RESOLUTION 07-01-2020

DIGEST
Paralegals: Confidentiality of Address on File with Department of Motor Vehicles
Amends Vehicle Code section 1808.4 to add paralegals employed by a county to the list of people entitled to request that their home addresses be treated as "confidential" on DMV records.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
This resolution is similar to Resolution 06-07-2009, which was approved in principle.

Reasons:
This resolution amends Vehicle Code section 1808.4 to add paralegals employed by a county to the list of people entitled to request that their home addresses be treated as "confidential" on DMV records. This resolution should be disapproved because, although paralegals who work for the public defender, in law enforcement, or for child protection agencies should be able to assure that their home addresses are confidential, the resolution would allow paralegals employed by a county to demand confidentiality, even if their work did not expose them to undue risks.

California Vehicle Code section 1808 provides that information collected by the Department of Motor Vehicles is generally considered public information and is subject to inspection by the public in accordance with the Public Records Act, Government Code section 6253 et seq. The Vehicle Code contains several exceptions to public disclosure, including: inspectors or investigators employed by a district attorney's office (Veh. Code, § 1808.2); persons being stalked (Veh. Code, § 1808.21, subd. (d)(1)(B)(i)); attorneys employed in the office of a district attorney or public defender (Veh. Code, § 1808.4, subd. (a)(7)); and child abuse investigators and social workers working in child protective services (Veh. Code, § 1808.4, subd. (a)(10)).

This resolution would allow paralegals who work for a county in any capacity to require that the DMV maintain their residential addresses as confidential. In contrast, attorneys are not entitled to have the DMV protect their home addresses unless they work in certain high risk positions, such as in the district attorney's office, the public defender's office, or in child abuse matters.

The resolution should be disapproved because it is overbroad. Paralegals could require that the DMV maintain their residential addresses as confidential even when the attorneys with whom they work do not have similar rights and the work they are performing is unlikely to create risks similar to those attorneys, paralegals, and social workers whose addresses are currently shielded. This overbreadth could be cured either by adding paralegals to subdivisions (a)(7), (a)(8), (a)(10), and (a)(14) of Vehicle Code section 1808.4, rather than to subdivision (a)(21), or by adding a new subdivision creating protections for paralegals who work in criminal justice or positions with similar risks.

This resolution is similar to Assembly Bill 2322 (2017-2018 Reg. Sess.), which clarified that the protection for home addresses applies to active or retired judges and court commissioners and

expanded those protections to the surviving spouse or child of a judge or court commissioner. Assembly Bill 2322, which amended Vehicle Code section 1808.4, was chaptered on September 29, 2018. This resolution is similar to Assembly Bill 980 (2019-2020 Reg. Sess.), which sought to protect residence addresses of adult abuse investigators or social workers working in protective services within a social services department, and the public guardian, public conservator, and public administrator of each county, and their staff. Assembly Bill 980 died in the Appropriations Committee. This resolution is similar to Senate Bill 517 (2019-2020 Reg. Sess.), Senate Bill 362 (2017-2018 Reg. Sess.), and Senate Bill 1390 (2017-2018 Reg. Sess.), all three of which sought to protect residence addresses of code enforcement officers and parking control officers. Senate Bill 517, Senate Bill 362, and Senate Bill 1390 all died in the Appropriations Committee.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Vehicle Code section 1808.4, to read as follows:

§ 1808.4

(a) For all of the following persons, the person's home address that appears in a record of the department is confidential if the person requests the confidentiality of that information:

(1) Attorney General.

(2) State Public Defender.

(3) A Member of the Legislature.

(4) An active or retired judge or court commissioner.

(5) A district attorney.

(6) A public defender.

(7) An attorney employed by the Department of Justice, the office of the State Public Defender, or a county office of the district attorney or public defender.

(8) A city attorney, city prosecutor, or an attorney who submits verification from their public employer that the attorney represents the city in matters that routinely place the attorney in personal contact with persons under investigation for, charged with, or convicted of, committing criminal acts, if that attorney is employed by a city attorney or city prosecutor.

(9) A nonsworn police dispatcher.

(10) A child abuse investigator or social worker, working in child protective services within a social services department.

(11) An active or retired peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code.

(12) An employee of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, or the Prison Industry Authority specified in Sections 20403 and 20405 of the Government Code.

(13) A nonsworn employee of a city police department, a county sheriff's office, the Department of the California Highway Patrol, a federal, state, or local detention facility, or a local juvenile hall, camp, ranch, or home, who submits agency verification that, in the normal course of the employee's employment, the employee controls or supervises inmates or is required to have a

prisoner in the employee's care or custody.

(14) A county counsel assigned to child abuse cases.

(15) An investigator employed by the Department of Justice, a county district attorney, or a county public defender.

(16) A member of a city council.

(17) A member of a board of supervisors.

(18) A federal prosecutor, criminal investigator, or National Park Service Ranger working in this state.

(19) An active or retired city enforcement officer engaged in the enforcement of the Vehicle Code or municipal parking ordinances.

(20) An employee of a trial court.

(21) A psychiatric social worker or paralegal employed by a county.

(22) A police or sheriff department employee designated by the chief of police of the department or the sheriff of the county as being in a sensitive position. A designation pursuant to this paragraph shall, for purposes of this section, remain in effect for three years subject to additional designations that, for purposes of this section, shall remain in effect for additional three-year periods.

(23) A state employee in one of the following classifications:

(A) Licensing-Registration Examiner, Department of Motor Vehicles.

(B) Motor Carrier Specialist I, Department of the California Highway Patrol.

(C) Museum Security Officer and Supervising Museum Security Officer.

(D) Licensing Program Analyst, State Department of Social Services.

(24) (A) The spouse or child of a person listed in paragraphs (1) to (23), inclusive, regardless of the spouse's or child's place of residence.

(B) The surviving spouse or child of a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, if the peace officer died in the line of duty.

(C) The surviving spouse or child of a judge or court commissioner, if the judge or court commissioner died in the performance of their duties.

(D) (i) Subparagraphs (A), (B), and (C) do not apply if the person listed in those subparagraphs was convicted of a crime and is on active parole or probation.

(ii) For requests made on or after January 1, 2011, the person requesting confidentiality for their spouse or child listed in subparagraph (A), (B), or (C) shall declare, at the time of the request for confidentiality, whether the spouse or child has been convicted of a crime and is on active parole or probation.

(iii) Neither the listed person's employer nor the department shall be required to verify, or be responsible for verifying, that a person listed in subparagraph (A), (B), or (C) was convicted of a crime and is on active parole or probation.

(E) (i) The department shall discontinue holding a home address confidential pursuant to this subdivision for a person specified in subparagraph (A), (B), or (C) who is the child or spouse of a person described in paragraph (4), (9), (11), (13), or (22) if the child or spouse is convicted of a felony in this state or is convicted of an offense in another jurisdiction that, if committed in California, would be a felony.

(ii) The department shall comply with this subparagraph upon receiving notice of a disqualifying conviction from the agency that employs or formerly employed the parent or spouse of the convicted person, or as soon as the department otherwise becomes aware of the disqualifying

conviction.

(b) The confidential home address of a person listed in subdivision (a) shall not be disclosed, except to any of the following:

(1) A court.

(2) A law enforcement agency.

(3) The State Board of Equalization.

(4) An attorney in a civil or criminal action that demonstrates to a court the need for the home address, if the disclosure is made pursuant to a subpoena.

(5) A governmental agency to which, under any law, information is required to be furnished from records maintained by the department.

(c) (1) A record of the department containing a confidential home address shall be open to public inspection, as provided in Section 1808, if the address is completely obliterated or otherwise removed from the record.

(2) Following termination of office or employment, a confidential home address shall be withheld from public inspection for three years, unless the termination is the result of conviction of a criminal offense. If the termination or separation is the result of the filing of a criminal complaint, a confidential home address shall be withheld from public inspection during the time in which the terminated individual may file an appeal from termination, while an appeal from termination is ongoing, and until the appeal process is exhausted, after which confidentiality shall be at the discretion of the employing agency if the termination or separation is upheld. Upon reinstatement to an office or employment, the protections of this section are available.

