RESOLUTION 12-01-2019

WITHDRAWN BY PROPONENT

RESOLUTION 12-02-2019

DIGEST
Discovery: Verification of Responses Under Oath
Adds Code of Civil Procedure section 2016.090 to allow a party responding to discovery to sign a verification based on review of information within the party's possession, custody or control.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution adds Code of Civil Procedure section 2016.090 to allow a party responding to discovery to sign a verification based on review of information within the party's possession, custody or control. This resolution should be approved in principle because allowing individual parties and entities to sign verifications based on information and belief acknowledges specific limitations some parties may face in preparing a response under oath.

Current law does not expressly permit "information and belief" discovery responses. Under case law, a verification based on "information and belief" cannot be used as evidence. (See Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (Rutter Group 1998) ¶ 8:1106; *Liepmann v. Lieber* (1986) 180 Cal.App.3d 914, 919; *Thiebaut v. Blue Cross of Indiana* (1986) 178 Cal.App.3d 1157; *Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1019; and *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) This resolution would allow a discovery response to be signed and verified by an agent or someone acting in a representative capacity, e.g., an officer of a corporation, who has reviewed the file, but who did not personally produce or maintain the documents or information.

The purpose behind discovery is to clarify the issues at hand between the litigants. The proposal furthers this purpose by allowing organizations, such as corporations that have a high turnover rate, to sign discovery responses based on information and belief rather than personal knowledge, which can then be used at trial. In addition, signing under verification based on "information and belief" will reduce litigation costs and court backlog as all parties can rely upon the verified discovery response.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add Code of Civil Procedure section 2016.090.

§ 016.090

Where any written discovery response pursuant to this Civil Discovery Act is required to be made "under oath" or otherwise verified, excluding deposition testimony, said verification shall:

(a) Be certified or declared under penalty of perjury pursuant to Code of Civil Procedure section 2015.5; and

(b) For a verification by an individual party, such verification shall be in the following format:

I, [NAME], hereby declare and state:

1. I am a party to the above-referenced matter.

2. I have read the foregoing [name of document] and know the contents thereof.

3. I have made reasonable and good faith efforts to review relevant documents, records, and information in my possession, custody, and control.

4. Based on such review and upon my personal knowledge, the matters stated in the foregoing document are true and correct.

(c) For a verification by a representative of an entity, including but not limited to a corporation, partnership, or limited liability company, such verification shall be in the following format:

I, [NAME], hereby declare and state:

1. I am the [representative's capacity] of [entity name], a party to the above-referenced matter, and am authorized to make this Verification on its behalf.

2. I have read the foregoing [name of document] and know the contents thereof.

3. I have made reasonable and good faith efforts to review relevant documents, records, and information in the possession, custody, and control of, or known to, [entity name], and its officers and employees.

4. Based on such review, the facts stated in the foregoing document are true and correct.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem**:** Responses to written discovery under the Civil Discovery Act are to be made "under oath." The typical method for satisfying this requirement is for the responding party to execute a verification. However, a responding party is also required to conduct a reasonable and good faith review and search of documents, including documents obtained by counsel, and thus may also include matters based on "information and belief" and hearsay. Typically, this problem is solved by providing verifications using language for verifying pleadings pursuant to CCP § 446. However, Courts have held that a verification on "information and belief" cannot be used as evidence. (*See, e.g., Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 919, *Thiebaut v. Blue Cross of Indiana* (1986) 178 Cal.App.3d 1157, 1161, *Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1019, and *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) This problem is further exacerbated where the party verifying the discovery is a representative of an entity, who may be required to rely solely on information provided to him or her as opposed to personal knowledge. Nothing in the Discovery Act clarifies the content of a Verification.

The Solution: This resolution sets out specifically the content of verifications for both individual parties and for entity parties, and acknowledges that the responses are provided based both on personal knowledge and on review of information within the party's possession, custody and control. The entity verification is based on language suggested by Weil & Brown, *California Civil Procedure Before Trial*, § 8:1106, which is modeled on federal practice.

IMPACT STATEMENT
This Resolution will affect the California Civil Discovery Act.

CURRENT OR PRIOR RELATED LEGISLATION

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RESOLUTION 12-03-2019

DIGEST
Subpoenas: Permits Non-Parties to File Motions to Quash
Amends Code of Civil Procedure section 1987.1 to permit a non-party whose records are being subpoenaed to file a motion to quash that subpoena.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1987.1 to permit a non-party whose records are being subpoenaed to file a motion to quash that subpoena. This resolution should be approved in principle because it creates a procedure whereby a non-party who does not qualify as a consumer or an employee, can protect records that contain trade secrets, confidential or private information, financial data, or other protectable information.

Currently, under Code of Civil Procedure section 1987.1, non-parties' rights to quash a subpoena are limited to: (1) a witness; (2) consumers whose personal records, such as medical, financial, or telephone records are sought; (3) employees whose personnel records are subpoenaed; and (4) a person whose personally identifying information is sought in connection with an action involving that person's exercise of free speech rights. A corporation that has provided trade secrets to a potential business partner under a Non-Disclosure Agreement has no right to seek to quash a subpoena seeking those records from the potential business partner. A closely-held or limited liability corporation cannot move to quash a subpoena seeking its records from a financial institution.

This resolution would permit the entity whose records are being sought to ask the court to protect those records. Abuse of motions to quash is unlikely, as an entity is not likely to expend the time and money necessary to bring a motion to quash. The resolution could be improved by limiting the non-party's rights to file a motion to quash to subpoenas seeking production of records containing trade secrets, confidential or private information, financial data, or data that is otherwise protectable.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1987.1 to read as follows:

§1987.1

(a) If a subpoena requires the attendance of a witness or the production of books, documents, electronically stored information, or other things before a court, or at the trial of an

issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person.

(b) The following persons may make a motion pursuant to subdivision (a):

(1) A party.

(2) A witness.

(3) A consumer described in Section 1985.3.

(4) An employee described in Section 1985.6.

(5) A person whose personally identifying information, as defined in subdivision (b) of Section 1798.79.8 of the Civil Code, is sought in connection with an underlying action involving that person's exercise of free speech rights.

(6) A non-party whose books, documents, electronically stored information or other things are being sought by the subpoena.

(c) Nothing in this section shall require any person to move to quash, modify, or condition any subpoena duces tecum of personal records of any consumer served under paragraph (1) of subdivision (b) of Section 1985.3 or employment records of any employee served under paragraph (1) of subdivision (b) of Section 1985.6.

(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, only certain persons can file a motion to quash. Those persons are limited to a party, the witness, a consumer, an employee, or a person whose PII is sought. If a subpoena seeks the records of a non-party who does not qualify as a consumer or an employee, that non-party has no rights to object or file a motion to quash the subpoena. This situation has arisen where records of an entity (corporation or LLC) are sought by a record holder. The most common instance is where the entity's banking and financial records are being sought by a bank. The entity does not qualify as a consumer and thus does not have objections rights and since the documents are not being requested from the entity directly, the entity has no standing to file a motion to quash to protect their financial records, even if those records are not relevant to the action.

The Solution: This resolution authorizes a non-party whose records are being sought by a subpoena to file a motion to quash.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION
None known.

