RESOLUTION 04-01-2020

DIGEST
Civil Compromise: Expanding Civil Compromise of Misdemeanors
Amends Penal Code section 1377 to allow civil compromise for misdemeanor "hit and run" offenses under Vehicle Code sections 20001 and 20002.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1377 to allow civil compromise for misdemeanor "hit and run" offenses under Vehicle Code sections 20001 and 20002. This resolution should be disapproved because it would allow a civil compromise for property damage to preclude criminal prosecution for the offense of leaving the scene of an accident.

A civil compromise may occur for some qualifying misdemeanor offenses when the defendant and victim reach a mutual civil settlement for the damages caused directly by the defendant's criminal act. Civil compromise is available for those misdemeanors where there is an overlap between the civil remedy and the public remedy of prosecution for a crime. (*People v. Dimacali* (2019) 32 Cal.App.5th 822, 833; *People v. O'Rear* (1963) 220 Cal.App.2d Supp. 927, 931.) For example, vandalism (Pen. Code, § 594) is a type of offense for which a civil compromise can be made; the act of vandalism is simultaneously a crime and a civil injury where a civil settlement can rectify the damage. Under the statutory scheme, the victim informs the court of the settlement and the court may then dismiss the matter. The prosecutor's concurrence is not required.

Vehicle Code section 20001 does not criminalize automobile accidents, i.e. the "hit." Rather, the conduct made criminal in Vehicle Code section 20001 is the flight afterward, i.e. the "running." (*People v. Martinez* (2017) 2 Cal.5th 1093, 1102.) A person who flees an accident violates Vehicle Code section 20001 even if the accident was wholly the fault of the other party. This is because the accident merely serves as a condition precedent to the duty to stop. That is, it is the occurrence of the accident, regardless of fault, that triggers the duty to stop. The victim in a hit and run is not "'injured by [the] act constituting' the crime, but by the noncriminal condition precedent to the crime." (*People v. Dimacali*, at p. 837; see *People v. Martinez*, at p. 1102; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1340.) In other words, the victim in a hit and run is not injured by the "running," they are injured by the "hit." The "hit" is not a crime under Vehicle Code section 20001. Finally, a misdemeanor hit and run involving property damage is uniquely a public offense in that every law-abiding driver suffers injury in the form of increased insurance premiums. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1124.)

This resolution would allow defendants to avoid prosecution through a civil compromise for misdemeanor violations of Vehicle Code section 20001 and 20002 where the underlying accident

involved only property damage. The resolution should be disapproved because it would prevent the prosecution of a harm to the public (i.e., fleeing the accident) through payment of damages for a different, individual harm (i.e., the property damage). Although the non-offending driver might receive compensation for any property damage, there would be no consequences for the public harm caused by leaving the scene of an accident.

Moreover, a misdemeanor hit and run can be charged to the driver who was hit by another driver, if the driver who was hit flees the scene of the accident. Consequently, this resolution would present the unintended consequence of allowing the driver at fault for the collision to obtain compensation from the driver who fled, even though that fleeing driver may not have caused the collision; the party at fault for the property damage could use the threat of a hit and run prosecution to extort compensation from the injured party

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1377, to read as follows:

§ 1377

When the person injured by an act constituting a misdemeanor, including a person injured during the course of conduct described in Vehicle Code sections 20001 or 20002, has a remedy by a civil action, the offense may be compromised, as provided in Section 1378, except when it is committed as follows:

(a) By or upon an officer of justice, while in the execution of the duties of his or her office.

(b) Riotously.

(c) With an intent to commit a felony.

(d) In violation of any court order as described in Section 273.6 or 273.65.

(e) By or upon any family or household member, or upon any person when the violation involves any person described in Section 6211 of the Family Code or subdivision (b) of Section 13700 of this code.

(f) Upon an elder, in violation of Section 368 of this code or Section 15656 of the Welfare and Institutions Code.