(3) With respect to a retired peace officer, the peace officer's home address shall be withheld from public inspection permanently upon request of confidentiality at the time the information would otherwise be opened. The home address of the surviving spouse or child listed in subparagraph (B) of paragraph (24) of subdivision (a) shall be withheld from public inspection for three years following the death of the peace officer.

(4) The department shall inform a person who requests a confidential home address what agency the individual whose address was requested is employed by or the court at which the judge or court commissioner presides.

(5) With respect to a retired judge or court commissioner, the retired judge or court commissioner's home address shall be withheld from public inspection permanently upon request of confidentiality at the time the information would otherwise be opened. The home address of the surviving spouse or child listed in subparagraph (C) of paragraph (24) of subdivision (a) shall be withheld from public inspection for three years following the death of the judge or court commissioner.

(d) A violation of subdivision (a) by the disclosure of the confidential home address of a peace officer, as specified in paragraph (11) of subdivision (a), a nonsworn employee of the city police department or county sheriff's office, a judge or court commissioner, as specified in paragraph (4) of subdivision (a), or the spouses or children of these persons, including, but not limited to, the surviving spouse or child listed in subparagraph (B) or (C) of paragraph (24) of subdivision (a), that results in bodily injury to the peace officer, employee of the city police department or county sheriff's office, judge or court commissioner, or the spouses or children of these persons is a felony.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The paralegals of public defender agencies as well as in law enforcement and child protection agencies are not currently afforded the same license confidentiality protections even though they conduct many of the same tasks as investigators and social workers, making home visits to clients, alleged victims, and witnesses. They drive into high crime areas to conduct their work and are placed in the same risk category of potential harm, therefore, should be afforded the same protections.

The Solution: Paralegals of public defender, prosecutor, child protection services and other law enforcement agencies should be able to apply to protect the release of their home addresses as they have the exact same safety concerns as other professionals enumerated in this code section.

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

CURRENT OR PRIOR RELATED LEGISLATION
Similar to Senate Bill No. 517 (2019-2020), which is in Senate Appropriations, and Assembly Bill No. 980 (2019-2020), which is in Assembly Appropriations.

AUTHOR AND/OR PERMANENT CONTACT:
Natasha E. Khamashta, nkhamashta@pubdef.lacounty.gov, (562) 715-3410

RESPONSIBLE FLOOR DELEGATE: Natasha E. Khamashta

RESOLUTION 07-02-2020

DIGEST

Law Enforcement: Compensation for Certain Officer-Involved Shooting Deaths
Adds Government Code section 815.2.5 to provide compensation to families of unarmed decedents who died by law enforcement's use of firearms, without proof of wrongdoing.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:
Similar to Resolutions 09-03-2019 and 09-06-2018, which were disapproved.

Reasons:
This resolution adds Government Code section 815.2.5 to provide compensation to families of unarmed decedents who died by law enforcement's use of firearms, without proof of wrongdoing. This resolution should be disapproved because it fails to create the strict liability it seeks; provides no guidance as to how the factual determination for the presumption of liability is made; sets no limits on the amount of compensation or attorney fees; and will not preclude state or federal litigation arising from the same conduct.

Under current law, survivors of a decedent whose death was caused by law enforcement's use of force must sue in state or federal court for wrongful death or violation of civil rights. They must establish that the use of force was negligent under state law or unreasonable under federal law. In the absence of demonstrable wrongdoing or noncompliance with police policies and standards by law enforcement officials, such as in cases of mistaken judgment or well-founded fear, survivors of those who die from the deployment of lethal force by that official are not entitled to compensation.

This resolution claims that strict liability is appropriate because "law enforcement firearm deployment is an ultrahazardous activity and … law enforcement firearm deployment resulting in the death of a nonthreatening, unarmed person is compensable." The resolution would mandate compensation, including attorney fees, in all cases of death due to firearm deployment by law enforcement, regardless of fault, where the decedent was unarmed at the time of the shooting and posed no threat justifying the fatal response. However, this presumption of liability and resulting compensation would not be available if the law enforcement agency has credible evidence demonstrating the decedent posed a threat necessitating the lethal use of a firearm. It is not clear by whom or by what method this determination is made, or how this differs from the standards now used in civil rights lawsuits arising out of officer involved shooting deaths.

For qualified claims, either the local agency or the California Department of General Services is directed to negotiate the amount of compensation with the claimant. If an agreement cannot be reached, the claimant is then authorized to bring a state court action for an undefined "survivor's compensation claim under this section." The resolution lacks standards regarding compensation and sets no limit on the amount a claimant may demand or on the attorney fees that may be claimed. In contrast, the California Victim's Compensation Board caps its benefits at $70,000

and permits compensation only for out-of-pocket expenses incurred on behalf of the victim or claimant that have not been reimbursed by other sources. (See https://victims.ca.gov/.) Unlike a state survivor's claim, the compensation provided for in the resolution does not preclude claims for pain and suffering. (See Code Civ. Proc., § 377.34.) Nor does the resolution require surviving family members to file a joint claim, creating the possibility of multiple demands arising from the same incident. Further, while subdivision (c) states "eligible surviving members shall receive compensation by the agency for their loss[,]" subdivision (j) states compensation "shall be paid upon an appropriation for that purpose by the Legislature." There is no provision for the source of these funds.

While the resolution attempts to provide a fault-free remedy for some cases of fatal firearm use, it does not prevent lawsuits. Under subdivision (h), a claimant can always reject the compensation offered and sue. Even if the offer of compensation is accepted, under subdivision (i), claimants may still litigate entitlement "to reasonable attorney fees for assistance with preparing, advancing, negotiating, litigating, and securing payment of claims." While subdivision (k) purports to preclude the filing of federal claims if compensation is accepted, most likely this would be found invalid under the supremacy clause of the federal Constitution, which prohibits states from applying state law that is inconsistent with federal law. (*Felder v. Casey* (1988) 487 U.S. 131, 140 [Wisconsin claim requirements inapplicable to federal § 1983 actions; see also *Williams v. Horvath* (1976) 16 Cal.3d 836, 842 [same].)

Shooting deaths of unarmed people by law enforcement is a serious matter and worthy of attention. While there may be merit in having some form of public compensation for firearm fatalities without proof of fault to avoid litigation, the resolution does not achieve this goal.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 815.2.5 to read as follows:

§ 815.2.5

(a) The Legislature finds and declares that law enforcement firearm deployment is an ultrahazardous activity and that law enforcement firearm deployment resulting in the death of a nonthreatening, unarmed person is compensable.

(b) This section shall be known, and may be cited as the Unarmed Decedent Agency Liability and Family Compensation Act of 2021.

(c) Whenever a firearm deployment by an officer of a California state, city, county or city and county law enforcement agency, or by an officer of a University of California police department, a California State University police department, a California Community College police department, or a police department of a school district, or other local or regional law enforcement or public safety agency, in the course and scope of employment, results in the death of an unarmed person who did not present a threat necessitating a fatal response from law enforcement, the eligible surviving family members shall receive compensation by the agency for their loss.

(d) For purposes of this section, "eligible surviving family members" shall include a spouse or domestic partner, parents, children, and dependent relatives specified in Code of Civil Procedure Sec. 377.60.

(e) An eligible surviving family member may file a compensation claim against a California law enforcement agency under this section with the Department of General services or local or regional government entity within 6 months of receiving notice from that law enforcement agency of the family member's death as a result of a firearm deployment by the agency.

(f) A compensation claim or lawsuit shall not be filed against any law enforcement agency individual employee under this section.

(g) If the decedent was not armed with a weapon or simulated weapon, and did not present a threat necessitating a fatal response from law enforcement, the claim against the agency shall be approved, unless evidence of the deceased having been unarmed or not having been a threat necessitating a fatal response by law enforcement is contradicted by more credible evidence such as corroborated law officer testimony.

(h) The Department of General services or local or regional government entity shall negotiate a compensation amount for an approved survivor's compensation claim against a law enforcement agency. In state law enforcement agency cases, the Controller shall certify the negotiated compensation amount for the claimant or representative of a minor or dependent adult claimant. If a negotiated compensation amount cannot be reached, or if the claim is disapproved, the claim may proceed to state court as a survivor's compensation claim under this section. Compensation, whether negotiated or provided by a judgment against the agency, may be paid in full or on a multi-year schedule as the claimant or representative may elect.

