**RESOLUTION 11-01-2017**

**DIGEST**
Commercial Code: Account Debtor - Affirmative Relief
Amends Commercial Code section 9404 to allow an account debtor to seek affirmative relief for overpayment, even if the debt has been assigned.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Commercial Code section 9404 to allow an account debtor to seek affirmative relief for overpayment, even if the debt has been assigned. This resolution should be approved in principle because it will give debtors the same ability to collect for overpayment from an assignee of their debt as they have against the original creditor.

Currently, Commercial Code section 9404 protects debt purchasers by limiting the debtor's rights to relief to an offset against the amount owed. As a result, debt purchasers hold greater rights and greater ability to recover from the account debtor than the original creditor would have held. Under Commercial Code section 9404, subdivision (b), subject to limited statutory exceptions, "the claim of an account debtor against an assignor may be asserted against an assignee . . . only to reduce the amount the account debtor owes." This resolution would encourage entities who acquire debt obligations to conduct adequate due diligence into the debts being acquired and would decrease the opportunity for collusion between the original creditor and the assignee, to the detriment of the debtor.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Commercial Code section 9404 to read as follows:

§ 9404

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subdivisions (b) to (e), inclusive, the rights of an assignee are subject to both of the following:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract.

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subdivision (c) and except as otherwise provided in subdivision (d), the claim of an account debtor against an assignor may be asserted against an assignee under subdivision (a) ~~only to reduce the amount the account debtor owes~~.

(c) This section is subject to law other than this division which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtors obligation, law other than this division requires that the record include a statement to the effect that the account debtors recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health care insurance receivable.

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

**PROPONENTS:** Joseph A. Goldstein, Jonathan A. Goldstein, Charles H. Goldstein, Charles Wake, Jodi Taksar, Joel Douglas, Robin Bernstein-Lev, Brian Francis Doyle, Barry Ross, James De Sario

**STATEMENT OF REASONS**

The Problem: Under the statute's current language, an account debtor who has overpaid an assignor who then assigns the debt to an assignee, cannot recover the overpayment. In addition, under the current statute, the account debtor can only use this overpayment and/or overcompensation to reduce the amount that the account debtor owes to the assignee. Therefore, the account debtor is deprived of a legal mechanism to obtain the monies overpaid to the original assignor. The current statute is unjust because it legally shields and immunizes assignees from ever being financially responsible to the account debtor for the overpayment. In addition, this statute establishes a public policy that legally encourages assignees to purchase debt without due diligence and without much scrutiny.

The Solution: Would delete the words "only to reduce the amount the account debtor owes" from the statute which would then allow an account debtor to seek affirmative relief, e.g. the overpayment made by the account debtor to the original assignor, from the assignee.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Joseph A. Goldstein, The Goldstein Law Firm, 8912 Burton Way, Beverly Hills, California 90211; (310) 553-4746; fax (310) 282-8070; josephgoldsteinesq@gmail.com

**RESPONSIBLE FLOOR DELEGATE:** Joseph A. Goldstein

**RESOLUTION 11-02-2017**

**DIGEST**
Finance Code: Expand Definition of "Pro-Rater"
Amends Finance Code section 12002.1 to expand the definition of "pro-rater" to include factoring companies.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Finance Code section 12002.1 to expand the definition of "pro-rater" to include factoring companies. This resolution should be approved in principle because it will close a loophole whereby out-of-state factoring companies are incentivized to work with fly-by-night temporary agencies that flout California Law.

The Check Sellers, Bill Payers and Proraters Law (the Law) is contained in Division 3 of the Financial Code, commencing with section 12000. The regulations are contained in Subchapter 10 of Chapter 3, title 10 of the California Code of Regulations, commencing with section 1770. (10 Cal. Code Regs., § 1770, et seq.) The Law, originally named the Check Sellers and Cashers Law, was enacted in 1947. As enacted, it provided for the licensing and regulatory review of companies and individuals who sold checks, cashed checks, or paid bills on behalf of others. General pro-raters are persons who, for compensation, engage in the business of receiving money or something of value from a debtor for the purpose of distributing the money or something of value among creditors in payment or partial payment of the debtor's obligations.

In the employment context, when factoring companies purchase payroll invoices from a temporary employment agency, the practical effect of this is that payroll factoring companies operate as unlicensed "pro-raters" because: (1) the payroll factoring company receives compensation from the temporary employment agency selling the payroll invoices – (usually in the form of an administrative fee, incremental fee, daily fee or late fee); (2) the payroll factoring company engages in whole or in part in the business of receiving money – (usually receiving money in the form of direct payment from the temporary employment agency's client accounts); (3) for the purpose of distributing the money or evidences thereof; (4) among creditors – (these are the "creditors" of the temporary employment agency – the employees – who are providing services to the temporary employment agency's clients; (5) in payment or partial payment of the obligations of the debtor, the "debtor" in this case being the temporary employment agency that owes payroll wages to its employees for working at the temporary employment agency's client accounts. As an unlicensed "pro-rater", factoring companies are not subject to the protective licensing requirements of the statute, including a limit on the interest that pro-raters can charge their customers.

Currently, however, payroll factoring companies who finance temporary employment agencies: 1) do not have licenses as "pro-raters" under the Finance Code and resist complying

with existing statute; 2) directly operate and conduct business in this state through these temporary employment agencies (either by loaning so much money that cannot possibly be repaid and therefore setting up a situation in which the creditor [the factoring company] becomes the de facto operator of the temporary employment agency business, or by directly controlling the temporary employment agencies' employees because these employees are technically the "collateral" of the payroll factoring company); and 3) as unlicensed pro-raters, earn significant and usuries fees for loaning funds to these temporary employment agencies that would otherwise be unlawful if earned by a licensed pro-rater under the existing statute.

This resolution addresses and fixes this problem by amending the "Pro-Rater" statute to clearly include factoring companies that finance payroll invoices of California employers.