(g) Upon a child, as described in Section 647.6 or 11165.6.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: For more than a hundred years, subject to the oversight of the court, the law has allowed complaining witnesses and defendants to resolve minor criminal cases by offering the alleged victim compensation for losses resulting from the defendant's alleged conduct. These civil compromise statutes are most commonly used in "hit and run" cases, where the facts may

be in dispute, but the defendant driver agrees to compensate the other driver for any loss stemming from the accident. This outcome saves the public money by resolving cases without trial and guarantees that an injured party is quickly compensated for any loss. However, in 2018, the Court of Appeal ruled that injured drivers were not technically "victims" of hit and run (because just causing a car accident is not a crime) and therefore could not civilly compromise these cases. (*People v. Dimacali* (2019) 32 Cal.App.5th 822.)

The Solution: This resolution reinstates the right of hit and run victims to civilly compromise their cases, subject to the oversight of the court.

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 04-02-2020

DIGEST
Peremptory Challenges: Effect of Prior Dismissal on Felony Prosecution
Amends Penal Code section 1387 to preclude a prosecutor from exercising a peremptory challenge to a judge assigned for trial when the prosecutor dismisses the case and refiles it.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1387 to preclude a prosecutor from exercising a peremptory challenge to a judge assigned for trial when the prosecutor dismisses the case and refiles it. This resolution should be approved in principle it addresses the real problem of "judge shopping" and unnecessary trial delays.

Currently, a prosecutor has discretion to dismiss a felony case and refile it. (Pen. Code, § 1387.) When that happens, the case begins anew as if the prior case had not occurred, with limited exceptions. (See Pen. Code, §§ 1387, 1388; *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 364.) The prosecution is limited in how many times it may dismiss and refile, but there are no general restrictions on the reasons for dismissing and refiling. (See Pen. Code, § 1387.) Since the dismissal and refiling starts the case anew, the prosecutor would be free to dismiss charges and refile them after receiving unfavorable rulings from a judge, and then exercise a peremptory challenge against the same judge pursuant to Code of Civil Procedure section 170.6. Although a peremptory challenge is unavailable where the prosecution admits that the "sole rationale" for the dismissal and refiling was "to evade the impact of rulings made in the first case" (*Birts v. Superior Court* (2018) 22 Cal.App.5th 53, 59), few defendants are able to make such a showing. Allowing a peremptory challenge after dismissal and refiling would prejudice the defense because they would have to re-subpoena witnesses and wait approximately 90 days to return to trial. An in-custody defendant would have to await the second start of trial in pretrial detention.

This resolution would require that if the prosecutor dismisses the case after it has been assigned to a judge for trial, the case must be returned to the judge that was assigned to the case in the first instance. The prosecutor would not be allowed to exercise a peremptory challenge to prevent the case from being returned to the original trial judge. In a jurisdiction that has master calendar judicial assignments, the challenge would not be timely after the first assignment is made. (Code Civ. Proc., § 170.6.)

The resolution should be approved in principle because it would close a loophole and make sure first dismissals are only used out of necessity, such as witness unavailability, and not for exploiting strategic advantages. This resolution prevents the prosecutor from "judge shopping" by requiring that the case be returned to the original trial judge. This resolution, however, does

not take into account that the original judge may no longer be available to hear the matter due to trial obligations in other cases, retirement, vacation, illness or death. In that circumstance, the resolution would force courts to re-assign cases to the same judge once the judge becomes available, which could be months down the line. In busy jurisdictions, the judge may be involved in another trial or could be on leave or retired by the time the case is ready to be returned to trial months later. This would create logistical problems. However, this logistical issue could be resolved if there were an exception for a judge's unavailability.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1387, to read as follows:

§ 1387

(a) An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony, except in those felony cases, or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds any of the following:

(1) That substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at, or prior to, the time of termination of the action.

(2) That the termination of the action was the result of the direct intimidation of a material witness, as shown by a preponderance of the evidence.

(3) That the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed in a prosecution arising under subdivision (e) of Section 243 or Section 262, 273.5, or 273.6. This paragraph shall apply only within six months of the original dismissal of the action, and may be invoked only once in each action. Nothing in this section shall preclude a defendant from being eligible for diversion.