(i) Eligible surviving family members shall be entitled to reasonable attorney fees for assistance with preparing, advancing, negotiating, litigating, and securing payment of claims.

(j) Compensation for a death resulting from a state law enforcement agency firearm deployment shall be paid upon an appropriation for that purpose by the Legislature.

(k) If elected, compensation under this section shall preclude additional compensation from federal claims for the same fatality.

(l) If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local and regional agencies, and to school districts for those costs shall be made pursuant to part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

The Problem: Law enforcement firearm deaths of nonthreatening unarmed persons are a source of great public concern. Such deaths are compensable under current state and federal law provided negligence, excess force or other wrongful conduct by an individual law enforcement officer can be proven. That is not always the case. Various causes – mistaken judgments, confusion, well-founded fear, panic incidents, unintentional firearm discharges or intentional firearm discharges in compliance with training and regulations – can result in what hindsight

shows are unnecessary fatalities but do not necessarily establish viable claims for survivor compensation under current law. See "Wrongful death suits rarely filed; families seldom win," Las Vegas Review-Journal, November 27, 2011.

There is considerable reluctance within the public to find wrongdoing by law enforcement. Even in cases of egregious law officer misconduct, jurors can have great difficulty finding wrongdoing. In a South Carolina police officer's criminal trial following his 2015 fatal shooting of unarmed motorist Walter Scott, the jury viewed video evidence showing no threat to anyone when the officer on trial repeatedly and fatally shot the fleeing, unarmed Mr. Scott in the back. Video evidence and bystander testimony also showed after the shooting, the officer went to his vehicle, retrieved a taser weapon then placed that taser next to Mr. Scott's prone body. The officer testified Mr. Scott had taken possession of the taser before the fatal shooting. The eyewitness testified Mr. Scott never touched the taser. The jury could not reach a verdict.

The Washington Post last updated "Fatal Force" national statistics on law enforcement fatal shootings on March 10, 2020. Data for 2019 show 135 firearm fatalities by law enforcement in California. Decedents are classified as armed, unarmed, armed with an unknown weapon, and weapon unknown. California 2019 firearm fatalities by law enforcement included eight unarmed persons and nine persons classified as" weapon unknown.

There is no persuasive policy reason to not treat unnecessary deaths as compensable without requiring proof of individual law officer wrongful conduct. In these cases, the proposed statute is preferable to 42 U.S.C. Sec. 1983 because that federal statute requires wrongful conduct by "Any person." The proposed statute expressly prohibits filing claims against individual agency employees. The proposed statute will improve public confidence in law accountability and hopefully reduce public animus when fatalities of unarmed persons do occur because survivors will be entitled to compensation as a matter of law.

The Solution: The solution is to provide reliable recourse to family survivors of a nonthreatening unarmed decedent. The proposed law enforcement agency strict liability statute authorizing compensation without requiring proof of individual officer misconduct meets that need.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Peter Pursley, 1308 ½ Addison Street, Berkeley, CA 94702, voice: (916) 972-1722; email: peterpursley.ph.d@gmail.com

RESPONSIBLE FLOOR DELEGATE: Peter Pursley

COUNTERARGUMENTS AND COMMENTS
BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This Resolution attempts to establish comprehensive new law regarding law enforcement's use of firearms. The language in this Resolution is problematic for multiple reasons, including the following: First, the Resolution seeks to provide compensation (including mandatory attorney fees) "as a matter of law" and without any finding of wrongdoing to a family, i.e., "eligible surviving members", of someone who is shot and killed by law enforcement. That is problematic because there should be a finding of wrongdoing before anyone is compensated. Second, the Resolution is unnecessary because state and federal civil rights law provide recourse for families of deceased victims of police misconduct. Third, language throughout this Resolution is ambiguous. Fourth, the following language at the beginning of this Resolution is an unsupported legislative finding that could easily cascade into other laws and be misused: "law enforcement firearm deployment is an ultrahazardous activity and that law enforcement firearm deployment resulting in the death of a nonthreatening, unarmed person is compensable. Fifth, the Resolution is trying to resolve a difficult problem the wrong way. One underpinning of the Resolution is mistrust of jurors to get it right. For example, the author states: "Even in cases of egregious law officer misconduct, jurors can have great difficulty finding wrongdoing." While we may not always agree with jurors' decisions, our jury system is a foundational part of our justice system that should not be legislated away. If we legislate away our jury system with this law, what other laws should we distrust a jury to get it right?

RESOLUTION 07-03-2020

DIGEST
Public Employee Liability: Limitations on Immunity
Amends Government Code section 821.6 to limit immunity for public employees for damages caused by a proceeding in their scope of employment to claims of malicious prosecution.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 821.6 to limit immunity for public employees for damages caused by a proceeding in their scope of employment to claims of malicious prosecution. This resolution should be disapproved because public employees should have broad immunity in the performance of their prosecutorial duties from the threat of harassment through civil suits, rather than only in the narrow case of an action for malicious prosecution.

Current law provides that public employees are not liable for injury caused when they institute or prosecute any judicial or administrative proceeding within the scope of their employment, even if they act maliciously and without probable cause. (Gov. Code, § 821.6.) The law does not define the scope of "administrative proceeding." The California Supreme Court has held that immunity under section 821.6 does not apply to actions for false imprisonment, as the action was not caused by instituting or prosecuting a proceeding since the action occurred after any proceeding had been adjudicated. (*Sullivan v. Cty. of Los Angeles* (1974) 12 Cal.3d 710, 719-720.) The Court suggested in dicta that the Legislature intended to limit such immunity to causes of action for malicious prosecution. (*Id*.)

Since *Sullivan* was decided, however, many California courts have interpreted Government Code section 821.6 to apply to torts other than malicious prosecution, and have held that this section applies in a variety of administrative proceedings where the acts were undertaken in the course of an investigation. (See *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491 [extending immunity to liability for publication of disciplinary action]; *Jenkins v. Cty. of Orange* (1989) 212 Cal.App.3d 278, 283 [interpreting *Sullivan* as narrowly holding that section 821.6 does not apply to false imprisonment claims]; *Jenkins v. Cty. of Orange* (1989) 212 Cal.App.3d at 283 [extending immunity to liability for a failure to use due care in investigating child abuse reports]; *Cappuccio, Inc. v. Harmon* (1989) 208 Cal.App.3d 1496, 1502 [extending immunity to liability for libel and slander]; *Amylou R. v. Cty. of Riverside* (1994) 28 Cal.App.4th 1205 [extending immunity to liability for tortious acts of officers during an investigation]; *Baughman v. State of California* (1995) 38 Cal.App.4th 182 [extending immunity to liability for conversion of property]; *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744 [extending immunity to liability for false arrest and related causes of action]; and *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168 [extending immunity to liability for failure to report child abuse allegations after conducting an investigation].) These cases further the public policy announced in *White v. Towers* (1951) 37 Cal.2d 727, 729, a case decided before section 821.6 was enacted, which held that immunity

should protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits.

This resolution would explicitly limit the immunity provided by Government Code section 821.6 to apply only to claims of malicious prosecution, effectively codifying the *Sullivan* court's interpretation of the Legislature's intent in enacting section 821.6. This resolution would effectively overturn the post-*Sullivan* precedents, thereby increasing the threat of litigation and liability for local and state officials who investigate and prosecute violations of California and local laws.

This resolution should be disapproved because public employees should have broad immunity in the performance of their prosecutorial duties. Many laws and regulations are administered and enforced at the local level. County, city, and other agency employees perform vital duties like child welfare investigations and dependency proceedings, code enforcement proceedings, disciplinary hearings, and other administrative hearings. It is imperative that these employees can perform their duties and make decisions without worrying about exposure to potential litigation. As stated in *White v. Towers*, "it is for the best interests of the community as a whole that [any public officer] be protected from harassment in the performance of that duty." (*White v. Towers* (1951) 37 Cal.2d 727, 729.) This resolution will increase the threat of litigation and have a chilling effect on investigation and enforcement efforts by public employees.