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RESOLUTION 12-04-2019

DIGEST
Discovery: Proportionality in E-Discovery
Amends Code of Civil Procedure section 2019.040 to provide factors for determining the scope of discovery of electronically stored information.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 2019.040 to provide factors for determining the scope of discovery of electronically stored information. This resolution should be disapproved because, although it addresses a real problem in discovery, the language could be read to prohibit all discovery of electronically stored information (ESI) when the likely burden or expense of the proposed discovery of electronically stored information outweighs the likely benefit.

Records are increasingly stored electronically. As a result, identification and production of ESI is necessary in almost every action. Rule 26(b)(1) of the Federal Rules of Civil Procedure, which was adopted in 2015, requires that ESI production be proportionate to the needs of the case. Specifically, with respect to ESI, Rule 26(b)(2)(b) provides that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause."

As written, this resolution arguably blocks the right to obtain any ESI if the likely burden or expense of the proposed discovery of ESI outweighs the likely benefit. To avoid this consequence, the resolution should be amended by adding a period after the word information on line 3, and inserting the phrase "Production of electronically stored information shall be proportional to the needs of the case, considering the" in place of "except when." With the proposed amendment, subsection (a) would read:

> When any method of discovery permits the production, inspection, copying, testing, or sampling of documents or tangible things, that method shall also permit the production, inspection, copying, testing, or sampling of electronically stored information. Production of electronically stored information shall be proportional to the needs of the case, considering the likely burden or expense of the proposed discovery of electronically stored information outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of

the issues in the litigation, and the importance of the requested discovery in resolving the issues.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Section 2019.040 of the Code of Civil Procedure, to read as follows:

§2019.040

(a) When any method of discovery permits the production, inspection, copying, testing, or sampling of documents or tangible things, that method shall also permit the production, inspection, copying, testing, or sampling of electronically stored information, except when the likely burden or expense of the proposed discovery of electronically stored information outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(b) All procedures available under this title to compel, prevent, or limit the production, inspection, copying, testing, or sampling of documents or tangible things shall be available to compel, prevent, or limit the production, inspection, copying, testing, or sampling of electronically stored information.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: E-discovery costs overwhelm many cases due to the explosion in the amount of electronically stored information (ESI) available to parties. Retrieval, review and production of ESI is time consuming and expensive, while often generating large quantities of useless information. Federal courts and other states have responded to this problem by imposing proportionality constraints on discovery of ESI to discourage costly over-discovery. California took a half step towards recognition of proportionality for ESI when the electronic discovery act was enacted in 2009, but inconsistency in the statutory scheme, and subsequent state bar opinions and appellate decisions have created uncertainty in its application. Under the current statutes, proportionality considerations do not govern discovery of ESI unless and until a court issues an order in response to a motion for protective order or an opposition to a motion to compel (e.g., CCP secs. 2019.030, 2031.060(f)(4), 2031.310 (f)(4). Absent court intervention, e-discovery is presumptively unrestricted at present. In addition, litigants are dissuaded from efficiently responding to e-discovery requests by countervailing authority such as State Bar Formal Opinion 2015-193 and appellate decisions including *Williams v. Superior Court*, 3 Cal.5th 531 (2017).

The Solution: This resolution harmonizes conflicting provisions of the discovery code and places the proportionality factors for electronic discovery to the forefront. Including

proportionality in the scope of discovery will encourage parties in cases involving large volumes of ESI to reduce costs by searching for information efficiently and using reliable technology. The proposed revision is based on similar changes to the Federal Rules of Civil Procedure in 2015 that have been favorably received by practitioners.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SCBA

Current legal authority addresses the handling of discovery and discovery disputes relating to electronically stored information in the same manner and using the same analyses as in any other disputed aspect of production.

This proposal provides an "exception" to what production of electronically stored information is permissible, rather than the current burdensome limitation on otherwise permissible discovery. The placement of the proposed "carve-out" language within the definition of what scope of discovery is permissible invites litigation and court review of how the proposed amendment is to be interpreted and applied in practice vis-à-vis current applicable discovery statutes and precedent. The amendment provides a basis to revisit, alter and/or reverse the current standard and practice requiring a responding party to first object and/or make a showing of burden. Practitioners will use this as an opportunity to limit the scope of electronically stored information currently discoverable and/or to shift the burden away from the responding/objecting party towards the propounding party.

In the case of an unduly burdensome objection, currently the trial court will limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. Either affirmatively in a protective order or in response to a motion to compel (as with other objections), the party opposing discovery has an obligation to supply the bases for its burdensome objection by evidence showing the quantum of work/cost required.
Federal Rules likewise provide that a party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost and, on motion to compel discovery or for a protective order, the responding party must show

that the information is not reasonably accessible because of undue burden or cost. If the showing is made, the court may nonetheless order discovery from such sources if the party shows good cause.

In sum, the proposed amendment seeks to amend the statute - indeed the sentence - that establishes the right to production of electronically stored information itself, giving fodder for further litigation and efforts to limit such discovery. Moreover, the proposal sets the standard "where the likely burden or expense outweighs the likely benefit" rather than the current "*clearly* outweighs" standard noted in *Williams v. Superior Court*.

RESOLUTION 12-05-2019

DIGEST
Summary Judgment: Electronic Service
Amends Code of Civil Procedure section 437c to clarify that electronic service of summary judgment motions is permitted if authorized by the Code of Civil Procedure.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 437c to clarify that electronic service of summary judgment motions is permitted if authorized by the Code of Civil Procedure. This resolution should be approved in principle because the addition of electronic service into the two-day extension of time regarding motions for summary judgment brings the statute into conformity with the provisions for electronic service under Code of Civil Procedure section 1010.6.

Under California Rules of Court, rule 2.251, courts throughout California are adopting local rules authorizing or mandating electronic service unless personal service is required by statute or rule. Code of Civil Procedure section 1010.6 provides conditions for when electronic service can be used. Accordingly, since electronic service is widely used, it makes sense to include provisions to clarify its use in a notice of a motion and in supporting papers 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 437c to read as follows:

§437c

(a) (1) A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct.

(2) Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, ~~or~~ another method of delivery providing for

overnight delivery, or by electronic service if authorized by Section 1010.6, the required 75-day period of notice shall be increased by two court days.

(3) The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) (1) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.

(2) An opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.

(3) The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

(4) A reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

(5) Evidentiary objections not made at the hearing shall be deemed waived.

(6) Except for subdivision (c) of Section 1005 relating to the method of service of opposition and reply papers, Sections 1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(7) An incorporation by reference of a matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived.

(e) If a party is otherwise entitled to summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion that the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists. Upon the grant of a motion for summary judgment on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

(i) If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of a party to compel discovery under the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4).

(j) If the court determines at any time that an affidavit was presented in bad faith or solely for the purpose of delay, the court shall order the party who presented the affidavit to pay the

other party the amount of the reasonable expenses the filing of the affidavit caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers or on the court's own noticed motion, and after an opportunity to be heard.

(k) Unless a separate judgment may properly be awarded in the action, a final judgment shall not be entered on a motion for summary judgment before the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding provided for in this section.

(l) In an action arising out of an injury to the person or to property, if a motion for summary judgment is granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment on, the absence or involvement of the defendant who was granted the motion.

