RESOLUTION 01-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 3043.7, to read as follows:

§ 3043.7

(a) A victim of a crime committed by an inmate, or the next of kin of the victim if the victim has died, who is entitled to appear at a hearing to review or consider the inmate's parole suitability, shall have the following rights:

(1) the right to receive reasonable notice from the prosecuting agency of any scheduled hearing, including any change to the date, time, and place of the hearing;

(2) the right to obtain from the Board of Parole Hearings or the prosecuting agency any statements, recommendations, and risk assessments as they become available to the prosecuting agency, except for those portions made confidential by law;

(3) the right to submit relevant documents to the Board no later than 10 days before the hearing;

(4) the right to propose clarifying questions for the panel to ask the inmate, if they are not irrelevant or cumulative;

(5) the right to have their designated representative assist in exercising these rights; and

(6) the right to be informed by the prosecuting agency of the rights enumerated in paragraphs (1) through (5).

(b) Nothing in this section shall be construed as a limitation on any other rights of the victim or next of kin.

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

PROPONENT: Richard Ceballos, Michele Anderson, Jeff Hayden, H. Thomas Watson, Shaun Dabby Jacobs, Matt Schechter, Erin Joyce, Carolin Shining, Laura Jane Kessner, Kim Tran

STATEMENT OF REASONS

The Problem (including Existing Law): A victim of a crime committed by an inmate, or the victim's next of kin, has a right to attend the inmate's parole hearing with a designated representative. (*See* Cal. Const., art. I, § 28, subd. (b)(7); Pen Code, § 3043, subds. (a), (b).) If their contact information is on file, the Board of Parole Hearings will provide notice 90 days in advance. But given the passage of time, any information is usually out-of-date. Instead, the prosecuting agency, which is also notified, is in the best position to contact victims or their family members, using DMV records and other databases. Most already do so, but it is not a legal requirement.

Like the prosecuting agency, victims or their next of kin also have the right to make a statement. (Cal. Const., art. I, § 28, subd. (b) par. (8); Pen. Code, § 3043, subd. (c).) But unlike the prosecuting agency, they do not have access to the statements, recommendations, and risk assessments that are available to other participants at least 10 days before the hearing. Access to these documents, which are shared with the prosecuting agency and are routinely read into the

record verbatim at the hearing, allows one to prepare for the hearing with knowledge of relevant facts, including the inmate's institutional behavior, parole plans, and current risk to public safety. Instead, victims or their next of kin depend on the prosecuting agency to receive such information in advance.

But if the prosecuting agency chooses to absent itself from the process, victims or their next of kin are left in the dark as to the inmate's conduct while in prison and likelihood of release, which complicates the decision whether to attend and what kind of statement to prepare. Without the prosecuting agency's assistance, they are also unable to provide the Board with police reports or trial transcripts to prevent the panel from relying on an inaccurate or sanitized version of the commitment offense based entirely on an inmate's recollection. Currently, the prosecuting agency can submit relevant documents to the Board no later than 10 days before the hearing. (*See* Cal. Code Regs., tit. 15, § 2030, subd. (c).) No similar provision exists for victims or their next of kin. (*See* Cal. Code Regs., tit. 15, § 2029.)

At the hearing, a representative for the prosecuting agency can propose clarifying questions for the panel to ask the inmate, which may be helpful in resolving factual discrepancies and addressing unanswered questions. (*See* Cal. Code Regs., tit. 15, § 2030, subd. (d)(2).) But if the prosecuting agency is absent, victims or their next of kin will be denied a rare opportunity to hear the inmate's answer on any lingering questions they may have about the offense.

The Solution: This resolution would provide victims, or their next of kin, the right to receive reasonable notice of a parole hearing from the prosecuting agency, the right to limited discovery of non-confidential documents, and the same rights as the prosecuting agency to submit relevant documents and propose clarifying questions.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESOLUTION 01-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code Section 1054.1, to read as follows:

§ 1054.1

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information: ~~if it is the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies.~~

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

~~(b) Statements of all defendants.~~

(b) The complete file of all law enforcement agencies, investigatory agencies, and prosecutor's offices of the crimes charged against the accused, including but not limited to the following:

The defendant's statements, the codefendant's statements, witness statements, investigating officer's notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

~~(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.~~

(d) The complete criminal record of the defendant and of any witness, including records of convictions, acquittals, charges dismissed, charges not filed and police reports.

~~(e) Any exculpatory evidence.~~

(e) All exculpatory evidence and all evidence of mitigation.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses ~~whom the prosecutor intends to call at the trial~~, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

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

PROPONENT: David Michael Bigeleisen, Frank Leidman, Joachim Steinberg, James Brosnahan, Gerald Richards, Melissa Alain, Mary Vail, Tulasi Hosain, Jeffrey Hayden, and Mark Harvis

STATEMENT OF REASONS

The Problem (including Existing Law): Discovery in criminal cases is governed by two bodies of law, State law enacted by voter initiative in 1990, and Federal Due process las as spelled out in the United States Supreme Court cases of *Brady v. Maryland* (1963) 373 U.S. 83 and *Kyles v Whitley* (1995) 514 U.S. 419.

But these bodies of law often omit disclosure of evidence which will exculpate the accused. Sometimes the failure to disclose evidence is deliberate on the part of the prosecutor. An example is the case of Benjamin Field, in Santa Clara Count. We genuinely hope and believe this is a rare exception.

More often, the prosecutor fails to recognize the exculpatory value of information in his file. This is understandable. The prosecutor looks at his file from the point of view which will help his case.

Many wrongful convictions have been overturned upon the defense learning of exculpatory evidence after the fact.

The Solution: The amendment provides for an open file rule. An open file rule requires the prosecutor to permit the defense to review the factual portion of the entire prosecutor's file. It comports completely with the prosecution's duties of disclosure to the defendant. It makes the prosecutor's function easier; no longer must the prosecutor decide which evidence is relevant, which evidence is material and which evidence must be disclosed.

Disclose it all.

The system works. Two conservative District Attorneys' offices have had open file rules for at least thirty years. They are San Mateo County and San Diego County. This amendment is based on a North Carolina Statute: General Statute § 15A - 903 (2011).

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 01-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 859b, to read as follows:

§ 859b

At the time the defendant appears before the magistrate for arraignment on the original complaint, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads on the original complaint, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2.

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment~~,~~ or plea on the original complaint, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

For purposes of this subdivision, "good cause" includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to Section 1318 unless:

(1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

(2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.

(3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

(4) The illness of counsel.
(5) The unexpected engagement of counsel in a jury trial.
(6) Unforeseen conflicts of interest which require appointment of new counsel.

The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment~~,~~ or plea on the original complaint, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): A preliminary hearing of an in-custody defendant must occur 10-court-days of arraignment, absent a waiver or a magistrate's finding of good cause for continuance. In *Garcia v. Superior Court* (2020) 47 Cal.App.5th 631, the Second District recently held that an arraignment on an amended complaint triggers a new 10-court-day period that supersedes previous time waivers:

> "Garcia argues that, based on the plain language of the statute, his July 16, 2019 arraignment and plea on the amended complaint was a triggering event, restarting the 10-day clock for holding a preliminary hearing under section 859b. … The People, on the other hand, contend that an arraignment or plea on an amended complaint is not a triggering event under section 859b because the filing of an amended complaint does not start a new criminal proceeding, but rather acts as a continuation of the previously filed charges. The People claim that, because Garcia personally waived the 10-day and 60-day time limits for the preliminary hearing at his June 21, 2019 arraignment on the original complaint and no new triggering event occurred, he is not entitled to dismissal of the amended complaint or release from custody. We conclude, based on the plain language of section 859b, the legislative purpose of the statute, and relevant case law, Garcia's arraignment and plea on the amended complaint was a triggering event under section 859b, which required the preliminary hearing be held within 10 court days of that arraignment and plea unless Garcia personally waived his right to a preliminary hearing within that 10-day period, or the prosecution established good cause for a continuance."