This resolution is related to Resolution 12-01-2017.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Finance Code section 12002.1 to read as follows:

§ 12002.1

A prorater is a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing the money or evidences thereof among creditors in payment or partial payment of the obligations of the debtor. <u>For purposes of this division, a factor, as defined in Civil Code § 2026 et. seq., who purchases, sells, transfers, exchanges, finances, and/or otherwise provides money for the payroll invoices of any employer in the State of California, is a pro-rater.</u>

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

**PROPONENTS:** Joseph A. Goldstein, Jonathan A. Goldstein, Charles H. Goldstein, Charles Wake, Jodi Taksar, Scott Luskin, Robin Bernstein-Lev, Brian Francis Doyle, Barry Ross, James De Sario

**STATEMENT OF REASONS**

<u>The Problem</u>: In the employment context, when factoring companies purchase payroll invoices from a temporary employment agency, the practical effect of this is that payroll factoring companies operate as unlicensed "pro-raters" because: (1) the payroll factoring company receives compensation from the temporary employment agency selling the payroll invoices – (usually in the form of an administrative fee, incremental fee, daily fee or late fee); (2) the payroll factoring company engages in whole or in part in the business of receiving money – (usually receiving money in the form of direct payment from the temporary employment agency's client accounts); (3) for the purpose of distributing the money or evidences thereof; (4) among creditors – (these are the "creditors" of the temporary employment agency – the employees – who are providing services to thetemporary employment agency's clients; (5) in payment or partial payment of the obligations of the debtor, the "debtor"in this case being the temporary employment agency that owes payroll wages to its employees for working at the

temporary employment agency's client accounts. As an unlicensed "pro-rater", factoring companies are not subject to the protective licensing requirements of the statue, including a limit on the interest that pro-raters can charge their customers.

The Solution: Would add the following language to Finance Code § 12002.1 that for purposes of this division, a factor, as defined in Civil Code § 2026 et. seq., who purchases, sells, transfers, exchanges, finances, and/or otherwise provides money for the payroll invoices of any employer in the State of California, is a pro-rater.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Joseph A. Goldstein, The Goldstein Law Firm, 8912 Burton Way, Beverly Hills, California 90211; (310) 553-4746; fax (310) 282-8070; josephgoldsteinesq@gmail.com

**RESPONSIBLE FLOOR DELEGATE:** Joseph A. Goldstein

# RESOLUTION 11-03-2017

**DIGEST**
Unlicensed Contractors: Eliminating Entitlement to Criminal Restitution
Amends Business and Professions Code sections 7028 and 7028.16 to clarify that a person who knowingly hires an unlicensed contractor is not a victim of a crime or entitled to restitution.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code sections 7028 and 7028.16 to provide that a person who knowingly hires an unlicensed contractor is not a victim of a crime or entitled to restitution. This resolution should be disapproved because it undermines the public policy that unlicensed contractors should not profit from violating the licensure requirements.

Under current law, an unlicensed person who performs building, electrical or plumbing jobs is not entitled to obtain recovery for payment of their fees, even under quantum meruit theory. (Bus. & Prof. Code, § 7031.) Furthermore, an unlicensed person who provides services requiring a contractor's license has committed a crime that can be punished by incarceration. (See Bus. & Prof. Code, §7028.) In connection with his or her criminal conviction, the bad actor who violates the licensing statutes may be ordered to pay restitution. (Pen. Code, § 1202.4, subd. (f).) The message is clear – become licensed or you will not be entitled to profit.

This resolution is contrary to that well-established policy and may harm consumers. In particular, this resolution places the burden on the consumer to establish that he or she *did not* know the person performing services was unlicensed in order for the convicted criminal to be ordered to pay restitution in connection with his or her criminal conviction. Unlicensed contractors often prey upon vulnerable consumers by offering lower rates than their licensed, regulated, bonded and insured counterparts, who are regulated, bonded and accountable for their performance. The consumer remains a victim as a matter of law. It should be no defense that the unlicensed individual advised the consumer of that status, and the consumer should not be further victimized.

In effect, the resolution encourages unlicensed persons to engage a regulated profession by simply making a disclosure. It undermines the profession of licensed contractors, as well as the enforcement of qualification, practices and standards. It fosters construction that does not comply with applicable building codes. It emasculates criminal remedies seeking to stem the behavior.

The consequences transcend an individual transaction. When it comes to building construction, the results can affect subsequent purchasers, building safety, and the community.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code sections 7028 and 7028.16 to read as follows:

§ 7028

(a) Unless exempted from this chapter, it is a misdemeanor for a person to engage in the business of, or act in the capacity of, a contractor within this state under either of the following conditions:

(1) The person is not licensed in accordance with this chapter.

(2) The person performs acts covered by this chapter under a license that is under suspension for failure to pay a civil penalty or to comply with an order of correction, pursuant to Section 7090.1, or for failure to resolve all outstanding final liabilities, pursuant to Section 7145.5.

(b) A first conviction for the offense described in this section is punishable by a fine not exceeding five thousand dollars ($5,000) or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(c) If a person has been previously convicted of the offense described in this section, unless the provisions of subdivision (d) are applicable, the court shall impose a fine of 20 percent of the contract price, or 20 percent of the aggregate payments made to, or at the direction of, the unlicensed person, or five thousand dollars ($5,000), whichever is greater, and, unless the sentence prescribed in subdivision (d) is imposed, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence or a fine. If the court imposes only a fine or a jail sentence of less than 90 days for second or subsequent convictions under this section, the court shall state the reasons for its sentencing choice on the record.

(d) A third or subsequent conviction for the offense described in this section is punishable by a fine of not less than five thousand dollars ($5,000) nor more than the greater amount of ten thousand dollars ($10,000) or 20 percent of the contract price, or 20 percent of the aggregate payments made to, or at the direction of, the unlicensed person, and by imprisonment in a county jail for not more than one year or less than 90 days. The penalty provided by this subdivision is cumulative to the penalties available under all other laws of this state.

(e) A person who violates this section is subject to the penalties prescribed in subdivision (d) if the person was named on a license that was previously revoked and, either in fact or under law, was held responsible for any act or omission resulting in the revocation.

(f) If the unlicensed person engaging in the business of or acting in the capacity of a contractor has agreed to furnish materials and labor on an hourly basis, “the contract price” for the purposes of this section means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(g) Notwithstanding any other law, an indictment for any violation of this section by an unlicensed person shall be found, or information or a complaint shall be filed, within four years from the date of the contract proposal, contract, completion, or abandonment of the work, whichever occurs last.

(h) For any conviction under this section, a person who utilized the services of the unlicensed person is a victim of crime, providing that he or she lacked knowledge that the

contractor was unlicensed, and is eligible, pursuant to subdivision (f) of Section 1202.4 of the Penal Code, for restitution for actual economic losses~~, regardless of whether he or she had knowledge that the person was unlicensed~~.

(i) The changes made to this section by the act of adding this subdivision are declaratory of existing law.