(m) (1) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of an order pursuant to this section, except the entry of summary judgment, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition shall be increased by two court days. The superior court may, for good cause, and before the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(2) Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party.

(n) (1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion that has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied.

(3) In the trial of an action, neither a party, a witness, nor the court shall comment to a jury upon the grant or denial of a motion for summary adjudication.

(o) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(p) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(q) In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.

(r) This section does not extend the period for trial provided by Section 1170.5.

(s) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(t) Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision.

(1) (A) Before filing a motion pursuant to this subdivision, the parties whose claims or defenses are put at issue by the motion shall submit to the court both of the following:

(i) A joint stipulation stating the issue or issues to be adjudicated.

(ii) A declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement.

(B) The joint stipulation shall be served on any party to the civil action who is not also a party to the motion.

(2) Within 15 days of receipt of the stipulation and declarations, unless the court has good cause for extending the time, the court shall notify the stipulating parties if the motion may be filed. In making this determination, the court may consider objections by a nonstipulating party made within 10 days of the submission of the stipulation and declarations.

(3) If the court elects not to allow the filing of the motion, the stipulating parties may request, and upon request the court shall conduct, an informal conference with the stipulating parties to permit further evaluation of the proposed stipulation. The stipulating parties shall not file additional papers in support of the motion.

(4) (A) A motion for summary adjudication made pursuant to this subdivision shall contain a statement in the notice of motion that reads substantially similar to the following: “This motion is made pursuant to subdivision (t) of Section 437c of the Code of Civil Procedure. The

parties to this motion stipulate that the court shall hear this motion and that the resolution of this motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement."

(B) The notice of motion shall be signed by counsel for all parties, and by those parties in propria persona, to the motion.

(5) A motion filed pursuant to this subdivision may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.

(u) For purposes of this section, a change in law does not include a later enacted statute without retroactive application.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Electronic service is authorized under Code of Civil Procedure Section 1010.6 if certain conditions are met, and electronic service is being used more frequently as many courts turn to electronic filing systems. However, CCP 437c creates an ambiguity on the authorized methods of service of motions for summary judgment in that it calls out the extension of time for certain service methods, but is silent on electronic service. Thus, it is unclear whether electronic service of motions for summary judgment or adjudication is permitted.

The Solution: This resolution adds electronic service into the 2-day extension of time (consistent with CCP 1010.6(a)(4)(B) which states electronic service extends the time by two court days). This removes any doubt that motions for summary judgment can be served electronically.

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

CURRENT OR RELATED LEGISLATION
None known.

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RESOLUTION 12-06-2019

DIGEST

Arbitration: Time to Respond to Petition to Confirm, Vacate, or Correct an Award
Amends Code of Civil Procedure sections 1288.2 and 1290.6 to clarify and extend the time in which to respond to a petition to confirm, vacate, or correct arbitration awards.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:
Similar to Resolution 04-02-2016, which was disapproved.

Reasons:
This resolution amends Code of Civil Procedure sections 1288.2 and 1290.6 to clarify and extend the time in which to respond to a petition to confirm, vacate, or correct arbitration awards. This resolution should be approved in principle because it would clarify and simplify the time for responding to petitions to confirm, vacate or correct arbitration awards and extend the deadline to file a response to a petition to compel arbitration from 10 days to 30 days.

Under current law, Code of Civil Procedure section 1288 provides that a party may file a petition to confirm an arbitration award no later than four years after service of the award, and that a petition to vacate or correct an award must be filed no later than 100 days after service of the award. Code of Civil Procedure section 1288.2 limits the time within which an objection to the confirmation of an arbitration award can be filed to 100 days after service of the award. Thus, if a party petitions to confirm the award 200 days after service of the award, the respondent can no longer seek to vacate or correct the award. Code of Civil Procedure section 1290.6 requires any response to a petition to compel arbitration to be filed within 10 days (or 30 days if the petition is served on an out of state party).

This resolution extends the 10 day deadline to compel an arbitration in section 1290.6 to 30 days, simplifies the calculation of the 30 day deadline, and clarifies that the response under section 1288.2 must be filed within 30 days of the new deadline in section 1290.l6, while maintaining the 100 day limit set forth in sections 1288 and 1288.2. Thirty days is far more practical and reasonable than the 10 days currently provided, although currently section 1290.6 only authorizes a 30-day response period where service of the petition is made by on an out-of-state party under section 1290, subdivision (b)(2).

Resolution 04-02-2016, which was disapproved by the Conference, proposed changing section 1290.6 to call for the service and filing of the response to the petition at least nine court days before the hearing, rather than within 10 days after service of the petition. The present resolution is a cleaner proposal, does not entail the potential for delay and abuse concerning the hearing, and it averts the time conflicts among the different provisions implicated by the amendment offered in Resolution 04-02-2016.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 1288.2 and 1290.6, to read as follows:

§1288.2

A response requesting that an award be vacated or that an award be corrected shall be served and filed by the deadline provided in Section 1290.6 and not later than 100 days after the date of service of a signed copy of the award upon:

(a) The respondent if he was a party to the arbitration; or

(b) The respondent's representative if the respondent was not a party to the arbitration.

§1290.6

A response shall be served and filed within ~~10~~ 30 days after service of the petition ~~except that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section 1290.4, the response shall be served and filed within 30 days after service of the petition~~. The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court.

(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 sections 1288.2 and 1290.6, read together, are confusing as to when a response to a petition to confirm must be filed. Section 1288.2 indicates that a response can be filed up to 100 days after service of the award, but Section 1290.6 only grants 10 days to respond. The purpose of the two statutes is different (the first providing an outer limit on when an award can be challenged and the second providing a deadline on when any response can be filed). This causes confusion as to when a response must be filed. In addition, the 10 day window to file a response is quite short, especially in situations where the party is not represented, or even worse, did not appear at the arbitration hearing. Additional time is needed for those unrepresented parties to secure counsel and file a response to the petition.

The Solution: This resolution expands the time to respond to a petition to 30 days, in order to give parties time to secure counsel, if necessary, and adds a cross-reference to Section 1288.2 in order to avoid any further confusion as to the deadline to respond to a petition.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 12-07-2019

DIGEST
Arbitration: Judicial Appointment of Arbitrator When Parties Cannot Agree
Amends Code of Civil Procedure section 1281.6 to change the statutory procedure for judicial appointment of a neutral arbitrator when the parties cannot agree.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1281.6 to change the statutory procedure for judicial appointment of a neutral arbitrator when the parties cannot agree. This resolution should be disapproved because it could undermine parties' arbitration agreements, creates a complex procedure that does not clarify the law, and does not ensure parties receive an appropriate arbitrator.

Most contractual arbitration clauses provide specific rules for the selection of arbitrators. Code of Civil Procedure section 1281.6 anticipates that parties' arbitration agreements will set forth the appointment procedure, or that the parties will agree on a neutral, with a court appointed arbitrator being a last resort. Pursuant Code of Civil Procedure section 1281.85, the Judicial Council has adopted Ethics Standards for Neutral Arbitrators, including a general duty of impartiality, duty to refuse appointment if unable to be impartial, required disclosures, duty to inform one's self of such disclosures, and automatic bases for disqualification at Standard 10. If the arbitrator fails to comply with the disclosure requirements, the court may vacate the arbitration award. (See, e.g., *Honeycutt v. JPMorgan Chase Bank, N.A.* (2018) 25 Cal.App.5th 909.) The letter and spirit of the arbitration law anticipates appointment of candidates who parties believe can fairly and properly adjudicate disputes related to their contract.

