



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Civil Practice and Procedure: Response to Amended Complaint	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 3.1320	January 1, 2011
Recommended by	Date of Report
Civil and Small Claims Advisory Committee	August 13, 2010
	Contact
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Executive Summary

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 3.1320, which governs demurrers, to eliminate its applicability to an amended complaint. An apparent conflict exists between rule 3.1320(j)(2) and Code of Civil Procedure section 471.5 concerning the time to respond to an amended complaint. Amending the rule as proposed would remove the conflict.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 3.1320(j)(2) to eliminate its applicability to an amended complaint.

The text of amended rule 3.1320 is attached at page 4.

Previous Council Action

The 10-day period to respond to an amended complaint, currently found in rule 3.1320(j)(2) was added to the rule effective July 1, 1984. At that time, the council amended the rule—then numbered 325—to add the following in a new subdivision (g):

[Demurrer not directed to all causes of action]

A demurrer to a cause of action may be filed without answering other causes of action. Unless otherwise ordered, *defendant shall have 10 days to move to strike, demur, or otherwise plead to the complaint or the remaining causes of action following* (1) the overruling of the demurrer, (2) *amendment of the complaint* or the expiration of the time to amend if the demurrer was sustained with leave to amend, or (3) the sustaining of the demurrer if the demurrer was sustained without leave to amend. (Italics added.)

The 1984 report¹ that recommended the rule amendment explains that the purpose is to extend the time to answer a complaint when a demurrer to any cause of action is filed. That purpose is accomplished by the first sentence of former rule 325(g), above, and is currently provided for in rule 3.1320(b). The report does not discuss the 10-day time within which to respond to an amended complaint. A comment in response to the proposal, however, from the Committee on Administration of Justice “raised a question as to whether the proposal conflicts with statute.” The report does not address a potential conflict with Code of Civil Procedure section 471.5, but instead focuses on the extended time to fully respond to a complaint when a demurrer is filed.²

The rule also was amended and renumbered as part of the overall reorganization of the California Rules of Court effective January 1, 2007.

Rationale for Recommendation

The 10-day period to plead in response to an amended complaint in rule 3.1320(j)(2) is inconsistent with the 30-day period within which to answer an amended complaint in Code of Civil Procedure section 471.5. Because of this inconsistency, it is not clear by what date a defendant must answer after being served with an amended complaint after a demurrer was sustained with leave to amend. Under section 471.5, a defendant has 30 days to respond: “The defendant shall answer the amendments, or the complaint as amended, within 30 days after service thereof, ...” Under rule 3.1320(j)(2), a defendant has 10 days to respond: “[D]efendant has 10 days to move to strike, demur, or otherwise plead to the complaint or the remaining causes of action following the amendment of the complaint.”

¹ Judicial Council of California, Court Management Committee, *Law and Motion Rule Amendments* (May 8, 1984).

² In response, the report notes, “The possibility of a conflict with statute would appear to be less of a concern here than in the situation where motion to compel arbitration [another proposal included in the report] would be permitted in lieu of a response. A demurrer is a pleading even when it applies only to some of the causes of action. The suggested rule would seem to be an appropriate exercise of the council’s authority.”

Under the proposed amendment of rule 3.1320(j)(2), the subdivision's 10-day requirement to plead would apply only to a responsive pleading following: (1) the overruling of a demurrer, (2) the expiration of time to amend if a demurrer was sustained with leave to amend, and (3) the sustaining of a demurrer without leave to amend. If a demurrer is sustained and no amended complaint is filed, a responsive pleading would be proper only as to causes of action not subject to the earlier demurrer. (Rule 3.1320(j), by its terms, applies to pleading to the complaint or *the remaining causes of action*.) If a demurrer is sustained as to the entire complaint and no amended complaint is filed, a defendant may move to dismiss the complaint under Code of Civil Procedure section 581(f).