§ 7028.16

A person who engages in the business or acts in the capacity of a contractor, without having a license therefor, in connection with the offer or performance of repairs to a residential or nonresidential structure for damage caused by a natural disaster for which a state of emergency is proclaimed by the Governor pursuant to Section 8625 of the Government Code, or for which an emergency or major disaster is declared by the President of the United States, shall be punished by a fine up to ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, or for two or three years, or by both that fine and imprisonment, or by a fine up to one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment. ~~In addition, a person who utilized the services of the unlicensed contractor is a victim of crime regardless of whether that person had knowledge that the contractor was unlicensed.~~

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

**PROPONENT:** Mark Harvis, Arwen Johnson, Robin Bernstein-Lev, Nick Stewart-Oaten, Albert Menaster, Casey Lilienfeld, Tom Moore, Natasha Brown, Kimberly Singer, Julia Bredrup

**STATEMENT OF REASONS**

The Problem: Under current law, a person is considered a victim of a crime if they engage the services of an unlicensed contractor—even if they knew that the contractor was unlicensed when they hired him. Such a person can then have the contractor arrested and demand repayment of all money earned by the contractor, even if the person suffered no actual loss as a result of the use of the unlicensed contractor. Consequently, those who knowingly employ unlicensed contractors can wait until the work is completed, have the contractor prosecuted for being unlicensed, and seek to force the return of money earned by the contractor through criminal restitution proceedings. This is fundamentally unfair, and provides a perverse incentive for people to hire unlicensed contractors, which defeats the purpose of contractor licensing laws in the first instance.

The Solution: The proposed resolution would clarify that those who knowingly hire unlicensed contractors are not entitled to the return of money earned by that contractor, and would restrict potential recovery in criminal restitution proceedings to those who lacked knowledge that the contractor they hired was unlicensed. Such an amendment would ensure that people do not take advantage of unlicensed contractors by intentionally hiring them to save costs on construction projects, and then reporting them to law enforcement in an effort to recoup their expenses. The proposed resolution would further clarify that, consistent with case law, any restitution order under section 7028 would be limited to reimbursement for a victim's actual economic losses (*i.e.*, losses resulting from work performed by the unlicensed contractor that was not up to

standard), and is not intended to result in a windfall to the complaining witness. This resolution only addresses the abuse of criminal statutes by unscrupulous people, and would still permit suits against unlicensed contractors for sub-standard work in the civil context (*i.e*., it does not modify the civil statutes governing unlicensed contracting work).

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Mark Harvis, Los Angeles County Public Defender 320 W Temple Ste 590 Los Angeles, CA 90012 213 974-3066, mharvis@pubdef.lacounty.gov

**RESPONSIBLE FLOOR DELEGATE:** Mark Harvis

**RESOLUTION 11-04-2017**

**DIGEST**
Cosmetologists and Barbers: Domestic Violence/Sexual Assault Education; Reporting Immunities
Amends Business and Professions Code section 7362.5 to require domestic violence/sexual assault education for cosmetologists and barbers and adds section 7320.6 to provide immunities for either reporting or failing to report suspected violations.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 7362.5 to require domestic violence/sexual assault education for cosmetologists and barbers and adds section 7320.6 to provide immunities for either reporting or failing to report suspected violations. This resolution should be approved in principle because it will help disseminate information about domestic violence and sexual assault and may provide additional resources for such victims.

The resolution would require cosmetologists and barbers to take a course on domestic violence and sexual assault awareness but does not make these individuals mandatory reporters. Training would allow cosmetologists and barbers to recognize possible evidence of domestic violence or sexual assault, provide information about resources available to possible victims, and tools for assisting victims. While there may be a modest increase in the cost of cosmetology training, the training will provide vital information.

According to "Helping Battered Women and Their Children in Rural Communities: A Guide for Cosmetologists", a publication of the Pennsylvania Coalition Against Domestic Violence, battered women often confide in cosmetologists. "Clients often share very personal information with their stylists. Most women see a cosmetologist on a regular basis over many years. In that time, trusting relationships are built as clients and stylists share stories about their families, jobs and views on a variety of subjects. Cosmetologists . . . have a track record of referral work and pioneering health awareness promotion, including tackling difficult subjects, such as cancer and HIV/AIDS." An Illinois law similar to this resolution became effective January 1, 2017. (Ill. Public Act 099-0766.) A similar proposal is pending in Colorado. (Colo. HB 17-1175.)

This resolution is similar to A.B. No 326 (Salas), now pending, which requires only one hour of training on "physical and sexual abuse awareness." The required training under AB 326 includes elder abuse and human trafficking in addition to domestic violence and sexual assault. AB 326 differs from this resolution in that AB 326 specifies that cosmetologists and barbers are not required to act on any information received.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 7362.5 and add section 7320.6 as follows:

§ 7362.5

(a) A course in barbering established by a school shall consist of not less than 1,500 hours of practical training and technical instruction in the practice of barbering as defined in Section 7316.

(b) A course in cosmetology established by a school shall consist of not less than 1,600 hours of practical training and technical instruction in the practice of cosmetology as defined in Section 7316, except as provided in this chapter.

(c) The course in barbering required by paragraph (a) of this Section shall include one hour of education in domestic violence and one hour of sexual assault awareness education by such providers and in such manner as shall be prescribed by the State Board of Barbering and Cosmetology.

(d) The course in cosmetology required by paragraph (b) of this Section shall include one hour of education in domestic violence and one hour of sexual assault awareness education by such providers and in such manner as shall be prescribed by the State Board of Barbering and Cosmetology.

§ 7320.6

Liability; domestic violence and sexual assault.

(a) A person licensed under this Act who completes a course in barbering or who completes a course in cosmetology which included the domestic violence and sexual assault awareness education provided in Section 7362.5 (c) or (d) as a part of his or her education, or his or her employer, shall not be civilly or criminally liable for acting in good faith or failing to act on information obtained during the course of employment concerning potential domestic violence or sexual assault.

(b) A person licensed under this Act who completes a one hour course of education in domestic violence and a one hour course of sexual assault awareness education by such providers and in such manner as shall be prescribed by the State Board of Barbering and Cosmetology, or his or her employer, shall not be civilly or criminally liable for acting in good faith or failing to act on information obtained during the course of employment concerning potential domestic violence or sexual assault.

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

**PROPONENT:** San Mateo County Bar Association

**STATEMENT OF REASONS**

The Problem: Domestic violence and sexual assault are significant problems. Cosmetologists and barbers engage a broader spectrum of the public on a more frequent basis than most other licensed professionals. On occasion, these professionals become privy to incidents which would

otherwise go unreported. Other jurisdictions have recognized the need to include domestic violence and sexual assault training for cosmetologists.

