claim
78 for damages, or an issue of duty.

79 (2) A motion for summary adjudication may be made by itself or as an alternative to
80 a motion for summary judgment and shall proceed in all procedural respects as a motion for
81 summary judgment. However, a party may not move for summary judgment based on issues
82 asserted in a prior motion for summary adjudication and denied by the court, unless that
83 party establishes to the satisfaction of the court, newly discovered facts or circumstances or
84 a change of law supporting the issues reasserted in the summary judgment motion.

85 (g) Upon the denial of a motion for summary judgment, on the ground that there is a
86 triable issue as to one or more material facts, the court shall, by written or oral order, specify
87 one or more material facts raised by the motion as to which the court has determined there
88 exists a triable controversy. This determination shall specifically refer to the evidence
89 proffered in support of and in opposition to the motion which indicates that a triable
90 controversy exists. Upon the grant of a motion for summary judgment, on the ground that
91 there is no triable issue of material fact, the court shall, by written or oral order, specify the
92 reasons for its determination. The order shall specifically refer to the evidence proffered in
93 support of, and if applicable in opposition to, the motion which indicates that no triable issue
94 exists. The court shall also state its reasons for any other determination. The court shall

95 record its determination by court reporter or written order.

96 (h) If it appears from the affidavits submitted in opposition to a motion for summary
97 judgment or summary adjudication or both that facts essential to justify opposition may exist
98 but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a
99 continuance to permit affidavits to be obtained or discovery to be had or may make any
100 other order as may be just. The application to continue the motion to obtain necessary
101 discovery may also be made by ex parte motion at any time on or before the date the
102 opposition response to the motion is due.

103 (i) If, after granting a continuance to allow specified additional discovery, the court
104 determines that the party seeking summary judgment has unreasonably failed to allow the
105 discovery to be conducted, the court shall grant a continuance to permit the discovery to go
106 forward or deny the motion for summary judgment or summary adjudication. This section
107 does not affect or limit the ability of any party to compel discovery under the Civil
108 Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4).

109 (j) If the court determines at any time that any of the affidavits are presented in bad
110 faith or solely for purposes of delay, the court shall order the party presenting the affidavits
111 to pay the other party the amount of the reasonable expenses which the filing of the
112 affidavits caused the other party to incur. Sanctions may not be imposed pursuant to this
113 subdivision, except on notice contained in a party's papers, or on the court's own noticed
114 motion, and after an opportunity to be heard.

115 (k) Except when a separate judgment may properly be awarded in the action, no final
116 judgment may be entered on a motion for summary judgment prior to the termination of the
117 action, but the final judgment shall, in addition to any matters determined in the action,
118 award judgment as established by the summary proceeding herein provided for.

119 (l) In actions which arise out of an injury to the person or to property, if a motion for
120 summary judgment was granted on the basis that the defendant was without fault, no other
121 defendant during trial, over plaintiff's objection, may attempt to attribute fault to or
122 comment on the absence or involvement of the defendant who was granted the motion.

123 (m)(1) A summary judgment entered under this section is an appealable judgment as
124 in other cases. Upon entry of any order pursuant to this section, except the entry of summary
125 judgment, a party may, within 20 days after service upon him or her of a written notice of
126 entry of the order, petition an appropriate reviewing court for a peremptory writ. If the
127 notice is served by mail, the initial period within which to file the petition shall be increased
128 by five days if the place of address is within the State of California, 10 days if the place of
129 address is outside the State of California but within the United States, and 20 days if the
130 place of address is outside the United States. If the notice is served by facsimile
131 transmission, Express Mail, or another method of delivery providing for overnight delivery,
132 the initial period within which to file the petition shall be increased by two court days. The
133 superior court may, for good cause, and prior to the expiration of the initial period, extend
134 the time for one additional period not to exceed 10 days.

135 (2) Before a reviewing court affirms an order granting summary judgment or
136 summary adjudication on a ground not relied upon by the trial court, the reviewing court
137 shall afford the parties an opportunity to present their views on the issue by submitting
138 supplemental briefs. The supplemental briefing may include an argument that additional
139 evidence relating to that ground exists, but that the party has not had an adequate

140 opportunity to present the evidence or to conduct discovery on the issue. The court may
141 reverse or remand based upon the supplemental briefing to allow the parties to present
142 additional evidence or to conduct discovery on the issue. If the court fails to allow
143 supplemental briefing, a rehearing shall be ordered upon timely petition of any party.

