RESOLUTION 06-01-2019

DIGEST
Court E-Filing: Tolling of Deadlines
Amends Code of Civil Procedure section 1010.6 to toll filing deadlines after documents are electronically submitted to the court.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1010.6 to toll filing deadlines after documents are electronically submitted to the court. This resolution should be approved in principle because it eliminates the risks that a litigant will submit a document for electronic filing within the permitted time, but (1) will not have proof that the document was timely filed because the court does not immediately confirm receipt and filing of the document, or (2) will be unable to file in a timely manner after the court rejects the document.

Under current law, Code of Civil Procedure section 1010.6 subdivision (b) grants trial courts the ability to adopt local rules governing electronic filing, subject to the general restrictions of the section. Under certain circumstances, trial courts may mandate electronic filing in the county. (Code Civ. Proc., § 1010.6, subds. (c) and (d).) In addition, each county can select the vendors that may engage in electronic filing.

While some counties and some electronic filing services automatically confirm receipt of electronic documents, in other locales, these tasks are performed by clerks and may take up to several days. In the latter situation, waiting for proof that a document has been filed may result in an untimely filing. Litigants who are required to file electronically or who take advantage of that option should not face the risk that a document will be deemed untimely because of the court's delay in processing the electronic filing of a document.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1010.6, to read as follows:

§1010.6
(a) A document may be served electronically in an action filed with the court as provided in this section, in accordance with rules adopted pursuant to subdivision (e).
(1) For purposes of this section:
(A) "Electronic service" means service of a document, on a party or other person, by either electronic transmission or electronic notification. Electronic service may be performed

directly by a party or other person, by an agent of a party or other person, including the party or other person's attorney, or through an electronic filing service provider.

(B) "Electronic transmission" means the transmission of a document by electronic means to the electronic service address at or through which a party or other person has authorized electronic service.

(C) "Electronic notification" means the notification of the party or other person that a document is served by sending an electronic message to the electronic address at or through which the party or other person has authorized electronic service, specifying the exact name of the document served, and providing a hyperlink at which the served document may be viewed and downloaded.

(2)(A)(i) For cases filed on or before December 31, 2018, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has agreed to accept electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d).

(ii) For cases filed on or after January 1, 2019, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented to receive electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). Express consent to electronic service may be accomplished either by (I) serving a notice on all the parties and filing the notice with the court, or (II) manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service. The act of electronic filing shall not be construed as express consent.

(B) If a document is required to be served by certified or registered mail, electronic service of the document is not authorized.

(3) In any action in which a party or other person has agreed or provided express consent, as applicable, to accept electronic service under paragraph (2), or in which the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d), the court may electronically serve any document issued by the court that is not required to be personally served in the same manner that parties electronically serve documents. The electronic service of documents by the court shall have the same legal effect as service by mail, except as provided in paragraph (4).

(4)(A) If a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of that document is deemed complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent.

(B) Any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days, but the extension shall not apply to extend the time for filing any of the following:

(i) A notice of intention to move for new trial.

(ii) A notice of intention to move to vacate judgment under Section 663a.

(iii) A notice of appeal.

(C) This extension applies in the absence of a specific exception provided by any other statute or rule of court.

(5) Any document that is served electronically between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed served on that court day. Any document that is served electronically on a noncourt day shall be deemed served on the next court day.

(6) A party or other person who has provided express consent to accept service electronically may withdraw consent at any time by completing and filing with the court the appropriate Judicial Council form. The Judicial Council shall create the form by January 1, 2019.

(7) Consent, or the withdrawal of consent, to receive electronic service may only be completed by a party or other person entitled to service or that person's attorney.

(8) Confidential or sealed records shall be electronically served through encrypted methods to ensure that the documents are not improperly disclosed.

(b) A trial court may adopt local rules permitting electronic filing of documents, subject to rules adopted pursuant to subdivision (e) and the following conditions:

(1) A document that is filed electronically shall have the same legal effect as an original paper document.

(2)(A) When a document to be filed requires the signature of any person, not under penalty of perjury, the document shall be deemed to have been signed by the person who filed the document electronically.

(B) When a document to be filed requires the signature, under penalty of perjury, of any person, the document shall be deemed to have been signed by that person if filed electronically and if either of the following conditions is satisfied:

(i) The person has signed a printed form of the document before, or on the same day as, the date of filing. The attorney or other person filing the document represents, by the act of filing, that the declarant has complied with this section. The attorney or other person filing the document shall maintain the printed form of the document bearing the original signature until final disposition of the case, as defined in subdivision (c) of Section 68151 of the Government Code, and make it available for review and copying upon the request of the court or any party to the action or proceeding in which it is filed.

(ii) The person has signed the document using a computer or other technology pursuant to the procedure set forth in a rule of court adopted by the Judicial Council by January 1, 2019.

(3) Any document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day. Any document that is received electronically on a noncourt day shall be deemed filed on the next court day.

(4) The court receiving a document filed electronically shall issue a confirmation that the document has been received and filed. The confirmation shall serve as proof that the document has been filed. Any filing deadline arising from a statute, including, without limitation, a statute of limitations; state rule of court; local rule of court; and/or order by the court, shall be tolled for any period during which the court has not issued a confirmation of both receipt and filing of an electronically filed document. The date of such tolling shall run from the date on which the document is first submitted electronically to the court, and the tolling period shall run from the date of that first submission until the court issues confirmation of both receipt and filing of the document.

(5) Upon electronic filing of a complaint, petition, or other document that must be served with a summons, a trial court, upon request of the party filing the action, shall issue a summons with the court seal and the case number. The court shall keep the summons in its records and

may electronically transmit a copy of the summons to the requesting party. Personal service of a printed form of the electronic summons shall have the same legal effect as personal service of an original summons. If a trial court plans to electronically transmit a summons to the party filing a complaint, the court shall immediately, upon receipt of the complaint, notify the attorney or party that a summons will be electronically transmitted to the electronic address given by the person filing the complaint.

(6) The court shall permit a party or attorney to file an application for waiver of court fees and costs, in lieu of requiring the payment of the filing fee, as part of the process involving the electronic filing of a document. The court shall consider and determine the application in accordance with Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code and shall not require the party or attorney to submit any documentation other than that set forth in Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code. Nothing in this section shall require the court to waive a filing fee that is not otherwise waivable.

(7) A fee, if any, charged by the court, an electronic filing manager, or an electronic filing service provider to process a payment for filing fees and other court fees shall not exceed the costs incurred in processing the payment.

(c) If a trial court adopts rules conforming to subdivision (b), it may provide by order that all parties to an action file and serve documents electronically in a class action, a consolidated action, a group of actions, a coordinated action, or an action that is deemed complex under Judicial Council rules, provided that the trial court's order does not cause undue hardship or significant prejudice to any party in the action.

(d) A trial court may, by local rule, require electronic filing and service in civil actions, subject to the requirements and conditions stated in subdivision (b), the rules adopted by the Judicial Council under subdivision (f), and the following conditions:

(1) The court shall have the ability to maintain the official court record in electronic format for all cases where electronic filing is required.

(2) The court and the parties shall have access to more than one electronic filing service provider capable of electronically filing documents with the court or to electronic filing access directly through the court. The court may charge fees of no more than the actual cost of the electronic filing and service of the documents. Any fees charged by an electronic filing service provider shall be reasonable. The court, an electronic filing manager, or an electronic filing service provider shall waive any fees charged if the court deems a waiver appropriate, including in instances where a party has received a fee waiver.