Recently, Illinois amended its laws to require domestic violence and sexual assault classes for cosmetologists. (Illinois Public Act 099-0766). The Middlesex District Attorney (Massachusetts) hosted domestic violence training for cosmetology students. (https://wilmingtonapple.com/2016/11/04/middlesex-da-hosts-domestic-violence-training-for-shawsheen-tech-cosmetology-students/)

California requires sexual harassment and abuse prevention training for certain employers (Gov. Code § 12950.1). Barbers and cosmetologists are required to undergo several hundred hours of training. Requiring 2 hours of training for new licensees - as part of 1,500 hours already required - is appropriate.

In order to avoid a chilling effect upon reporting, some degree of immunity from civil and criminal liability should be afforded to barbers and cosmetologists who have received formal training in domestic violence and sexual assault. Illinois included an immunity provision in its statute; a proposed new statute mirrors that language.

The Solution: Amends Business and Professions Code section 7362.5 to include one hour of education in domestic violence and one hour of sexual assault awareness education by providers in a manner to be prescribed by the State Board of Barbering and Cosmetology.

The State Board of Barbering and Cosmetology exists within the Department of Consumer Affairs. It consists of nine members, four of whom are from the professions themselves. The Board is specifically authorized to make rules and regulations in aid or furtherance of laws governing barbers and cosmetologists (Bus. & Prof. Code § 7312).

The final aspect of the solution is a newly proposed section of law, Business & Professions Code 7320.6, which would limit liability for acting in good faith or failing to act by a licensee or his/her employer, where the licensee has completed courses on domestic violence and sexual assault awareness. Subsection (a) covers new licensees and subsection (b) covers existing licensees who did not receive such training during their licensure but subsequently obtained it.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Rolando Pasquali, 1220 Howard Avenue, Suite 250, Burlingame, CA 94010. Phone (650) 579-0100; Fax (650) 579-0102; e-mail: r@LawSuite.net

**RESPONSIBLE FLOOR DELEGATE**: Rolando Pasquali

**RESOLUTION 11-05-2017**

**DIGEST**
Corporations: Make Corporate Records Available in California or Electronically
Amends Corporations Code section 1601 to require corporations to produce corporate records to shareholders for in-person inspection in California, unless shareholders elect to receive the records by mail or electronically.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Corporations Code section 1601 to require corporations to produce corporate records to shareholders for in-person inspection in California, unless shareholders elect to receive the records by mail or electronically. This resolution should be approved in principle because it protects California investors by requiring any California corporation or foreign corporation with its principle office in California, or that otherwise keeps the records in question in California, to produce its records for shareholder inspection at its California office, if any, or if none, within a reasonable radius of the shareholder's California residence.

Currently, a corporation that chooses to subject itself to California laws by incorporating here, and takes money from California investors, is not required to make its books and records available to investors in the state. Under Corporations Code section 1601, a shareholder may, upon written demand, inspect the accounting books and records and minutes of a California corporation or a foreign corporation doing business in California. Shareholder inspection demands are regularly used by California shareholders, often times in connection with ongoing, or anticipated, shareholder or shareholder derivative litigation. In *Innes v. Diablo Controls* (2016) 248 Cal.App.4th 139, the First District Court of Appeal addressed where that inspection may take place, and it may not be in California.

In the *Innes v. Diablo Controls* case, Diablo Controls was a California corporation whose corporate books and records were kept in Illinois. The issue on appeal was whether, under section 1601, the corporation had to produce the records for shareholder inspection in California or could do so in Illinois where they were maintained. Relying on dicta in a 2004 case, *Jara v. Suprema Meat* (2004) 121 Cal.App.4th 1238, and noting that the statute makes no provision that the requested records be brought in state, the Court of Appeal held there was no obligation on the part of the corporation to bring the requested records to California for inspection. It need only make the records available for inspection "at the office where the records are kept"; in that case, Illinois.

So, under *Innes v. Diablo Controls*, if you are a shareholder making a section 1601 demand to inspect corporate records, and those records are "kept" by the corporation at a location outside of California, you could be buying an out-of-state plane ticket. The corporation has no obligation to

produce the records for inspection at any location other than where they are "kept". If that "kept" location is out-of-state, tough luck, you can be forced to go there to make the inspection.

This is problematic in that it places a substantial burden on California investors even where the entity is principally operating in California. This resolution fixes this issue and also provides an alternative option for the shareholder to request the records in electronic format, in lieu of an in-person inspection, if the shareholder pays for reasonable costs associated with that conversion. Many productions are done by copying the documents and mailing them to shareholders (which is not expressly permitted under the Code), so the second part of the resolution just expressly authorizes and modernizes this form of this practice.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 1601 to read as follows:

§ 1601

(a) The accounting books and records and minutes of proceedings of the shareholders and the board and committees of the board of any domestic corporation, and of any foreign corporation keeping any such records in this state or having its principal executive office in this state, shall be open to inspection at its principal California office, or if none, at the physical location for the corporation's registered agent for service of process, upon the written demand on the corporation of any shareholder or holder of a voting trust certificate at any reasonable time during usual business hours, for a purpose reasonably related to such holder's interests as a shareholder or as the holder of such voting trust certificate. Alternatively, the shareholder may elect to request the corporation produce the records by mail or electronically if the shareholder pays for the reasonable costs in copying or converting the records to electronic format. The right of inspection created by this subdivision shall extend to the records of each subsidiary of a corporation subject to this subdivision.

(b) Such inspection by a shareholder or holder of a voting trust certificate may be made in person or by agent or attorney, and the right of inspection includes the right to copy and make extracts. The right of the shareholders to inspect the corporate records may not be limited by the articles or bylaws.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS**

The Problem: In *Innes v. Diablo Controls* (2016) 248 CalApp.4th 139, the Court of Appeal held under Corporations Code section 1601 that California shareholders would have to travel to a California corporation's Illinois office to inspect corporate records since the records were maintained there and not at its California office. If a corporation chooses to subject itself to California laws by incorporating here and then takes money from California residents to invest in that company, that corporation should not be allowed to hide its corporate records out of state.