Because the 10-day requirement to plead would no longer apply to an amended complaint, there would be no inconsistency with section 471.5.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment as part of the spring 2010 invitation-to-comment cycle. Seven individuals or organizations submitted comments. Six commentators agreed with the proposal without any modifications. One disagreed with the proposal because she thought the language of the amended rule would be confusing and could be read to allow an improper pleading. As circulated for comment, the amended rule could be interpreted to allow a defendant to demur after a demurrer is sustained without leave to amend (subdivision (j)(3)) or after the expiration of time to amend if the demurrer was sustained with leave to amend (subdivision (j)(2)). But filing another demurrer would not be proper or necessary in these circumstances because there would be no amended complaint to demur to. Nor could a defendant bring a motion to strike after filing a demurrer, whether the demurrer was sustained or overruled. “Whatever questions of law the defendant wishes to raise as to the sufficiency of the complaint, whether by demurrer or motion to strike, must be raised at the same time.” (Witkin, Cal. Proc. 5th ed. 2008) Pleading §1015.) The proper action following the sustaining of a demurrer would be the filing of an answer to the remaining causes of action or a motion to dismiss if the demurrer was sustained as to the entire complaint.

The commentator suggested further modification of the rule language to provide clarity. The advisory committee agreed with the commentator's first suggested modification—to delete the words “motion to strike,” “move to strike,” and “demur” as available pleadings after a demurrer had been ruled on.

Implementation Requirements, Costs, and Operational Impacts

The proposal would have minimal implementation requirements and costs and would end confusion about the time within which a response to an amended complaint is due.

Attachments

1. Cal. Rules of Court, rule 3.1320 at page 4
2. Chart of comments, at page 5–10

Rule 3.1320 of the California Rules of Court would be amended by the Judicial Council effective January 1, 2011, to read:

1 **Rule 3.1320. Demurrers**

2

3 **(a)–(i) * * ***

4

5 **(j) ~~Time for motion to strike, demur, or otherwise plead to respond after~~**
6 **demurrer**

7

8 Unless otherwise ordered, defendant has 10 days to ~~move to strike, demur,~~ answer
9 or otherwise plead to the complaint or the remaining causes of action following:

10 (1) The overruling of the demurrer;

11 (2) ~~The amendment of the complaint or~~ The expiration of the time to amend if the
12 demurrer was sustained with leave to amend; or

13 (3) The sustaining of the demurrer if the demurrer was sustained without leave to
14 amend.

SPR10-15**Civil Practice and Procedure: Response to Amended Complaint** (amend Cal. Rules of Court, rule 3.1320)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Orange County Bar Association Lei Lei Wang Ekvall President Newport Beach	A	No specific comment.	No response required.
2.	Barbara L. Roberts Judge Superior Court of Butte County Oroville	A	Thank you.	No response required.
3.	Santa Clara County Bar Association Angela F. Storey Chair – Civil Practice Committee San Jose	A	No specific comment.	No response required.
4.	State Bar of California Committee on Administration of Justice Saul Bercovitch Legislative Counsel San Francisco	A	CAJ supports this proposal.	The committee notes the support.
5.	State Bar of California Committee on Appellate Courts T. Peter Pierce, Chair San Francisco	A	No specific comment.	No response required.
6.	Superior Court of San Bernardino County Debra Meyers Deputy Court Executive Officer/General Counsel	N	Disagree. The rule is confusing and appears to having surprising effects Cal. Rules of Court, 3.1320, subd. (j), currently provides: (j) <i>Time for motion to strike, demur, or otherwise plead after demurrer Unless otherwise ordered, defendant has 10 days to move to strike demur, or otherwise plead to the complaint or the remaining</i>	

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			<p>causes of action following:</p> <ul style="list-style-type: none"> (1) The overruling of the demurrer; (2) The amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or (3) The sustaining of the demurrer if the demurrer was sustained without leave to amend. <p>It was noted that under Cal. Code of Civ. Proc., § 471.5, a defendant has 30 days to respond to an amended complaint. The proposed change would delete the words “The amendment of the complaint or” from subdivision (j)(2).</p> <p>The amended language would allow a party to “move to strike, demur, or otherwise plead” following the overruling of a demurrer, the failure to amend after a demurrer was sustained with leave to amend, or the sustaining of a demurrer without leave to amend.</p> <p>There is some authority that suggests that a party may demur to a <i>subsequent</i> complaint even after a demurrer to a previous complaint was overruled. See <u>Pacific States Enterprises, Inc. v. City of Coachella</u> (1993) 13 Cal. App. 4th 1414,</p>	<p>Rule 3.1320(j) is intended to apply to various types of pleadings to the extent that the type of pleading is a proper response to the previous procedural action. The rule provision addresses various previous procedural actions to which a particular responsive pleading is appropriate; it is not intended to authorize a type of pleading that would otherwise not be allowed.</p>