The process proposed by the resolution increases the risk that the parties will have to submit their dispute to unknown persons, who may not be fair, neutral, or knowledgeable about the matters involved in the particular case. Under the proposal, either party could still successfully thwart the arbitrator selection process contemplated by the parties' agreement, and ultimately force the case into a chance appointment of an arbitrator by the court who the parties did not propose, may not know, or even like. Such an arbitrator also may not have the experience and expertise needed for the parties' particular dispute. Therefore, the methodology proposed by the resolution could run afoul of the purpose and intent, if not the letter of the parties' pre-dispute arbitration agreement. It could undermine the protections the parties contemplated in the agreement, including the parties' active participation in selecting acceptable arbitrators. Because this resolution would result in parties receiving less protections in an arbitration, it should be disapproved.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1281.6 as follows:

§1281.6

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the ~~court, on petition of a party to the arbitration agreement, shall appoint the~~ arbitrator shall be appointed as provided herein.

When a petition is made to the court to appoint a neutral arbitrator, the court shall ~~nominate five persons from lists of persons supplied jointly by the parties to the arbitration or~~ compile a list of nominees for appointment as arbitrator. The list shall be composed of the following persons: two supplied by each side; two supplied jointly by the parties to the arbitration; in personal injury cases, two obtained at random from the court's panel list of arbitrators as provided in Rule of Court 3.814; the court may, at its discretion, augment the list by adding to it up to two nominees. The names of nominees augmented by the court shall be obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of the list of nominees from the court jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall ~~appoint the arbitrator from the nominees.~~ forward the list of nominees to the court's ADR administrator who shall serve as the arbitration administrator pursuant to Rule of Court 3.813. The arbitration administrator shall send the list of nominees to counsel for the parties and the arbitrator shall be appointed as provided in Rule of Court 3.815(b)(3-5). If the first arbitrator appointed declines to serve, the administrator shall vacate the appointment of the arbitrator and may either:

(1) In personal injury cases, replace the arbitrator's name on the list of nominees with one name obtained at random from the court's panel list of arbitrators as provided in Rule of Court 3.814, restore to the list of nominees the names previously rejected by the parties pursuant to Rule of Court 3.815(b)(3), and repeat the process of selection of the arbitrator as provided in Rule of Court 3.815(b)(3-5);

(2) In cases other than personal injury cases, allow the parties 10 days to jointly submit the name of a replacement nominee to replace the arbitrator's name on the list of nominees, restore to the list of nominees the names previously rejected by the parties pursuant to Rule of Court 3.815(b)(3), and repeat the process of selection of the arbitrator as provided in Rule of Court 3.815(b)(3-5); or

(3) Certify the case to the court for further selection proceedings in conformity with this article.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: The courts and, by extension, arbitrations are supposed to be a completely "level playing field." While this ideal is entirely achievable, it is increasingly non-existent in practice. On the one hand defendants - often through no fault of their own - are repeatedly forced into court by plaintiffs who file suit. On the other hand, the present system allows parties to refuse to agree upon a truly "neutral" arbitrator. When this occurs, the opposing party's only remedy is to seek appointment of an arbitrator by the court. As written, C.C.P. §1281.6 allows the court to appoint someone of the Court's choosing irrespective of the preferences of the litigants. This often results in the court appointing arbitrators from entities that derive a large percentage of their income from repeat clients. Nobody likes to bite the hand that feeds them. Target defendants, and insurers - through easily identifiable insurance defense firms - "feed" private mediation entities hundreds of times more often than any individual plaintiff, or any plaintiff's firm. At a minimum, the existing dynamic creates the appearance of favoritism.

The Solution: Changing Code of Civil Procedure section 1281.6 to allow parties to submit names while mirroring the selection process utilized for judicial arbitration will allow the parties to each strike truly "bad" arbitrators while insuring that the arbitrator is randomly selected. A controlled, but still random, selection process will restore faith in the system on the public's part while unshackling arbitrators from any qualms that they might have from calling it "as they see it" without worrying about the impact of their award upon future work.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 12-08-2019

DIGEST
Arbitration: Service of Arbitration Award on All Parties
Amends Code of Civil Procedure sections 1288.4 regarding service of the arbitration award on all parties before a petition to confirm the award may be filed with the superior court.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1288.4 regarding service of the arbitration award on all parties before a petition to confirm the award may be filed with the superior court. This resolution should be disapproved because Code of Civil Procedure section 1283.6 already requires service of the arbitration award on all parties, and Code of Civil Procedure section 1288.4 simply provides that no petition to confirm, vacate or correct an award may be served and filed until at least 10 days after a signed copy of the award was served on the petitioner.

This resolution expresses concern that when an award issues and a petition to confirm has been filed, there is no provision for notifying a defaulted party of the award. However, Code of Civil Procedure section 1283.6 already specifically requires the neutral arbitrator to serve a signed copy of the award "on each party to the arbitration." True, the language of Code of Civil Procedure section 1283.6 does not clearly provide that a defaulted party must be served, but neither does the change proposed in this resolution amending Code of Civil Procedure section 1288.4.

If there is an ambiguity regarding service requirement on all or each party to the arbitration, it is not solved by this resolution. Moreover, the provision the resolution would amend, Code of Civil Procedure section 1288.4, does not concern notice to the parties of the award or any superior court petition. Rather it simply imposes a 10-day waiting period before someone who is served with the award may petition the court to confirm, vacate or correct the award. To that end, until a party is served, including a defaulted party, that party must wait ten days before that party may file a petition. Code of Civil Procedure sections 1290.4 through 1290.8, are the provisions which address the service of the petition and response to the petition.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1288.4, to read as follows:

§1288.4

No petition may be served and filed under this chapter until at least 10 days after service of the signed copy of the award upon ~~the petitioner~~ all of the parties to the arbitration. If the parties are served on different days or by different methods, then the latest date of service shall be deemed the effective date of service of the signed copy of the award.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: This statute only requires service of an arbitration award on the petitioner before a petition to confirm the arbitration award may be filed. All parties to the arbitration (even defaulting ones) should receive notice of the arbitration award so each party has an opportunity to evaluate the award. In the case that triggered this resolution, a party did not appear at the hearing and the arbitration made a "default' award against that party and did not serve a copy of the award. The party only learned of the award upon being service with a petition to confirm the award. There was no time to comply with the award (hence the 10 day waiting period) and the client is now subject to costs in that proceeding pursuant to Code of Civil Procedure section 1293.2.

The Solution: This resolution requires service of the arbitration award on all parties to the arbitration before a petition to confirm or vacate can be filed. This is a fair way to ensure all parties receive notice of the award before being hurled into another judicial forum.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SCBA

Resolution 12-08-2019 is unnecessary and creates confusion in the law. The resolution misreads CCP section 1288.4 as only requiring service of the Arbitration award upon the petitioner.