(*Id.* at 646.)

Garcia's interpretation of Section 859b upends decades of criminal practice and creates a trap for the unwary. On one hand, a prosecutor may file an amended complaint too far in advance of a scheduled hearing, not realizing that an arraignment on an amended complaint invalidates past time waivers. On the other hand, a defendant who refuses to waive time may nevertheless have

their right to a speedy preliminary hearing set beyond the original statutory period if arraigned on an amended complaint, which *Garcia* treats as a new triggering event that restarts the clock.

Ultimately, a knowledgeable prosecutor seeking to amend the complaint can provide timely notice of the intent to do so but refrain from the formality of arraignment until the start of a hearing. But a defendant cannot avoid being arraigned on a filed amended complaint, which *Garcia* suggests would restart the statutory periods under Section 859b.

The Solution: This resolution would restore the pre-*Garcia* understanding that a defendant has a statutory right to a preliminary hearing within a 10-court-day or 60-calendar day period starting from arraignment or plea on the original complaint, such that a subsequent arraignment on an amended complaint neither invalidates past time waivers nor restarts the clock, which reduces gamesmanship and ensures a timely hearing.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 01-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1536, to read as follows:

§ 1536

(a) All property or things taken on a warrant must be retained by the officer's ~~in his custody~~ agency, a member of the prosecution team, or an employee or agent thereof, subject to the order of the court to which ~~he~~ the officer is required to return the proceedings ~~before him~~, or of any other court in which the offense in respect to which the property or things taken is triable.

(b) A court order is not required for a law enforcement agency to dispose of any property or thing taken on a warrant, based on an agreement between the prosecuting agency and the person from whom the property or thing was taken or that person's attorney.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Codified in 1872, Penal Code section 1536 requires all property seized pursuant to a warrant to be "retained by the officer in his custody subject to the order of the court." Accordingly, law enforcement agencies must obtain a court order before returning or otherwise disposing of any property seized pursuant to a warrant, even when the item is subsequently determined not to have any evidentiary value or when a case has ended. This results in prosecutors, defense attorneys, and courts expending time and resources to prepare, review, and obtain court orders on uncontested matters. Additionally, modern police agencies do not permit officers to retain custody of seized evidence but require that such evidence be booked in a central repository under the control of the agency.

The Solution: This resolution would update Penal Code section 1536 to clarify that persons authorized to retain seized evidence include the officer's agency, a member of the prosecution team, or an employee or agent thereof. It would also permit a law enforcement agency to dispose of seized evidence without a court order, based on an agreement between the prosecuting agency and the person from whom it was seized or that person's attorney. This promotes judicial economy and saves the parties time and resources. Expediting the disposition of seized property also helps increase available storage capacity in property rooms, which reduces costs for law enforcement agencies.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 01-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 803, to read as follows:

§ 803

(a) Except as provided in this section, a limitation of time prescribed in this chapter is not tolled or extended for any reason.

(b) No time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time prescribed in this chapter.

(c) A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison or imprisonment pursuant to subdivision (h) of Section 1170, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, including, but not limited to, the following offenses:

(1) Grand theft of any type, forgery, falsification of public records, or acceptance of, or asking, receiving, or agreeing to receive, a bribe, by a public official or a public employee, including, but not limited to, a violation of Section 68, 86, or 93.

(2) A violation of Section 72, 118, 118a, 132, 134, or 186.10.

(3) A violation of Section 25540, of any type, or Section 25541 of the Corporations Code.

(4) A violation of Section 1090 or 27443 of the Government Code.

(5) Felony welfare fraud or Medi-Cal fraud in violation of Section 11483 or 14107 of the Welfare and Institutions Code.

(6) Felony insurance fraud in violation of Section 548 or 550 of this code or former Section 1871.1, or Section 1871.4, of the Insurance Code.

(7) A violation of Section 580, 581, 582, 583, or 584 of the Business and Professions Code.

(8) A violation of Section 22430 of the Business and Professions Code.

(9) A violation of Section 103800 of the Health and Safety Code.

(10) A violation of Section 529a.

(11) A violation of subdivision (d) or (e) of Section 368.

(d) If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations.

(e) A limitation of time prescribed in this chapter does not commence to run until the offense has been discovered, or could have reasonably been discovered, with regard to offenses under Division 7 (commencing with Section 13000) of the Water Code, under Chapter 6.5 (commencing with Section 25100) of, Chapter 6.7 (commencing with Section 25280) of, or Chapter 6.8 (commencing with Section 25300) of, Division 20 of, or Part 4 (commencing with Section 41500) of Division 26 of, the Health and Safety Code, or under Section 386, or offenses under Chapter 5 (commencing with Section 2000) of Division 2 of, Chapter 9 (commencing with Section 4000) of Division 2 of, Section 6126 of, Chapter 10 (commencing with Section 7301) of

Division 3 of, or Chapter 19.5 (commencing with Section 22440) of Division 8 of, the Business and Professions Code.

(f) (1) Notwithstanding any other limitation of time described in this chapter, if subdivision (b) of Section 799 does not apply, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age, was the victim of a crime described in Section 261, 286, 287, 288, 288.5, or 289, former Section 288a, or Section 289.5, as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.

(2) This subdivision applies only if all of the following occur:

(A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

(C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation.

(3) No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(4) (A) In a criminal investigation involving any of the crimes listed in paragraph (1) committed against a child, when the applicable limitations period has not expired, that period shall be tolled from the time a party initiates litigation challenging a grand jury subpoena until the end of the litigation, including any associated writ or appellate proceeding, or until the final disclosure of evidence to the investigating or prosecuting agency, if that disclosure is ordered pursuant to the subpoena after the litigation.

(B) Nothing in this subdivision affects the definition or applicability of any evidentiary privilege.

(C) This subdivision shall not apply if a court finds that the grand jury subpoena was issued or caused to be issued in bad faith.

(g) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met:

(A) The crime is one that is described in subdivision (c) of Section 290.

(B) The offense was committed prior to January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense.

(2) For purposes of this section, "DNA" means deoxyribonucleic acid.

(h) For any crime, the proof of which depends substantially upon evidence that was seized under a warrant, but which is unavailable to the prosecuting authority under the procedures described in People v. Superior Court (Laff) (2001) 25 Cal.4th 703, People v. Superior Court (Bauman & Rose) (1995) 37 Cal.App.4th 1757, or subdivision (c) of Section 1524, relating to claims of evidentiary privilege or attorney work product, the limitation of time prescribed in this chapter shall be tolled from the time of the seizure until final disclosure of the evidence to the

prosecuting authority. Nothing in this section otherwise affects the definition or applicability of any evidentiary privilege or attorney work product.

(i) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which a hidden recording is discovered related to a violation of paragraph (2) or (3) of subdivision (j) of Section 647.

(j) Notwithstanding any other limitation of time described in this chapter, if a person flees the scene of an accident that caused death or permanent, serious injury, as defined in subdivision (d) of Section 20001 of the Vehicle Code, a criminal complaint brought pursuant to paragraph (2) of subdivision (b) of Section 20001 of the Vehicle Code may be filed within the applicable time period described in Section 801 or 802 or one year after the person is initially identified by law enforcement as a suspect in the commission of the offense, whichever is later, but in no case later than six years after the commission of the offense.