(3) The court shall have a procedure for the filing of nonelectronic documents in order to prevent the program from causing undue hardship or significant prejudice to any party in an action, including, but not limited to, unrepresented parties. The Judicial Council shall make a form available to allow a party to seek an exemption from mandatory electronic filing and service on the grounds provided in this paragraph.

(4) Unrepresented persons are exempt from mandatory electronic filing and service.

(5) Until January 1, 2021, a local child support agency, as defined in subdivision (h) of Section 17000 of the Family Code, is exempt from a trial court's mandatory electronic filing and service requirements, unless the Department of Child Support Services and the local child support agency determine it has the capacity and functionality to comply with the trial court's mandatory electronic filing and service requirements.

(e) The Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, and access to public records, and rules relating to the integrity of electronic service. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(f) The Judicial Council shall adopt uniform rules to permit the mandatory electronic filing and service of documents for specified civil actions in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, access to public records, unrepresented parties, parties with fee waivers, hardships, reasonable exceptions to electronic filing, and rules relating to the integrity of electronic service. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(g)(1) The Judicial Council shall adopt uniform rules to implement this subdivision as soon as practicable, but no later than June 30, 2019.

(2) Any system for the electronic filing and service of documents, including any information technology applications, Internet Web sites, and Web-based applications, used by an electronic service provider or any other vendor or contractor that provides an electronic filing and service system to a trial court, regardless of the case management system used by the trial court, shall satisfy both of the following requirements:

(A) The system shall be accessible to individuals with disabilities, including parties and attorneys with disabilities, in accordance with Section 508 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794d), as amended, the regulations implementing that act set forth in Part 1194 of Title 36 of the Code of Federal Regulations and Appendices A, C, and D of that part, and the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(B) The system shall comply with the Web Content Accessibility Guidelines 2.0 at a Level AA success criteria.

(3) A vendor or contractor that provides an electronic filing and service system to a trial court shall comply with paragraph (2) as soon as practicable, but no later than June 30, 2019. Commencing on June 27, 2017, the vendor or contractor shall provide an accommodation to an individual with a disability in accordance with subparagraph (D) of paragraph (4).

(4) A trial court that contracts with an entity for the provision of a system for electronic filing and service of documents shall require the entity, in the trial court’s contract with the entity, to do all of the following:

(A) Test and verify that the entity’s system complies with this subdivision and provide the verification to the Judicial Council no later than June 30, 2019.

(B) Respond to, and resolve, any complaints regarding the accessibility of the system that are brought to the attention of the entity.

(C) Designate a lead individual to whom any complaints concerning accessibility may be addressed and post the individual’s name and contact information on the entity’s Internet Web site.

(D) Provide to an individual with a disability, upon request, an accommodation to enable the individual to file and serve documents electronically at no additional charge for any time period that the entity is not compliant with paragraph (2) of this subdivision. Exempting an individual with a disability from mandatory electronic filing and service of documents shall not be deemed an accommodation unless the person chooses that as an accommodation. The vendor or contractor shall clearly state in its Internet Web site that an individual with a disability may request an accommodation and the process for submitting a request for an accommodation.

(5) A trial court that provides electronic filing and service of documents directly to the public shall comply with this subdivision to the same extent as a vendor or contractor that provides electronic filing and services to a trial court.

(6)(A) The Judicial Council shall submit four reports to the appropriate committees of the Legislature relating to the trial courts that have implemented a system of electronic filing and service of documents. The first report is due by June 30, 2018; the second report is due by December 31, 2019; the third report is due by December 31, 2021; and the fourth report is due by December 31, 2023.

(B) The Judicial Council's reports shall include all of the following information:

(i) The name of each court that has implemented a system of electronic filing and service of documents.

(ii) A description of the system of electronic filing and service.

(iii) The name of the entity or entities providing the system.

(iv) A statement as to whether the system complies with this subdivision and, if the system is not fully compliant, a description of the actions that have been taken to make the system compliant.

(7) An entity that contracts with a trial court to provide a system for electronic filing and service of documents shall cooperate with the Judicial Council by providing all information, and by permitting all testing, necessary for the Judicial Council to prepare its reports to the Legislature in a complete and timely manner.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: Existing law provides that a document submitted electronically to a court for electronic filing shall be deemed filed on the court day of electronic receipt. (Code Civ. Proc., § 1010.6, subd. (b)(3).) However, Section 1010.6, subdivision (b)(4) also states that proof of such electronic filing arises from the court's issuance of a "confirmation of receipt and filing" (i.e., the clerk's endorsement of a filed document). In reality, courts usually do not issue such "confirmation" of filing until one or more days after the date on which the party has submitted the document for filing through the e-filing system; and then, too, the "confirmation" is dated as of the date of issuance of the "confirmation", which is a date subsequent to the date of submission.

Thus, Code of Civil Procedure section 1010.6 presents an inherent ambiguity and conflict that leaves the litigant who has timely filed a document to comply with a statute of limitations or rule of court, with no proof of timely filing when the court issues an untimely confirmation, or, worse, the court rejects the document a week after the deadline, leaving no opportunity to cure any defect. At that point, the filing litigant is left with no recourse or remedy, and has no legal "proof" of compliance with a statute of limitations or rule of court. In short, the litigant would lose his or her legal rights because of the court's delay in processing the electronic filing of a document. That is clearly not the outcome intended by the statute.

The Solution: This resolution amends Code of Civil Procedure, section 1010.6, subdivision (b)(4), to toll any filing deadline (such as a statute of limitations or deadline pursuant to a briefing schedule) related to a document filed through the court's e-filing system, as of the date on which the document was submitted electronically to the court for filing, and the tolling period would run from the date of that first submission until the court issues confirmation of both receipt and filing of the document. Such tolling will resolve the existing ambiguity and conflict in Code of Civil Procedure section 1010.6, and thereby preserve the rights of litigants who timely submit documents to the court but do not receive from the court any confirmation of filing on the day of submission.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Shivadev S. Shastri, P. O. Box 1604, Los Altos, CA 94023-1604, (650)428-1768, shivadevshastri@att.net.

RESPONSIBLE FLOOR DELEGATE: Shivadev S. Shastri

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Rather than the proponent's approach of tolling until the receipt and filing are confirmed with allowance for multiple iterations, we recommend a rule that if an efiler gets a notice of rejection, within one court day of that notice, the efiler could resubmit with a "file on demand" note to the clerk and the clerk would take it as "filed on demand" as of the date of the original filing. This would replicate the process as it would happen during the physical filing process at the clerk's window, but would allow for the time delay caused by the electronic filing.

RESOLUTION 06-02-2019

DIGEST
Torts: Personal Injury Statute of Limitations
Amends Government Code sections 911.2 and 911.8 to increase the statute of limitations for tort claims against public entities from six months to two years, and Civil Code section 335.1 to increase the statute of limitations for non-public entity tort claims from two years to four years.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code sections 911.2 and 911.8 to increase the statute of limitations for tort claims against public entities from six months to two years, and Civil Code section 335.1 to increase the statute of limitations for non-public entity tort claims from two years to four years. This resolution should be disapproved because it does not accomplish the purpose stated, incorrectly cites one of the statutes it proposes to amend, improperly restricts claims under the Tort Claims Act to claims involving personal property and growing crops, and there is no need to increase the limitations period for personal injury actions to four years.

