

RESOLUTION 03-04-06

DIGEST

Rules of Court: Notice of Unavailability

Adds Rule 310 to the California Rules of Court to provide a structural framework for notices of unavailability of counsel.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Rule 310 to the California Rules of Court to provide a structural framework for notices of unavailability of counsel. This resolution should be approved in principle because it codifies case law standards and current practices by providing clear rules and limits regarding using notices of unavailability of counsel.

Case law currently provides that once counsel or a party is put on notice of the unavailability of counsel, actions by counsel or a party which are inconsistent with the notice may be grounds for sanctions under Code of Civil Procedure section 128.5. (*Tenderloin Housing Clinic v. Sparks* (1992) 8 Cal.App.4th 299.) In practice, counsel often issue notices of unavailability even if another member of their firm may be available to handle the case in that counsel’s absence. Further counsel may abuse the use of the notices by serving them during the month before the discovery cut-off in an action to prevent discovery from taking place. This resolution will limit such abuses by enacting a procedure for objecting to a notice and requiring a court hearing on any notice objected to before it becomes effective. The resolution also puts limits on the number of such notices issued by counsel in certain time frames and provides that such a notice may only be issued if all counsel representing that party are unavailable.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council add California Rules of Court, Rule 310 to read as follows:

- 1 Rule 310
- 2 (a) [General Provision] Any party may serve a Notice of Unavailability of Counsel
- 3 on all other parties when counsel will be unavailable to attend court appearances, ex parte
- 4 requests, respond to motions, or otherwise unable to communicate with the Court or other
- 5 counsel. The Notice shall set forth the dates counsel will be unavailable and shall be served
- 6 on all parties and filed with the Court. The Notice shall be served as soon as the
- 7 unavailability is known.
- 8 (b) [Objections] Any party receiving a Notice of Unavailability shall have five days
- 9 to serve and file an objection to the notice, setting forth the grounds for the objection. If no

10 timely objection is served, a receiving party shall not act in a manner inconsistent with the
11 notice. If an objection is served, the Notice of Unavailability is deemed invalid unless the
12 requesting party moves the Court for an order for appropriate relief.

13 (c) [Limits] A Notice of Unavailability shall not be used unless all counsel
14 representing the requesting party in the action are unavailable. No counsel shall serve one or
15 more Notices of Unavailability covering more than thirty calendar days in any calendar year
16 unless the Notice is supported by a declaration of counsel establishing good cause.

17 (d) The Court may award sanctions under Code of Civil Procedure section 128.5 for
18 abuse of this rule.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: There is no statutory basis for serving and filing a Notice of Unavailability. Case law currently recognizes that once a party is put on notice of counsel's unavailability, acting in a manner inconsistent with such notice could be grounds for sanctions under Code of Civil Procedure section 128.5. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299.)

This Resolution: This resolution provides a structural framework for Notices of Unavailability and sets out limits on their use.

The Problem: Notices of unavailability have their place in civilized practice, as long as their use is not abused. Such notices are frequently served, often by busy solo or small firm practitioners. However, a practitioner who makes a habit out of serving such notices for the month prior to discovery cut-off is abusing the procedure. This abuse of professional courtesy should be discouraged. The problem exists at large firms as well; when four lawyers appear on a caption and a notice of unavailability of counsel is served when the most junior among them takes a vacation. We need a rule to curb these abuses and to provide a framework to seek relief from such abuses.

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 resolution may affect local practices.

AUTHOR AND/OR PERMANENT CONTACT: Alyson L. Huber, Bartko, Zankel, Tarrant & Miller, 900 Front Street, San Francisco, California 94111, voice (415) 956-1900, fax (415) 956-1152, email ahuber@bztm.com

RESPONSIBLE FLOOR DELEGATE: Alyson L. Huber

COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

This resolution demonstrates the futility in attempting to mandate professional courtesy through legislation. The resolution's complex scheme will create more problems than it solves. Instead of simply notifying opposing counsel that you are going away on vacation, you would also need to check your mail for an objection, and if one is served, file a motion to obtain Court permission for your vacation. It would be better if the Courts, and the legislature this conference would lobby to pass this resolution into law, were focused more on the merits of our client's claims than on our personal schedules.

Preventing abuse of the existing Notice of Unavailability practice is a worthy goal, but this resolution is not the solution. There are many procedures that unethical counsel can and will abuse, but we don't have or need a Rule of Court to address each one specifically. The law, as explained in the *Tenderloin* case cited by the proponents, makes clear that even if "a legal procedure pursued has justification in law, the timing thereof may be oppressive and may constitute harassment if it unjustifiably neglects or ignores the legitimate interest of a fellow attorney." In that case, an award of sanctions against counsel employing abusive tactics was affirmed. Thus, if someone is abusing the Notice of Unavailability process, we already have procedural mechanisms and case law with which to deter those abuses. This resolution would create an unnecessary framework which encourages counsel to fire off dueling notices, objections, and motions, instead of encouraging counsel to have good faith discussions about scheduling issues.