(k) Notwithstanding any other limitation of time described in this chapter, if a person flees the scene of an accident, a criminal complaint brought pursuant to paragraph (1) or (2) of subdivision (c) of Section 192 may be filed within the applicable time period described in Section 801 or 802, or one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, whichever is later, but in no case later than six years after the commission of the offense.

(l) A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense involving the offering or giving of a bribe to a public official or public employee, including, but not limited to, a violation of Section 67, 67.5, 85, 92, or 165, or Section 35230 or 72530 of the Education Code.

(m) Notwithstanding any other limitation of time prescribed in this chapter, if a person actively conceals or attempts to conceal an accidental death in violation of Section 152, a criminal complaint may be filed within one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, provided, however, that in any case a complaint may not be filed more than four years after the commission of the offense.

(n) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint brought pursuant to a violation of Section 367g may be filed within one year of the discovery of the offense or within one year after the offense could have reasonably been discovered.

(2) This subdivision applies to crimes that were committed on or after January 1, 2021, and to crimes for which the statute of limitations that was in effect before January 1, 2021, has not run as of January 1, 2021.

(o) Notwithstanding any other limitation of time described in this chapter, a criminal complaint brought pursuant to subdivision (b) of Section 523 may be filed within three years after the person is initially identified by law enforcement as a suspect in the commission of that offense.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): "Ransomware" is a type of computer malware that encrypts the victim's data, rendering it inaccessible, and makes a monetary demand that the victim must pay in order to recover the encrypted files or prevent the public release of confidential data. These attacks are always carried by anonymous perpetrators, who are increasingly targeting critical infrastructure, such as governments, hospitals, and schools.

- Garrity, *California medical center forced to reschedule procedures due to ransomware attack*, Becker's Hospital Review (Jan. 6, 2020), https://www.beckershospitalreview.com/cybersecurity/california-medical-center-forced-to-reschedule-procedures-due-to-ransomware-attack.html.)

- Tidy, *How hackers extorted $1.14m from University of California, San Francisco*, BBC (Jun. 29, 2020), https://www.bbc.com/news/technology-53214783.

- *Malware Attack Forces Rialto Unified To Suspend Online Learning*, CBS Los Angeles (Aug. 24, 2020), https://losangeles.cbslocal.com/2020/08/24/malware-attack-forces-rialto-unified-to-suspend-online-learning.

- Campa, *Ransomware attack hits Newhall schools, halting online classes*, L.A. Times (Sep. 15, 2020), https://www.latimes.com/california/story/2020-09-15/newhall-elementary-schools-ransomware-attack.

- Swindell, *Sonoma Valley Hospital hit by cybercriminals with ransomware attack*, The Press Democrat (Oct. 30, 2020), https://www.pressdemocrat.com/article/news/sonoma-valley-hospital-hit-by-cybercriminals-with-ransomware-attack/?sba=AAS

In 2018, the Legislature amended Penal Code section 523 to permit "ransomware" to be prosecuted as a form of extortion, which has a 3-year statute of limitations from the date of the offense. (*See* Pen. Code, §§ 523, subd. (b), 801.) But no prosecution has ever been brought under the "ransomware" law. As written, the actus reus of "ransomware" is not the extortionate demand but the introduction of the malware on the system: "Every person who, with intent to extort property or other consideration from another, **introduces** ransomware into any computer, computer system, or computer network is punishable pursuant to Section 520 in the same manner as if such property or other consideration were actually obtained by means of the ransomware." (Pen. Code, § 523, subd. (b) (emphasis added).) This follows California's mailbox rule, in which an extortion by threatening letter is deemed complete upon deposit in the mail. (*See* Pen. Code, §§ 523, subd. (a), 660.)

But once encrypted, a computer system becomes impervious to a forensic examination that might reveal when the ransomware was introduced. The inability to know when the crime occurred, and thus when the statute of limitations will run, discourages the use of investigative resources to identify a perpetrator, which can take years due to the legal and technical hurdles that must be overcome in an online investigation.

The Solution: This resolution would amend Penal Code section 803 to permit the filing of a complaint for a violation of Section 523(b) within three years after law enforcement initially identifies the person as a suspect. This is similar to existing statutes of limitation for hit and run and the concealment of an accidental death, where the identity of the perpetrator is usually not known at the time of the incident. (*See* Pen. Code, § 803, subds. (j), (k), (m).)

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

CURRENT OR PRIOR RELATED LEGISLATION
In 2020, SB 239 and SB 922 would have extended the statute of limitations for computer hacking in violation of Penal Code section 502 to 3 years from the date of discovery. Currently, AB 1247 (Chau) seeks to do the same.

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RESOLUTION 01-06-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of Bar Associates recommend that legislation be sponsored to delete Penal Code sections 647 (b) and (d), Penal Code section 653.22, Penal Code section 653.23, and to amend Penal Code section 315, 316 and 11225, and to add Health and Safety Code section 429.13 to read as follows:

§647 Disorderly conduct

Except as provided in paragraph (5) of subdivision (b) and subdivision (k), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) An individual who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

~~(b)(1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by another person to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.~~

~~(2) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by another person who is 18 years of age or older to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.~~

(b)~~(3)~~(1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.

~~(4)~~(2) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer or solicitation to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

~~(5)~~(3) Notwithstanding ~~paragraphs (1) to (3), inclusive~~ paragraph (1), this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision (a) of Section

305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.

~~(c)~~ (b) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

~~(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.~~

~~(e)~~ (c) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.

~~(f)~~ (d) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that they are unable to exercise care for their own safety or the safety of others, or by reason of being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

~~(g)~~ (e) If a person has violated subdivision

~~(h)~~ (f) A peace officer, if reasonably able to do so, shall place the person, or cause the person to be placed, in civil protective custody. The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may place a person in civil protective custody with that kind and degree of force authorized to effect an arrest for a misdemeanor without a warrant. A person who has been placed in civil protective custody shall not thereafter be subject to any criminal prosecution or juvenile court proceeding based on the facts giving rise to this placement. This subdivision does not apply to the following persons:

(1) A person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.

(2) A person who a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to subdivision (f).

(3) A person who a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control.

~~(i)~~ (g) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

~~(j)~~ (h) Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant.

~~(k)~~(i)(1) A person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision does not apply to those areas of a private business used to count currency or other negotiable instruments.

(2) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim's identity to actually be established.

(3)(A) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim's identity to actually be established.

(B) Neither of the following is a defense to the crime specified in this paragraph:

(i) The defendant was a cohabitant, landlord, tenant, cotenant, employer, employee, or business partner or associate of the victim, or an agent of any of these.

(ii) The victim was not in a state of full or partial undress.

(4)(A) A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

(B) A person intentionally distributes an image described in subparagraph (A) when that person personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.

(C) As used in this paragraph, "intimate body part" means any portion of the genitals, the anus and, in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

(D) It shall not be a violation of this paragraph to distribute an image described in subparagraph (A) if any of the following applies:

(i) The distribution is made in the course of reporting an unlawful activity.

(ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.

(iii) The distribution is made in the course of a lawful public proceeding.

(5) This subdivision does not preclude punishment under any section of law providing for greater punishment.

~~(k)~~ (j) (1) A second or subsequent violation of subdivision (j) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($2,000), or by both that fine and imprisonment.