Moreover, this resolution is also inconsistent with the purpose of the California Tort Claims Act, which provides that governmental tort liability must be based on statute rather than the absence thereof (Gov. Code, §§ 810-996.6.). "Except as otherwise provided by statute: [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).)

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 821.6, to read as follows:

§ 821.6

A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause. <u>This section shall be limited to claims of malicious prosecution.</u>

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Disagreement in the courts exists on the scope of immunity under Government Code section 821.6. On one end, the California Supreme Court in *Sullivan v. Cty. Of Los Angeles*, 12 Cal.3d 710, 717 (Cal. 1974), states the immunity is limited to malicious prosecution and was followed by *Garmon v. Cty. Of Los Angeles*, 828 F.3d 837, 847 (9th Cir. 2016) and *Brewster v. Cty. Of Shasta*, 112 F.Supp.2d 1185, 1188 n.5 (E.D. Cal. 2000), *aff'd*, 275 F.3d 303 (9th Cir. 2001). On the other end, various California appellate court decisions have applied that immunity beyond malicious prosecution. *See Kayfetz v. California*, 156 Cal.App.3d 491 (1984), *Amylou R. v. Cty. Of Riverside*, 28 Cal. App. 4th 1205 (1994), *Baughman v. California*, 38 Cal. App. 4th 182 (1995), and *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007).

Based on the text, the limitation to malicious prosecution makes sense. First, it talks about injury caused by the employees instituting or prosecuting a proceeding, not other acts. Second, it speaks directly to the three elements of malicious prosecution: (1) initiating or procuring the arrest and prosecution of another under lawful process, (2) from malicious motives, and (3) without probable cause.

Intratextually, a contrast with Government Code section 820.4 provides further bases. Section 820.4 provides immunity to **any** "**act or omission**…in the execution or enforcement…" By contrast, section 821.6 only applies to the instituting or prosecuting a proceeding, not "any act or omission" in the institution or prosecution of a proceeding.

Furthermore, the legislative history confirms this interpretation. The Senate committee, when enacting section 821.6, stated, "California courts have repeatedly held public entities and employees immune for this sort of conduct" and cited *Dawson v. Martin*, 309 P.2d 915 (1957), *White v. Towers*, 235 P.2d 209 (1951), *Coverstone v. Davies*, 239 P.2d 876 (1952), and *Hardy v. Vial*, 311 P.2d 494 (1957), all of which concerned malicious prosecution. It adds, "This section continues the existing immunity of public employees; and, because no statute imposes liability on public entities for malicious prosecution, public entities likewise are immune from liability. Cal. Govt. Code § 821.6 senate committee cmt. (Deering 1983 & Supp. 2008).

The Solution: This resolution makes clear that the immunity for government officials under section 821.6 is limited to malicious prosecution.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS
BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Limiting section 821.6 immunity is inconsistent with the purpose of the California Government Claims Act. The modification this Resolution proposes unnecessarily increases the threat of litigation and liability for local officials who investigate and prosecute violations of California and local laws.

Many laws and regulations are administered and enforced at the local level, not just in the criminal courts but also in the civil courts and before administrative tribunals. County, city, and other agency employees perform vital duties like child welfare investigations and dependency proceedings, code enforcement proceedings, disciplinary hearings, and other administrative hearings. In these and other local matters, the stakes can be very high. By eliminating section 821.6 immunity that currently encompasses these vital investigative and adjudicative functions, it will increase the threat of litigation and have a chilling effect on investigation and enforcement efforts by public employees. Public welfare and public safety will suffer. Moreover, the asserted need for this Resolution arises from a disagreement between a 1974 Supreme Court case versus several more recent California Court of Appeal cases. However, two more recent California Supreme Court decisions construe section 821.6 consistent with the broad application of this immunity: *Asgari v. City of Los Angeles*, 15 Cal.4th 744 (1997) and *B.H. v. County of San Bernardino,* 62 Cal. 4th 168 (2015) that the federal courts did not address. The purported justification for this Resolution is misplaced.

RESOLUTION 07-04-2020

DIGEST
Bane Act: Updating Section References
Amends Civil Code section 52.1 (Tom Bane Civil Rights Act) and Penal Code Section 422.77 to properly reflect the new subdivisions created under Assembly Bill No. 3250 (2017-2018 Reg. Sess.).

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 52.1 (Tom Bane Civil Rights Act) and Penal Code section 422.77 to properly reflect the new subdivisions created under Assembly Bill No. 3250 (2017-2018 Reg. Sess.). This resolution should be approved in principle because the Civil Code section currently referred to in the Civil Code and Penal Code are incorrect.

In 2018, the Legislature enacted Assembly Bill No. 3250 (2017-2018 Reg. Sess.) which inserted a new subdivision (a) into Civil Code section 52.1. However, as drafted and enacted, Assembly Bill No 3250 (2017-2018 Reg. Sess.) did not also change the various internal references to the related subdivisions of section 52.1 that were reordered. As such, the statute's internal references currently refer to the wrong subdivisions. This same issue appears in Penal Code section 422.77. This was likely an oversight on the drafters' part. The proposed language corrects this error.

Therefore, this resolution should be approved in principle.

This resolution is related to Resolutions 07-05-2020, 07-06-2020, and 07-07-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 52.1 and Penal Code section 422.77, to read as follows:

§ 52.1

(a) This section shall be known, and may be cited, as the Tom Bane Civil Rights Act.

(b) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil

penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(c) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (~~a~~b), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (~~a~~b).

(d) An action brought pursuant to subdivision (~~a~~b) or (~~b~~c) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (~~a~~b) also may be filed in the superior court for any county wherein the Attorney General has an office, and in that case, the jurisdiction of the court shall extend throughout the state.

(e) If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (~~a~~b) or (~~b~~c), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

(f) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or the clerk of the court to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section.

(g) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure.

(h) An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.

(i) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (~~b~~c), the court may award the petitioner or plaintiff reasonable attorney's fees.

(j) A violation of an order described in subdivision (~~d~~e) may be punished either by prosecution under Section 422.77 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure.

However, in any proceeding pursuant to the Code of Civil Procedure, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine.

(k) Speech alone is not sufficient to support an action brought pursuant to subdivision (~~a~~b) or (~~b~~c), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

(l) No order issued in any proceeding brought pursuant to subdivision (~~a~~b) or (~~b~~c) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined.

(m) The rights, penalties, remedies, forums, and procedures of this section shall not be waived by contract except as provided in Section 51.7.

§ 422.77

(a) Any willful and knowing violation of any order issued pursuant to subdivision (~~a~~b) or (~~b~~c) of Section 52.1 of the Civil Code shall be a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than six months, or by both the fine and imprisonment.

(b) A person who has previously been convicted one or more times of violating an order issued pursuant to subdivision (~~a~~b) or (~~b~~c) of Section 52.1 of the Civil Code upon charges separately brought and tried shall be imprisoned in the county jail for not more than one year. Subject to the discretion of the court, the prosecution shall have the opportunity to present witnesses and relevant evidence at the time of the sentencing of a defendant pursuant to this subdivision.

(c) The prosecuting agency of each county shall have the primary responsibility for the enforcement of orders issued pursuant to Section 52.1 of the Civil Code.

(d) The court may order a defendant who is convicted of a hate crime to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: In 2018, amendments to the Bane Act (AB 3250) created a new subdivision (a) in Civil Code section 52.1 and adjusted all other subdivisions to their next letter. However, the internal references to the various subdivisions within section 52.1 and Penal Code section 422.77 were not corrected to reflect the new subdivision letters.

The Solution: By correcting the references to the Bane Act subdivisions, this resolution cleans up a problem left by the 2018 amendments to the Bane Act

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 07-05-2020

DIGEST
Civil Rights: Requiring Award of Costs and Expert Witness Fees to Prevailing Plaintiff
Amends Civil Code section 52.1 to require the award of costs, including expert expenses, to a prevailing plaintiff or petitioner in a Tom Bane Civil Rights Act case.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 52.1 to require the award of costs, including expert expenses, to a prevailing plaintiff or petitioner in a Tom Bane Civil Rights Act case. This resolution should be disapproved because costs are already available to a prevailing party as a matter of right under Code of Civil Procedure section 1032, subdivision (b) and expert witness fees are allowed as costs pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(8).