Current law establishes a system for presenting claims by individuals and entities for torts committed by employees of governmental agencies. (Gov. Code, §§ 810 to 996.6.) This system requires that the injured party present their claim to the agency within six months from the day the claim accrues. (Gov. Code, § 911.2.) The governmental entity must then either accept or reject that claim. If the claim is rejected, the entity is required to issue a notice to the claimant advising them that they have six months to file suit. (Gov. Code, § 911.8.) In addition to this scheme for governmental claims, Code of Civil Procedure section 335.1 (incorrectly cited in the Resolution as "Civil Code section 335.1") provides for a general limitations period for personal injuries of two years.

This resolution first attempts to increase the limitations period for governmental claims by amending Government Code section 911.2 to delete the reference to personal injuries, and second to amend Government Code section 911.8 by increasing the time to file an action set out in the notice to two years instead of six months.

However, these two revisions to the Tort Claims Act in Government Code sections 911.2 and 911.8, do not accomplish the stated purpose. First, the removal of the clause in the first sentence limits the revision to "personal property or growing crops" and does not allow personal injury claims. This is a fatal flaw as it deletes personal injuries from this section of the Tort Claims Act all together. In addition, the six month limitations period at line 4, which the resolution would like to revise, remains intact. The change to section 911.8 does not cure the issue, and in fact becomes inconsistent with section 911.2. This is because line 24 of resolution would change the notice provision to a two-year limitations period, which is inconsistent with the six-month

limitations period referenced at line 4 in section 911.8. These changes are internally inconsistent and do not accomplish the stated purpose of extending the Tort Claims Act limitations period from six months to two years.

With respect to the proposal that the general limitations period for personal injuries set out in Code of Civil Procedure section 335.1, there is no adequate justification for doubling the general limitations period from two years to four years. Extending the risk for damages for an additional two years for an accident in which the defendant may or may not be responsible is too burdensome. In particular, such an increase would allow increased damages in claims that may not be legitimate. The statute was revised in 2002, at which time the Legislature considered an extension to the limitations period to allow additional time for matters to settle before litigation and selected two years over one year, and no more. The two-year period is an adequate balance between allowing sufficient time for the claim to be developed and setting an outside limit for bringing a claim.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code sections 911.2 and 911.8, and Civil Code § 335.1 to read as follows:

§911.2

(a) A claim relating to a cause of action ~~for death or for injury to person or~~ to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action.

(b) For purposes of determining whether a claim was commenced within the period provided by law, the date the claim was presented to the Department of General Services is one of the following:

(1) The date the claim is submitted with a twenty-five dollar ($25) filing fee.

(2) If a fee waiver is granted, the date the claim was submitted with the affidavit requesting the fee waiver.

(3) If a fee waiver is denied, the date the claim was submitted with the affidavit requesting the fee waiver, provided the filing fee is paid to the department within 10 calendar days of the mailing of the notice of the denial of the fee waiver.

§911.8

(a) Written notice of the board's action upon the application shall be given in the manner prescribed by Section 915.4.

(b) If the application is denied, the notice shall include a warning in substantially the following form:

"WARNING

"If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within 2 years ~~six (6) months~~ from the date your application for leave to present a late claim was denied.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

§335.1

Within ~~two~~ four years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law provides for much longer statutes of limitations for civil suits related to contracts (4 years) and a personal property (3 years) than personal injury and death (1-2 years). People's claims too often expire under these very short statutes. California has some of the shortest personal injury statutes of limitations in the country. This flies in the face of justice and Californians' values.

It is not uncommon for a victim to need time to recover before pursuing legal recourse through the courts. To require victims to do so or be barred from all remedies under the current statutes of limitations is just plain cruel. Furthermore, criminal statutes of limitations often far exceed the civil statutes for assault, battery and murder, so criminal cases are not likely to have commenced, let alone have been adjudicated before a plaintiff must file their civil claims.

Potential defendants typically engage in a cost-benefit analysis before considering whether to stop a wrongful action (such as polluting or not enacting proper measures for safety). If the defendant decides that the cost of changing a wrongful practice would be greater than the cost of continuing it then a key deterrent of the tort system is lost.

The Solution: By extending these statutes of limitations by up to an additional 2 years, victims would have a more viable avenue through the courts to seek accountability for the most egregious of injustices. By reducing the number of potential claims that are barred due to the short statutes of limitations, aggrieved parties have a fairer and more just amount of time to seek treatment and recover before having to endure the additional stress of a civil suit. Furthermore, increasing the time to file a claim in state court better allows for plaintiffs to obtain criminal evidence arising from any criminal charges and cases resulting from the injury, as well as other evidence related to the injury. The damages related to the injuries would have more time to be assessed and the courts and jurists would be provided with more information about the impact of the alleged damages.

The current system is far too tilted to allow the perpetrators of violence, whether private citizens or government actors, to avoid accountability and consequences for their actions. The public's perception of our civil legal system as a means to justice is rapidly declining and this is one of many measures we can take to improve people's access to justice and the public's perception of the legal system's ability to dole out just outcomes.

IMPACT STATEMENT
This resolution may require additional statutory changes.

CURRENT OR PRIOR RELATED LEGISLATION:
None known.

AUTHOR AND/OR PERMANENT CONTACT: Jennifer Orthwein, Medina Orthwein LLP, 1322 Webster St. Ste 200, Oakland, CA 94612, phone: 510-823-2040, fax: 510-217-3580, jorthwein@medinaorthwein.com

RESPONSIBLE FLOOR DELEGATE: Jennifer Orthwein

RESOLUTION 06-03-2019

DIGEST
Pleadings: Deletes Requirement to Cite to Subsection of Statute of Limitations
Amends Code of Civil Procedure section 458 to delete the requirement to cite to specific subsections in asserting a statute of limitations defense.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 458 to delete the requirement to cite to specific subsections in asserting a statute of limitations defense. This resolution should be approved in principle because it would simplify the pleading of a statute of limitations defense while eliminating confusion as to whether parts of specific statutes are considered to be subdivisions.

Under existing law, both the section and subdivision of specific statutes must be cited when pleading a statute of limitation as an affirmative defense in an answer. (Code Civ. Proc., § 458.) Failure to do so results in waiver of the defense. (*Martin v. Van Bergan* (2012) 209 Cal.App.4th 84.)

This resolution still requires the defendant in a civil action to cite to the specific statute governing the basis for the claimed statute of limitations defense, but deletes the requirement that the defendant also specify the subsection of the pertinent statute. The requirement that a defendant specify the subsection is unnecessary and confusing because it is unclear whether some statutes are considered to have subdivisions, because most start with "within X years" and then list either letters or numbers (i.e. (a), (b), (c) or 1. 2. 3.) that are not consistent with each other. It is also unclear how to determine which of them should be considered to be subdivisions. (See e.g., Code Civ. Proc., §§ 335.1, 336, 336a, 337, 337.5, 338, 339, 340, 341, and 349 ¾.) These sections define various statutes of limitations. This resolution simplifies the requirement while still giving adequate notice of any statute of limitations claimed.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 458, to read as follows:

§ 458

In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section ~~and subdivision thereof, if it is so divided,~~ relied

upon) of The Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, when using the Statute of Limitation as an affirmative defense in an answer, both the section and the subsection must technically be cited. This is an archaic law and unnecessary procedural requirement. Some Statutes of Limitations have subsections, but others do not (even though it may contain a laundry list of applicable claims). It is also unclear whether some statutes are considered to have subsections or not because most start with a "With X years" and then list situations either letters or numbers (i.e. (a), (b), (c) or 1. 2. 3.) See, for example, Code of Civil Procedure sections 335.1, 336, 336a, 337, 337.5, 338, 339, 340, 341, and 349 ¾.