(2) If the victim of a violation of subdivision (j) was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($2,000), or by both that fine and imprisonment.

~~(l)~~ (k) (1) If a crime is committed in violation of subdivision (b) and the person who was solicited was a minor at the time of the offense, and if the defendant knew or should have known that the person who was solicited was a minor at the time of the offense, the violation is punishable by imprisonment in a county jail for not less than two days and not more than one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both that fine and imprisonment.

(2) The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days of imprisonment in a county jail required by this subdivision. If the court reduces or eliminates the mandatory two days' imprisonment, the court shall specify the reason on the record.

§ 647.1. Solicitation to engage in ~~lewd conduct or prostitution;~~ public intoxication involving intravenous use of a controlled substance; additional fine

In addition to any fine assessed under Section 647, the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates subdivision (a) or (b) of Section 647, or, if the offense involves intravenous use of a controlled substance, subdivision (f) of Section 647, with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this section.

~~§ 315. Keeping or residing in house of ill-fame; common repute as evidence~~

~~Every person who keeps a house of ill-fame in this state, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor; and in all prosecutions for keeping or resorting to such a house common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it.~~

~~§ 316. Keeping disorderly houses, etc., which disturb immediate neighborhood; innkeepers; landlords~~

~~Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.~~

§ 318. Place of illegal gambling ~~or prostitution~~; prevailing upon person to visit; punishment

Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of illegal gambling ~~or prostitution~~, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six

months, or fined not exceeding five hundred dollars ($500), or be punished by both that fine and imprisonment.

§ 11225. Place of illegal gambling, ~~prostitution~~, etc.; place used for human trafficking; place used as bathhouse permitting conduct capable of transmitting AIDS; nuisance; injunction, abatement, and prevention

(a)(1) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, ~~lewdness, assignation, or prostitution~~, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, ~~lewdness, assignation, or prostitution~~, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) Nothing in this subdivision shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

(b)(1) Notwithstanding any other law, every building or place used for the purpose of human trafficking, and every building or place in or upon which acts of human trafficking are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) For purposes of this subdivision, human trafficking is defined in Section 236.1.

(c)(1) Every building or place used as a bathhouse which as a primary activity encourages or permits conduct that according to the guidelines of the federal Centers for Disease Control and Prevention can transmit AIDS, including, but not limited to, anal intercourse, oral copulation, or vaginal intercourse, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

(2) For purposes of this subdivision, a “bathhouse” means a business which, as its primary purpose, provides facilities for a spa, whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming.

~~§ 653.22. Offense; intent; relevant circumstances~~

~~(a)(1) Except as specified in paragraph (2), it is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by acting in a manner and under circumstances that openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.~~

~~(2) Notwithstanding paragraph (1), this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision (a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.~~

~~(b) Among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution are that the person:~~

~~(1) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.~~

(2) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution.

(3) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, or any other offense relating to or involving prostitution, within five years of the arrest under this section.

(4) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution.

(5) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, with the exception of paragraph (3), or in any other behavior indicative of prostitution activity.

(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered in determining whether a person has the requisite intent. Moreover, no one circumstance or combination of circumstances is in itself determinative of intent. Intent must be determined based on an evaluation of the particular circumstances of each case.

§ 653.23. Supervising or otherwise aiding a prostitute

(a) It is unlawful for any person to do either of the following:

(1) Direct, supervise, recruit, or otherwise aid another person in the commission of a violation of subdivision (b) of Section 647 or subdivision (a) of Section 653.22.

(2) Collect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person in violation of subdivision (b) of Section 647.

(b) Among the circumstances that may be considered in determining whether a person is in violation of subdivision (a) are that the person does the following:

(1) Repeatedly speaks or communicates with another person who is acting in violation of subdivision (a) of Section 653.22.

(2) Repeatedly or continuously monitors or watches another person who is acting in violation of subdivision (a) of Section 653.22.

(3) Repeatedly engages or attempts to engage in conversation with pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.

(4) Repeatedly stops or attempts to stop pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.

(5) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22.

(6) Receives or appears to receive money from another person who is acting in violation of subdivision (a) of Section 653.22.

(7) Engages in any of the behavior described in paragraphs (1) to (6), inclusive, in regard to or on behalf of two or more persons who are in violation of subdivision (a) of Section 653.22.

~~(8) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, subdivision (a) of Section 653.22, Section 266h, or 266i, or any other offense relating to or involving prostitution within five years of the arrest under this section.~~

~~(9) Has engaged, within six months prior to the arrest under subdivision (a), in any behavior described in this subdivision, with the exception of paragraph (8), or in any other behavior indicative of prostitution activity.~~

~~(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered. Moreover, no one circumstance or combination of circumstances is in itself determinative. A violation of subdivision (a) shall be determined based on an evaluation of the particular circumstances of each case.~~

~~(d) Nothing in this section shall preclude the prosecution of a suspect for a violation of Section 266h or 266i or for any other offense, or for a violation of this section in conjunction with a violation of Section 266h or 266i or any other offense.~~

Health and Safety Code §429.13 Operators of Businesses of Prostitution must adopt and promote safer sex practices

(1) Every operator of a business of prostitution must—

(a) Take all reasonable steps to give health information (whether oral or written) to sex workers and clients: and

(b) If the person operates a brothel, display health information prominently in that brothel; and

(c) Note state or imply that a medical examination of a sex worker means the sex worker is not infected, or likely to be infected, with a sexually transmissible infection; and

(d) The owner and operator of a business of prostitution must not discourage the use of prophylactics in the course of business.

(1) The obligations in this section apply only in relation to commercial sexual services provided for the business and to sex workers and clients in connection with those services.

(2) In this section, health information means information on sager sex practices and on services for the prevention and treatment of sexually transmissible infections.

(3) The director of the Health Services Department may implement suitable regulations to enforce the above.

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

PROPONENT: David Michael Bigeleisen, Frank Leidman, Joachim Steinberg, James Brosnahan, Gerald Richards, Melissa Alain, Mary Vail, Tulasi Hosain, Jeffrey Hayden, and Mark Harvis

STATEMENT OF REASONS

The Problem (including Existing Law): Historically, prostitution has been regulated and criminalized in keeping with varying moral perspectives. Current condemnation and criminal prohibitions have not abated the prostitution. The underground nature of the prostitution business

creates dangers and vulnerabilities for sex workers and their clients and negatively impacts public health and safety. This illegal status makes it easier for predators to commit acts of violence against prostitutes.

By bringing sex work into daylight, we will:

1.Reduce violence. Legal sex work creates environments in which oversight is possible which protects prostitutes and clients from violence.

2. Reduce trafficking in human beings in the sex trade. This measure will provide a lawful environment for the sexual service industry, shifting enforcement resources to actual incidences of abuse rather than consensual commercial sex.

3. Promote public health. Current research reflects that prostitutes have a rate of sexually transmitted disease infections that is equal to other comparable segments of the population. Openness in the sex industry will support sexual health educational initiatives including safe sex practices and access to medical services for sex workers.

4. Promote labor rights and OSHA standards in the sex industry. Workers in the sex industry deserve the same rights as workers in any other trade.

The Solution: Removes penal provisions for consensual sex acts, whether they are without financial compensation, or for financial compensation. This resolution retains intact all of the laws prohibiting any form of forced prostitution. It also retains intact all of the laws protecting children from prostitution.