Importantly, section 1283.4 requires: “The neutral arbitrator shall serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement.” (Underline added.) Thus, to the extent the resolution seeks to correct the problem highlighted in the example, the resolution would be ineffective because the resolution mirrors the requirements of section 1283.4. Section 1288.4 simply provides a waiting period for any party that has been served an award to file a petition to confirm, correct, or vacate the award. The deadlines for filing any such petition are dictated by other sections. The resolution has not identified an actual problem with the Arbitration Act. Whether the example discussed in the resolution was the result of a prejudicial application of the Arbitration Act or some flaw therein, there is not sufficient explanation in the resolution to determine what the problem was. That said, the proposed change would not have prevented the problem.

RESOLUTION 12-09-2019

DIGEST
Undertaking Bond: Standards for Out-of-State Resident Bonds
Amends Code of Civil Procedure section 1030 to require a showing of no reasonable possibility that an out-of-state plaintiff will prevail before a bond is required.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 02-01-2018, which was disapproved.

Reasons:
This resolution amends Code of Civil Procedure section 1030 to require a showing of no reasonable possibility that an out-of-state plaintiff will prevail before a bond is required. This resolution should be disapproved because it defeats an important protection for California defendants who may otherwise be unable to enforce a cost award against an out-of-state plaintiff.

As currently written, Code of Civil Procedure section 1030 allows a California defendant to move the court to require an out of state plaintiff post a bond to cover a potential defense cost award, upon a showing that "that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding." (Code Civ. Proc., § 1030, subd. (b).) "The purpose of the statute is to enable a California resident sued by an out-of-state resident 'to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction.'" (*Yao v. Superior Court* (2002) 104 Cal.App.4th 327, 331; quoting *Shannon v. Sims Service Center, Inc.* (1985) 164 Cal.App.3d 907, 913; quoting from Recommendation Relating to Security for Costs (Oct. 1978) 14 Cal. Law Revision Com. Rep. (1978) p. 323.)

Code of Civil Procedure section 1030 recognizes that enforcement of a defense cost award against out-of-state plaintiffs is more costly and difficult, and may ultimately prove futile. Current law strikes an appropriate balance, following a due process hearing, of protecting California residents from meritless lawsuits brought by out-of-state residents versus the rights of out-of-state residents to pursue actions in California courts against California residents. This protective measure is particularly important where the plaintiff resides in a foreign country. In some countries, a California judgment for costs will not be recognized. The prevailing defendant must bring a separate action in the foreign country to prove the right to an award of costs.

The resolution markedly changes the showing that a California defendant must make to receive the protection of a bond securing a potential cost and fee award. It would change defendant's burden of proof from "reasonable possibility that the moving defendant will obtain judgment" to "no reasonable possibility that plaintiff will obtain judgment." This seriously undermines the needed protection for California defendants, sued by out-of-state persons, contemplated by the statute. Under the proposed change, only those claims deemed frivolous would effectively be subject to the bond requirement.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1030 to read as follows:

§1030

(a) When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding. For the purposes of this section, "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract.

(b) The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is ~~a~~ no reasonable possibility that the ~~moving defendant~~ plaintiff will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.

(c) If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

(d) The plaintiff shall file the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file the undertaking within the time allowed, the plaintiff's action or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

(e) If the defendant's motion for an order requiring an undertaking is filed not later than 30 days after service of summons on the defendant, further proceedings may be stayed in the discretion of the court upon application to the court by the defendant by noticed motion for the stay until 10 days after the motion for the undertaking is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been served with a copy of the undertaking. The hearing on the application for the stay shall be held not later than 60 days after service of the summons. If the defendant files a motion for an order requiring an undertaking, which is granted but the defendant objects to the undertaking, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been served with a copy of the undertaking.

(f) The determinations of the court under this section have no effect on the determination of any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding.

(g) An order granting or denying a motion for an undertaking under this section is not appealable.

(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 1030 provides a procedure under which a defendant can apply to have the court impose a requirement that a non-resident or foreign corporation post an undertaking to secure the award of costs and attorney fees that may be awarded in an action or proceeding. It provides for a hearing procedure where the burden on the moving defendant is nothing more than "that there is a reasonable **possibility** the moving defendant will obtain judgment . . ." This standard has already been held inapplicable to indigent plaintiffs in *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, where the court noted it "acts to prevent out-of-state residents from filing frivolous lawsuits against California residents." (*Id.*, at 428.) Under current law, the likely potential of the granting of such motion is to throw the plaintiff out of court without trial on the merits, based on the inability to post such a bond. This procedure is an undue burden on interstate commerce, as it clearly discriminates against out-of-state residents, restricting their access to the court based on the mere reasonable possibility of loss, a standard that no California resident has to meet. Subdivision (g) provides the determination is not appealable.

The Solution: This resolution would adjust the burden on the defendant who is bringing a motion under section 1030 to the demonstration that there is "no reasonable possibility" the plaintiff will prevail. Such a demonstration would be more consistent with the notion of discouraging truly frivolous cases. In the civil context, the standard of "reasonable possibility" is typically applied in the determination of such things as possibility of stating a cause of action when considering leave to amend after the sustaining of a demurrer, where the lack of a "reasonable possibility" of amending to state a cause of action is ground for denying leave to amend. However, it does not appear that the existence of a reasonable possibility of loss is used as a basis to deny a plaintiff relief in any other context. Cases should be resolved on their merits after full review, not based on a "reasonable possibility" that would only be required to be shown against a non-resident or foreign corporation, but would not be available against a resident or domestic corporation.

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

CURRENT OR RELATED LEGISLATION
None known.

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RESOLUTION 12-10-2019

DIGEST
Privilege: Eliminates Absolute Privilege for Falsely Reporting Alleged Criminal Activity
Amends Civil Code section 47 to except intentionally false reports from the privilege available for reporting criminal activity.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Identical to Resolution 04-07-2016, which was approved as amended.

Reasons:
This resolution amends Civil Code section 47 to except intentionally false reports from the privilege available for reporting criminal activity. This resolution should be approved in principle because it creates a civil remedy for a person harmed by an intentionally false report that she or he has engaged in criminal activity.

Under current law, when a citizen contacts law enforcement to report a suspected crime, the privilege in Civil Code section 47, subdivision (b) gives that person absolute immunity from liability, even if the report to the police was false and done maliciously or recklessly. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355.) The privileged information cannot be discovered, nor can it be admitted for any purpose. The absolute immunity of section 47 subdivision (b) bars causes of action for libel, slander, false imprisonment and intentional infliction of emotional distress, even if the police report was made maliciously. (*Mulder v. Pilot Air Freight* (2004) 32 Cal.4th 384, 387.) Under *Hagberg*, the only viable claim that can be based upon a citizen report of suspected criminal activity is malicious prosecution. (*Cox v. Griffin* (2019) 34 Cal.App.4th 440, 448.)

Today's public discourse is filled with false accusations of criminal activity, which may well diminish an individual's reluctance to avoid making such false accusations. Given the rapid spread of information and misinformation, an individual's reputation can be harmed by false accusations, even if no charges are filed. In addition, the person who is the target of a false accusation may lose her or his job and incur legal fees defending the charges.

