Study J-506 June 14, 2006

Third Supplement to Memorandum 2006-11

Civil Discovery Improvements (Discussion of Issues)

In Memorandum 2006-11, the staff suggested enacting a new statute providing for an expedited hearing when a discovery motion is made in an unlawful detainer matter. This supplement discusses a bill introduced this legislative session, AB 2008 (Haynes), which may have relevance to the suggested idea. The supplement also addresses the procedural aspects of a discovery motion in an unlawful detainer matter.

AB 2008 (HAYNES)

AB 2008 (Haynes) is similar in some respects to the suggested reform relating to a discovery motion in an unlawful detainer matter. As explained below, however, there appear to be significant differences.

Background

A defendant in an unlawful detainer matter is normally required to answer a summons and complaint within five days of service. Code Civ. Proc. §§ 1167, 1167.3. Failure to do so allows for immediate entry of a default judgment, and issuance of a writ of execution. Code Civ. Proc. § 1169. Once an answer is filed, the trial of the matter, absent an agreement or court order to the contrary, is required to be held within 20 days after a request to set is made. Code Civ. Proc. § 1170.5.

Within the five day period to answer, a defendant may instead move to quash the summons, or move to stay or dismiss the action on certain specified grounds. Code Civ. Proc. § 418.10. The filing of either of these motions extends the defendant's time to answer the complaint. Code Civ. Proc. § 1167.4. Still, the defendant's motion must be heard within seven days of filing, and the defendant must thereafter answer the complaint within five days after the court rules on the motion. Code Civ. Proc. § 1167.4.

Alternatively, a defendant served with a summons and complaint in an unlawful detainer matter may demur to the complaint within five days of service. Code Civ. Proc. § 1170. However, no statute provides for an expedited

hearing on a demurrer filed by a defendant in an unlawful detainer matter. Under general civil rules of practice, a hearing on a demurrer need not be calendared until 35 days after filing. Cal. R. Ct. 325(b).

A motion to strike is another initial responsive pleading a civil defendant may file in lieu of an answer. Code Civ. Proc. § 435. No statute expressly authorizes or forbids a motion to strike in an unlawful detainer action. Under general civil rules of practice, a hearing on a motion to strike need not be calendared within *any* specified time period after filing.

The unlawful detainer statutes are silent as to what effect the filing of either a demurrer or a motion to strike has on a defendant's time to answer, or on the entry of a default judgment. However, it is at least theoretically possible a defendant in an unlawful detainer matter could avoid answering a complaint for a substantial period of time, and possibly substantially delay a trial in the matter without risk of a default judgment, by filing either a demurrer or a motion to strike.

Goal of AB 2008

In cases involving commercial property, AB 2008 seeks to preclude this possible delaying tactic. The bill would make the expedited hearing requirement for a motion to quash also applicable to a demurrer or motion to strike. According to the bill analysis, the author believes the change is needed because attorneys for commercial tenants rarely file a motion to quash, and instead attempt to raise procedural defenses in either a demurrer or motion to strike, in order to avoid the expedited hearing requirement.

Legislative Action on AB 2008

The last legislative action on AB 2008 occurred on May 9, 2006, when the bill was set for first hearing before the Assembly Judiciary Committee. However, the hearing was cancelled at the request of Assembly Member Haynes, and the Legislative Counsel website reports no further action on the bill since that date. Based on the subsequent passage of legislative deadlines, the bill now appears to be dead. (Assembly Member Haynes's office has confirmed that no rule waiver will be sought.)

Before it was taken off calendar, the bill had received a less than favorable analysis from the Assembly Judiciary Committee. The bill analysis suggests that application of the expedited hearing requirement to a demurrer or motion to strike would not be appropriate, as those motions differ substantially from a motion to quash in terms of complexity. The analysis notes that a motion to

quash is usually quite perfunctory, typically involving only proof of defective service, and can normally be prepared quite easily. On the other hand, according to the analysis, a demurrer or motion to strike almost always involves more complicated issues, and requires substantially more time to prepare for hearing.

The analysis further points out that, to the extent AB 2008 is intended to deter an attorney from filing either a demurrer or a motion to strike solely to cause delay, an attorney is already deterred from doing so by rules of professional conduct.

Interestingly, neither AB 2008 nor the bill analysis addresses the fact that a "stand alone" demurrer or motion to strike, as contrasted with a motion to quash, constitutes a general appearance. Code Civ. Proc. §§ 418.10(d), 1014, 1177. This distinction would appear to be of some significance, as a general appearance by an unlawful detainer defendant allows the 20 day trial clock to start upon a request to set by the plaintiff. Code Civ. Proc. §§ 1170, 1170.5.

Relevance to Discovery Motion Reform

Although generally related in subject matter, the staff believes neither the considerations underlying AB 2008 nor those underlying the Assembly Judiciary Committee analysis bear on the suggested reform relating to a discovery motion in an unlawful detainer matter.

First, as contrasted with an initial defense pleading, the filing of a discovery motion neither extends the time to answer a served complaint, nor extends the time for a matter to proceed to trial. Thus, such motion could not be used as a statutorily authorized delaying tactic, apparently the primary concern of Assembly Member Haynes.

Second, AB 2008 would *compel* a party to calendar a hearing on certain motions in less time than is currently provided, setting an earlier *last* date on which such a motion could be heard. The discovery motion reform would only *allow* a party to calendar a motion hearing earlier than is currently possible, setting only an earlier *first* date on which such motion could be heard. Thus, to the extent a party wanted or needed more time to prepare for a hearing on a discovery motion (the primary focus of the Assembly Judiciary Committee's analysis of AB 2008), the reform would not interfere in any way.