The Tom Bane Civil Rights Act provides that in addition to damages, injunctive, or equitable relief awarded to the petitioner or plaintiff, the court may award the petitioner or plaintiff reasonable attorney fees. (Civ. Code, § 52.1, subd. (j).)

Under current law, Code of Civil Procedure section 1032, subdivision (b) requires the award of costs to a prevailing party. Code of Civil Procedure section 1033.5, subdivision (a)(8) already includes "fees of expert witnesses as awarded by the court" as an item of allowable costs. Code of Civil Procedure section 1033.5, subdivision (a)(10)(B) also provides that attorney's fees when authorized by statute are an item of allowable costs. The existing provision at Civil Code section 52.1, subdivision (i) for "reasonable attorney fees" appears to be intended to provide the statutory basis for the award of attorney fees as costs under Code of Civil Procedure section 1033.5, subdivision (a)(10)(B).

The procedure for claiming prejudgment costs, including attorney fees and expert witness fees, among other things, is found in the memorandum of costs and motion process of California Rules of Court, rules 3.1700 (as to costs other than attorney fees), and 3.1702 (as to attorney fees).

The resolution amends subdivision (i) by substituting "shall" for "may," and by adding "costs, including expert expenses" to the existing provision for attorney fees.

The resolution's substitution of the word "shall" for "may" in Civil Code section 52.1, subdivision (i) would invite confusion as to the nature and extent of the court's discretion with respect to which costs were necessary and which expert fees should be allowed. Code of Civil Procedure section 1033.5, subdivision (b)(1) currently prohibits the award of expert feess not ordered by the court, leaving it to the court's discretion to decide which experts are necessary. This resolution would take away the court's discretion.

In addition, the resolution does not clarify the applicable definition of "costs" and "expert expenses", giving rise to questions as to whether the Code of Civil Procedure and Rules of Court procedures would govern, or some other procedures or formulae would be required. It could also result in a potential of over designation and overuse of expert witnesses, and confusion as to whether the cost shifting provisions of Code of Civil Procedure section 998 would apply in these cases.

Therefore, this resolution should be disapproved.

This resolution is related to Resolutions 07-04-2020, 07-06-2020, and 07-07-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 52.1, to read as follows:

§ 52.1

(a) This section shall be known, and may be cited, as the Tom Bane Civil Rights Act.

(b) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(c) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a).

(d) An action brought pursuant to subdivision (a) or (b) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (a) also may be filed in the superior court for any county wherein the Attorney General has an office, and in that case, the jurisdiction of the court shall extend throughout the state.

(e) If a court issues a temporary restraining order or a preliminary or permanent

injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

(f) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or the clerk of the court to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section.

(g) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure.

(h) An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.

(i) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court ~~may~~ shall award the petitioner or plaintiff reasonable attorney's fees and costs, including expert expenses.

(j) A violation of an order described in subdivision (d) may be punished either by prosecution under Section 422.77 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure. However, in any proceeding pursuant to the Code of Civil Procedure, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine.

(k) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

(l) No order issued in any proceeding brought pursuant to subdivision (a) or (b) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined.

(m) The rights, penalties, remedies, forums, and procedures of this section shall not be waived by contract except as provided in Section 51.7.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Unlike the Federal civil rights law, 42 U.S.C. §§ 1983, 1988, the Bane Act does not require awarding reasonable attorney fees and costs to the prevailing plaintiff. The purpose of such a requirement is to encourage attorneys to be willing to take cases against the government, and plaintiffs to bring actions, all to ensure the government is held accountable for violations of our rights and liberties. The Bane Act, however, only gives judges discretion to award attorney fees and says nothing about costs, including expert expenses. Expert witnesses are often the highest single-item cost in litigation, and failure to cover them puts plaintiffs, who have limited means, at a considerable disadvantage against a government official whose defense is funded by taxpayers. Under 42 U.S.C. § 1983, that disadvantage is lessened because a prevailing plaintiff can recover those costs, but not under the Bane Act.

The Solution: By requiring attorney fees to be awarded to a prevailing plaintiff along with litigation costs, including expert fees, the field is more level between the private plaintiff and government defendant.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS
BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

The proposed substitution of the word "shall" for "may" in Civil Code section 52.1, subdivision (i) could result in confusion as to the nature and extent of the court's discretion with respect to the amount of attorney's fees, which costs were necessary and the amount thereof, and which expert fees should be allowed and the amount thereof. This resolution unnecessarily seeks to remove judicial discretion from the award of attorneys' fees and expert costs. While the proponent purports this is simply making this provision consistent with Federal Civil Rights litigation, that is inaccurate. Attorneys' fees awards are often the sole driver of lawsuits or what makes some case difficult or impossible to resolve. Federal Courts awarding fees pursuant to 42 U.S.C. section 1988 have an entire body of case law that guides what is reasonable, who is the prevailing party, and other considerations. Courts can deny fees for technical or nominal

victories. The award of expert fees is largely discretionary.

Here, the statute as currently written provides an adequate level of consideration, preserves judicial discretion, and plaintiffs have other tools in state court to obtain reasonable expert costs – such as a well-timed or considered Code of Civil Procedure section 998 offer to compromise. This revision is simply unnecessary and will be counter-productive to its stated goals – driving more litigation to trial for the sake of fees alone. These matters should be subject to the exercise of the court's discretion in each individual case.

RESOLUTION 07-06-2020

DIGEST
Civil Rights: Confirmation of Availability of Treble Damages in Tom Bane Act Suits
Amends Civil Code section 52.1 to provide that treble damages may be awarded to prevailing plaintiffs and petitioners in Tom Bane Civil Rights Act cases.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Civil Code section 52.1 to provide that treble damages may be awarded to prevailing plaintiffs and petitioners in Tom Bane Civil Rights Act cases. This resolution should be disapproved because Civil Code section 52 already provides for such damages.

Currently, the Tom Bane Civil Rights Act (Civ. Code, § 52.1) ("Bane Act") includes, at subdivision (c), a provision for the award of damages pursuant to Civil Code section 52. Civil Code section 52 itself does not specifically provide for the imposition of the damages it articulates in Bane Act cases. Civil Code section 52, subdivision (a) specifically applies the treble damages potential to Civil Code sections 51, 51.5, and 51.6.

Rather than placing a reference to the Bane Act in Civil Code section 52, subdivision (a) after the reference to Civil Code section 51.6, the resolution adds a potential for up to treble damages to the Tom Bane Act itself.

The resolution should be disapproved because although it would clarify that treble damages are available to a prevailing plaintiff or petitioner in such cases, the addition of such language to Civil Code section 52.1 would be redundant since such damages are already included in section 52. Section 52 provides that in addition to actual damages, "any amount that may be determined by a jury, or a court sitting up to a maximum of three times the amount of actual damage . . . may be determined by the court in addition thereto . . ." (Civ. Code § 52, subd. (a)), and lists sections 51, 51.5, and 51.6 as being within its ambit. If the goal is to confirm that additional damages in Bane Act cases are available up to a maximum of three times actual damages, as provided in Civil Code section 52, such could be achieved by adding section 52.1 to the list in section 52, subdivision (a), which sets out the sections to which section 52 applies.

For example, Senate Bill No. 873 (2019-2020 Reg. Sess.) § 3 would add a new Civil Code section 51.6.5 to the list in Civil Code section 52. This should resolve concerns about the reticence of the federal district court to award such treble damages based on the fact that section 52.1 is not listed in section 52, subdivision (a). It would also prevent potential confusion and unintended consequences from adding a redundant remedy, without resolving the current omission of Civil Code section 52.1, from the list in Civil Code section 52, subdivision (a).

Therefore, this resolution should be disapproved.

This resolution is related to Resolutions 07-04-2020, 07-05-2020, and 07-06-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code 52.1, to read as follows:

§ 52.1

(a) This section shall be known, and may be cited, as the Tom Bane Civil Rights Act.

(b) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(c) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52 <u>including up to three times actual damages</u>, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a).

(d) An action brought pursuant to subdivision (a) or (b) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (a) also may be filed in the superior court for any county wherein the Attorney General has an office, and in that case, the jurisdiction of the court shall extend throughout the state.