IMPACT STATEMENT
Civil Code Sections 798.56(c)(1) and 799.70(d) provide remedies to a landlord if a resident is convicted of prostitution. These will have to be addressed, but the social impact aspects can be dealt with as zoning issues.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 02-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 835a, to read as follows:

§ 835a

(a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

(3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

(5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

(6) That police shootings of unarmed Black people in the United States are three times higher than that of white people. That despite a more widespread use of body cameras and increased media attention of police brutality, violent encounters with the police continue to represent significant causes of injury and death in the United States, particularly for Black, Indigenous, and People of Color (BIPOC).

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance. However, a peace officer may not use deadly force to effect an arrest for a misdemeanor or infraction offense.

(c) (1) Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person as specified in section (c)(1)(C).

(B) To apprehend a fleeing person for any felony that ~~threatened or~~ resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, ~~make reasonable efforts to~~ identify themselves as a peace officer and warn that deadly force may be used. ~~unless the officer has objectively reasonable grounds to believe the person is aware of those facts.~~

(C) Peace officers are prohibited from using deadly force or force likely to cause serious bodily injury or death, except when a civilian has immediate possession of a weapon directed as specified in (C)(2).

(1) A weapon is defined as a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, knives or swords within lunging distance of an officer, or a motor vehicle,

(2) and this weapon is directed at an officer, other officers, or a civilian at the time of the murder.

(3) In the case of a motor vehicle specified in (C)(1), appropriate and reasonable measures to stop the progression of the moving vehicle must be first employed.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other deescalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) "Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

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

PROPONENT: National Lawyers Guild – San Francisco

STATEMENT OF REASONS

The Problem (including Existing Law): Current law allows peace officers to use force in certain situations. However, police shootings of unarmed Black people in the United States are three times higher than that of white people. That despite a more widespread use of body cameras and increased media attention of police brutality, violent encounters with the police continue to represent significant causes of injury and death in the United States, particularly for Black, Indigenous, and People of Color (BIPOC). Part of the reason for this is that peace officers are not limited to using deadly force to apprehend dangerous or violent felons. Peace officers may also use deadly force to effect an arrest of a person committing a misdemeanor or an infraction. As the world has seen with the deaths of Sandra Bland, George Floyd, and Philando Castile, (to name but a few) deadly force against the BIPOC community is more common even where the person was stopped for a misdemeanor.

The Solution: This resolution would amend Penal Code section 835a to limit the situations where a peace officer could use deadly force. It would provide that peace officers cannot use deadly force to effect an arrest of a person suspected of committing misdemeanor or infraction. The resolution would also strengthen the situations in which peace officers must give warnings before using deadly force.

IMPACT STATEMENT
This resolution may require additional statutory changes. This resolution may impact Penal Code section 189.

CURRENT OR PRIOR RELATED LEGISLATION
Penal Code section 835a was amended in 2019 by AB 392. The amendment changed California's legal standard governing when force can be used, and how it is to subsequently be evaluated, by modifying the state standard so that it is consistent with the federal standard of "objective reasonableness," as articulated in numerous United States Supreme Court and federal circuit courts of appeal.

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RESPONSIBLE FLOOR DELEGATE: Natashia D. Saunders

RESOLUTION 02-02-2021

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 596, to read as follows:

§ 596

Every person who, without the consent of the owner, willfully administers poison to any animal, the property of another, or exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, is guilty of a misdemeanor.

However, the provisions of this section shall not apply in the case of a person who exposes poisonous substances upon premises or property owned or controlled by him for the purpose of controlling or destroying predatory animals or livestock-killing dogs and if, prior to ~~or~~ and during the placing out of such poisonous substances, he shall have ~~posted upon the property~~ provided notice as follows. Conspicuous signs shall be posted upon the property ~~conspicuous signs~~ located at intervals of distance not greater than one-third of a mile apart, and in any case not less than three such signs having words with letters at least one inch high reading "Warning–Poisoned bait placed out on these premises," which signs shall be kept in place until the poisonous substances have been removed. In addition to posting the above-described warning signs, notice to tenants on properties with borders adjoining the property where poisonous substances will be used shall be given 30 days notice, prior to the usage of the poisonous substances, via a letter to the tenant on each such property, sent by Certified United States Mail, stating the starting date upon which the poisonous substances will be used. Whenever such signs have been conspicuously located upon the property or premises owned or controlled by him as hereinabove provided, and all required notices to tenants on adjacent properties have been mailed as provided above, such person shall not be charged with any civil liability to another party in the event that any domestic animal belonging to such party becomes injured or killed by trespassing or partaking of the poisonous substance or substances so placed.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Penal Code section 596 in its current form is intended to protect the animal property of others by providing notice of the use of poisonous substances on private property where the animals might roam. As currently written, the notice requirements of the statute are limited in a manner that defeats its purpose. Currently, notice can be given during the placement of poisonous substances, which leaves open the possibility of property animals wandering onto poisoned lands prior to notice having been posted. Further, the current notice requirements fall short of providing effective notice to the tenants on adjoining properties of the dangers to come. A tenant on an adjoining property in an agricultural or farm area may be housed miles from the place where the poisons will be used, lessening the likelihood of seeing posted signs.

The Solution: By requiring prior notice of the intended use of poisonous substances, the problem of animals wandering onto lands as the poisons are being used is reduced. Further, the gravity of the open use of poisonous substances to kill unwanted animals, which endangers property animals from adjacent fields, justifies the minor additional burden of requiring letters to be sent to the tenants residing upon those adjoining fields.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESOLUTION 02-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 141, to read as follows:

§ 141

(a) Except as provided in subdivisions (b) and (c), a person who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon a trial, proceeding, or inquiry, is guilty of a misdemeanor.

(b) A peace officer who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, or causes a peace officer's body camera to have unclear images and/or sound, or not to function with the specific intent that the action or inaction will result in a person being charged with a crime or with the specific intent that the physical matter, digital image, or video recording will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by two, three, or five years in the state prison.

(c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(d) This section does not preclude prosecution under both this section and any other law.

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

PROPONENT: National Lawyers Guild – San Francisco

STATEMENT OF REASONS

The Problem (including Existing Law): Current law provides that it is a felony for a peace officer to tamper with evidence by altering, planting, or concealing evidence, including digital or video evidence. However, the law does not address peace officer body cameras.

The Solution: This resolution would clarify that it is also evidence tampering if a peace officer knowingly causes his or her body camera to have unclear images or sound, or if a peace officer causes his or her body camera not to work. This resolution will strengthen and protect the integrity of criminal prosecutions.

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

CURRENT OR PRIOR RELATED LEGISLATION
None

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RESPONSIBLE FLOOR DELEGATE: Natashia D. Saunders

RESOLUTION 02-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 189 and 196, to read as follows:

§ 189

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or, by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289, or former Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, or murder that is perpetrated by a peace officer not in compliance with Section 835a during an arrest or encounter with a person, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

(1) "Destructive device" has the same meaning as in Section 16460.

(2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.

(3) "Weapon of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of the defendant's act.

(e) To prove the killing by a peace officer was "deliberate and premeditated," during an arrest or encounter with a person, it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of the defendant's act, or that the arrest was lawful or unlawful.

(fe) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) or during an encounter with or arrest by a peace officer in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(fg) Subdivision (ef) does not apply to a defendant when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties.

§ 196

Homicide is justifiable when committed by peace officers and those acting by their command in their aid and assistance, under either of the following circumstances:

(a) In obedience to any judgment of a competent court that has ordered a sentence of death.

(b) When the homicide results from a peace officer's use of force that is in compliance with Section 835a.