PROCEDURAL ASPECTS OF AN UNLAWFUL DETAINER DISCOVERY MOTION

In the First Supplement to Memorandum 2006-11, the staff suggested that a new Section 1170.8 be added to the Code of Civil Procedure, to read:

> 1170.8. In any action under this chapter, a discovery motion may be made at any time upon giving five days notice.

As discussed at pages 4-5 of the First Supplement, some clarification of the procedural requirements for a motion under this section may be necessary to avoid ambiguity or conflict with other statutes.

Possible Additional Statutory Language

As currently drafted, the proposed new section does not specify when an opposition or a reply needs to be served or filed. The section also does not address whether the five day notice requirement is affected by the manner of notice given.

Such details are provided in Code of Civil Procedure Section 1005, which governs most motions in most civil litigation. (Code of Civil Procedure Section 1177 makes Section 1005 applicable to a motion in an unlawful detainer matter.) However, some of the procedural provisions in Section 1005 are logically inconsistent with a statute allowing an expedited motion hearing on only five days' notice. For example, Section 1005 provides that opposition to a motion must generally be filed and served nine court days before the motion hearing.

Nevertheless, the unlawful detainer statutes already contain two other sections allowing for motions on extremely short notice, and no special procedural requirements have been statutorily provided for these sections. Code of Civil Procedure Section 1170.7 allows a motion for summary judgment in an unlawful detainer matter to be made on five days' notice; Section 1167.4 allows a motion to quash a served summons to be made on *three* days' notice. Leading treatises acknowledge the "gaps" in the statutory coverage relating to these motions, and advise practitioners to consult local rules for guidance. We have found one local rule on this point, which provides:

> .... 2. If a summary judgment/adjudication motion in an unlawful detainer action is personally served on the opposing party or counsel, it must be filed with the Court and served at least five (5) days prior to the hearing. If the motion is served by mail, it must be served on the opposing party or counsel at least ten (10) days prior to the hearing and filed with the Court five (5) days prior to the hearing. If the summary judgment/adjudication motion is personally served, the opposition is due by 12 p.m. Pacific Time (noon Pacific Time) on the Court day prior to the hearing. If the summary judgment/adjudication motion is served by mail, opposition is due two (2) Court days prior to the hearing. Reply is due by 8:15 a.m. Pacific Time on the morning of the hearing.

S.F. Sup. Ct. R. 8.11(B)(2). At this time, the staff does not know what if any procedural requirements other courts typically impose when motions are made under either of these two sections.

When Is A Motion "Made"?

An additional issue raised by the language of the proposed new section is the reference to the motion being "made" on five days' notice.

Again, two other unlawful detainer provisions — Section 1167.4 relating to a motion to quash and Section 1170.7 relating to a motion for summary judgment — use similar terminology. However, a reference to when a motion is "made," at least on its face, is quite ambiguous. It could easily refer either to the date a motion is *filed*, or to the date a motion is *heard*.

In Sections 1167.4 and 1170.7, it is relatively clear the references are to the date the motion may be *heard*. It would make little sense to require notice to be given several days before *filing* a motion. Such an interpretation would also fail to ensure an expedited *resolution* of the respective motions, which could still be heard at any time. In fact, Section 1167.4 comes close to eliminating the ambiguity by providing that "the time for making the motion shall be not less than three days nor more than seven days *after the filing of the notice*." Code Civ. Proc. 1167.4(a) (emphasis added).

However, complicating matters is Code of Civil Procedure Section 1177, which states that "Except as otherwise provided in this Chapter [relating to unlawful detainer matters], the provisions of Part II of this Code are applicable to, and constitute the rules of practice in the proceedings mentioned in this Chapter." Among the provisions of Part II of the Code of Civil Procedure is Section 1005.5, which states that "A motion … is deemed to have been made … *upon the due service and filing of the notice of motion*…." Code Civ. Proc. 1005.5 (emphasis added).

Other rules of motion practice generally avoid this ambiguity by making a specific textual reference to a *hearing* on a motion. For example, Code of Civil Procedure Section 1005 does not reference a motion being "made" at all, and instead provides that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing." Code Civ. Proc. 1005(b).

Possible Approach

The new section relating to a discovery motion in an unlawful detainer matter would be the third unlawful detainer provision establishing an unusually short notice period for a motion. Each of the sections would have an ambiguous

reference to a motion being "made"; none of the sections would specify procedural requirements for the referenced motion.

Notwithstanding the interest in consistency, the staff is reluctant to endorse the idea of adding a third ambiguous section to the unlawful detainer statute. On the other hand, any clarification of the proposed new section alone would serve to highlight the ambiguity in the other two sections, and perhaps suggest (by implication) an unintended construction of those sections.

The staff therefore suggests that the Commission **propose to add new Section 1170.8 as drafted, but also propose to add a new Section 1177.5, along the following lines**:

Code Civ. Proc. § 1177.5 (added). Practice rules governing motion

SEC. ____. Section 1177.5 is added to the Code of Civil Procedure, to read:

1177.5. The following rules apply to any motion under Section 1167.4, 1170.7, or 1170.8:

(a) A motion is deemed to be made on commencement of the hearing on the motion.

(b) The provisions of Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 apply.

(c) All opposing papers shall be filed with the court and a copy served on each party not later than seven days following service of the notice of motion, or two court days before the hearing on the motion, whichever is earlier.

(d) The court may by order provide for the service and filing of a reply paper.

(e) Subject to Section 1167.5, the court upon a showing of good cause may extend or shorten the time period for filing and serving opposition or reply papers.

(f) Notwithstanding any other provision of this section, all opposition and reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to all other parties not later than noon of the next business day after the papers are filed.

Comment. Section 1177.5 is new. It is modeled on Section 1005(b).

Respectfully submitted,

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