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			<p>1420 (footnote 3); <u>Pavicich v. Santucci</u> (2000) 85 Cal. App. 4th 382, 389 (footnote 3); but see <u>Bennett, v. Suncloud</u> (1997) 56 Cal. App. 4th 91, 96. But to demur to the same pleading that a party previously unsuccessfully demurred to would be a disguised motion for reconsideration, and clearly improper unless the requirements of Cal. Code of Civ. Proc., § 1008 were met. And to the extent that a demurrer has been sustained as to some causes of action, either without leave to amend or after a failure to amend when leave to amend is granted, it seems unlikely that the court would allow the responding party to demurrer to the remaining causes of action which that party failed to demur to.</p> <p>All of which is to say that, while it may have been proper to “move to strike, demur, or otherwise plead” after a complaint was amended following the sustaining of a demurrer, if Rule 3.1320(j) is amended to no longer address the possibility of amendment, it is difficult to conceive of a situation in which the responding party would properly be allowed to do anything other than filing an answer to the complaint under the circumstances for which the Rule is applicable.</p>	<p>The committee agrees that the language of proposed rule amendment could be confusing. In some of the circumstances described in the proposed amended rule, a motion to strike or a demurrer would not be a proper responsive pleading. The committee, therefore, has modified the rule as suggested by the commentator in her first suggested modification.</p>

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			<p>An additional problem is that, if a demurrer to the complaint as a whole is sustained without leave to amend, or is sustained with leave to amend but no amended complaint is filed, the proper response for the defendant is to move to dismiss pursuant to Cal. Code Civ. Proc., § 581, subd. (f) not to move to strike, demur, or otherwise plead, and there is no time limit for seeking such a dismissal.</p> <p>The proposed amendment to Rule 3.1320 results in a disconnect between the proposed actions (to move to strike or to demur) and the appropriate - - or at least most common – responses to the situations discussed. It is true that the language “otherwise plead” in Rule 3.1320 would include answering, but I fail to see the logic in specifically indentifying two courses of action (move to strike and demurring) that are not appropriate responses to demurrers being overruled or sustained without further amendment, and using a general term to cover the most common response to those actions (answering).</p> <p>Consider the following:</p> <p>[Chart of actions and time limits with reference to rule 3.1320 omitted. Is this really long? Might it be an attachment? Seems odd to</p>	

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			<p>omit.]</p> <p>The implication that the rule authorizes a demurrer or motion to strike following any of the events listed in subdivisions (j)(1)-(3) could be combatted by making the following change:</p> <p style="padding-left: 40px;">(j) Time for motion to strike, demur, or otherwise plead to respond after demurrer[note missing period] Unless otherwise ordered, defendant has 10 days to answer move to strike, demur, or otherwise plead to the complaint or the remaining causes of action following:</p> <p style="padding-left: 80px;">(1) The overruling of the demurrer;</p> <p style="padding-left: 80px;">(2) The amendment of the complaint or tThe expiration of the time to amend if the demurrer was sustained with leave to amend; or</p> <p style="padding-left: 80px;">(3) The sustaining of the demurrer if the demurrer was sustained without leave to amend.</p> <p>This would make it clear that the Rule does not authorize a demurrer or motion to strike when it would otherwise be barred by Cal. Code of Civ. Proc., § 1008 and would stop parties from arguing that Rule 3.1320(j) authorizes successive demurrers to the same pleading by the same party.</p>	

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			<p>That said, I think the Rule could be made somewhat more precise by amending it as follows:</p> <p>(j) Time for motion to strike, demur, or otherwise plead to respond after demurrer Unless otherwise ordered, a demurring defendant has 10 days to answer move to strike, demur, or otherwise plead to the complaint or the remaining causes of action after:</p> <p>(1) The overruling of the demurrer to the complaint is overruled; (2) The amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or (3) The sustaining of the demurrer is sustained if the demurrer was sustained to without leave to amend to part of the complaint; or (3) The expiration of the time to amend if the demurrer is sustained with leave to amend to part of the complaint and no amended complaint is filed.</p>	
7.	Superior Court of San Diego County Michael M. Roddy Court Executive Officer	A	No specific comment.	No response required.