Reducing Court Congestion: *New Rules in Civil Procedure*

By Amy I. Huberman

SEVERAL CHANGES TO THE California Code of Civil Procedure went into effect January 1, 2016. As a result, litigation counsel in California must take note of the changes before filing a demurrer or motion for summary judgment. The new legislation also amends §998 to address an unintended inequity in the statute.

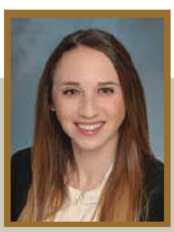
Meet and Confer Before You Demur

Since January 1, counsel must meet and confer at least five days prior to filing a demurrer.[1] The new code section resulting from passage of Senate Bill 383 requires a good faith meet and confer in person or by telephone between counsels. The demurring party must identify all the specific causes of action that party believes are subject to demurrer and why. In response, the complaining party must provide legal support for its complaint.

The purpose of this process is to determine if agreement can be reached that would eliminate the need for unnecessary and time consuming demurrer hearings. If the parties are unable to meet and confer as the statute requires, the demurring party will be granted an automatic 30-day extension of time to file a responsive pleading after submitting a declaration to the court regarding the inability to meet and confer.

The rule takes into consideration the problem of a complaining party not making itself available to meet and confer. But the new rule is silent as to a demurring party's failure to meet and confer. Moreover, the rule specifically states that "any determination by the court that the meet and confer was insufficient shall not be grounds to overrule or sustain a demurrer." This could assume some form of the meet-and-confer process occurred. It is an open question what happens if the process did not occur at all.

The new text also prohibits a party from amending a complaint or cross-complaint in response to a demurrer more than three times.[2] However, the three-amendment rule does not



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include amendments made without leave of court. For instance, a moving party who amends their complaint before the demurrer hearing, making the demurrer hearing moot, still has three opportunities to amend. But a moving party who wishes to amend prior to the demurrer hearing, must now amend and file before the opposition to the demurrer is due. This suggests that amended complaints filed on the eve of the demurrer hearing may no longer be allowed.

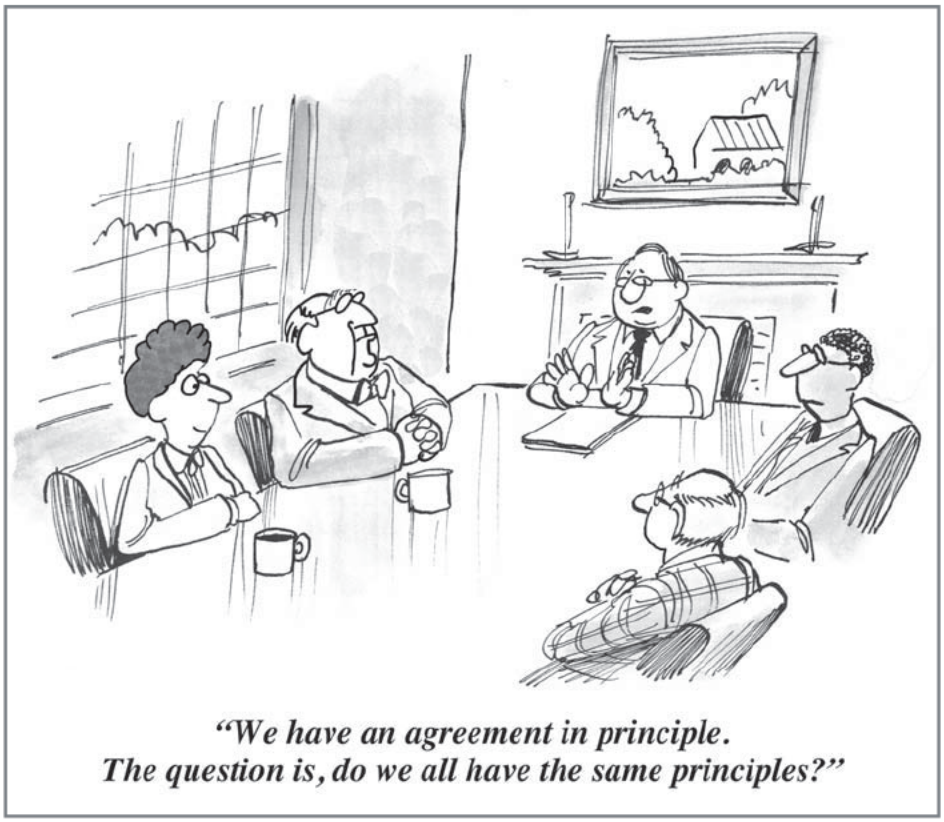
The rule is an attempt by the legislature to reduce court congestion, urge good faith litigation, and discourage plaintiffs from filing frivolous complaints.

Reenacting Summary Adjudication of "Partial" Issues

Assembly Bill 1141 reenacts and makes permanent a summary adjudication statute that was inadvertently allowed to sunset. §437(c)(s) was originally enacted to improve judicial efficiency by allowing a court to issue summary adjudication of partial issues, though the ruling would not dispose of the entire cause of action. Section 437(c)(s) required parties to stipulate in advance that a ruling on the issue would further the interest of judicial economy, but the section lapsed on January 1, 2015 because no legislation was enacted to reauthorize its provisions. New §437(c)(t) is essentially the same as the lapsed section.

Prior to §437(c)(s), if summary adjudication was not dispositive of the entire cause of action, the court was not authorized to hear it. Under the new amendment, stipulating parties may file a motion for summary adjudication which does not dispose of the entire action. Before filing the motion, the parties must file a joint stipulation stating the issue or issues to be adjudicated.

Each party must also submit a declaration stipulating that the motion will further the interest of judicial economy and that a ruling on the motion will either reduce the amount of time of the trial or significantly increase the chance that the parties will agree on a settlement. Procedurally, a stipulation between at least two parties is required. The moving party must serve the joint stipulation upon any party to the action who is not a party to the motion. The



"We have an agreement in principle. The question is, do we all have the same principles?"

non-stipulating party must be given the opportunity to object.

Within fifteen days of the court's receipt of the stipulation and declarations, the court will notify the stipulating parties as to whether a motion for summary adjudication may be filed.

Code of Civil Procedure §998 and Equity

The primary purpose of what is commonly referred to as a 998 settlement offer is to encourage parties to settle. Assembly Bill 1141 seeks to equalize expert witness costs when a settlement offer is rejected pursuant to §998. An omnibus bill in 2005 created what appears to be an inadvertent inequity.

The word "postoffer" was added to §998(d), but was not added to §998(c). Its addition created inequity between plaintiffs and defendants because if a plaintiff rejected a 998 settlement offer, and failed to receive a better award at trial, the court had discretion to award defendant's pre- and post-offer expert witness fees. On the other hand, if a defendant rejected a 998 settlement offer, the court had discretion only to award the plaintiff's post-offer expert witness costs.

Initially, AB 1141 sought to remove "postoffer" from §998(d) to remedy the inequity. However, the legislature proposed inserting "postoffer" in §998(c). Now, both parties are able to recover expert witness costs incurred only after the §998 offer is made. Litigants are therefore encouraged to make and accept 998 settlement offers early in litigation to recover maximum expert witness fees.

Civil litigators in California should familiarize themselves with all recent amendments to the Code of Civil Procedure, follow the new rules and assist judges in reducing court congestion.

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[1] CCP §430.41(a)(2).
[2] CCP §430.41(e).