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

PROPONENT: National Lawyers Guild – San Francisco

STATEMENT OF REASONS

The Problem (including Existing Law): The current felony murder rule, Penal Code section 189, does not provide criminal penalties for peace officers who kill someone in the course of a stop or arrest. However, peace officers have unique training and skills in combat, critical thinking, discipline, self-control under stress, and other techniques which, within the scope of their work, are applied regularly and systematically for the purpose of community defense and law enforcement and militarization. For these reasons, peace officers—akin to highly trained boxers or martial artists— are deadly weapons and are inherently dangerous when acting in the usual course of business.

The Solution: This proposed amendment to the Felony Murder Rule (Pen. Code, § 189), would provide criminal penalties for peace officers who kill someone in the course of a stop or arrest; in other words, it affects police officers who carry out the death penalty on untried civilians. Under this amendment, peace officers will be subject to the criminal consequences of intentionally or unintentionally killing someone in the course of a stop or arrest, and will have no criminal immunity. The goal of this amendment is to help save the lives of untried civilians and those whose alleged crimes would not result in the death penalty (even if they were later found guilty), as well as to protect the lives of officers. In time, this law will help to stabilize the relationship between law enforcement agencies and the community by building and enhancing trust between them, and perhaps, under the direction of defense specialists, will help officers engage and enhance their non-lethal training, de-escalation, and combat techniques so as to avoid being charged with murder. The resolution also amends Penal Code section 196 to clarify that justifiable homicide by peace officers based on a court order is limited to situations where the court orders a death sentence.

IMPACT STATEMENT

This resolution may require additional statutory changes. This resolution will affect Penal Code section 835a.

CURRENT OR PRIOR RELATED LEGISLATION

Penal Code section 196 was amended in 2019 by AB 392. The amendment changed California's legal standard governing when force can be used, and how it is to subsequently be evaluated, by modifying the state standard so that it is consistent with the federal standard of "objective

reasonableness," as articulated in numerous United States Supreme Court and federal circuit courts of appeal.

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RESPONSIBLE FLOOR DELEGATE: Natashia D. Saunders

RESOLUTION 02-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1464, to read as follows:

§ 1464

(a) (1) Subject to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and except as otherwise provided in this section, there shall be levied a state penalty in the amount of ten dollars ($10) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses, except

(i) Vehicle Code infractions.

(ii) parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code.

(2) Any bail schedule adopted pursuant to Section 1269b or bail schedule adopted by the Judicial Council pursuant to Section 40310 of the Vehicle Code may include the necessary amount to pay the penalties established by this section and Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and the surcharge authorized by Section 1465.7, for all matters where a personal appearance is not mandatory and the bail is posted primarily to guarantee payment of the fine.

(3) The penalty imposed by this section does not apply to the following:

(A) Any restitution fine.

(B) Any penalty authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code.

(C) Any parking offense subject to Article 3 (commencing with Section 40200) of Chapter 1 of Division 17 of the Vehicle Code.

(D) The state surcharge authorized by Section 1465.7.

(b) Where multiple offenses are involved, the state penalty shall be based upon the total fine or bail for each case. When a fine is suspended, in whole or in part, the state penalty shall be reduced in proportion to the suspension.

(c) When any deposited bail is made for an offense to which this section applies, and for which a court appearance is not mandatory, the person making the deposit shall also deposit a sufficient amount to include the state penalty prescribed by this section for forfeited bail. If bail is returned, the state penalty paid thereon pursuant to this section shall also be returned.

(d) In any case where a person convicted of any offense, to which this section applies, is in prison until the fine is satisfied, the judge may waive all or any part of the state penalty, the payment of which would work a hardship on the person convicted or his or her immediate family.

(e) After a determination by the court of the amount due, the clerk of the court shall collect the penalty and transmit it to the county treasury. The portion thereof attributable to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code shall be deposited in the appropriate county fund and 70 percent of the balance shall then be transmitted to the State Treasury, to be deposited in the State Penalty Fund, which is hereby created, and 30

percent to remain on deposit in the county general fund. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the state by a county.

(f) Notwithstanding any other law, the Director of Finance shall provide a schedule to the Controller for all transfers of funds made available by the Budget Act from the State Penalty Fund in the current fiscal year.

(g) Upon the order of the Department of Finance, sufficient funds may be transferred by the Controller from the General Fund for cashflow needs of the State Penalty Fund. A cashflow loan made pursuant to this provision shall be short term and does not constitute a General Fund expenditure. A cashflow loan and the repayment of a cashflow loan does not affect the General Fund reserve.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Vehicle Code infractions currently include supplemental fees for several state and local programs. There is an exception to the supplemental fees for "parking offenses." For example, Penal Code § 1464 doubles the base fine to fund these programs:

Restitution,
Peace Officer's Training,
Driver Training Penalty Assessment,
Corrections Training, and
Local Public Prosecutors and Public Defenders Training

And Government Code §§ 70372 and 76000 add fees for:
Courthouse Construction,
Criminal Justice Facilities Construction,
Automated Fingerprint Identification,
Emergency Medical Service, and
DNA Identification

Due to these ten supplemental fees, a Vehicle Code violation with a $100 base fine results in a $490 total fine. See "Not Just a Ferguson Problem," 10, http://www.lccr.com/not-just-fergusonproblem-how-traffic-courts-drive-inequality-in-california/. If a person cannot afford to pay the inflated fees, then a $300 late fee will apply. After non-payment, the court will order the DMV to suspend the person's driver's license. Vehicle Code § 13365.

The Solution: The supplemental fees to Vehicle Code infractions have a disparate impact on low-income people. If the supplemental fees for Vehicle Code infractions are removed, the penalty for each infraction will be what the "schedule" sets out. Unreasonable extra fees – that have nothing to do with the severity of the infraction offenses – are simply not "fair" for anyone. If the special programs really are important, then the Legislature and the Governor should fund

them through the budget process. In 2019, the California Judicial Council received a $500,000 "Price of Justice" grant from the Bureau of Justice Assistance. The Council is using the grant funding to test an online "Ability-to-Pay Calculator" program in five counties. For more information, visit https://www.courtinnovation.org/articles/california-ability-pay-calculator. While the Judicial Council's test programs may be a step in the right direction – California needs substantial and progressive social justice reforms. This resolution also supports the the U.S. Department of Justice's assertions that the supplemental fees and resulting driver's license suspensions cause harm because they force individuals into escalating debt and unnecessary incarceration, which leads to job loss and becoming trapped in a cycle of poverty. See https://www.justice.gov/opa/pr/justice-department-announcesresources-assist-state-and-local-reform-fine-and-fee-practices.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule. 36T

CURRENT OR PRIOR RELATED LEGISLATION
Various "amnesty" programs: 1) SB 185 (Hertzberg, 2017): People with traffic tickets for Vehicle Code infractions will have the right to request an "indigency" determination. If the court finds the person to be indigent, then the court will reduce the fine and fees by 80%. In addition, if the person does not pay the fees within a 4-year period, then the debt will be vacated, in the interest of justice. 2) SB 85 (Committee on Budget and Fiscal Review, 2015): established the 2015-2017 Traffic Ticket Amnesty Program in Vehicle Code § 42008.8. 3) SB 881 (Hertzberg, 2016): clarified procedures for the courts to administer the 2015-2017 Amnesty Program. This resolution is very similar to Resolution 10-08-2017.