The Solution: This resolution deletes the requirement to cite to specific subsections of the Statute of Limitations, but retains the requirement that the party cite to the specific section number relied upon.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 06-04-2019

DIGEST
Prejudgment Interest: Fixes Time for Motion to Recover Prejudgment Interest
Amends Civil Code sections 3287 and 3291 to establish a deadline for filing a motion to recover prejudgment interest.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code sections 3287 and 3291 to establish a deadline for filing a motion to recover prejudgment interest. This resolution should be approved in principle because it sets forth a reasonable standard for a plaintiff to make a timely request for prejudgment interest and would bring an end to the current confusion courts face in determining when a party should request prejudgment interest.

The purpose of prejudgment interest is to encourage settlement. Civil Code section 3287 allows a plaintiff to be awarded prejudgment interest in a contract action. Civil Code section 3291 allows for the award of prejudgment interest for personal injuries sustained in certain tort actions where a plaintiff has made an offer to settle pursuant to Code of Civil Procedure section 998 and receives a more favorable award at trial. However, the problem is that neither statute specifies the timing or mechanism for seeking prejudgment interest and there is no rule in the California Rules of Court that specifies when prejudgment interest must be sought. This has led to confusion in the trial courts and has caused a plaintiff's request for prejudgment interest to be improperly denied because the trial court deemed it to be untimely.

In *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, the court noted that there was no statute, rule of court, or case authority that established a procedure or time frame for requesting an award of prejudgment interest. The court found that based on California Rules of Court, rule 875, "prejudgment interest should be awarded in the judgment on the basis of a specific request therefor made before entry of judgment" or at the latest "may be sought as part of a motion for new trial pursuant to Code of Civil Procedure section 657, on the grounds of '[e]xcessive or inadequate damages.'" (*North Oakland Medical Clinic, supra*, 65 Cal.App.4th at 830-831; quoting Code Civ. Proc., § 657, subd. (5).) The court further stated, "Pending the promulgation of a rule by the Judicial Council, which we think appropriate, requests for prejudgment interest under section 3287 by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion." (*North Oakland Medical Clinic*, *supra*, 65 Cal.App.4th at 831; citing Code Civ. Proc., § 659.)

In *Steiny & Co, Inc. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, the court also noted that no statute or rule of court specified when prejudgment interest must be sought, but

found that the award of interest after entry of judgment was proper where the complaint requested prejudgment interest.

In *Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, the court found that the plaintiff's request for prejudgment interest that was made less than 15 days after the entry of judgment "was made within the statutory time limit for motions under Code of Civil Procedure section 657." (*Id*. at 298; citing Code Civ. Proc., § 659, subd. (a)(2).)

In 1998, the Court of Appeal believed that it was necessary for the Judicial Council to set forth a procedure and time limit for a party to request prejudgment interest. To date, no such statute or rule of court has been created to address this problem. Since the proposed resolution seeks to remedy the problem, and requires that the request for prejudgment interest be set within 15 days after written notice of the entry of judgment, which is the time frame found reasonable by the most recent court ruling on this issue, the resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code sections 3287 and 3291 to read as follows:

§3287

(a) A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

(c) Unless another statute provides a different interest rate, in a tax or fee claim against a public entity that results in a judgment against the public entity, interest shall accrue at a rate equal to the weekly average one year constant maturity United States Treasury yield, but shall not exceed 7 percent per annum. That rate shall control until the judgment becomes enforceable under Section 965.5 or 970.1 of the Government Code, at which time interest shall accrue at an annual rate equal to the weekly average one year constant maturity United States Treasury yield at the time of the judgment plus 2 percent, but shall not exceed 7 percent per annum.

(d) A motion to recover interest under this section must be filed no later than fifteen days after written notice of entry of judgment.

§3291

(a) In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of the other person, corporation,

association, or partnership, and whether the injury was fatal or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section.

(b) If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.

(c) This section shall not apply to a public entity, or to a public employee for an act or omission within the scope of employment, and neither the public entity nor the public employee shall be liable, directly or indirectly, to any person for any interest imposed by this section.

(d) A motion to recover interest under this section must be filed no later than fifteen days after written notice of entry of judgment.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Civil Code section 3287 provides for the award of prejudgment interest by the court in contract actions. Civil Code section 3291 provides for an award of prejudgment interest in certain tort actions and in relation to Code of Civil Procedure section 998 offers. However, these sections do not set a time limit for moving to recover prejudgment interest as recognized by the appellate court in *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824. This ambiguity has resulted in differing conclusions on whether there is a time limit and what a time limit should be for bringing such a motion. (See, e.g., *Rockroller v. Koljonen* (2015) 2015 WL 1456033 at 13 ["Under the particular facts here, we conclude a formal motion was not required and [plaintiff]'s request was sufficient. Neither the Legislature nor the Judicial Council has prescribed a noticed motion procedure for recovery of prejudgment interest, and we decline to impose one when the damages are undisputedly liquidated. A noticed motion would not have added anything to the analysis, it would have been a mere formality."].)

The Solution: This resolution solves the current ambiguity by fixing the time limit to bring a motion to claim prejudgment interest. It sets that time limit as similar to the time for claiming costs under Code of Civil Procedure section 1034 and related rules fixed by the Judicial Council, currently found in California Rules of Court, rule 3.1700. This time limit is chosen over that of the time for filing a motion for new trial as adopted by the *North Oakland Medical Clinic* Court because it would give an additional five days where notice of entry of judgment is served by mail.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Darin L. Wessel, Esq., 771 Jamacha Rd., #415, El Cajon, CA 92019, (213) 880-2664, darinwessel@gmail.com

RESPONSIBLE FLOOR DELEGATE: Darin L. Wessel

RESOLUTION 06-05-2019

DIGEST
Government Tort Claims Act: Extending Presentation Time for Incapacitated Claimants
Amends Government Code section 911.6 to extend the filing deadline under the Government Tort Claims Act for claimants incapacitated within six months after accrual of the claim.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 911.6 to extend the filing deadline under the Government Tort Claims Act for claimants incapacitated within six months after accrual of the claim. This resolution should be disapproved because it would undermine the purpose and intent underlying early presentation of claims against governmental agencies by allowing any "incapacity," at any time, allegedly existing within the first six months to justify a late presentation of claim.

Historically, public entities are not liable for injuries caused by that entity or its employee, except as authorized by statute. Where a claim is statutorily permitted, as a condition precedent to filing a lawsuit, the claim must be timely presented to the governmental entity for its consideration in the manner outlined by the California Tort Claims Act. Claims against the government for personal injury or death must be presented within six months of accrual of the cause of action, or by application for leave to present a late claim, no later than one year. (Gov. Code, §§ 911.2, 911.4, 911.6; see also Gov. Code, §§ 945.4, 945.6, 946.6.) The time period is strictly enforced. For example, in computing the one-year period, the time during which the claimant is a minor does not extend the deadline unless the minor is mentally incapacitated and also without an appointed guardian ad litem or a conservator during the entire six-month period. (See Gov. Code, § 911.4, subd. (c)(1).)