(4) That the termination of the action was the result of the complaining witness being found in contempt of court as described in subdivision (b) of Section 1219 of the Code of Civil Procedure. This paragraph shall apply only within six months of the original dismissal of the action, and may be invoked only once in each action.

(b) Notwithstanding subdivision (a), an order terminating an action pursuant to this chapter is not a bar to another prosecution for the same offense if it is a misdemeanor charging an offense based on an act of domestic violence, as defined in subdivisions (a) and (b) of Section 13700, and the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed. This subdivision shall apply only within six months of the original dismissal of the action, and may be invoked only once in each action. Nothing in this subdivision shall preclude a defendant from being eligible for diversion.

(c) An order terminating an action is not a bar to prosecution if a complaint is dismissed before the commencement of a preliminary hearing in favor of an indictment filed pursuant to

Section 944 and the indictment is based upon the same subject matter as charged in the dismissed complaint, information, or indictment.

However, if the previous termination was pursuant to Section 859b, 861, 871, or 995, the subsequent order terminating an action is not a bar to prosecution if:

(1) Good cause is shown why the preliminary examination was not held within 60 days from the date of arraignment or plea.

(2) The motion pursuant to Section 995 was granted because of any of the following reasons:

(A) Present insanity of the defendant.

(B) A lack of counsel after the defendant elected to represent himself or herself rather than being represented by appointed counsel.

(C) Ineffective assistance of counsel.

(D) Conflict of interest of defense counsel.

(E) Violation of time deadlines based upon unavailability of defense counsel.

(F) Defendant's motion to withdraw a waiver of the preliminary examination.

(3) The motion pursuant to Section 995 was granted after dismissal by the magistrate of the action pursuant to Section 871 and was recharged pursuant to Section 739.

(d) Absent a conflict with the defendant's speedy trial rights or agreement of the parties, if a prosecutor dismisses and refiles a case after the case was assigned to a judge for trial without challenge pursuant to Code of Civil Procedure Section 170.6, the case shall thereafter be returned to the same judge for trial, and no 170.6 motion shall be heard.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, prosecutors are permitted to dismiss and refile criminal cases on the day of trial without repercussion. This rule was designed to offer prosecutors a safety net if, for example, a key witness unexpectedly fails to show up to court for trial. The problem is that some less scrupulous prosecutors abuse this statute and use it to forum shop. These prosecutors wait to see what pre-trial rulings the assigned trial judge issues and then, if they dislike those rulings, dismiss and refile the case in an attempt to get a new (more favorable) judge. Permitting one side to unilaterally "redo" key evidentiary hearings when they dislike the first result is both a waste of resources and an abuse of the justice system.

The Solution: This resolution would clarify that where a prosecutor fails to challenge a trial judge under section 170.6, they cannot thereafter forum shop by dismissing and refiling the case.

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 04-03-2020

DIGEST
Misdemeanor and Infraction Fines and Fees: Ability to Pay
Adds Penal Code section 1462.6 to create a presumption that homeless individuals have no ability to pay, and to allow consideration of defendants' ability to pay fines and fees.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolutions 10-08-2017 and 06-03-2001, which were approved in principle, and 01-03-2016, which was withdrawn.

Reasons:
This resolution adds Penal Code section 1462.6 to create a presumption that homeless individuals have no ability to pay, and to allow consideration of defendants' ability to pay fines and fees. This resolution should be approved in principle because there are no provisions in the Penal Code that address ability to pay fines and fees or that specifically state a presumption that a person who is homeless does not have any ability to pay fines and fees.

While Vehicle Code section 42003, subdivision (c), permits a judge to assess a defendant's ability to pay current, as well as outstanding, fines and fees in any case when the defendant appears before a traffic referee or judge, that consideration of a defendant's ability to pay is not clearly required outside of the Vehicle Code. This resolution would require that a defendant's ability to pay fines and fees be taken into consideration by a judge in all proceedings for misdemeanors and infractions. (Pen. Code, pt. 2, title 11, ch. 1, § 1427 et seq.) The proposed language for the addition of Penal Code section 1462.6 also creates the presumption that a person suffering from homelessness is unable to pay the fines and fees, which is not expressly included in Vehicle Code section 42003.