(e) If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

(f) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or the clerk of the court to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency

having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section.

(g) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure.

(h) An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.

(i) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees.

(j) A violation of an order described in subdivision (d) may be punished either by prosecution under Section 422.77 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure. However, in any proceeding pursuant to the Code of Civil Procedure, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine.

(k) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

(l) No order issued in any proceeding brought pursuant to subdivision (a) or (b) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined.

(m) The rights, penalties, remedies, forums, and procedures of this section shall not be waived by contract except as provided in Section 51.7.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: In 1991, the Bane Act was amended (SB 98) to enable recovery of damages under Civil Code section 52, which allows for damages "up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000)" in subdivision (a).

However, specific statutes are referenced, and 52.1 is not one of them, which has led Federal district courts to not permit such damages in a Bane Act claim.

The Solution: By clarifying that the damages under Civil Code section 52 referenced by section 52.1, subdivision (c), include up to three times actual damage, this resolution ends the confusion regarding how much in damages is permitted.

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

CURRENT OR PRIOR RELATED LEGISLATION
SB 98 (1991), enacted.

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This Resolution is essentially seeking to add treble damages, a form of punitive damages that would not otherwise be available in a civil rights case absent intentional malice. This is bad policy and inconsistent with the well-developed law in civil rights cases. In *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004), Justice Baxter highlighted the problems with the statute as currently worded, noting that the Legislature "might have inadvertently transformed section 52.1 from its originally intended purpose as a weapon…to combat the rising incidence of hate crimes, to a generally applicable catchall provision that will encourage claimants to seek section 52.1's sweeping remedies…in commonplace tort actions to which those special statutory remedies were never intended to apply." (*Venegas*, 32 Cal.4th at pp. 844-45.) He further noted that "it should not prove difficult to frame many, if not most, asserted violations [of federal and state rights]…as incorporating a threatening, coercive, or intimidating verbal or written component." (*Id*. at pp. 850-51.) There is simply no need to assist in widening what is already an overbroad statute and add treble damages in what could be nothing more than "commonplace tort actions to which those special statutory remedies were never intended to apply".

RESOLUTION 07-07-2020

WITHDRAWN BY PROPONENT

RESOLUTION 07-08-2020

WITHDRAWN BY PROPONENT

RESOLUTION 07-09-2020

WITHDRAWN BY PROPONENT

RESOLUTION 07-10-2020

DIGEST
Tort Claims: Time to File Lawsuit After Government Claim Denied
Amends Government Code section 945.6 to add an alternate deadline of one year and 45 days from the date of accrual for filing a lawsuit after denial of a government claim.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution would amend Government Code section 945.6 to add an alternate deadline of one year and 45 days from the date of accrual for filing a lawsuit after denial of a government claim. This resolution should be disapproved because it seeks to solve a problem that does not exist.

Under current law, a person who seeks compensation from a public entity must file a claim within six months of accrual of the cause of action. (Gov. Code, § 911.2, subd. (a).) The public entity has forty-five days to respond. (Gov. Code, § 912.4, subd. (a).) If the claim is denied in writing, the claimant then has six months in which to file suit. (Gov. Code, § 945.6, subd. (a)(1).) This resolution would add an alternative deadline of one year and forty-five days from the accrual of the action in cases where that date is later than the six-month filing deadline.

The resolution suggests that under the current law, a claimant who diligently files a government claim upon the accrual of their cause of action is punished by having, at most, six months and forty-five days from the date the claim is filed to initiate litigation, while the claimant who delays and files the claim at the six-month deadline is rewarded by having an additional six months within which to prepare their complaint.

The Government Claims Act is intended to give public entities prompt notice of a claim so the strengths and weaknesses of the claim may be investigated while the evidence is fresh, and witnesses are available. This furthers the goal of providing an opportunity for amicable settlement, thereby avoiding the expenditure of public funds in needless litigation. (*Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 465-466.)

No good reason exists to create two inconsistent periods in which to file suit after the claim is denied: the existing six months, or one year and 45 days from when the cause accrued, whichever is later. Since a claim only arises and can be presented after it accrues, the resolution would effectively make superfluous the six-month period to file suit and convert it in all cases to a period of one year and 45 days from accrual. In some cases, this would mean the government entity is in a worse situation than a nonpublic entity where the statute of limitations may be one-year from accrual, such as in cases stemming from medical neglect.

Providing one year and 45 days to all claimants will discourage quicker claim-filing. It will create more confusion in the determination of the statutory deadlines and increase the chance of error for all parties.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 945.6, to read as follows:

§ 945.6

(a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) If written notice is given in accordance with Section 913, not later than six months after the date such notice is personally delivered or deposited in the mail, or a year and forty-five (45) days from the accrual of the cause of action, whichever occurs later.

(2) If written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division.

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

PROPONENT: San Diego County Bar Associations

STATEMENT OF REASONS

The Problem: Currently, a person whose rights were violated by a state or local actor has six months to file a Government Claims Form to preserve remedies under state law. Within 45 days after that, the Government Claims Board is supposed to inform the person whether the claim is accepted or rejected. If rejected, the person has six months from the date of the letter to sue the state entity or employee(s).

This can provide a perverse incentive to delay filing a Government Claims Form. If filed one day after the violation, the Board has until day 46 to respond, and then the plaintiff has until day 228 to sue. However, if the plaintiff waited six months, or until day 182 to file the Form, the Board has until day 228 to respond, then the plaintiff has until day 410 to sue. The difference in the time to prepare for a lawsuit can be significant.

Plaintiffs who file their Government Claims Form earlier should not be penalized by having less time before filing a lawsuit. If anything, filing the Form early should be encouraged, and the current system discourages it.

The Solution: This solution allows plaintiffs to initiate a civil suit against a state or local entity or employee as late as if, under the status quo, they filed their claim form on the last allowable day, and the Board rejected their claim on the last allowable day. This takes away a disincentive to filing the claim form earlier. The reason we still need the "not later than six months after the date such notice is personally delivered or deposited in the mail" part of subdivision (a)(1) is the allowance for late claims under various circumstances, in which six months after rejection would go beyond one year and 45 days.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This Resolution is a hammer in search of a nail. There is no problem or undue confusion with the existing Government Claims Act timing requirements. The purpose of the abbreviated timelines for filing a claim include that it gives the public entity prompt notice of a claim so it can investigate the strengths and weaknesses of the claim while the evidence is still fresh and the witnesses are available. As well, timely claims afford an opportunity for amicable adjustment, thereby avoiding the expenditure of public funds in needless litigation and inform the public entity of potential liability so it can better prepare for the upcoming fiscal year. Adding time to file suit after the denial of a timely claim furthers none of these goals and does nothing more than invite confusion and error for plaintiffs and public entities alike.

RESOLUTION 07-11-2020

DIGEST
Prisoners: Finding of Rules Violation Does Not Preclude Civil Action in All Cases
Amends Penal Code section 2932 to allow a civil action despite a finding reached without a conviction, plea agreement, or negotiated settlement that the inmate violated prison rules.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 16-02-2019, which was approved in principle.

Reasons:
This resolution amends Penal Code section 2932 to allow a civil action despite a finding reached without a conviction, plea agreement, or negotiated settlement that the inmate violated prison rules. This resolution should be disapproved because it does not produce the intended result of preventing summary proceedings used to find that an inmate violated prison rules from barring the inmate's civil claims.

Once a person begins serving a sentence, they are governed by a distinct and exclusive scheme for earning credits to shorten the period of incarceration. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31.) The denial or revocation of good time credits is based on maintaining institutional safety and meeting correctional goals. These decisions are made in "the unique environment in which prison officials must accomplish 'the basic and unavoidable task of providing reasonable personal safety for guards and inmates.'" (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1498, fn. 5.) Courts have recognized that due process standards are met in connection with rule violations if there is "some evidence from which the conclusion of the administrative tribunal could be deduced." (*Superintendent v. Hill* (1985) 472 U.S. 445, 455- 456.) On review, a court will apply an "extraordinarily deferential standard of review" by which disciplinary action will not be disturbed so long as "some evidence" supports the action taken. (*Zepeda*, *supra,* 141 Cal.App.4th at p. 1498.) In addition to revoking good time credits, a finding that an inmate has violated prison rules will prevent that inmate from filing a civil action under 42 U.S.C. § 1983 if a judgment in favor of the inmate would "necessarily imply" the invalidity of the revocation of good time credits. (*Edwards v. Balisok* (1997) 520 U.S. 641, 648; *see Smith v. Reyes* (S.D. Cal. 2012) 904 F.Supp.2d 1070, 1074 [applying *Edwards v. Balisok* to loss of good time credits by a California State Prison inmate].) *Balisok* does not apply to civil rights causes of action brought under state law.