The resolution would upend the statutory scheme by extending the six-month period for the presentation of claims based merely on the subjective assertion that the injured claimant was in some undefined manner "incapacitated" physically or mentally at any point during the first six months. Conceivably that would apply to some extent to virtually every injured claimant. The current language requires physical or mental incapacity for the entire six months in order to justify presentation of a claim outside the six-month limit. Yet even that situation does not effectively preclude the claimant, such as through a guardian or legal representative, from timely presenting the claim on behalf of the injured party. Moreover, there are already provisions for the presentation of a late claim to the entity and seeking superior court permission, where, among other recognized exceptions, the tardiness was due to mistake, inadvertence, surprise or excusable neglect, so long as the delay was not prejudicial to the governmental body and it was presented within one-year. (See Gov. Code, §§ 911.6, subd. (b)(1), 946.6, subd. (c)(1).)

Related to Resolutions 06-06-2019 and 06-07-2019.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

§911.6

(a) The board shall grant or deny the application within 45 days after it is presented to the board. The claimant and the board may extend the period within which the board is required to act on the application by written agreement made before the expiration of the period.

(b) The board shall grant the application where one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during ~~all~~ any of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time, provided the application is presented within six months of the person no longer being physically or mentally incapacitated, or a year after the claim accrued, whichever comes first.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(c) If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The California Tort Claims Act statute of limitations is far more black-and-white than others. With most statutes of limitations, any tolling provisions are applied insofar as the tolling circumstance (e.g., claimant was unconscious) occurs. Some of them have a cap (e.g., being in prison tolls an SOL for as long as the inmate is in prison, but it maxes out at two years. If the individual was in prison for less than two years since the incident, it tolls only as long as the person was in prison). Claims under the California Tort Claims Act, however, have a tolling cap at six months and no partial tolling.

When anyone, under color of state law, commits a tort against a private person or entity, that person or entity has to file a claim with the Government Claims Program within six months of the incident to preserve their claims under state law and give the state an opportunity to resolve the complaint without it going to a lawsuit.

Under a few circumstances, the six-month deadline is tolled to a year. One of those circumstances is if the person was incapacitated for the **whole six months**. If, however, the person was incapacitated for only part of the six months, the six-month deadline does not toll by however long the person was incapacitated; it does not toll at all. In other words, if a person awoke from a coma one day before the six months expired, the person would have to file it by the next day. Additionally, if the person went into a coma one day after the incident, the deadline would still be six months even if the person has not awoken. In short, it either gets extended six months or not at all. That is far too black-and-white for a statute of limitations.

The Solution: This resolution enables a partial tolling of the statutes of limitations under the California Tort Claims Act if the claimant was incapacitated for less than six months after the incident. If the person was disabled for three months after the event, the deadline to file a Government Claim is delayed by three months. If it is one day under six months, it is tolled by six months minus one day. This will ensure that fewer people run out the clock on their claims by giving more people a solid six months to file once they regain their capacity. This does not change the law if a person awakens after six months, in which the deadline remains one year after the incident.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Ben Rudin, 3830 Valley Centre Dr., Ste. 705 PMB 231, San Diego, CA 92130, (858) 256-4429, ben_rudin@hotmail.com.

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 06-06-2019

DIGEST
Government Tort Claims Act: Extend Deadline for Claimants Who Were Minors
Amends Government Code section 911.6 to extend the filing deadline for minors.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 911.6 to extend the filing deadline for minors. This resolution should be approved in principle because it corrects an inequitable result when the literal language of the statute is applied.

Current law establishes a system for presenting claims by individuals and entities for torts committed by employees of governmental agencies. (Gov. Code, §§ 810-996.6.) This system requires that the injured party present their claim to the agency within six months from the day the claim accrues. (Gov. Code, § 911.2.) The governmental entity must then either accept or reject that claim. If the claim is rejected, the entity is required to issue a notice to the claimant advising them that they have six months to file suit. (Gov. Code, § 911.8.) Exceptions to these rules can be found in Government Code section 911.6. Included among those exceptions is subdivision (b)(2), where the claimant has been a minor for the entire six-month limitation period. If a minor reaches majority before the six month period expires—which can have the effect of a shortened time to bring a claim—the claim is barred.

Statutes of limitations are intended to be black and white, and provide bright line rules on when an action can be brought. That said, the proponent's point is well taken—a minor who is not a minor during the entire six month limitations period is by definition excluded from application of Government Code section 911.6. That results in an unfair application of the intention of the section. A number of cases—stretching back over two decades—have uniformly interpreted the provisions of section 911.6 and its statutory predecessors as indicating that the Legislature intended to accord special solicitude to the claims of injured minors, and to require a public entity to accept a late claim filed on behalf of a minor so long as the application is filed with the entity within one year of the accrual of the cause of action. (*See, e.g., Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 479-480; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 883-884; *Frost v. State of California* (1966) 247 Cal.App.2d 378, 386-387; *Hom v. Chico Unified Sch. Dist.* (1967) 254 Cal.App.2d 335, 338–339; *Ridley v. City of San Francisco* (1969) 272 Cal.App.2d 290, 292; *Wozniak v. Peninsula Hospital* (1969) 1 Cal.App.3d 716, 720-721; *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 849.)

Although governmental agencies have a vested interest in dealing with claims against their employees in a timely and expeditious manner, there is no rational basis for the limitation that the minor must be a minor for the entire limitations period where such a limitation can, in some

cases, work an inequity. Commencing the limitations period within six months of the minor reaching majority or a year after the claim accrues, whichever occurs first, corrects that inequity. Governmental entities will only face at most an additional six months from accrual or perhaps less, so this resolution does not impact the expeditious resolution of claims.

Related to Resolutions 06-05-2019 and 06-07-2019.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

§ 911.6

(a) The board shall grant or deny the application within 45 days after it is presented to the board. The claimant and the board may extend the period within which the board is required to act on the application by written agreement made before the expiration of the period.

(b) The board shall grant the application where one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.

(2) The person who sustained the alleged injury, damage or loss was a minor during ~~all~~ any of the time specified in Section 911.2 for the presentation of the claim, provided the application is presented within six months of the person turning eighteen (18) years old or a year after the claim accrues, whichever comes first.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(c) If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The California Tort Claims Act statute of limitations is far more black-and-white than others. With most statutes of limitations, any tolling provisions are applied insofar as the tolling circumstance (e.g., claimant was a minor) occurs. Some of them have a cap (e.g., being in prison tolls an SOL for as long as the inmate is in prison, but it maxes out at two years. If the

individual was in prison for less than two years since the incident, it tolls only as long as the person was in prison). Claims under the California Tort Claims Act, however, have a tolling cap at six months and no partial tolling.

When anyone, under color of state law, commits a tort against a private person or entity, that person or entity has to file a claim with the Government Claims Program within six months of the incident to preserve their claims under state law and give the state an opportunity to resolve the complaint without it going to a lawsuit.

Under a few circumstances, the six-month deadline is tolled to a year. One of those circumstances is if the person was a minor for the **whole six months**. If, however, the person was a minor for only part of the six months, the six-month deadline does not toll by however long the person was a minor; it does not toll at all. In other words, if a person turned 18 one day before the six months expired, the person would have to file it by the next day. In short, it either gets extended six months or not at all. That is far too black-and-white for a statute of limitations.

The Solution: This resolution enables a partial tolling of the statutes of limitations under the California Tort Claims Act if the claimant was a minor for less than six months after the incident. If the person was a minor for three months after the event, the deadline to file a Government Claim is delayed by three months. If it is one day under six months, it is tolled by six months minus one day. This will ensure that fewer people run out the clock on their claims by giving more people a solid six months to file once they turn 18. This does not change the law if a person becomes 18 after six months, in which the deadline remains one year after the incident.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT:
Ben Rudin, 3830 Valley Centre Dr., Ste. 705 PMB 231, San Diego, CA 92130, (858) 256-4429, ben_rudin@hotmail.com.

