

RESOLUTION 10-04-06

DIGEST

Discovery: Ex Parte Applications

Adds Code of Civil Procedure section 2016.041 to permit courts to require counsel to set motions to compel by ex parte application.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution adds Code of Civil Procedure section 2016.041 to permit courts to require counsel to set motions to compel by ex parte application. This resolution should be disapproved because cooperation between the parties cannot be accomplished through mandatory ex parte hearings.

Existing law already requires counsel to meet and confer prior to bringing regularly noticed discovery motions. This resolution, however, would impose the requirement that discovery motions be set by ex parte hearings upon 48-hour notice if a superior court chooses to adopt a local rule so stating. The expectation is that the ex parte notice and hearing would force counsel to meet and confer and ideally resolve discovery disputes informally. This resolution discounts the fact that motions to compel are typically brought because counsel cannot informally resolve discovery disputes. The process and expense of bringing a preliminary ex parte application to resolve discovery disputes would likely fuel further discord between opposing, zealous counsel, and would add a court appearance with its additional cost to the client.

Courts have recognized that the discovery process is inherently prone to abuse which must be judicially curbed. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 434.) Requiring yet another layer of civil process in order to have a court address such abuse would likely be inefficient and contrary to the goal of judicial economy and will likely increase expenses to the litigants.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 2016.041 to read as follows:

- 1 § 2016.041
- 2 Through its county-wide Local Rules (as opposed to departmental rules), Superior
- 3 Courts may require that the moving party set an ex parte hearing to schedule the hearing for
- 4 the motion to compel. Notice of the ex parte hearing shall be given to the opposing party no

5 later than 48 hours before the ex parte hearing.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Respecting a discovery motion to compel, section 2016.040 simply requires the filing of a declaration in support of a motion to compel showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

This Resolution: Would allow Superior Courts to establish through their Local Rules the requirement that counsel for the moving party set an ex parte hearing to allow the court to resolve the discovery issues or to schedule the hearing for the motion to compel if resolution is not feasible due to the number and complexity of the issues involved given court time constraints at ex parte hearing.

The Problem: While existing law requires that counsel file a meet-and-confer declaration as part of the filing of a motion to compel, counsel rarely meet face to face to resolve their discovery disputes, but often exchange meet and confer letters that tend to escalate the conflict rather than resolve it. For this reason and many others, the requirement that counsel meet and confer informally and in good faith is more ineffective than not. Many trial courts, however, have found that counsel are less likely to take unreasonable or legally untenable positions in face-to-face meetings, especially before the court. In addition, often the court can quickly resolve the discovery dispute(s), thereby reducing litigation costs and expediting the case to trial or settlement. Indeed, some courts already require the setting of a discovery ex parte hearing to schedule a motion to compel pursuant to their authority to manage the court calendar. But it is unclear whether this procedure is proper since it imposes an additional requirement for filing motions to compel that is not authorized by the Code. On the other hand, some courts do not have the time or inclination to resolve discovery disputes through an ex parte hearing. Therefore, rather than require the setting of an ex parte hearing to schedule a motion to compel regardless of the court calendar, the courts should be given the opportunity to choose to establish this requirement through their Local Rules. The phrase but not departmental rule in the text of the proposed law is required to ensure that it is clearly understood that the Superior Court as a whole, and not its various departments, has the option of instituting this requirement, as allowing each department to make this choice would cause much confusion regarding which departments require the ex parte hearing to schedule the motion to compel, and which do not.

IMPACT STATEMENT

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

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COUNTERARGUMENTS

BEVERLY HILLS BAR ASSOCIATION

This resolution has two defects. First, it adds another layer of procedure with additional expense before a party can move to compel discovery. Second, it lays the groundwork for county-wide Local Rules which would further Balkanize practice in the State, and make it more difficult for out-of-county lawyers to practice effectively.

While the meet-and-confer process is ineffective in some cases, and ex parte hearings reportedly encourage some parties to take more reasonable positions, neither result is well-documented or universal. However, the rule change, if and where adopted, would require ALL parties to incur the expense of additional ex parte appearances and paperwork, and make the process of moving to compel (or opposing a motion) more difficult and cumbersome. If counsel rarely meet in person to discuss discovery issues, a face-to-face meet and confer (as required in some U.S. District Courts) would be a much easier and less costly rule change. If counsel take unreasonable positions, sanctions for such positions are already provided for by C.C.P. §2023.010(h).

SANTA CLARA COUNTY BAR ASSOCIATION

This proposed resolution will only serve to burden the resources of the Courts. Any opportunity for ex parte hearings as a substitute for meet-and-confer between counsel would only defeat the intent of the meet-and-confer requirement, which is to minimize the number of discovery disputes that come before the Courts. Furthermore, promoting the use of the ex parte calendar for resolution of discovery disputes will crowd out other applications that are more appropriately suited for that calendar. This resolution should therefore be defeated.