144 (n)(1) If a motion for summary adjudication is granted, at the trial of the action, the
145 cause or causes of action within the action, affirmative defense or defenses, claim for
146 damages, or issue or issues of duty as to the motion which has been granted shall be deemed
147 to be established and the action shall proceed as to the cause or causes of action, affirmative
148 defense or defenses, claim for damages, or issue or issues of duty remaining.

149 (2) In the trial of the action, the fact that a motion for summary adjudication is
150 granted as to one or more causes of action, affirmative defenses, claims for damages, or
151 issues of duty within the action shall not operate to bar any cause of action, affirmative
152 defense, claim for damages, or issue of duty as to which summary adjudication was either
153 not sought or denied.

154 (3) In the trial of an action, neither a party, nor a witness, nor the court shall
155 comment upon the grant or denial of a motion for summary adjudication to a jury.

156 (o) A cause of action has no merit if either of the following exists:

157 (1) One or more of the elements of the cause of action cannot be separately
158 established, even if that element is separately pleaded.

159 (2) A defendant establishes an affirmative defense to that cause of action.

160 (p) For purposes of motions for summary judgment and summary adjudication:

161 (1) A plaintiff or cross-complainant has met his or her burden of showing that there
162 is no defense to a cause of action if that party has proved each element of the cause of action
163 entitling the party to judgment on that cause of action. Once the plaintiff or cross-
164 complainant has met that burden, the burden shifts to the defendant or cross-defendant to
165 show that a triable issue of one or more material facts exists as to that cause of action or a
166 defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or
167 denials of its pleadings to show that a triable issue of material fact exists but, instead, shall
168 set forth the specific facts showing that a triable issue of material fact exists as to that cause
169 of action or a defense thereto.

170 (2) A defendant or cross-defendant has met his or her burden of showing that a cause
171 of action has no merit if that party has shown that one or more elements of the cause of
172 action, even if not separately pleaded, cannot be established, or that there is a complete
173 defense to that cause of action. Once the defendant or cross-defendant has met that burden,
174 the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or
175 more material facts exists as to that cause of action or a defense thereto. The plaintiff or
176 cross-complainant may not rely upon the mere allegations or denials of its pleadings to show
177 that a triable issue of material fact exists but, instead, shall set forth the specific facts
178 showing that a triable issue of material fact exists as to that cause of action or a defense
179 thereto.

180 (q) This section does not extend the period for trial provided by Section 1170.5.

181 (r) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4
182 (commencing with Section 1159) of Title 3 of Part 3.

183 (s) For the purposes of this section, a change in law does not include a later enacted
184 statute without retroactive application.

185

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

Existing law: States that an opposition to a motion to summary judgment must be served and filed not less than 14 days preceding the date of hearing and that any reply papers must be served and filed not less than 5 days before the date of hearing

This Resolution: Would change the deadlines for opposition and reply papers to be served and filed from calendar to court days.

The Problem: Under current law there is a potential conflict between the date that the reply papers must be served and the date that any written objections must be served. While the reply papers must be served five calendar days before the date of hearing, under Rule of Court 342, any written objections must be served three court days before the date of hearing. This inconsistency between calendar and court days can lead to an anomaly, whereby the party opposing a motion for summary judgment has to file and serve his written objections before he has seen the reply papers. The anomaly may mean that the party opposing the papers has no opportunity to file objections to evidence submitted in the reply papers.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The changes proposed in this resolution are unnecessary and would have undesirable effects. The change to court days at page 1, line 25, relating to when opposition papers must be filed, is not necessary; and would overly complicate the statute. The change to court days at page 2, line 39, relating to when reply papers must be filed and served, would decrease the time available to the moving party to file and serve a reply brief. Reply papers do not normally contain new evidence; when they do, both CCP section 437c and Rules of Court, Rule 343 provide that objections may be made orally at the hearing.

In the statement of reasons, the proponent has cited the wrong Rule of Court; it is Rule 345 which

provides the date for written objections to evidence to be filed and served. Rule 345, however, does not address reply papers at all. Rule 343 provides that a party desiring to make objections to evidence may make them pursuant to Rule 345, or may make arrangements to have a court reporter present at the hearing.