The Solution: This resolution requires any California corporation to produce its records for shareholder inspection at its California office, if any, or if none, within a reasonable radius of the shareholder's California residence. This resolution also provides an alternative option for the shareholder to request the records in electronic format, in lieu of an in person inspection, if the shareholder pays for reasonable costs associated with that conversion. Many productions are done by copying the documents and mailing them to shareholders (which is not expressly permitted under the Code), so the second part of the resolution just expressly authorizes and modernizes this form of this practice.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND PERMANENT CONTACT:** Melissa L. Bustarde, Esq., Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090

**RESPONSIBLE FLOOR DELEGATE:** Melissa L. Bustarde, Esq.

**RESOLUTION 11-06-2017**

**DIGEST**
Corporations: Permit a Suspended Corporation to Voluntarily Dissolve
Amends Corporations Code section 2205 and Revenue and Tax Code sections 23301 and 23301.5 to authorize a suspended corporation to file a certificate of dissolution.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
Similar to 09-01-2016, which was disapproved.

Reasons:
This resolution amends Corporations Code section 2205 and Revenue and Taxation Code sections 23301 and 23301.5 to authorize a suspended corporation to file a certificate of dissolution. This resolution should be approved in principle because authorizing a corporation to file for voluntary dissolution if it is suspended provides a solution to a persistent problem.

Currently under section 2205 of the Corporations Code, a suspended corporation loses all rights and powers, including the power to dissolve the corporation. Therefore, many entities sit on the books of the Secretary of State that are dormant and defunct due to suspension. These corporations continue to accrue fines and penalties imposed by the Secretary of State and Franchise Tax Board, including for failures to file Statement of Information and minimum tax payments; but because these entities are now defunct and the founders/owners are not personally liable for their accruing debts, these entities simply sit on the record books continuing to accrue penalties without any resolution likely to occur.

If approved, the normal dissolution process under Corporations Code section 1900-1907 would apply. Under the Corporations Code, a corporation may *only* elect to dissolve if a majority of the directors certify either that corporation has paid or will pay its taxes or, per section 1900, subdivision (b)(2), if the corporation has not conducted any business for the preceding five years, i) that the corporation's known debts and liabilities have been paid or adequately provided for as far as its assets permitted, and ii) that a final franchise tax return has been or will be filed with the Franchise Tax Board.

Although the current law preventing corporate dissolutions unless and until its corporate tax responsibilities are fully paid is appealing in principle, the actual result is not increased tax payments – just more defunct corporations. Allowing for voluntary dissolution allows owners of defunct corporations to move on and discontinues a waste of Government resources, while still fully complying with their financial and tax obligations.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 2205 and Revenue and Tax Code sections 23301

and 23301.5 to read as follows:

§ 2205

(a) A corporation that (1) fails to file a statement pursuant to Section 1502 for an applicable filing period, (2) has not filed a statement pursuant to Section 1502 during the preceding 24 months, and (3) was certified for penalty pursuant to Section 2204 for the same filing period, is subject to suspension pursuant to this section rather than to penalty pursuant to Section 2204.

(b) When subdivision (a) is applicable, the Secretary of State shall provide a notice to the corporation informing the corporation that its corporate powers, rights, and privileges will be suspended after 60 days if it fails to file a statement pursuant to Section 1502.

(c) After the expiration of the 60-day period without any statement filed pursuant to Section 1502, the Secretary of State shall notify the Franchise Tax Board of the suspension and provide a notice of the suspension to the corporation, and thereupon, the corporate powers, rights, and privileges of the corporation are suspended, except for the purpose of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name or filing a certificate of election to dissolve and/or certificate of dissolution pursuant to Chapter 19.

(d) A statement pursuant to Section 1502 may be filed notwithstanding suspension of the corporate powers, rights, and privileges pursuant to this section or Section 23301, 23301.5, or 23775 of the Revenue and Taxation Code. Upon the filing of a statement pursuant to Section 1502 by a corporation that has suffered suspension pursuant to this section, the Secretary of State shall certify that fact to the Franchise Tax Board and the corporation may thereupon be relieved from suspension unless the corporation is held in suspension by the Franchise Tax Board by reason of Section 23301, 23301.5, or 23775 of the Revenue and Taxation Code.

§ 23301

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name or filing a certificate of election to dissolve and/or certificate of dissolution, the corporate powers, rights and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited, if any of the following conditions occur:

(a) If any tax, penalty, or interest, or any portion thereof, that is due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, either at the time the return is required to be filed or on or before the 15th day of the ninth month following the close of the taxable year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year.

(b) If any tax, penalty, or interest, or any portion thereof, due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, upon notice and demand from the Franchise Tax Board, is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax.

(c) If any liability, or any portion thereof, which is due and payable under Article 7 (commencing with Section 19131) of Chapter 4 of Part 10.2, is not paid on or before 6 p.m. on the last day of the 11th month following the date that the tax liability is due and payable.

§ 23301.5

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name or filing a certificate of election to dissolve and/or certificate of dissolution, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited, if a taxpayer fails to file a tax return required by this part.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS**

The Problem: A suspended corporation loses all of its rights and powers, including the power to dissolve the corporation. Many corporations sit on the books of the Secretary of State that are dormant and defunct due to suspension. These corporations continue to accrue minimum franchise taxes each year, even though the businesses are no longer operating.

The Solution: This resolution authorizes a corporation to file for voluntary dissolution if it is suspended in order to give some finality to the owners of the corporation and stop the hollow fines and penalties imposed by the Secretary of State and Franchise Tax Board.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESPONSIBLE FLOOR DELEGATE:** Melissa L. Bustarde, Esq.

**RESOLUTION 11-07-2017**

**DIGEST**
Non-Profit Corporations: Conforms Standards for Removal of Directors
Amends Corporations Code section 9223 to provide that directors of non-profit religious corporations can be removed for fraudulent or dishonest acts or for gross abuse of authority.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Corporations Code section 9223 to provide that directors of non-profit religious corporations can be removed for fraudulent or dishonest acts or for gross abuse of authority. This resolution should be approved in principle because it brings the standard for removing a director of a non-profit religious corporation in-line with non-profit public and mutual benefit corporations.

Within the chapter pertaining to non-profit corporations, Corporations Code sections 5223 (non-profit public benefit corporation) and 7223 (non-profit mutual benefit corporation), both provide that a director may be removed in the case of "*fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising [under this chapter]*, and may bar from reelection any director so removed for a period prescribed by the court." (Emphasis added.) Currently, however, section 9223 (non-profit religious corporation), only provides that directors may be removed "in case of fraudulent acts." Thus, a director in a corporation organized under section 9200 et seq., may remain in his or her position of power even if they commit acts which breach his/her fiduciary duties, as long as it does not amount to fraud. Where some such non-profit corporations receive hundreds of thousands, if not millions, of dollars of money donated by the public, the standard should be more than just assurance that the directors are not intentionally defrauding the corporation.