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 06-07-2019

DIGEST
Government Tort Claims: Tolling Late Claims Deadline for Inmates or Parolees
Amends Government Code section 911.6 to require public entities to grant inmates and parolees who filed an administrative appeal with the Department of Corrections leave to file a late claim.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 12-06-2018, which was approved in principle.

Reasons:
This resolution amends Government Code section 911.6 to require public entities to grant inmates and parolees who filed an administrative appeal with the Department of Corrections leave to file a late claim. This resolution should be disapproved because the exhaustion requirement relating to an appeal of prison conditions is unrelated to whether a prisoner suffered a claim implicated by the Government Tort Claims Act and the time for an appeal is not related to the date of injury.

Government Code section 911.2, subdivision (a), requires a person to submit a personal injury claim against the government "not later than six months after the accrual of the cause of action." The six-month time limit to file a Government Claim is strictly construed. However, if a party wishes to file a late Government Claim, they must file their application for leave to file a late claim, no later than one year after the date of injury. (Gov. Code, § 911.4, subd. (b).)

Current law requires that the public entity accept an application to file a late Government Claim if the injured person was a minor during the entire six-month period, if the person was physically or mentally incapacitated during the entire six-month period, or if the person died before the expiration of the six-month period. (Gov. Code, § 911.6, subds. (b)(2)-(4).) This resolution seeks to expand the class of people allowed to file late government claims to include inmates or parolees that appeal a claim for injuries against a prison or jail under the administrative appeals process set forth in California Code of Regulations, title 15, section 3084, et seq.

California Code of Regulations, title 15, section 3084 et seq., relates to when prisoners or inmates may file an appeal of a grievance regarding their conditions of incarceration or injuries. The appeals provisions set forth in these regulations do not specify any time limit from when the alleged injury occurred to when the inmate or prisoner must file the original grievance. Instead, the time limits set forth in California Code of Regulations, title 15, section 3084.8 relate to the time upon which an appeal of a denial of a grievance may commence. (Cal. Code Regs., tit. 15, § 3084.8.)

This resolution seeks to tie an inmate's time limit to file a late government claim, to within one year of the decision rejecting the inmate's administrative appeal, not from the date of their injuries. However, a claim accrues on the date the injury occurred. "The date of accrual for

purposes of the claim presentation requirement is the same date on which the cause of action would accrue for purposes of the statute of limitations in an action against a private party." (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 63.) "The general rule for defining the accrual of a cause of action sets the date as the time when, under the substantive law the wrongful act is done or the wrongful result occurs, and the consequent liability arises." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 387.)

There is no reason why an inmate cannot timely file a claim with the Victim Compensation and Government Claims Board for "injury, damage, or property loss" to the extent money damages are sought, within either six months of the injury or within one year of the injury in time to file an application for approval to file a late claim. If this resolution becomes law, it will give prisoners and inmates a more generous statute of limitations than any other class of people because it will give them more than one year from the date of their injuries. Thus, this resolution should be disapproved.

Related to Resolutions 06-05-2019 and 06-06-2019.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

§911.6

(a) The board shall grant or deny the application within 45 days after it is presented to the board. The claimant and the board may extend the period within which the board is required to act on the application by written agreement made before the expiration of the period.

(b) The board shall grant the application where one or more of the following is applicable:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2.

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time.

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

<u>(5) The person who sustained the alleged injury, damage, or loss is an inmate or parolee and filed a claim about that alleged injury, damage, or loss against a prison, jail, or employee under the process of California Code of Regulations Title 15, sections 3084, et seq.</u>

(c) If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day or, if the period within which the board is required to act is extended by agreement pursuant to this section, the last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Many inmates run out the clock on their state law claims for damages without realizing it. Although being an inmate usually tolls the statute of limitations for up to two years (unless imprisoned for life without parole per Code Civ. Proc., § 352.1(a)), it does not toll the six-month deadline to file a Government Claims form for actions against public employees or public entities, which is one of two prerequisites for inmates to sue them (Code Civ. Proc., § 352(b)).

When subject to excessive force by a guard, or a failure to protect, they often just file a complaint with the Department of Corrections (CDCR) known as a 602. That is their only prerequisite to filing a federal civil rights (42 U.S.C. § 1983) claim, and the other prerequisite to filing a state-law claim against a public entity or employee. While inmates are usually well aware of the need to file the 602, they are often unaware that they need to submit a separate form for their state-law claims, resulting in their loss of opportunity to make any claims or receive any remedies under state law.

Furthermore, the time to exhaust the CDCR complaint process can take over six months, and it does not toll the six-month requirement to file a Government Claims form. The purpose of the CDCR complaint process is to give inmates and the prisons a chance to resolve the issues internally and prevent future damages. Requiring they file a claim for damages concurrently can wholly or partially defeat the purpose of the prison grievance process.

The Solution: This resolution ensures that if the inmate files a complaint with the Department of Corrections, he or she gets a year to file the claim for damages with the Government Claims Board. Although the CDCR complaint process can take over six months, it usually takes under a year. Giving them this six-month extension helps prevent them from unknowingly running out the clock on their state claims, and gives the CDCR grievance process a chance to resolve before the inmate has to file a Government Claims form.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known. Similar to Resolution 12-06-2018.

AUTHOR AND/OR PERMANENT CONTACT: Ben Rudin, 3830 Valley Centre Dr., Ste. 705 PMB 231, San Diego, CA 92130, (858) 256-4429, ben_rudin@hotmail.com.

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 06-08-2019

DIGEST
Architects, Engineers and Surveyors: Clarifies Requirements for Certification of Merit
Amends Code of Civil Procedure section 411.35 to clarify that a Certification of Merit be required for each area of discipline of the professionals being sued.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 411.35 to clarify that a Certification of Merit be required for each area of discipline of the professionals being sued. This resolution should be approved in principle because it fosters the letter and spirit of the statute, discouraging inclusion of unmeritorious claims against a professional in litigation, which may otherwise occur were the plaintiff only required to obtain consultation with a professional for one but not all the disciplines involved in the lawsuit.

In actions against architects, engineers and surveyors, current law requires that the attorney prosecuting the claim consult with and obtain an opinion from an expert in the same discipline to assure that a meritorious basis for the claim exists, as a prerequisite to filing suit. (Code Civ. Proc., § 411.35, subd. (a).) Absent two limited exceptions, to file a complaint or cross-complaint against an architect, engineer and/or surveyor based on professional negligence, the attorney for the plaintiff or cross-complainant must file, concurrently with the charging pleading, a Certificate of Merit declaring there was consultation with and a supportive opinion by a licensed professional of the same discipline. (*Id*. at § 411.35, subd. (b).)

As currently written, the statute creates ambiguity when a complaint names a combination of architects, professional engineers or land surveyors – will a single certificate against a single professional suffice, or is one required for each discipline? This ambiguity is sometimes exploited by counsel who, for example, will only consult with an architect to obtain the required opinion, even though the complaint also names a professional engineer as a defendant. This defeats the protective feature of the statute, which calls for a preliminary opinion by a licensed professional that meritorious grounds support the conclusion that the defendant being sued fell below the applicable standard of care.