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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

RESOLUTION 03-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business & Professions Code Section 6068, to read as follows:

§ 6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent an act that the attorney reasonably believes is likely to result in imminent self-inflicted harm or death of the client or a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem (including Existing Law): Existing law only allows an attorney to reveal confidential information in order to prevent a criminal act likely to result in the death or substantial bodily harm to an individual. The State Bar interprets that provision to apply to persons other than the client. Suicide itself is not a crime. *In re Joseph G.* (1983) 34 Cal. 3d 429, 433; *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, 1624. So if your client indicates

they are about to harm themselves or plan to commit suicide, other than trying to talk the client out of performing that act, the attorney is helpless.

The ABA has concluded an attorney may disclose a client's declared intent to commit suicide to a third person. See ABA Comm. On Prof'l Ethics and Responsibility, Informal Opinion Op. 89-1530(1989) (citing ABA Comm. On Prof'l Ethics and Responsibility, Informal Opinion Op. 83-1500 (1983)). The exceptions to confidentiality under the ABA Model Rul 1.6(b) are broader than in California. Rule 1.6 states: (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm.

This exactly situation happened to me where the client indicated they were about to commit suicide. A call to the State Bar Ethic's Hotline revealed that if I tried to call 9-1-1, the police or even a relative, I would be in violation of this section and could be subject to discipline. The Ethics Hotline also informed me that my inquiry was a common call they receive. Attorneys should not have to choose between our license and livelihood and saving a client's life.

The Solution: This resolution would allow (but not require) attorneys will reveal confidential information if the attorney believes a client is about to commit an act of self-harm or death/suicide. This will allow attorneys to make that call if they think it is necessary and the act is imminent.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 03-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6086.5, to read as follows:

§ 6086.5

(a) The board of trustees shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007 to the extent provided by rules adopted by the board of trustees pursuant to this chapter. In these proceedings the State Bar Court may exercise the powers and authority vested in the board of trustees by this chapter, including those powers and that authority vested in committees of, or established by, the board, except as limited by rules of the board of trustees within the scope of this chapter.

(b) Access to records of the State Bar Court shall be governed by court rules and laws applicable to records of the judiciary and not the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(c) Upon petition by a licensee accompanied by a fee sufficient to defray costs associated with consideration of a petition, filed in State Bar Court, the State Bar of California may remove from the licensee's State Bar Profile, information on a licensee's State Bar profile that has been posted for no less than five years which constitutes an administrative action, or an item that has been posted on the licensee's State Bar Profile for no less than ten years which constitutes a disciplinary action, where the licensee provides evidence of rehabilitation indicating that the notice is no longer required in order to prevent a credible risk to members of the public utilizing licensed activity of the licensee.

(d) The State Bar of California may develop, through regulations, the amount of the fee and the minimum information to be included in a licensee's petition, including, but not limited to, a written justification and evidence of rehabilitation.

(e) The petition process described by subdivisions (d) and (e) shall commence January 1, 2023.

(f) The State Bar of California shall maintain a list of all licensees whose administrative or disciplinary records are altered as a result of a petition approved under subdivision (d). The State Bar of California shall make the list accessible to other licensing bodies. The State Bar of California shall update and provide the list to other licensing bodies as often as it modifies the records displayed on its website in response to petitions approved under subdivision (d).

(g) For the purposes of Sections 6007, 6043, 6049, 6049.2, 6050, 6051, 6052, 6077 (excluding the first sentence), 6078, 6080, 6081, and 6082, "board" includes the State Bar Court.

(h) Nothing in this section shall authorize the State Bar Court to adopt rules of professional conduct or rules of procedure.

(i) The Executive Committee of the State Bar Court may adopt rules of practice for the conduct of all proceedings within its jurisdiction. These rules may not conflict with the rules of procedure adopted by the board, unless approved by the Supreme Court.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The State Bar Act (codified in the Business and Professions Code) provides for the licensing and regulation of lawyers by the State Bar of California. Fees charged and collected by the State Bar of California from its licensees under the Business and Professions Code are paid to the State Bar of California for the purpose of funding the discipline system and admissions. Existing law requires the State Bar of California to provide on the Internet on the State Bar website specific information regarding the status of every license issued by the State Bar of California on licensees' State Bar Profiles.

At this time any administrative action or any level of discipline against a licensee remains on a licensee's State Bar profile indefinitely, except in rare circumstances. For instance, an administrative inactive enrollment for failing to timely comply with a licensee's MCLE requirement can be expunged from a licensee's State Bar profile after seven years under certain conditions. Very remote or minor violations remain on a State Bar profile much longer than necessary to protect the public by providing full information about lawyers. This resolution would strike a balance in allowing a licensee to seek expungement where the licensee could establish the information is not necessary to ensure public protection.

The Solution: This resolution would authorize the State Bar Court, upon petition by a licensee accompanied by a specified fee, to (1) remove from the licensee's State Bar Profile an item that has been posted for at least five years which constitutes an administrative action against a licensee's license; and (2) remove from the licensee's State Bar Profile an item that has been posted for at least ten years which constitutes any level of public discipline, where the licensee can establish rehabilitation indicating that the notice is no longer required to prevent a credible risk to members of the public utilizing licensed activity of the licensee. The resolution would require the State Bar Court, in evaluating a petition, to take into consideration other violations that present a credible risk to the members of the public since the administrative or disciplinary action which the licensee is seeking to be removed occurred. The resolution would also authorize the State Bar of California to develop, through regulations, the amount of the fee and the minimum information to be included in a licensee's petition, including, but not limited to, a written justification and evidence of rehabilitation. The resolution would require the petition process to commence January 1, 2021. The resolution would require the State Bar of California to maintain a list of all licensees whose disciplinary records are altered as a result of the petition process and to update the list and make it available to other licensing bodies, as specified.

IMPACT STATEMENT

This resolution may require additional statutory changes.

CURRENT OR PRIOR RELATED LEGISLATION

In 2016, the Legislature created a pathway for licensees of the Department of Real Estate to seek expungement of remote discipline recorded on that agency's website in AB 1807, which amended Business and Professions Code section 10083.2 et seq.

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RESOLUTION 04-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 685.010, to read as follows:

§ 685.010

(a) Interest accrues at the rate of ~~10 percent~~ one percent plus the prime interest rate on the date judgment is entered per annum on the principal amount of a money judgment remaining unsatisfied.

(b) The Legislature reserves the right to change the rate of interest provided in subdivision (a) at any time ~~to a rate of less than 10 percent per annum~~, regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred. A change in the rate of interest may be made applicable only to the interest that accrues after the operative date of the statute that changes the rate.

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

PROPONENTS: H. Thomas Watson, David M. Axelrad, David S. Ettinger, Mitchell C. Tilner, Lisa Perrochet, John A. Taylor, Stephan E. Norris, Robert H. Wright, Jason R. Litt, Brad S. Pauley, Steve S. Fleischman, Mark A. Kressel, Eric S. Boorstin, Jens Koepke

STATEMENT OF REASONS

The Problem: Judgment debtors must either pay 10 percent annual interest on appealed judgments or tender payment of the judgment to stop the accrual of interest and hope they can recover that payment if the judgment is reversed. Although the Legislature reserved its right to change the 10 percent annual interest rate when it enacted section 685.010 in 1982, it has never done so. The prime interest rate was as high as 17 percent in 1982, but has been less than 5 percent for many years. For more than two decades, the amount of interest earned on safe investments has been far less than 10 percent. Thus, the fixed 10 percent interest rate provides a windfall to judgment creditors. This windfall discourages judgment creditors from negotiating settlements, and discourages the pursuit of potentially meritorious appeals. As a result, it likely insulates many erroneous judgments from appellate review. And when interest rates are high, which could soon happen now that the U.S. money supply is being greatly increased, the fixed interest rate may induce some judgment debtors to pursue weak or *un*meritorious appeals to delay payment while earning interest on the money they are not paying to the judgment creditor.