That said, this resolution may overstate the issue in that breaches of fiduciary duty usually constitutes constructive fraud. "[C]onstructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another, even though the conduct is not otherwise fraudulent." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562; 2 Miller & Starr, Cal. Real Estate (2d ed. 1989), § 3:20, p. 120-121; Civ. Code, § 1573, subd. (1).) If a fiduciary relationship exists, any concealment of material fact is fraud. (*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 937-938; *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1997) 67 Cal.App.3d 19, 32.) Unlike actual fraud, constructive fraud does not require an intentional deception, an "intent to deceive" being implied from the failure to disclose. (*Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 525.) Further, reasonable reliance is presumed upon a nondisclosure of the fiduciary, absent direct evidence of lack of reliance. (*Estate of Gump* (1991) 1 Cal.App.4th

582, 601.) "The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555.)

Although directors of religious non-profits are subject to other sanctions, besides removal, for engaging in self-dealing transactions, the text of the statute should be updated to avoid any ambiguity about the duties of directors of non-profit religious corporations.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 9223 to read as follows:

§ 9223

(a) The superior court of the proper county may, at the suit of a director, or twice the authorized number (Section 5036) of members, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising under Article 3 of this chapter (commencing with § 9230) and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such action.

(b) The Attorney General may bring an action under subdivision (a), may intervene in such an action brought by any other party and shall be given notice of any such action brought by any other party.

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

**PROPONENT:** Sacramento County Bar Association

**STATEMENT OF REASONS**

The Problem: Within the chapter pertaining to non-profit corporations, Corporations Code sections 5223 (non-profit public benefit corporation) and 7223 (non-profit mutual benefit corporation) both provide that a director may be removed in the case of "fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising [under this chapter], and may bar from reelection any director so removed for a period prescribed by the court." (Emphasis added.) However, Section 9223 (non-profit religious corporation) provides that directors may be removed only "in case of fraudulent acts." Thus, a director in a corporation organized under Sections 9200 et seq., may, with impunity, commit acts which breach his/her fiduciary duties, as long as it does not amount to fraud. The clear danger here is that such non-profit corporations are frequently receiving thousands, if not millions, of dollars of money donated by the public, who entrust the directors of such corporations to carry out the stated mission and to do so while adhering to their fiduciary duty to the corporation. The standard should be more than just assurance that the directors are not intentionally defrauding the corporation.

The Solution: The language of Section 9223 should be amended to match that of the other code sections covering removal of directors from non-profit corporations.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute, or rule other than those expressly identified.

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**RESOLUTION 11-08-2017**

**DIGEST**
State Bar: New "Retired" Category for California Lawyers Over Age 60
Amends California Business and Professions Code section 6006 to add a new "retired" category for California lawyers who pay no annual dues but receive membership benefits.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends California Business and Professions Code section 6006 to add a new "retired" category for California lawyers who pay no annual dues but receive membership benefits. This resolution should be disapproved because it grants membership benefits to retired lawyers based primarily on their advanced age for free, and it is unreasonable to grant free membership benefits to retired lawyers, as there is no right to membership in the California Bar Association.

Under current law, the California State Bar allows two categories of membership: active and inactive. (Bus. & Prof. Code, §§ 6003-6005.) An inactive member pays minimal annual dues ($155 per year in 2016), for which he/she obtains some limited privileges, does not have to comply with continuing education obligations, and is not allowed to practice law in California, vote in any State Bar related election, or hold any State Bar office. An inactive member may request reinstatement to active practice if he/she is not suspended on disciplinary charges. (Bus. & Prof. Code, § 6006.) Inactive status can either be voluntary (e.g., when a lawyer moves to another state, or retires from active practice) (Bus. & Prof. Code, § 6004); or involuntary (e.g., when a lawyer fails to pay annual dues, does not complete CLE requirements, or is suspended from practice based on disciplinary proceedings) (Bus. & Prof. Code, §§ 6004, 6007).

The benefits of maintaining an inactive membership include, but are not limited to, the eligibility to apply for and participate in the State Bar approved life, accidental death and dismemberment, and disability income insurance programs; be appointed by the Board of Trustees of the State Bar to various committees; receipt of the State Bar membership card and monthly editions of the California Bar Journal. (See, e.g., 2017 Application to Transfer to Inactive Member Status, available at http://www.calbar.ca.gov/Portals/0/documents/members/2016_MSC_Transfer-Inactive_rV1_2017.pdf.)

A lawyer may also completely resign his/her membership from the State Bar voluntarily either because they no longer wish to practice law in California, or as a condition of a disciplinary proceeding.

This resolution adds a category of "retired" for lawyers who are at least 60 years old and have not faced any disciplinary proceedings in their last 10 years of practice. This new category of members would have all of the same rights as inactive members, but would not have to pay even the reduced annual dues. This is unreasonable for at least two reasons.

First, because it is based primarily on age, as a younger lawyer with a clean record for 10 years who decides to retire would not be allowed these free benefits.

Second, because it grants the same membership benefits available to an inactive member (who pays minimal annual dues) for free. There is no reasonable justification for free benefits, as membership in the State Bar is not a right; it is voluntary. Therefore, the argument that even the minimal dues inactive members pay creates a financial burden on retired lawyers is not reason enough to create a category of free membership, as it would create a greater financial strain on the State Bar's already limited resources. This would, in turn, interfere with the State Bar's ability to perform its primary function: public protection. (Bus. & Prof. Code, § 6001.1.)

There is no stigma to resigning one's membership to the State Bar because, for example, the State Bar Rules do not allow a lawyer to resign with discipline charges pending. (Rules of the State Bar, rule 2.45.)

Finally, this resolution affects California Business and Professions Code sections 6003-6005, which set out the categories of membership in the State Bar, but this resolution has not offered an amendment to these sections.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6006 to read as follows:

§ 6006

(a) Active members ~~who retire from practice~~ shall be enrolled as inactive members at their request.

(b) An active member shall be enrolled as a retired member if the member has been an active member for ten (10) years or more as of the date of retirement, has attained the age of sixty (60) as of the date of retirement, and has had no record of disciplinary proceedings during the ten (10) years immediately prior to enrollment as a retired member. Membership records of the State Bar of California shall reflect that a member who meets the qualifications of this subsection and has requested that they be enrolled as a retired member is retired. Upon enrollment as a retired member, no additional fees shall be imposed or required of the retired member except as provided in subsection (d) of this section.

(c) Inactive or retired members are not entitled to hold office or vote or practice law.