This resolution solves the ambiguity. It specifies that a certificate is required for each of the disciplines implicated of the named defendant professionals. It also allows the option of combining the certificates for each discipline into a single Certificate of Merit.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Procedure Code section 411.35 to read as follows:

§ 411.35

(a) In every action, including a cross–complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross–complaint on any defendant or cross–defendant, the attorney for the plaintiff or cross–complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross–complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross–defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross–defendant was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed <u>per discipline</u>, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time. <u>Certificates reflecting consultations with multiple disciplines may be combined into one certificate or filed separately</u>.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa

loquitur" or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation. The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court's own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross–complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in–camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross–complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross–complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: As reflected in subdivision (b)(1) of section 411.35, existing law states that in every action arising out of professional negligence of an architect, a professional engineer, or a surveyor, a certificate shall be executed by the attorney for the plaintiff declaring that the attorney has "consulted with and received an opinion from at least one architect, professional engineer, or land surveyor in the same discipline as the defendant."

However, subdivision (c) of section 411.35 states that "only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time."

Thus, a question arises whether a party who sues multiple disciplines may file a Certificate of Merit reflecting a consultation with an expert in only one of them. This problem may have arisen in 1983 when the Legislature amended the language of subdivision (b) to require a consultation with an expert in the same discipline, but left in place the language in subdivision (c) stating that only one certificate shall be filed. A case illustrating how the problem may arise and one solution for it is *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 Cal.App.4th 913. However, that case does not address all fact patterns, such as when a person does not or cannot obtain an opinion from the second specialty or fails to do so on time (see *Curtis Engineering Corp. v. Superior Court* (2017) 16 Cal.App.5th 542, 548-549), but attempts to excuse his non-compliance by arguing that only one certificate is required.

The Solution: The addition of some clarifying language would make clear that a person suing an architect, an engineer, and a surveyor must not only consult with an expert in each discipline but also file a Certificate reflecting that he has done so.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Jay Chafetz, 1839 Ygnacio Valley Road, #204, Walnut Creek, CA 94598, voice 925-899-8760, e-mail jaychafetz@jaychafetzlaw.com

RESPONSIBLE FLOOR DELEGATE: Jay Chafetz

RESOLUTION 06-09-2019

DIGEST
Standard of Proof: Anti-SLAPP Motions and Medical Punitive Damages
Amends Code of Civil Procedure sections 425.13 and 425.16 regarding the burden of proof for a punitive damages claim in medical malpractice or an anti-SLAPP motion to strike.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure sections 425.13 and 425.16 regarding the burden of proof for a punitive damages claim in medical malpractice or an anti-SLAPP motion to strike. This resolution should be disapproved because it impermissibly joins two unrelated provisions of law with distinct purposes and policy interests and results in an incomplete codification of existing law.

The proposed resolution conflates two substantively unrelated areas of law into a single resolution, frustrating individual analysis on the merit for each of these very different statutes and classes of protected defendants. While each statute currently uses a similar standard of proof, the policies and effects for those standards are separate and distinct.

Code of Civil Procedure section 425.13 was enacted to protect health care professionals from improperly motivated or manipulative claims, while also keeping the cost of medicine down. To this end, section 425.13 currently requires that a plaintiff seeking leave to proceed with a punitive damages claim against a physician must present evidence showing a "substantial probability that the plaintiff will prevail" on that claim. Independent of this context, exemplary damages are not favored in law. If allowed at all, there must be clear and convincing proof of malice. Often punitive damages are sought to induce settlement, and at a higher amount, since punitive damages are not covered by insurance and puts the defendant at personal risk in going to trial.

The proposed revision in this resolution to Code of Civil Procedure section 425.13, would change the standard of proof for leave to seek punitive damages from "substantial probability plaintiff will prevail" to a mere showing of "a prima facie case of liability." Such a revision would be a substantive change in the law because it fails to restate the "clear and convincing" evidentiary standard that is required for recovering punitive damages. (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 539-540.). A prima facie case or prima facie evidence is simply that on the face, without scrutiny or other competing evidence, it colorably appears to support the charge. The proposed amendment fails to preserve the clear and convincing evidentiary burden and, to the extent that it fails to do so, it is an incomplete codification of the evidentiary standards in *Looney*.

Likewise, Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute) was enacted to prevent plaintiffs from using lawsuits to abuse, harass, and silence individuals who exercised their constitutional rights to free speech. This statute provides invaluable protection to citizens, which can easily be emasculated by allowing a plaintiff's retaliatory complaint to proceed if the plaintiff only needs to show a colorable prima facie case against the defendant, without specific preservation of the evidentiary standard.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 425.16 and 425.13, to read as follows:

§425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established ~~that there is a probability that the plaintiff will prevail~~ a prima facie case of liability on the claim. As used herein, to establish a "prima facie case of liability" means the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. This definition is intended to incorporate rather than to change existing case law.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a ~~probability that he or she will prevail~~ prima facie case of liability on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's

fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

§425.13

(a) In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established ~~that there is a substantial probability that the plaintiff will prevail~~ a prima facie case of liability on the claim

pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier. As used herein, to establish a "prima facie case of liability" means the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. This definition is intended to incorporate rather than to change existing case law.

(b) For the purposes of this section, "health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, "Health care provider" includes the legal representatives of a health care provider.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Various provisions of existing law provide for consequences upon a showing of a "probability that the plaintiff will prevail" on a claim. For instance, this language is used in the statute defining the showing that is required to obtain a writ of attachment (CCP 488.220 (a)(2)), to maintain a lis pendens (CCP 405.32), to allege punitive damages against a healthcare provider (CCP 425.13), and to maintain a suit that a defendant establishes involves protected speech (CCP § 425.16.) However, in the first two examples, to establish probable validity means to establish that, after weighing the evidence submitted, the plaintiff will probably win the lawsuit. On the other hand, in the latter two examples, courts have construed the requirement of establishing probable validity to mean only that the plaintiff must submit sufficient evidence to support a verdict in his favor if his evidence is credited, without being weighed against competing evidence. When the same words are used in different statutes, they should, wherever possible, have the same meaning. They should not serve as a trap for unknowledgeable lay persons or unwary attorneys. Case law even states that the Legislature intends that the same language used in two different statutes means the same thing unless it expressly states otherwise. (See Korbel v. Chou (1994) 27 Cal.App.4th 1427, 1431.) The reader should not have to consult secondary sources to determine that language in a statue which appears to have a clear meaning based on how it is used in other statues, really means something else..

The Solution: In sections 425.16 and 425.16 the "probable validity" language should be abandoned in favor of the actual test that courts employ. The definition of prima facie validity used here is taken from *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714. In the medical malpractice context, existing case law equating probable validity to a prima face case of liability is represented by *Looney v. Superior* Court (1993) 16 Cal.App.4th 521. However, *Looney* adds

additional gloss to the phrase, given the punitive damages context. Therefore, the proposed amendment makes clear it is not meant to change, but rather to incorporate, existing case law.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Jay Chafetz, 1839 Ygnacio Valley Road, #204, Walnut Creek, CA 94598, voice 925-899-8760, e-mail jaychafetz@jaychafetzlaw.com.

RESPONSIBLE FLOOR DELEGATE: Jay Chafetz

RESOLUTION 06-10-2019

DIGEST
Anti-SLAPP: Repeals Reporting Requirement
Amends Code of Civil Procedure section 425.16 to end the requirement that a copy of anti-SLAPP motions to strike be transmitted to the Judicial Council.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 425.16 to end the requirement that a copy of anti-SLAPP motions to strike be transmitted to the Judicial Council. This resolution should be approved in principle because the reasons for the Judicial Council to receive and maintain anti-SLAPP motions are no longer relevant.