This proposal is consistent with legislative efforts to reduce the burden associated with court-ordered debt (fines and fees) on low-income individuals. For two decades, the California Legislature has enacted laws that balance the needs of low-income Californians with the ongoing need for the revenue derived from fines and fees collected from violators in infraction and misdemeanor cases. 2002 was the year that Vehicle Code section 42003 was enacted. Since that time, and in addition to the ability to pay provisions in Vehicle Code section 42003, there have been additional legislative efforts to address the impacts of fines and fees on low-income people.

This resolution is also consistent with a long line of CCBA resolutions that have sought to address the impacts of fines and fees on low-income Californians. Specifically, this resolution is similar to Resolution 10-08-2017 (approved in principle), which sought to repeal all fees added onto base fines for infraction violations in the Vehicle Code; 01-03-2016 (withdrawn by proponent), which sought to ensure that a credit for a fine was specifically a credit towards the base fine (for purposes of reducing the overall fine and fee burden on the violator); and, 06-03-2001(approved in principle), which sought to address a defendant's inability to pay fines and

fees for infraction violations of the Vehicle Code.

Counter arguments to this resolution misunderstand existing law. One counter argument asserts that providing a presumption of inability to pay for a person experiencing homelessness takes away judicial discretion. This is not true. The resolution creates a presumption of inability to pay. A judicial officer retains discretion to challenge that presumption should circumstances warrant.

Another counter argument states that the cost to recover outstanding debt cannot be a factor in the determination of a defendant's ability to pay. This is a misstatement of both the resolution and the law. There is nothing in the resolution or existing law that would require a court to conduct a cost-benefit analysis for the state in assessing an individual's ability to pay. The proposal does state, though, that homelessness provides two presumptions – that the defendant lacks the ability to pay, and that the costs of attempting to collect fines and fees from a homeless individual would likely outweigh the amount of money recovered. These two presumptions (a) are entirely consistent with each other, and (b) reflect the state of the law which, under Penal Code, section 1463.007, requires courts to submit annual reports on the collection of court-ordered debt, including the cost to collect that debt.

The stated goal of the resolution is to provide relief for people experiencing homelessness by creating a presumption of inability to pay. It is consistent with previous CCBA and legislative efforts to reduce the impacts of fines and fees on low income individuals. It acknowledges that the cost of collecting court-ordered debt is a factor that courts must report to the Legislature.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 1462.6, to read as follows:

§ 1462.6

Notwithstanding any other law, a court may waive any fine or fee imposed on a defendant upon a finding that the defendant lacks the ability to pay that fine or fee and that the cost of collection of that fine or fee is likely to outweigh the amount of money recovered from the defendant. The court shall presume that a homeless defendant lacks the ability to pay a fine or fee and that the cost of collection is likely to outweigh the amount of money recovered.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Current law imposes dozens of mandatory fines or fees following any criminal conviction (no matter how minor), many of which are currently mandatory. This makes little sense when the defendant lacks any ability to pay that fee, especially when the cost of collection

is likely to exceed the amount of any recovery. Many judges recognize this problem but lack the authority to avoid imposing such fees.

The Solution: This resolution clarifies that a court may (but is not required to) waive a fine or fee when the imposition of that fine or fee would be nonsensical.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Although the statement of solution states that "a court may (but is not required to)" waive a fine or fee, the last sentence of the proposed Penal Code section requires such a waiver for a homeless defendant. Homelessness would logically be a factor in the determination of such a waiver, but should not hamstring the court's discretion. We would favor the resolution if the last sentence of the proposed section were deleted.

OCBA

The Orange County Bar Association supports the proposition that a trial court should have the discretion to waive a fine or fee imposed upon a defendant where the court determines that the individual lacks the ability to pay the fine or fee. Period.