This resolution would amend Penal Code section 2932 to provide that an inmate may pursue civil claims only if the inmate's loss of good time credits occurred without a conviction, plea agreement, or negotiated settlement. In this regard, the resolution provides that its purpose is to abrogate *Balisok.* The resolution would also provide that a defendant in a federal civil lawsuit could not assert an affirmative defense based on *Heck v. Humphrey* (1994) 512 U. S. 477 (a case relied upon by the *Balisok* court) against an inmate who lost good time credits without a conviction, plea agreement, or negotiated settlement.

This resolution should be disapproved because it will not have the intended effect. The California Legislature does not have the power to abrogate the effect of a United States Supreme Court opinion regarding the application of federal law. As a result, the resolution cannot abrogate *Balisok*, or otherwise impact that decision's holding regarding the preclusive effect of rule violation findings on section 1983 actions in either state or federal court. Nor does the California Legislature have the ability to limit the affirmative defenses that can be raised in a federal civil lawsuit.

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 2932, to read as follows:

§ 2932

(a)(1) For any time credit accumulated pursuant to Section 2931 or 2933, not more than 360 days of credit may be denied or lost for a single act of murder, attempted murder, solicitation of murder, manslaughter, rape, sodomy, or oral copulation accomplished against the victim's will, attempted rape, attempted sodomy, or attempted oral copulation accomplished against the victim's will, assault or battery causing serious bodily injury, assault with a deadly weapon or caustic substance, taking of a hostage, escape with force or violence, or possession or manufacture of a deadly weapon or explosive device, whether or not prosecution is undertaken for purposes of this paragraph. Solicitation of murder shall be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.

(2) Not more than 180 days of credit may be denied or lost for a single act of misconduct, except as specified in paragraph (1), which could be prosecuted as a felony whether or not prosecution is undertaken.

(3) Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a misdemeanor, whether or not prosecution is undertaken.

(4) Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections and Rehabilitation. Any person confined due to a change in custodial classification following the commission of any serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for the act of misconduct or 180 days, whichever is less. Any person confined in a secure housing unit for having committed any misconduct specified in paragraph (1) in which great bodily injury is inflicted upon a nonprisoner shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for that act of misconduct. In unusual cases, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Secretary of the Department of Corrections and Rehabilitation finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-month periods,

the denial of the opportunity to participate in a credit qualifying assignment may be renewed upon a hearing and finding by the director.

(5) The prisoner may appeal the decision through the department's review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(b) For any credit accumulated pursuant to Section 2931, not more than 30 days of participation credit may be denied or lost for a single failure or refusal to participate. Any act of misconduct described by the Department of Corrections and Rehabilitation as a serious disciplinary infraction if committed while participating in work, educational, vocational, therapeutic, or other prison activity shall be deemed a failure to participate.

(c) Any procedure not provided for by this section, but necessary to carry out the purposes of this section, shall be those procedures provided for by the Department of Corrections and Rehabilitation for serious disciplinary infractions if those procedures are not in conflict with this section.

(1)(A) The Department of Corrections and Rehabilitation shall, using reasonable diligence to investigate, provide written notice to the prisoner. The written notice shall be given within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, except that if the prisoner has escaped, the notice shall be given within 15 days of the prisoner's return to the custody of the secretary. The written notice shall include the specific charge, the date, the time, the place that the alleged misbehavior took place, the evidence relied upon, a written explanation of the procedures that will be employed at the proceedings and the prisoner's rights at the hearing. The hearing shall be conducted by an individual who shall be independent of the case and shall take place within 30 days of the written notice.

(B) The Department of Corrections and Rehabilitation may delay written notice beyond 15 days when all of the following factors are true:

(i) An act of misconduct is involved which could be prosecuted as murder, attempted murder, or assault on a prison employee, whether or not prosecution is undertaken.

(ii) Further investigation is being undertaken for the purpose of identifying other prisoners involved in the misconduct.

(iii) Within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, the investigating officer makes a written request to delay notifying that prisoner and states the reasons for the delay.

(iv) The warden of the institution approves of the delay in writing.

The period of delay under this paragraph shall not exceed 30 days. The prisoner's hearing shall take place within 30 days of the written notice.

(2) The prisoner may elect to be assigned an employee to assist in the investigation, preparation, or presentation of a defense at the disciplinary hearing if it is determined by the department that either of the following circumstances exist:

(A) The prisoner is illiterate.

(B) The complexity of the issues or the prisoner's confinement status makes it unlikely that the prisoner can collect and present the evidence necessary for an adequate comprehension of the case.

(3) The prisoner may request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reasons to deny this request. The specific reasons shall be set forth in writing and a copy of the document shall be presented to the prisoner.

(4) The prisoner has the right, under the direction of the person conducting the hearing, to question all witnesses.

(5) At the conclusion of the hearing the charge shall be dismissed if the facts do not support the charge, or the prisoner may be found guilty on the basis of a preponderance of the evidence.

(d) If found guilty the prisoner shall be advised in writing of the guilty finding and the specific evidence relied upon to reach this conclusion and the amount of time-credit loss. The prisoner may appeal the decision through the department's review procedure, and may, upon final notification of appeal denial, within 15 days of the notification demand review of the department's denial of credit to the Board of Parole Hearings, and the board may affirm, reverse, or modify the department's decision or grant a hearing before the board at which hearing the prisoner shall have the rights specified in Section 3041.5.

(e) Each prisoner subject to Section 2931 shall be notified of the total amount of good behavior and participation credit which may be credited pursuant to Section 2931, and his or her anticipated time-credit release date. The prisoner shall be notified of any change in the anticipated release date due to denial or loss of credits, award of worktime credit, under Section 2933, or the restoration of any credits previously forfeited.

(f)(1) If the conduct the prisoner is charged with also constitutes a crime, the department may refer the case to criminal authorities for possible prosecution. The department shall notify the prisoner, who may request postponement of the disciplinary proceedings pending the referral.

(2) The prisoner may revoke his or her request for postponement of the disciplinary proceedings up until the filing of the accusatory pleading. In the event of the revocation of the request for postponement of the proceeding, the department shall hold the hearing within 30 days of the revocation.

(3) Notwithstanding the notification requirements in this paragraph and subparagraphs (A) and (B) of paragraph (1) of subdivision (c), in the event the case is referred to criminal authorities for prosecution and the authority requests that the prisoner not be notified so as to protect the confidentiality of its investigation, no notice to the prisoner shall be required until an accusatory pleading is filed with the court, or the authority notifies the warden, in writing, that it will not prosecute or it authorizes the notification of the prisoner. The notice exceptions provided for in this paragraph shall only apply if the criminal authority requests of the warden, in writing, and within the 15 days provided in subparagraph (A) of paragraph (1) of subdivision (c), that the prisoner not be notified. Any period of delay of notice to the prisoner shall not exceed 30 days beyond the 15 days referred to in subdivision (c). In the event that no prosecution is undertaken, the procedures in subdivision (c) shall apply, and the time periods set forth in that subdivision shall commence to run from the date the warden is notified in writing of the decision not to prosecute. In the event the authority either cancels its requests that the prisoner not be notified before it makes a decision on prosecution or files an accusatory pleading, the provisions of this paragraph shall apply as if no request had been received, beginning from the date of the cancellation or filing.

(4) In the case where the prisoner is prosecuted by the district attorney, the Department of Corrections and Rehabilitation shall not deny time credit where the prisoner is found not guilty and may deny credit if the prisoner is found guilty, in which case the procedures in subdivision (c) shall not apply.