When California enacted Code of Civil Procedure section 425.16 in 1992 to respond to the problem of "Strategic Lawsuits Against Public Participation" ("SLAPP"), the legislation was a novel experiment for which little experiential data existed. Therefore, the Legislature required that all anti-SLAPP motions be transmitted to and maintained by the Judicial Council. (Code Civ. Proc., § 425.16, subd. (j).) The purpose of the reporting requirements was to collect information to reflect on the frequency, history and impact of these motions, and related appeals, for evaluative and further rule-making import. (Sen. Com. on Judiciary, Concurrence Analysis on Asm. Bill No. 1675 (1999-2000 Reg. Sess.).)

Since that time, a vast number of these motions have been filed and determined, along with a vast body of published appellate court decisions addressing these motions and the different circumstances in which they arise. Therefore, the fact-finding function by the Judicial Council regarding the need and/or effectiveness of anti-SLAPP motions is no longer required. Further, with the development of technology and electronic access to court records, having a depository for hard-copies of anti-SLAPP motions is superfluous and an unnecessary expense for California's financially strapped judicial system. The need and value from parties sending anti-SLAPP motions to the Judicial Council for it to maintain copies of every anti-SLAPP motion initiated is no longer needed.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

§425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits

brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, “act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of

motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

~~(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.~~

~~(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.~~

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Code of Civil Procedure section 425.16 was enacted in 1992 for the purpose of discouraging litigation that interferes with free speech rights. Because it was then a new procedure, the legislature included subdivision (j), requiring litigants to report related motion activity to the Judicial Council and giving it reporting and record keeping responsibilities related to such motion. The reporting requirements were expanded in 1999 based on the argument of necessity for evaluation of the effectiveness of the Special Motion to Strike process. Subdivision (j) includes no sanction for anyone who fails to comply with this reporting process. It is now 2019, and the Special Motion to Strike process has been thoroughly examined by the courts. For example, as of January 4, 2019, the WestLaw database reflects 4,577 appellate cases in which section 425.16 is cited.

The Solution: This resolution would eliminate the reporting and record maintenance requirements, and thereby avoid unnecessary effort by conscientious attorneys and the concomitant unnecessary costs to them and/or their clients and/or the Judicial Council.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: K. Martin White, Post Office Box 1826, Carlsbad, CA 92018, marnew@sbcglobal.net, (760) 434-6787

RESPONSIBLE FLOOR DELEGATE: K. Martin White

RESOLUTION 06-11-2019

DIGEST
Correction to Omit Reference to Outdated Code of Civil Procedure Section
Amends Code of Civil Procedure section 430.10 to delete the reference to section 411.36.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 430.10 to delete the reference to section 411.36. This resolution should be approved in principle because Code of Civil Procedure section 411.36 was repealed on January 1, 1997, by its own terms.

Former section 411.36 governed certificates to be filed in occupational negligence actions by common interest development associations against contractors. As section 411.36 has been repealed, this resolution appropriately deletes an unnecessary requirement under Code of Civil Procedure section 430.10.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.10, to read as follows:

§430.10

The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

(a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.

(d) There is a defect of misjoinder of parties.

(e) The pleading does not state facts sufficient to constitute a cause of action.

(f) The pleading in uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.

(h) No certificate was filed as required by Section 411.35.

~~(i) No certificate was filed was required by Section 411.36.~~

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Section 430.10 of the Code of Civil Procedure presently cites to another Section of the Code of Civil Procedure that has been repealed.

The Solution: Legislation to amend Section 430.10 to omit outdated citation.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Hilary J. Vrem, 1550 Hotel Circle North, Suite 300, San Diego, CA 92108-2911, voice 619-696-7066, fax 619-696-6907, e-mail hilary@bjjlaw.com

RESPONSIBLE FLOOR DELEGATE: Hilary J. Vrem

RESOLUTION 06-12-2019

DIGEST
Demurrers: Limit Demurrers to Claims Against Demurring Party
Amends Code of Civil Procedure section 430.50 to limit demurrers to causes of action filed against the demurring party.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 430.50 to limit demurrers to causes of action filed against the demurring party. This resolution should be disapproved because it will result in the filing of multiple demurrers rather than allowing issues of law to be determined in a single filing.

Current law does not specify whether a party can demur to a cause of action not asserted against that party. (See Code Civ. Proc., § 430.50.) In a multi-defendant case, a defendant may file a demurrer to causes of actions not asserted against them. (See Code Civ. Proc., § 430.50.) The Statement of Reasons asserts that this results in unnecessary work for litigants and the courts. However, the opposite is likely the case. Under current law, pleadings may be challenged in a single demurrer, helping streamline the litigation. This resolution would potentially require each defendant to file his or her own demurrer. The result would be that the number of demurrers would multiply, creating more work and raise the costs of litigation for all the litigants and the courts.

Furthermore, one purpose of a demurrer is to clean up the pleadings early in the process in order to avoid expensive discovery and litigation regarding causes of action that are not viable as a matter of law. This proposal could curtail that purpose.

Additionally, the party filing the demurrer may suffer a delay in setting trial when other parties are litigating causes of action that are not viable and would not lead to a recovery. Much the same result can be achieved later in the proceedings by a motion for judgment on the pleadings or motion for summary judgment.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.50 to read as follows:

§430.50

(a) A demurrer to a complaint or cross-complaint may be taken to the whole complaint or cross-complaint or to any of the causes of action stated therein against the demurring party.

(b) A demurrer to an answer may be taken to the whole answer or to any one or more of the several defenses set up in the answer.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, it is unclear whether a party can demurrer to a cause of action not asserted against that party. In a multi-defendant case, there have been demurrers (especially when joint demurrers are filed by multiple defendants) filed by defendants against causes of action not asserted against them. This causes unnecessary work by the litigants and the courts.

The Solution: This resolution provides that a party can only demurrer to causes of action that is asserted against the demurring party.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR RELATED LEGISLATION
None Known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Esq., Branfman Mayfield Bustarde Reichenthal LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075; (858) 793-8090; melissa@bmbr.com .

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SCBA

Resolution 06-12-2019 attempts to prevent a defendant from demurring to causes of action in which that defendant was not named. This resolution should be disapproved because it does not increase clarity in the law and will result in increased burden on the parties. First, it is unclear what effect the resolution would have upon a defendant's ability to file a demurrer to the entire complaint where that party is not named in every cause of action. Thus, while there may be a fatal defect to the entire action, if the moving defendant is not named in every cause of action, they may be foreclosed from disposing of the entire action via demurrer. Second,

limiting the ability of a party to raise defects to the entire action or portions thereof, even where those causes of action are not directly pled against the moving defendant, increases the costs to the parties and the courts. This is because the means of early resolution of the action by demurrer would be unavailable because the moving defendant was not named in one or more of the causes of action. This is particularly troublesome where the moving defendant might face liability via indemnity for the remaining causes of action in which the moving defendant was not named, or where the moving defendant could be subsequently named in the remaining causes of action through an amended complaint. Third, recent changes in the Code of Civil Procedure requiring the demurring defendant to meet and confer prior to filing a demurrer and the potential of sanctions under CCP 128.5 and 128.7 should limit frivolous demurrers.