OCBA however opposes the remainder of the resolution. This resolution as written would bar a court from waiving the fine or fee despite a finding of financial inability by the defendant if the amount likely recovered was a mere dollar more than the cost of collection. Further, consideration of the cost of collection being likely outweighed by the amount of money recovered from a defendant adds an additional unnecessary evidentiary finding that the court must make before granting waiver. Such costs are not static but will vary from place to place and time to time. A cost/recovery analysis is not a factor in the determination of an individual defendant's ability to pay. OCBA is mindful that the cost of collection and the amount actually recovered has resulted in foregoing the pursuit of collections in some counties and is being advocated by some legislators. The policy determination to forego collections based upon the cost outweighing the recovery of money is a public policy best made by political bodies such as the Legislature or a county board of supervisors, not the court at an individual defendant's hearing. Finally, a presumption that a homeless person lacks the ability to pay is also

unnecessary if the court has discretion to make a finding of the inability to pay. Homelessness is a factor evidencing the inability to pay which the court should consider just like any other relevant factor in its determination.

RESOLUTION 04-04-2020

DIGEST
Criminal Commitment: Outpatient Treatment to Count Towards Maximum Commitment
Amends Penal Code section 1026.5 and 1600.5 to allow outpatient treatment at a Conditional Release Program facility to count towards an inmate's maximum length of confinement.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code sections 1026.5 and 1600.5 to allow outpatient treatment at a Conditional Release Program facility to count towards an inmate's maximum length of confinement. This resolution should be approved in principle because it strikes a fair balance in addressing the needs of the inmate, the community and rehabilitation.

Under current law, Penal Code section 1600.5 states that if an individual is committed to a State Hospital pursuant to Penal Code section 1026.5, and is subsequently placed in an outpatient program (known as Conditional Release Program, commonly called CONREP), any time that the individual participates in the program does not count towards the individual's actual custody time, unless the individual is placed at a locked facility. Generally, a CONREP facility is administered locally and is not actually run by the Department of State Hospitals. An individual is only placed in the CONREP program if they are not a danger to themselves or others. The language of the current law creates curious situations where an individual is placed in an outpatient facility to treat their mental disorder at a CONREP approved facility for up to the term of their imprisonment (and possibly longer), but their time in that facility does not count toward their term of imprisonment. Therefore, in such situations, the CONREP facility has little to no encouragement to assist individuals in transitioning into independent living or employment, because while the individual remains at the CONREP facility, the facility will receive aid. The proposed resolution encourages getting individuals back into the larger community if and when they are able to enter the community.

This resolution would allow an individual committed to the Department of State Hospitals, who is then placed in a CONREP program to count time within the program towards their maximum commitment. The benefit to the individual is balanced by allowing a prosecutor to file for recommitment if the individual is determined to be a continuing danger to themselves or the community. This balance better achieves the goal of the Department of State Hospitals program, to "ensure public protection in California communities while providing an effective and standardized outpatient treatment system." See https://www.dsh.ca.gov/Treatment/Conditional_Release.html. Allowing healthy individuals to count time spent in a CONREP facility against their maximum criminal sentence is just, humane, and an efficient use of our resources.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 1026.5 and 1600.5, to read as follows:

§ 1026.5

(a) (1) In the case of any person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be ~~kept in actual custody~~ committed longer than the maximum term of commitment, except as provided in this section. For the purposes of this section, "maximum term of commitment" shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5, and disregarding any credits which could have been earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3.

(2) In the case of a person confined in a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony prior to July 1, 1977, and who could have been sentenced under Section 1168 or 1170 if the offense was committed after July 1, 1977, the Board of Prison Terms shall determine the maximum term of commitment which could have been imposed under paragraph (1), and the person may not be ~~kept in actual custody~~ committed longer than the maximum term of commitment, except as provided in subdivision (b). The time limits of this section are not jurisdictional.

In fixing a term under this section, the board shall utilize the upper term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, increased by any additional terms which could have been imposed based on matters which were found to be true in the committing court. However, if at least two of the members of the board after reviewing the person's file determine that a longer term should be imposed for the reasons specified in Section 1170.2, a longer term may be imposed following the procedures and guidelines set forth in Section 1170.2, except that any hearings deemed necessary by the board shall be held within 90 days of September 28, 1979. Within 90 days of the date the person is received by the state hospital or other treatment facility, or of September 28, 1979, whichever is later, the Board of Prison Terms shall provide each person with the determination of the person's maximum term of commitment or shall notify the person that a hearing will be scheduled to determine the term.