(d) Those members who are enrolled as inactive or retired members at their request may, on

application and payment of all fees required, become active members. Those who are or have been enrolled as inactive or retired members at their request are members of the State Bar for purposes of Section 15 of Article VI of the California Constitution. Those who are enrolled as inactive or retired members pursuant to Section 6007 may become active members as provided in that section.

(e) Inactive or retired members have such other privileges, not inconsistent with this chapter, as the board of trustees provides.

(f) Any person who has resigned from the practice of law solely because of the retirement of the person from the practice of law, would not otherwise be prohibited from enrollment in the practice of law and would otherwise have been entitled to enroll as a retired member under subsection (b) of this section, may petition the Supreme Court for reinstatement for the purpose of election to become a retired member.

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

**PROPONENT:** San Bernardino County Bar Association

**STATEMENT OF REASONS**

The Problem: Current State Bar members are limited to three options at the end of their career: continue as an active member, become an inactive member, or resign. As an active member, a retiree is required to complete continuing education programs and pay the full bar dues, thus creating a financial burden. As an inactive member, retirees are required to pay approximately half the full dues; which may be appropriate for a member practicing in another jurisdiction but not wanting to resign from the California State Bar. Again, this option imposes a financial burden on members now living on a retirement income. And resigning from the State Bar carries the stigma of "Resigned" appearing on the member's profile page, the same word used for disgraced members who leave rather than face charges.

The Solution: This resolution would create a member status of "Retired." To qualify for retired status, a member would need to be at least 60 years old, and have had no record of attorney discipline during the ten years immediately prior to the member's petition for retired status. Upon attaining a retired status, the member would incur no additional fees and their State Bar Profile would indicate "Retired." Additionally, any member who has resigned but would have been qualified to apply for retired status at the time they resigned may petition for re-designation as a retired member. A retired member can reapply for active status in the same manner as an inactive member.

**IMPACT STATEMENT**
The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESOLUTION 11-09-2017**

**DIGEST**
Public Resources Code: Recycling at Shopping Centers and Strip Malls
Amends Public Resources Code sections 42649.1 and 42649.2 to require shopping centers and strip malls to collect recyclable materials where the customers enter and exit and where shipments of goods are received.

**RESOLUTION COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Public Resources Code sections 42649.1 and 42649.2 to require shopping centers and strip malls to collect recyclable materials where the customers enter and exit and where shipments of goods are received. This resolution should be approved in principle because it promotes and encourages recycling by businesses and the public, enforces the existing language of the specified code sections, and will not be a significant cost burden to shopping and strip mall owners/operators.

By requiring that shopping and strip malls provide recycling, this resolution seeks to encourage pro-social behavior with regards to litter abatement and resource recovery and recycling. Additionally, the proposal makes clear a possible ambiguity in sections 42649.1 and 42649.2 of the Public Resource Code, which is arguably ambiguous regarding the requirement of strip malls and shopping centers to provide recycling where consumers enter and exit the shopping/strip mall.

Finally, requiring strip malls and shopping centers will help the state reach a recycle rate of 75% statewide. While the requirement to offer recycling could be a minor burden on some businesses, it is important that all commercial enterprises contribute to the goals of litter abatement and recycling to the fullest extent possible.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Public Resources Code sections 42649.1 and 42649.2 to read as follows:

§ 42649.1

For purposes of this chapter, the following terms mean the following:

(a) "Business" means a commercial or public entity, including, but not limited to, a firm, partnership, proprietorship, joint stock company, corporation, or association that is organized as a for-profit or nonprofit entity, a shopping center, a strip mall, or a multifamily residential dwelling.

(b) "Commercial solid waste" has the same meaning as defined in Section 17225.12 of

Title 14 of the California Code of Regulations.

(c) "Commercial waste generator" means a business subject to subdivision (a) of Section 42649.2.

(d) "Self-hauler" means a business that hauls its own waste rather than contracting for that service.

§ 42649.2

(a) (1) On and after July 1, 2012, a business that generates more than four cubic yards of commercial solid waste per week or is a multifamily residential dwelling of five units or more shall arrange for recycling services, consistent with state or local laws or requirements, including a local ordinance or agreement, applicable to the collection, handling, or recycling of solid waste, to the extent that these services are offered and reasonably available from a local service provider.

(2) Shopping centers and strip malls shall collect recyclable materials both where the customers enter and exit and where shipments are received.

(b) A commercial waste generator shall take at least one of the following actions:

(1) Source separate recyclable materials from solid waste and subscribe to a basic level of recycling service that includes collection, self-hauling, or other arrangements for the pickup of the recyclable materials.

(2) Subscribe to a recycling service that may include mixed waste processing that yields diversion results comparable to source separation.

(c) A property owner of a multifamily residential dwelling may require tenants to source separate their recyclable materials to aid in compliance with this section.

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

**PROPONENT:** Bar Association of San Francisco

**STATEMENT OF REASONS**

The Problem: In 2011, with AB 341, California set a goal for statewide recycling at 75% by the year 2020. Since July 1, 2012, AB 341 requires every business that generates more than 4 cubic yards of commercial solid waste per week and multifamily residential dwellings of 5 units or more to arrange for recycling services. Despite AB 341, since 2010, the state's recycling rate has remained flat at only 50%. *See* the data for "California's Statewide Recycling Rate," available at: http://www.calrecycle.ca.gov/75Percent/RecycleRate/default.htm.

Most shopping mall and strip mall businesses only collect recycling at the "back end," where they receive their shipments of goods. For example, they collect cardboard that was used as shipping packaging. However, many shopping malls and strip malls are not collecting recycling at the "front end," where the customers entering and exiting the businesses are placing many recyclable materials into trash cans for the landfill.

In 2014, California passed AB 1826, in require businesses that generate organic waste to collect such waste for recycling. However, diverting organic waste generated by businesses will not get

us from the current rate of 50% recycling to the goal of 75% recycling within the next three years.

The Solution: In order to accomplish the goal of 75% recycling, we need to change more of our habits. This resolution will require shopping centers and strip malls to purchase containers to collect recyclable materials from their customers. It will also require employees to keep landfill trash separated from the recyclable materials.

AB 341 already established the expensive part to force local municipalities to create mandatory recycling programs for businesses that generate over 4 cubic yards of waste per week. This resolution will make the already-established programs more effective by requiring shopping mall and strip mall businesses to collect recyclable materials at the front end, where the customers are, as well as at the back end, where they receive their shipments of goods.