Several other jurisdictions permit civil actions, including claims of defamation and false imprisonment, when a person has been victimized by intentionally false claims of criminal activity. (See, e.g., *Pihl v. Morris* (1946) 319 Mass. 577; *Smith v. District of Columbia* (D.C. App. 1979) 399 A.2d 213, 220; *Indiana Nat. Bank v. Chapman* (Ind. Ct. App. 1985) 482 N.E.2d 474, 479; *Dijkstra v. Westerink* (1979) 168 N.J. Super. 128, 401 A.2d 1118, 1120-1121; *Toker v. Pollak* (1978) 44 N.Y.2d 211 [376 N.E.2d 163, 168-169]; *Paramount Supply Co. v. Sherlin Corp.* (1984) 16 Ohio App.3d 176 [475 N.E.2d 197, 202-203]; *Schafroth v. Baker* (1976) 276 Or. 39 [553 P.2d 1046, 1048]; *Zarate v. Cortinas* (Tex. Civ. App. 1977) 553 S.W.2d 652, 655.) To date, no published data suggests that these states have experienced any chilling effect on citizen reports of crimes.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code section 47 as follows.

§ 47

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) This subdivision does not make privileged any communication between a person and a law enforcement agency in which a person intentionally falsely reports that another person has committed or is in the act of committing a criminal act or is engaged in an activity requiring law enforcement intervention, including when the purpose of the communication is to harass or annoy the other person.

~~(4)~~ (5) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech

or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

(d)(1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: During 2018 the media was replete with stories (sometimes accompanied by video) regarding people calling 911 to report non-criminal activity of people of color, such as "Barbeque Betty" and "Permit Patty." Calling 911 can be dangerous to innocent people's health. Over the past year, several innocent people (mostly young, Black males) have been killed by the police after a citizen called 911to report that the individuals involved were engaged in criminal activity, even though the deceased individuals were engaged in non-criminal, innocent activity. Lesser consequences can also result from false 911 calls. In California a deceased person's family in such circumstances will not have a civil cause of action against the caller. According to the California Supreme Court's interpretation of Civil Code § 47(b), "when a citizen contacts law enforcement personnel to report suspected criminal activity on the part of another person" that person has absolute immunity from liability, even if the report to the police was false and done maliciously or recklessly. *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355.

The Solution. *Hagberg* was a four to three decision, and the dissent pointed out that California is in the minority in its interpretation of § 47(b) or its equivalent in other states. The majority rested its decision primarily on prior decisions of the Courts of Appeal based on an asserted policy of encouraging communications between citizens and police but failed to explain why that policy should extend to protecting malicious or reckless false reports.

The dissenting opinion makes the better case for not making such reports subject to an absolute privilege in civil actions. The dissenting opinion ended as follows:

> "The ramifications of an intentionally false report of suspected criminal activity to police are enormous. Citizens arrested pursuant to such a report will be

> stigmatized, and forever thereafter have to note the arrest on job, credit, and housing applications. Assertions that the charges were dropped, and of one's actual innocence, will likely fall on deaf ears. Under the majority's conclusion today, such falsely accused individuals will have no opportunity to clear their name, seek compensation for economic loss in defending the charges or loss of their reputation. In the absence of clear support from either the language or the history of section 47(b), this court should not approve absolute civil protection for such destructive and criminal communications conduct."

This resolution is a companion to Resolution 14-05-2019 that makes it clear that it is a crime to use the 911 system for purposes of harassing a person on account of race, national origin, sexual identification or religion. This resolution addresses civil liability.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 12-11-2019

DIGEST
Civil Rights: Rights for the Homeless
Adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85 to give those experiencing homelessness basic rights in public spaces and a civil cause of action for violation of those rights.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Identical to Resolutions 09-01-2017 and 02-07-2018, which were disapproved, and similar to Resolution 05-06-2016, which was disapproved.

Reasons:
This resolution adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85 to give those experiencing homelessness basic rights in public spaces and a civil cause of action for violation of those rights. This resolution should be disapproved because the exemptions and rights created are overly expansive, would undermine the ability of others to access clean and non-threatening public spaces, would jeopardize the economic vitality of local businesses, and give rise to enormous financial and administrative burdens on courts and municipalities.

Under the resolution, a person experiencing homelessness need only erect a tent or cardboard box on a sidewalk or under an overpass, and they become entitled to broad rights and immunities. They would not be subject to criminal, civil or administrative penalties for sleeping, eating, or resting on public property. Municipalities would not be permitted to remove them or their belongings unless "adequate" housing (including room for every household member, handicap access, and no restrictions based on criminal history or substance abuse) was provided; and individual assessments of each person being removed conducted. Prior to removal, a municipality would have to provide at least thirty days written notice. If a person experiencing homelessness was not present at the time of removal, the municipality would have to document that the person received actual notice, and photograph and catalogue any property removed. Even where removal is based on valid safety concerns, a municipality would have to make every attempt to clean up the hazard (without removal) and provide alternative locations for those removed.

The resolution further provides a civil cause of action for any violation of these rights, providing for restitution, actual, compensatory and exemplary damages, a statutory award of $1,000 per violation, and reasonable attorney fees and costs. Currently, those experiencing homelessness can (and do) bring civil rights suits under 42 U.S.C. § 1983, and the Ninth Circuit has been receptive to those actions. (See, e.g., *Lavan v. City of Los Angeles* (9th Cir. 2012) 693 F.3d 1022, *cert. denied* June 24, 2013.) There is no justification for so greatly expanding the liability exposure of municipalities in this one area.

There have been several legislative measures providing for a "right to rest" proposed in California, none of which were as broad as this resolution, and none of which were successful. Assembly Bill No. 5 (2013-2014 Reg. Sess.), Senate Bill No. 608 (2015-2016 Reg. Sess.), and Senate Bill No. 876 (2015-2016 Reg. Sess.), all died at the committee level.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85, to read as follows:

§52.80

There is created a Homeless Person's Bill of Rights to guarantee that the rights, privacy and property of persons experiencing homeless are adequately safeguarded and protected under the laws of this state. The rights afforded persons experiencing homelessness to ensure that their person, privacy and property are safeguarded and protected, as set forth in subsection Sections 52.82 and 52.83 below, are available only insofar as they are implemented in accordance with other parts of the general statutes, state rules and regulations, federal law, the state Constitution and the United States Constitution.

§52. 81

For purposes of this part, the following definitions shall apply:

(a) "Adequate and accessible housing" means, at a minimum, living space:

(1) Where a person has both the right to reside and keep belongings on an ongoing, long term basis at any time of day or night;

(2) That meets living standards commonly acceptable to society, and includes safety from other individuals, the elements, and exposure to disease or filth, room to move about, storage space for belongings, the ability to maintain current household composition, accommodation for physical or mental limitations, and access to hygiene facilities; and

(3) That is accessible to the individual who is or will be living in that space, including that the individual must not be barred due to criminal background, treatment status, ability to show identification, household composition, physical or mental limitations, substance use disorder, or otherwise.

(b) "Hazardous condition" means a condition that creates an imminent public health or safety harm. The public health or safety harm must be created by the presence of a specific condition and not a generalized harm common to all who are unsheltered.