Within 20 days following the determination of the maximum term of commitment the board shall provide the person, the prosecuting attorney, the committing court, and the state hospital or other treatment facility with a written statement setting forth the maximum term of commitment, the calculations, and any materials considered in determining the maximum term.

(3) In the case of a person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604 who committed a misdemeanor, the maximum term of commitment shall be the longest term of county jail confinement which could have been imposed for the offense or offenses which the person was found to have committed, and the person may not be ~~kept in actual custody~~ committed longer than this maximum term.

(4) Nothing in this subdivision limits the power of any state hospital or other treatment facility or of the committing court to release the person, conditionally or otherwise, for any period of time allowed by any other provision of law.

(b) (1) A person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others without supervision by the State Department of State Hospitals or its designee.

(2) Not later than 180 days prior to the termination of the maximum term of commitment prescribed in subdivision (a), the medical director of a state hospital in which the person is being treated, or the medical director of the person's treatment facility or the local program director, if the person is being treated outside a state hospital setting or in the community, shall submit to the prosecuting attorney his or her opinion as to whether or not the patient is a person described in paragraph (1). If requested by the prosecuting attorney, the opinion shall be accompanied by supporting evaluations and relevant hospital or treatment records. The prosecuting attorney may then file a petition for extended commitment in the superior court which issued the original commitment. The petition shall be filed no later than 90 days before the expiration of the original commitment unless good cause is shown. The petition shall state the reasons for the extended commitment, with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements set forth in paragraph (1).

(3) When the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial, or a court trial if the person is not in a locked facility. The rules of discovery in criminal cases shall apply. If the person is being treated in a state hospital when the petition is filed, the court shall notify the community program director of the petition and the hearing date.

(4) The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney, or a court trial if the person is not in a locked facility. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless that time is waived by the person or unless good cause is shown.

(5) (a) In the case of an individual confined to a state hospital or other treatment facility, p~~P~~ending the hearing, the medical director or person in charge of the facility in which the person is confined shall prepare a summary of the person's programs of treatment and shall forward the summary to the community program director or a designee, and to the court. The community program director or a designee shall review the summary and shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the petition for extended commitment. The facility so designated shall continue the program of treatment, shall provide adequate security, and shall, to the greatest extent possible, minimize interference with the person's program of treatment.

~~(6)~~ (b) A designated facility need not be approved for 72-hour treatment and evaluation pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code). However, a county jail may not be designated unless the services specified in paragraph (5) are provided and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail. If there is evidence that the treatment program is not being complied with or accommodations have not been provided which ensure both the safety of the committed person

and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility or make any other appropriate order, including continuance of the proceedings.

~~(7)~~ (6) The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees. The state shall be represented by the district attorney who shall notify the Attorney General in writing that a case has been referred under this section. If the person is indigent, the county public defender or State Public Defender shall be appointed. The State Public Defender may provide for representation of the person in any manner authorized by Section 15402 of the Government Code. Appointment of necessary psychologists or psychiatrists shall be made in accordance with this article and Penal Code and Evidence Code provisions applicable to criminal defendants who have entered pleas of not guilty by reason of insanity.

~~(8)~~ (7) If the court or jury finds that the patient is a person described in paragraph (1), the court shall order the patient recommitted to the facility or outpatient treatment program into ~~in~~ which the patient was confined at the time the petition was filed. This commitment shall be for an additional period of two years from the date of termination of the previous commitment, and the person may not be ~~kept in actual custody~~ committed longer than two years unless another extension of commitment is obtained in accordance with the provisions of this subdivision. ~~Time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment.~~

~~(9)~~ (8) A person committed under this subdivision who is not on outpatient status shall be eligible for release to outpatient status pursuant to the provisions of Title 15 (commencing with Section 1600) of Part 2.