(g) If time credit denial proceedings or criminal prosecution prohibit the release of a prisoner who would have otherwise been released, and the prisoner is found not guilty of the

alleged misconduct, the amount of time spent incarcerated, in excess of what the period of incarceration would have been absent the alleged misbehavior, shall be deducted from the prisoner's parole period.

(h) Nothing in the amendments to this section 1 made at the 1981-82 Regular Session of the Legislature shall affect the granting or revocation of credits attributable to that portion of the prisoner's sentence served prior to January 1, 1983.

(i) No loss of credits under this or any other section, without a conviction, plea agreement, or negotiated settlement, shall have any preclusive or deferential effect in any civil claim brought by an inmate. No public employee shall, in any Federal civil lawsuit, allege *Heck v. Humphrey* as an affirmative defense against an inmate who lost credits or had the sentence extended without a conviction, plea agreement, or negotiated settlement. The purpose of this section is to abrogate the effect of Edwards v. Balisok, 520 U.S. 641 (1997).

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

PROPONENT: San Diego County Bar Associations

STATEMENT OF REASONS

The Problem: In our current system for prison rules violations, inmates can be found to have violated under a process that involves no right to a jury, confrontation, counsel, or against self-incrimination. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Guilty pleas do not even need to be knowing and voluntary. *Bostic v. Carlson*, 884 F.2d 1267, 1274 (9th Cir. 1989). After an inmate is found to have committed a rule violation, it is referred for possible prosecution. If a trial occurs and the inmate is acquitted, it undoes the guilty disciplinary finding. If no prosecution occurs, the result of guilt and sanctions remains. If the prosecutor decides not to prosecute, whether it be due to resources or lack of evidence, the guilty result remains. Although inmates can appeal, the standard of review is "any evidence in the record that supports the conclusion"; courts do not even need to examine the entire record. If they can find "some evidence" that supports the guilty finding, it stays. *Superintendent v. Hill*, 472 U.S. 445, 455-456 (1985).

When a guilty finding under this minimal process takes away good-time credits or extends their sentence, the inmate is precluded from filing a civil action if prevailing would necessarily mean the guilty finding is undone. *Edwards v. Balisok*, 420 U.S. 641 (1997). For example, imagine an inmate is found under the prison disciplinary process to have committed a battery against a peace officer. Part of the sanction is that his loss of good-time credits. The officer had actually attacked him unprovoked but made up the story to claim it was self-defense. Not only is the officer not punished while the inmate is, but on top of that, the inmate cannot sue the correctional officer for excessive force based on the attack being unprovoked because prevailing would necessarily vitiate the guilty finding in the prison disciplinary process and alter the length of his sentence. If the sanctions only altered conditions of his confinement, such as loss of yard time or administrative segregation, a civil suit would not be barred. Even if this minimal process to impose sanctions against an inmate is needed for prison safety, the standard is far lower than a civil suit, and the findings should not have any preclusive effect on an inmate filing a civil suit.

The Solution: This resolution ensures that the prison disciplinary process findings do not bar civil suits by inmates against prison officials, by both directing California courts not to give them any preclusive or deferential effect, and by prohibiting public employees from using that affirmative defense in Federal court. The idea is similar to Resolution 16-02-2019 that passed last year, but the solution is narrower. 16-02-2019 prohibits taking away credits or extending the inmate's sentence through the prison disciplinary process; this still allows such sanctions to be issued under that process, it just prohibits the findings in that process from barring inmates from filing civil suits.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Penal Code section 2931 provides a system for the award of good time credits to incarcerated prisoners, based on good behavior and participation in affirmative rehabilitative activities in the facility. The effect of this is that an inmate who receives a fixed sentence can ultimately be incarcerated for less than the full term of the sentence. Penal Code section 2932 provides procedures for sanctioning prisoners who violate the facility rules with loss of good time credits in an amount commensurate with the seriousness of the rule violation. The proponent appears to equate loss of good time credits with extension of a sentence. This is incorrect. Only a trial court can impose a sentence. The remedy for an inmate aggrieved by the loss of good time credits is found in the administrative procedures of section 2932, with resort to the courts through a petition for habeas corpus where the forfeiture of credits is evaluated under a "some evidence" standard. The proponent seeks to substitute a 42 U.S.C. §1983 type civil action as the remedy for the loss of such credits rather than the Penal Code section 2932 procedure. The current system correctly reflects the distinction between the failure to earn good time credits, and the imposition of a consecutive sentence for an in-facility crime, which would only be the product of referral of the in-facility matter to the District Attorney and successful prosecution of a new criminal case. We do not believe that the forfeiture of good time credits for a rule violation such as possession of a cellular telephone, which would not be a crime outside of the facility, merits a full jury trial proceeding. In addition, we strongly question the propriety of advocating state laws that purport to abrogate United States Supreme Court cases and put limitations on the ability of a public employee to assert other Supreme Court cases in a Federal lawsuit.

OCBA

The Orange County Bar Association opposes this resolution. The proponent seeks to limit or abrogate decisional law established by the United States Supreme Court as applied to a federal civil lawsuit by an amendment to section 2932 - a state statute. Penal Code section 2932 governs the denial of good behavior and participation credits for a prisoner by the Department of Corrections and Rehabilitation. The attempted limitation of a federal remedy or affirmative defense based on federal law should not be included in this statute as it is inconsistent with the subject matter of section 2932. Further, a state statute under the Supremacy Clause cannot abrogate the holding of the United State Supreme Court when it has interpreted a federal congressional act and the lawsuit is brought in federal court pursuant to federal law. (see gen., *Howlett v. Rose* (1990) 496 U.S. 356.)

RESOLUTION 07-12-2020

DIGEST
Government Employees: Discretionary Immunity
Amends Government Code section 820.2 to clarify that immunity under section 820.2 applies only to discretionary functions.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 820.2 to clarify that immunity under section 820.2 applies only to discretionary functions. This resolution should be disapproved because there is well-established law that states that governmental immunity only applies to discretionary actions and not to operational or ministerial functions.

Government Code section 820.2 provides that "except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." It is well established that section 820.2 immunity only applies to discretionary acts or omissions, not operational or ministerial acts or omissions. (See *Lopez v. S. Cal. Rapid Transit Dist*. (1985) 40 Cal.3d 780, 793; *Sanborn v. Chronicle Publishing Co*. (1976) 18 Cal.3d 406, 414, and; *Johnson v. State* (1968) 69 Cal.2d 784, 792.)

This resolution seeks to codify case law, but creates the possibility of confusion within the legal system. The cases cited above make reference to "acts" or "omissions," not "functions." The addition of the undefined term of "functions" to the statute will create unnecessary confusion and litigation because it may imply that a "function" is different than an "act or omission."

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 820.2, to read as follows:

§ 820.2

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused. This section shall apply only to discretionary functions, not operational or ministerial functions.

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

PROPONENT: San Diego County Bar Associations

STATEMENT OF REASONS

The Problem: The immunity of Govt. Code § 820.2 has been construed to apply only to discretionary functions and not operational or ministerial functions. See *Lopez v. S. Cal. Rapid Transit Dist.*, 221 Cal. Rptr. 840 (1985); *Sanborn v. Chronicle Publishing Co.*, 134 Cal. Rptr. 402 (1976), and *Johnson v. State*, 73 Cal. Rptr. 240 (1968). However, the statute does not specify that, and such clarification could be useful.

The Solution: This resolution codifies the precedent that immunity under § 820.2 applies only to discretionary functions.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

RESPONSIBLE FLOOR DELEGATE: Ben Rudin

COUNTERARGUMENTS AND COMMENTS
BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This Resolution is both unnecessary and overly simplistic. The Proponent notes that it merely codifies existing case law. However, in so doing it fails to include meaningful definitions or context for the terms operational or ministerial functions. Moreover, the Government Claims Act must be read together and not parsed out in this manner. Other provisions provide immunity for what could be described as operational or ministerial functions, such as issuing of permits. This modification would actually create more confusion than it purports to alleviate by potentially de-harmonizing the various statutory immunities that exist across the Act. As well, the difference between discretionary and operational is often highly fact driven and subject to various standards that may inadvertently be swept away. Professor Van Alstyne and the Legislature worked hard to craft a cohesive statutory structure in the Government Claims Act – piecemeal alterations of same merely undermine the statute itself and the extensive case law that has developed over many years.