**IMPACT STATEMENT**
The resolution does not affect any other statute or case law other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
AB 341 (Chesbro, 2011): to require that by the year 2020, not less than 75% of solid waste generated by source reduced, recycled, or composted. *See* Title 14 California Code of Regulations §§ 18835 – 18839. *See also* CalRecycle Mandatory Commercial Recycling Frequently Asked Questions, available at:
http://www.calrecycle.ca.gov/Recycle/Commercial/FAQ.htm

AB 1826 (Chesbro, 2014): requiring collection of organic waste for certain types of businesses.

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## COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

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### SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 11-09-2017. The proposed language itself is problematic as it reads as imposing an affirmative obligation on shopping centers and strip malls to "collect" recyclable materials from customers versus the indicated intent of imposing a duty to provide recycling collection containers for potential use by customers. The Delegation further believes this Resolution should be Disapproved on fundamental grounds as well. A core principle of freedom is that citizens should not be living in uncertainty over whether they are breaking any laws. Sadly, our country and state have continuously eroded that principle of democracy by increasingly passing micromanaging legislation that makes innocent people unknowingly guilty of top-down regulations governing everyday conduct. We should not

increase this problem. This Resolution adds one of those trivial requirements that honest business owners might not even be aware of and would be in violation for not knowing. It increases the chance that honest business owners who may be supportive of recycling efforts are nevertheless subjected to shakedown lawsuits for technical breaches of this proposed requirement.

Our delegation understands and agrees with the proponent's goal of increased recycling, and supports a less-invasive option of government encouraging the placement of recycling bins at the locations favored by the proponent.

**RESOLUTION 11-10-2017**

**DIGEST**
Cannabis Delivery: Ensuring Equal Access
Amends Business and Professions Code section 26200 to resolve any potential conflict with Business and Professions Code section 26090 and allow for equal access to cannabis.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 26200 to resolve any potential conflict with Business and Professions Code section 26090 and allow for access to cannabis. This resolution should be approved in principle because it protects individuals who suffer from conditions that limit their mobility and rely on delivery services to receive cannabis or cannabis products.

Cannabis use and business regulations have been updated several times over the last two years, most recently by Senate Bill No. 94, Cannabis: Medicinal and Adult Use. Under the current law, Business and Professions Code section 26200 appears to conflict with section 26090. Business and Professions Code section 26090, subdivision (c), states that a "local jurisdiction shall not prevent delivery of marijuana or marijuana products on public roads by a licensee acting in compliance with this division and local law as adopted under Section 26200." Section 26200, however, allows local jurisdictions to "completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction." While local jurisdictions should not and will not be required to allow dispensaries and or other cannabis businesses to be physically established and operate out of the locality, local jurisdictions should not be allowed to prevent its residents from receiving cannabis deliveries. This resolution amends section 26200, explicitly limiting local jurisdictions from preventing delivery of marijuana or marijuana products on public roads. This would allow for equal treatment for all cannabis users, including individuals who suffer from conditions that limit their mobility and rely on delivery services in order to receive marijuana or marijuana products.

It is worth noting that one of the major reasons for California's regulation of cannabis, including Proposition 64 which decriminalized its use, is that cannabis cultivation, distribution, and use is already widespread. There is no reason to believe that localities can, or would actually stop, their residents who are interested in purchasing cannabis from receiving cannabis. Certainly, localities that seek to prevent legal businesses from delivering to its residents, are indirectly favoring the black-market solutions previously in place.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 26200 to read as follows:

§ 26200

(a) Nothing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction; <u>provided however, that such an ordinance does not prevent delivery of marijuana or marijuana products on public roads.</u>

(b) Nothing in this division shall be interpreted to require a licensing authority to undertake local law enforcement responsibilities, enforce local zoning requirements, or enforce local licensing requirements.

(c) A local jurisdiction shall notify the bureau upon revocation of any local license, permit, or authorization for a licensee to engage in commercial marijuana activity within the local jurisdiction. Within 10 days of notification, the bureau shall inform the relevant licensing authorities. Within 10 days of being so informed by the bureau, the relevant licensing authorities shall commence proceedings under Chapter 3 (commencing with Section 26030) to determine whether a license issued to the licensee should be suspended or revoked.

(d) Notwithstanding paragraph (1) of subdivision (a) of Section 11362.3 of the Health and Safety Code, a local jurisdiction may allow for the smoking, vaporizing, and ingesting of marijuana or marijuana products on the premises of a retailer or microbusiness licensed under this division if:

(1) Access to the area where marijuana consumption is allowed is restricted to persons 21 years of age and older;

(2) Marijuana consumption is not visible from any public place or non-age restricted area; and

(3) Sale or consumption of alcohol or tobacco is not allowed on the premises.

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

**PROPONENT:** Bay Area Lawyers for Individual Freedom

**STATEMENT OF REASONS**

<u>The Problem</u>: This law appears to conflict with Business and Professions Code section 26090, subdivision (c), which states that a "local jurisdiction shall not prevent delivery of marijuana or marijuana products on public roads by a licensee acting in compliance with this division and local law as adopted under Section 26200." It creates an ambiguity as to whether or not an individual who lives in a jurisdiction that has banned dispensaries from physically operating within its boundaries is capable of receiving a cannabis delivery from a business lawfully registered and physically operating out of another jurisdiction.

As currently drafted, Business and Professions Code section 26200, subdivision (a), creates an ambiguity when viewed alongside Business and Professions Code section 26090, subdivision (c). Business and Professions Code section 26200, subdivision (a), is moot as to whether a location ("Location A") can, under Section 26200, prevent "all" deliveries from anywhere if it forbids local deliveries within Location A, or if a license issued in another location (Location B, for example) will satisfy Section 26090.

The Solution: This resolution would resolve the ambiguity created by Business and Professions Code section 26090, subdivision (c), and section 26200, subdivision (a), making it clear that local jurisdictions may regulate cannabis businesses so long as such regulation does not prevent delivery of marijuana or marijuana products on public roads, thereby allowing for equal treatment for all cannabis users, including individuals who suffer from conditions that limit their mobility and rely on delivery services in order to receive marijuana or marijuana products.

**IMPACT STATEMENT**
This resolution does not affect any other statute or case law other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**
AB 64 (Cooley, Jones-Sawyer, Lackey, and Wood) 2016 - Cannabis: medical and nonmedical: regulation and advertising – Filed with Secretary of State on December 12, 2016.
AB 266 (Bonta) - 2015- Medical Marijuana - Filed by Secretary of State on October 9, 2015
AB 243 (Wood) - 2015 - Medical Marijuana - Filed with Secretary of State on October 09, 2015.
SB 243 (McGuire) - 2016 Medical Marijuana - Filed with Secretary of State on October 09, 2015

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