~~(10)~~ (9) Prior to termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in paragraph (1). The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

~~(11)~~ (10) Any commitment under this subdivision places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

§ 1600.5

For a person committed as a mentally disordered sex offender under former Section 6316 or 6316.2 of the Welfare and Institutions Code, or committed pursuant to Section ~~1026, or 1026.5, or~~ 2972 who is placed on outpatient status under the provisions of this title, time spent on outpatient status, except when placed in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment. Nothing in this section shall be construed to extend the maximum period of parole of a mentally disordered offender.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: An individual found not guilty by reason of insanity faces a maximum length of confinement in the state hospital equivalent to the maximum possible length of incarceration for the offenses charged. If an individual reaches their maximum and still poses a danger, the prosecution can file a recommitment petition. Under current law, if an individual has sufficiently improved such that they no longer need inpatient treatment, they are transferred to a conditional release program (or "CONREP") that provides outpatient treatment in the community. Each county has its own CONREP, and most are non-government agencies that contract with the State Department of State Hospitals.

Time spend in CONREP does not count toward the individual's maximum confinement time. That means that individuals can be – and often are – living in the community receiving comprehensive state-funded services indefinitely. This is very costly for the state and does not encourage CONREP to work toward transitioning capable individuals to employment and independent living. Rather, individuals who could otherwise be contributing members of society are instead forced to remain under costly and often unnecessary supervision.

The Solution: Under this resolution, time spent in outpatient treatment would count toward an individual's maximum confinement time. However, it would also allow the prosecution to petition for recommitment of those individuals in CONREP who would pose a danger without continued community supervision, just as the law currently allows it to petition for recommitment of individuals in the state hospital who would pose a danger if released. This will encourage CONREP to work actively toward societal reintegration for mentally ill individuals, while providing a backstop for those individuals who may in fact need supervision indefinitely.

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 04-05-2020

DIGEST
Indigent Appeals: Obligation to File Notice of Appeal for Indigent Defendant Without Charge
Amends Penal Code section 1240.1 to require that an attorney who represented an indigent defendant at trial to prepare a notice of appeal without charging the defendant.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 1240.1 to require that an attorney who represented an indigent defendant at trial to prepare a notice of appeal without charging the defendant. This resolution should be approved in principle because current law requires the trial attorney for an indigent defendant to file the notice of appeal but does not prevent that attorney from charging for that filing, and the appointment of appellate counsel for an indigent defendant only occurs after the notice of appeal has been filed.

Under Penal Code section 1240.1, subdivision (b), an attorney who represented an indigent defendant in any criminal, juvenile court, or civil commitment case is obligated to execute and file a timely notice of appeal when the attorney believes that there are arguably meritorious grounds for appeal and it is in the defendant's interest to pursue an appeal. The attorney is also obligated to file the notice of appeal when directed to do so by a defendant having a right to appeal. However, current law does not limit the fees that may be charged for filing the notice of appeal, nor does it provide a means for appellate counsel to be appointed for indigent defendants until after the notice of appeal is filed.

A notice of appeal from a felony conviction must be filed within 60 days following the conviction. (Cal. Rules of Court, rule 8.308(a).) If the appeal challenges the validity of a guilty plea or an admission of a probation violation, a request for certificate of probable cause must be filed concurrently with the notice of appeal. (Pen. Code, § 1237.5.) A request for appointment of counsel is contained in the notice of appeal. (See, Judicial Council Form CR120.) The appellate court appoints appellate counsel for indigent defendants. (Cal. Rules of Court, rule 8.300(a).) A notice of appeal from a misdemeanor conviction must be filed within 30 days following conviction. (Cal. Rules of Court, rule 8.853(a).) A request for appointment of counsel is also contained in the notice of appeal for misdemeanor convictions. (*See* Judicial Council Form CR132.)

This resolution would assure no-cost representation for an indigent defendant by prohibiting the attorney who represented the indigent defendant at trial from charging any fee to file the notice of appeal. The resolution would be stronger if the attorney was also obligated to file the certificate of probable cause without charging for that work.