(c) "Homeless person(s)" and "person(s) experiencing homelessness" mean those individuals or members of families who lack a fixed, regular, and adequate nighttime residence, including people defined as homeless using the criteria established in the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.

(d) "Impoundment" means any action by the municipality to remove or tow a vehicle used as a residence without the express approval of the vehicle's owner.

(e) "Municipality" means any local jurisdiction and any of its contractors, agents, employees or partners.

(f) “Outdoor living space” means any outdoor public space that homeless individual(s) use to live or sleep in, as evidenced by the presence of a sleeping bag, shelter, tarp, tent, bed, cardboard, metal sheeting, furniture, or other objects demonstrating an intent to live in the location for one or more days, whether or not continuously.

(g) “Personal property” means any item which an individual owns and which might have value or use to that individual, regardless of whether the item is left unattended for temporary periods of time or whether it has monetary value. This does not include weapons other than knives, contraband, items which pose an obvious health or safety risk, or are clearly contaminated in a way which a reasonable person would conclude the items should not be stored with other property. Personal property includes non-rigid materials used for shelter, such as tents and tarps, but does not include building materials, such as wood products, metal, or rigid plastics

(h) “Public space” means any property that is owned by a government entity or any property upon which there is an easement for public use and that is held open to the public, including, but not limited to, plazas, courtyards, parking lots, sidewalks, public transportation facilities and services, public buildings, shopping centers, and parks.

(i) “Qualified outreach program” means a social service program with adequate oversight, training, and clinical supervision to conduct sufficient individualized outreach, and that the municipality contracts with or provides. Such programs shall have an established record of providing sustained, equitable, person-centered care, and staff providing services shall have training in the following areas: working with people with behavioral health issues including substance use disorder, mental disorders, or both; trauma-informed care, including people who have experienced or are experiencing gender- and gender-identity-based violence and violence based on sexuality; outreach, assessment, and engagement; harm reduction practices (including but not limited to safe needle exchange, use, and disposal, carrying and dispensing Narcan, informing individuals of rights (Good Samaritan Law) and treatment options (Buprenorphine and Methadone); cultural competence; confidentiality and grievance procedures; and may include peer coaches that include adequate oversight and clinical supervision.

(j) “Removal” means action to remove people, camps, structures, or personal property located at outdoor living spaces.

(k) “Rest” means the state of not moving, holding certain postures that include, but are not limited to, sitting, standing, leaning, kneeling, squatting, sleeping, or lying.

(l) “Sufficient individualized outreach” means individualized, person-centered outreach that responds to the unique needs of each person. Sufficient outreach involves:

(m) Making an individual assessment of each affected individual, which includes, but is not limited to, considerations of household composition; disability; mental illness or other mental or emotional capacity limitations; substance use or treatment status; geographic needs, such as proximity to personal support, healthcare, employment and other geographic considerations; and ongoing support needs;

(1) Identifying and offering adequate and accessible housing, if available, based on this individual assessment; and

(2) If an offer is accepted, providing assistance with both the administrative and logistical aspects of moving into the identified adequate and accessible housing.

(n) “Unsafe location” means a public space that poses imminent danger of harm to individuals residing in that location or to the general public. The danger of harm must be created by the existence of the specific outdoor living space at that particular location and not generalized danger of harm common to all who are unsheltered. Unsafe locations include, but are

not limited to, rights-of-way in industrial areas actively used for transporting people or goods and for providing ingress and egress to real property.

(o) “Unsuitable location” means a public space that has a specific public use that is substantially impeded as a result of an outdoor living space in that location. Improved areas of Municipality parks, including restored natural areas or natural areas actively undergoing restoration, and public sidewalks in front of houses and dwelling units are per se unsuitable.

§52.82

(a) Each homeless person in this state has the right to:

(1) Free movement without restraint;

(2) Have equal opportunities for employment;

(3) Receive emergency medical care;

(4) Register to vote and to vote;

(5) Have personal information protected;

(6) Have a reasonable expectation of privacy in his or her personal property; and

(7) Receive equal treatment by state and municipal agencies.

(b) Each municipality shall conspicuously post in the usual location for municipal notices a notice entitled "HOMELESS PERSON'S BILL OF RIGHTS" that contains the text set forth in subsection (a) of this section. Each municipality shall make copies of such notice available to members of the public upon request.

§52.83

(a) It is the intent of the Legislature that this section be interpreted broadly so as to prohibit policies or practices that are discriminatory in either their purpose or effect.

(b) Persons experiencing homelessness shall be permitted to use public space in the ways described in this section at any time that the public space is open to the public without discrimination based upon their housing status, and without being subject to criminal, civil, or administrative penalties. Permitted use of the public space include, but are not limited to, all of the following:

(1) Free movement without restraint.

(2) Sleeping or resting, and protecting oneself from the elements while sleeping or resting in a non-obstructive manner.

(3) Eating, sharing, accepting, or giving food in a space in which having food is not otherwise generally prohibited.

(4) Praying, meditating, worshiping, or practicing religion.

(c) Nothing in this section shall prevent law enforcement from enforcing laws to protect the right of people to use the sidewalk pursuant to the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(d) Nothing in this section shall prevent law enforcement from enforcing the Penal Code, except subdivision (e) of Section 647 of the Penal Code, so far as it prohibits rest.

§52.84

(a) A municipality may respond appropriately to emergency situations such as fires, crimes, or medical crises as it normally would outside outdoor living spaces. However, except as specified in (b) the municipality may undertake a removal or impoundment action only when the municipality has satisfied the following conditions:

(1) Adequate and accessible housing is available beginning at least 30 days before the time of removal or impoundment, to all individuals whose persons, personal possessions and/or vehicles are being removed or impounded.

(2) The affected individuals have been engaged with sufficient outreach over a period of not less than 30 days, to allow those interested to move voluntarily to adequate and accessible housing. Sufficient outreach involves, at a minimum: (1) making an individual assessment of each affected individual, which includes, but is not limited to, considerations of household composition; disability; mental illness or other mental or emotional capacity limitations; substance use or treatment status; geographic needs, such as proximately to personal support, healthcare, employment and other geographic considerations; and ongoing support needs; (2) identifying and offering adequate and accessible housing based on this individual assessment; and (3) if an offer is accepted, providing assistance with both the administrative and logistical aspects of moving into the identified adequate and accessible housing.

(3) The Municipality has provided written notice meeting the following requirements:

(A) The specific date and time the removal or impound will take place, which must not be fewer than thirty (30) days from notice date;

(B) Explanation of the actions that will be taken during the removal or impoundment and how loss of personal property can be avoided;

(C) Information about where personal property will be safeguarded if seized during the removal or impoundment and how it can be retrieved after removal or impoundment;

(D) Contact information for the outreach organizations that will work with that site as specified in subsection (2) above; and

(E) A statement that adequate and accessible housing is available for all affected individuals.

(F) Notice must be provided in languages likely to be spoken by impacted individuals, and through methods capable of being understood by persons with physical and mental disabilities.

(G) Notice must be posted in a conspicuous location at the relevant outdoor living space or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that location.

(b) If an outdoor living space or a vehicle used as a residence is in an unsafe or unsuitable location, or creates or contains a hazardous condition, the municipality may undertake a removal or impoundment action if conducted in accordance with the procedures set forth in this Section.

(1) Prior to conducting removal or impoundment actions based on unsafe or unsuitable locations, the municipality must do the following:

(A) The municipality must inform all individuals staying at such location the reasons that it is unsafe or unsuitable at least 48 hours prior to any removal or impoundment.

(B) The municipality must identify and make available a nearby, alternative location to camp or park that is not unsafe or unsuitable to all affected individuals.

(C) The municipality must conduct sufficient individualized outreach.

(2) Prior to conducting removal or impoundment actions based on hazardous conditions, the municipality must do the following:

(A) Provide access to basic garbage, sanitation, and harm reduction services as dictated by the nature of the hazardous condition, for at least 72 hours.

(B) Make reasonable efforts to identify the likely source of the hazardous condition and take action against only those responsible for creating the hazardous condition.

(C) Provide a meaningful opportunity to cure the hazardous condition, including:

(i) An effective cure notice of the specific conditions that create the hazardous condition and information on how that condition can be remedied; and

(ii) Provision of necessary items, such as garbage bags and bins, rodent traps, intravenous needle receptacles, and/or portable toilets, among others, that would allow the individuals to cure the hazardous condition. The municipality must allow individuals at least 72 hours to cure the hazardous condition before posting notice of removal or impoundment, and shall not conduct removal or impoundment if the hazardous conditions have been cured.

(D) The municipality must conduct direct outreach through site visits to: (a) inform all affected individuals prior to or during the cure period that the location has a hazardous condition and the actions needed to cure that condition; and (b) inform all affected individuals whether the hazardous condition has been remedied after the cure period, and if not, why not.

(3) Prior to removal or impoundment, the municipality must provide written notice meeting the following requirements:

(A) The specific date and time the removal or impound will take place;

(i) The removal or impound may not take place fewer than 48 hours from the date of notice in the case of unsafe or unsuitable location;

(ii) The removal or impound may not take place fewer than five (5) days from the date of notice in the case of a hazardous condition

(B) Explanation of how the location of the outdoor living space or vehicle is unsafe and/or unsuitable, or the hazardous condition has not been remedied;

(C) Explanation of the actions that will be taken during the removal or impoundment and how loss of personal property can be avoided;

(D) Information about where personal property will be safeguarded if seized during the removal or impoundment and how it can be retrieved after removal or impoundment;

(E) Clear directions to the alternative location;

(F) Contact information for the outreach organizations that will work with that site as described in subsection (4) below; and

(G) If available, a statement that adequate and accessible housing is available for all affected individual;

(H) Notice must be provided in languages likely to be spoken by impacted individuals, and through methods capable of being understood by persons with physical and mental disabilities.

(I) Notice must be posted in a conspicuous location at the relevant outdoor living space or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that location.

(4) Sufficient individualized outreach must involve, at a minimum, the following actions:

(A) Informing all affected individuals of the availability of the alternative location for the outdoor living space or vehicle, or offering adequate and accessible housing; and

(B) Offering assistance with both the administrative and logistical aspects of moving into the identified alternative location or adequate and accessible housing.

(c) During a removal or impoundment, the Municipality will safeguard all personal property free of charge according to the following requirements:

(1) For individuals present at the time of the removal or impoundment who have accepted the offer of an adequate and accessible housing but do not have the ability to transport their

personal property, the Municipality shall transport all personal property to the location of the accepted housing the day of the removal or impoundment.

(2) For individuals absent at the time of the removal or impoundment, the Municipality must document that those individuals had actual notice of the removal or impoundment. document that those individuals had actual notice of the removal or impoundment.

(3) For individuals absent at the time of removal or impoundment, or present but who did not accept the offer of adequate and accessible housing and do not have the ability to transport their personal property, the Municipality will safeguard all personal property as follows:

(A) Personal property must be photographed and catalogued by location and with identifying details of the personal property prior to being put into storage. Such information must be searchable by computer and by calling a Municipality agent.

(B) The location of the storage facility must be accessible by public transportation and accessible to those with disabilities.

(C) Its operating hours must extend beyond normal business hours to accommodate those who work or have other obligations during midweek during normal business hours.

(D) Photo identification shall not be required as a condition of retrieval;

(E) The Municipality must post notice for 90 days at the location of the removal or impoundment with the location of the seized personal property and instructions for reclaiming such personal property.

(F) After 90 days, the Municipality may dispose of any unclaimed personal items provided all the above requirements have been met.

§53.85

(a) Any person whose rights have been violated pursuant to this part may enforce those rights in a civil action.

(b) The court may award appropriate injunctive and declaratory relief, restitution for loss of property or personal effects and belongings, actual damages, compensatory damages, exemplary damages, statutory damages of one thousand dollars ($1,000) per violation, and reasonable attorney's fees and costs to a prevailing party.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing laws do not provide basic civil and human rights for people experiencing homelessness. Several municipalities in California have offensive and anachronistic laws targeting homeless people. In September 2018, the Ninth Circuit in *Martin et al v City of Boise,* 902 F.3d 1031(9th Cir. 2018) held that these laws are "cruel and unusual" and constitute a violation of the Eighth Amendment. Judge Marsha Berzon wrote, "As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter," *Id*. at 1048. By the virtue of their existence, homeless individuals are subject to civil and criminal sanctions, and have restrictions on their right to use, move freely, rest, protect themselves from the elements, eat, or perform religious observances in public spaces.

The Solution: The forced dispersal of people from encampment settings is not an appropriate strategy. It accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide lasting solutions to people who have been sleeping and living in an encampment. Homeless encampments across the country are increasingly subject to sudden evictions or "sweeps". Often conducted with little or no notice, sweeps displace homeless people from public space, and often result in the loss or destruction of people's possessions.

The loss of warm clothing, protective tents, medication, identification, and important documents can become a matter of life and death. Homeless persons are made to leave their encampment communities without being offered any alternative places to live. Because this merely disperses, rather than reduces homelessness, new encampments inevitably reappear. Without sanitation services, so will the public health and safety concerns that led to the sweeps. Indeed, California's state transportation agency eliminated 217 homeless encampments between July 2014 and February 2015, only to have some of them reopen the very same day. The cost to taxpayers for this ineffective exercise of governmental power is significant.

This resolution affords persons experiencing homelessness the right to use public spaces without discrimination based on their housing status. It also enumerates basic human rights that may be exercised without being subject to criminal or civil sanctions. These include the right to protect themselves from the elements, eat, perform religious observances, move freely, and rest in public spaces. It ensures the protection of due process rights of homeless persons personal property. It requires municipalities to provide alternative space or adequate housing as well as appropriately tailored services to people experiencing homelessness. This resolution provides aggrieved individuals injunctive and declaratory relief, restitution, damages, statutory damages of $1,000 per violation, fees and costs.

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

CURRENT OR PRIOR RELATED LEGISLATION
This resolution uses language from Connecticut Homeless Bill of Rights, California Senate Bill 876: Homelessness introduced by Liu in February 2016, and a proposed ordinance in Seattle, WA addressing assessment and access to housing, as well as due process rights of homeless persons.

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