The work included in filing a notice of appeal is minimal. The notice itself is a one-page Judicial Council form. In addition, the attorney is required to file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading, or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. (Pen. Code, § 1240.1, subd. (b).) The trial attorney has ready access to that information, and therefore is in the most efficient position to provide it for the notice of appeal. In addition, executing the notice of appeal does not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal. (*Id*.) Because the attorney who represented the indigent defendant is already obligated to file the notice of appeal and related documents, this resolution would not add to the workload. Further, it would assist in avoiding potential ethical problems created by the attorney's demand for payment, which could create a conflict if the client declined to pay or lacked the ability to do so.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1240.1, to read as follows:

§ 1240.1

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading, or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on

appeal unless the undertaking is expressly stated in the notice of appeal. No attorney who represented a defendant at trial or a minor at a juvenile adjudication who would be entitled to the appointment of counsel on appeal due to indigency may charge a fee to the defendant or minor for executing the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

(c) The State Public Defender shall, at the request of any attorney representing a prospective indigent appellant or at the request of the prospective indigent appellant himself or herself, provide counsel and advice to the prospective indigent appellant or attorney as to whether arguably meritorious grounds exist on which the judgment or order to be appealed from would be reversed or modified on appeal.

(d) The failure of a trial attorney to perform any duty prescribed in this section, assign any particular point or error in the notice of appeal, or designate any particular thing for inclusion in the record on appeal shall not foreclose any defendant from filing a notice of appeal on his or her own behalf or from raising any point or argument on appeal; nor shall it foreclose the defendant or his or her counsel on appeal from requesting the augmentation or correction of the record on appeal in the reviewing court.

(e) (1) In order to expedite certification of the entire record on appeal in all capital cases, the defendant's trial counsel, whether retained by the defendant or court–appointed, and the prosecutor shall continue to represent the respective parties. Each counsel's obligations extend to taking all steps necessary to facilitate the preparation and timely certification of the record of all trial court proceedings.

(2) The duties imposed on trial counsel in paragraph (1) shall not foreclose the defendant's appellate counsel from requesting additions or corrections to the record on appeal in either the trial court or the California Supreme Court in a manner provided by rules of court adopted by the Judicial Council.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Filing a notice of appeal is not a complicated process. It involves nothing more than filling out a Judicial Council form and filing it in the trial court. Existing law requires trial lawyer to perfect the filing of the notice of appeal. Some lawyers, however, refuse to file the

notice of appeal unless the defendant (who has hocked the family jewels to pay for the lawyer) coughs up a bunch of money – often hundreds of dollars. This is unconscionable.

The Solution: This resolution does one simple thing: it prohibits a defendant's trial lawyer from charging for filing a notice of appeal. It does nothing else.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SDCBA

The SDCBA Delegation recommends Disapproval of Resolution 04-05-2020 because it believes that attorneys should be able to charge for their services, as long as those charges are reasonable.

The SDCBA Delegation would support the resolution if amended by adding the following language underlined and in italics:

"No attorney who represented a defendant at trial or a minor at a juvenile adjudication who would be entitled to the appointment of counsel on appeal due to indigency may charge a fee to the defendant or minor for executing the notice of appeal *that would, per page, exceed the then current-fee for filing a motion for a new trial in a civil case per Government Code § 70617(a)(5)*."

The SDCBA Delegation agrees that filing a notice of appeal is typically a simple process, usually just filling out a single page Judicial Council form and filing it in the trial court. That is a process that a competent trial attorney should be able to accomplish quickly and with little cost to the client. Hence, to advance the state bar's twin goals of, "protecting the public & enhancing the administration of justice," the SDCBA Delegation agrees with the Resolution's author that the allowable fees chargeable to the client should be limited by statute to a reasonable cost, but not zero.

This counter-proposal sets it to be the same dollar amount, per page, as the filing fee for moving for a new trial of a civil action or special proceeding, per Government Code section 70617, subdivision (a)(5), presently $60. That is to specify an amount that would be nominal, readily determinable, and automatically indexed to inflation.

RESOLUTION 04-06-2020

WITHDRAWN BY PROPONENT