The Solution: As it true for interest on damages certain in California and for all money judgments in federal court, the interest rate accruing on California money judgments should be tied to the actual cost of money rather than being fixed at a rate unrelated to (and currently far higher than) that actual cost. Interest accruing on recovery of damages certain in California and on money judgments in federal court is tied to the rate of interest paid on 1-year treasury notes. (Civ. Code, § 3287, subd. (c); 28 U.S.C. § 1961.) Tracking that rule would be an improvement, but setting the interest rate equal to one plus the prime rate on the date the judgment is entered

provides a truer reflection of the actual cost of money. For litigants, the amendment will eliminate windfalls of interest accruing at a rate far higher than the actual cost of money in times when interest rates are low. The amendment also mitigates the problem of discouraging judgment debtors from pursuing potentially meritorious appeals to correct trial court errors. And when the prime interest rate is higher than ten percent, the amendment would mitigate inequity to judgment creditors from the incentive for judgment debtors to delay paying the judgments against them. The amendment has no significant fiscal impact on the courts or on municipal, county, or state finances, and may reduce litigation concerning interest accrual dates to the extent that collateral litigation is fueled by the disparity between the rate of interest accruing on unsatisfied judgments and the actual cost of money.

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

CURRENT OR PRIOR RELATED LEGISLATION
None

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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 170.6, to read as follows:

§ 170.6

(a) (1) A judge, court commissioner, or referee of a superior court of the State of California shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge or court commissioner is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.

(2) A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee. If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge, and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible. The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the

merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided.

A motion under this paragraph may be made following an appellate court's reversal ~~on appeal~~ of a trial court's ruling, decision, or ~~following reversal on appeal of a trial court's~~ final judgment, if the trial judge in the prior proceeding is assigned to conduct ~~a new trial on~~ further proceedings in the matter. Notwithstanding paragraph (4), the party who filed the writ petition or appeal that resulted in the reversal of a ruling, decision or final judgment of a trial judge ~~court~~ may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment, subject to the provisions of this subdivision barring a motion after commencement of certain trial proceedings or after the judge's determination of contested fact issues relating to the merits if such proceedings or factual determinations occur after the appellate reversal.

(3) A party to a civil action making that motion under this section shall serve notice on all parties no later than five days after making the motion.

(4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(5) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(6) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California, ss. PEREMPTORY CHALLENGE

County of _____

_____, being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That ____ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) action (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.

Subscribed and sworn to before me this

_____ day of _____, 20___.
(Clerk or notary public or other
officer administering oath)

(7) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(b) Nothing in this section shall affect or limit Section 170 or Title 4 (commencing with Section 392) of Part 2, and this section shall be construed as cumulative thereto.

(c) If any provision of this section or the application to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application and, to this end, the provisions of this section are declared to be severable.

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

PROPONENTS: H. Thomas Watson, Barry R. Levy, David M. Axelrad, David S. Ettinger, Mitchell C. Tilner, Lisa Perrochet, John A. Taylor, Jr., Robert H. Wright, Curt C. Cutting, Brad S. Pauley, Peder K. Batalden, Emily V. Cuatto

STATEMENT OF REASONS

The Problem: Under subdivision (a)(2): (1) litigants acquire both a new deadline for asserting a peremptory challenge and the opportunity to assert a *second* challenge if the appellate court reversed a "final judgment" and remands for a new trial, but (2) litigants acquire only a new deadline for asserting an *initial* peremptory challenge if the appellate court reversed any other ruling. (E.g., *McNair v. Superior Court* (2016) 6 Cal.App.5th 1227, 1233–1234; *First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310, 313-315.) That makes no sense. The need for a challenge is the same whether the reversal concerns an interlocutory order or a final judgment and regardless whether a litigant previously exercised a challenge as to a different judge. (E.g., *People v. Superior Court* (*Maloy*) (2001) 91 Cal.App.4th 391, 395-396; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324, 327.)

At the same time, the statute allows 60 days to make a challenge after a reversal, does not incorporate the limitations earlier in the subdivision barring otherwise timely motions if made after commencement of certain trial proceedings or judicial determinations. Those reasonable limitations avoid unwarranted disruption of court proceedings and should apply to motions made after an appellate reversal.

The Solution: The proposed amendment simplifies section 170.6 and both expands and limits the circumstances when litigants can assert a preemptory challenge after prevailing in the appellate courts. The amendment authorizes a party who had already challenged a previously assigned judge to challenge a later judge after that party obtains an appellate reversal of a ruling by that judge with respect to both interlocutory decisions and final judgments. The amendment also clarifies that any challenge after an appellate reversal may not be made after certain events specified in the statute, even if the 60-day deadline for making the motion has not passed.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION
None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 996.370, to read as follows:

§ 996.370

After a money judgment is affirmed on appeal and is satisfied, or after a money judgment is reversed on appeal in a decision that has become final by the issuance of the appellate court's remittitur, any undertaking to stay enforcement of the judgment pending appeal is extinguished by operation of law, without further court order to cancel or remove the bond from the court file.

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

PROPONENTS: H. Thomas Watson, Barry R. Levy, David M. Axelrad, David S. Ettinger, Lisa Perrochet, John A. Taylor, Jr., Robert H. Wright, Curt C. Cutting, Brad S. Pauley, Peder K. Batalden, Emily V. Cuatto, Eric S. Boorstin

STATEMENT OF REASONS

The Problem: Under existing law, an appeal bond should be canceled once the judgment is satisfied, because the purpose for which it was given is extinguished. (See Code Civ. Proc., § 995.430, subds. (b) & (c).) The same is true when a judgment has been reversed and the matter is remanded for new proceedings, after which a new judgment may be entered. There is then no further potential for liability on the surety's part. However, sureties underwriting appeal bonds often are not California companies, often are not familiar with California law, and continue to charge the judgment debtor premiums even after receiving an acknowledgment of satisfaction of the judgment from the judgment creditor, or after receiving the appellate court remittitur that memorializes reversal of the judgment for which the bond was given. Many sureties demand that the judgment debtor return to the trial court with a motion or stipulation to remove the bond or undertaking from the court file and return it to the surety, or a court order extinguishing the bond. (See Code Civ. Proc., § 995.360; Cal. Rules of Court, rule 3.1130(c).) This practice needlessly increases litigation costs and consumes attorney and court time for no valid reason.

The Solution: The proposed statute would clarify for litigants and sureties that a separate court order is not necessary to extinguish a surety's potential liability on an appeal bond, where a judgment for which the bond was given is satisfied in full or is reversed in a final appellate decision. Enacting section 996.370 will not change the rights and obligations of judgment creditors, judgment debtors, or sureties who issue undertakings to stay enforcement of money judgments pending appeal. It will, however, reduce litigation costs and free up time spent by counsel and the courts in unnecessarily retrieving appeal bonds from court files or otherwise obtaining superfluous orders to extinguish the bonds.

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

CURRENT OR PRIOR RELATED LEGISLATION: None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 1282.6, to read as follows:

§ 1282.6

(a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding or a deposition under Section 1283, and if Section 1283.05 is applicable, for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon his own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence.

(b) Subpoenas shall be issued, as of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office or by the neutral arbitrator.

(c) The party serving the subpoena shall fill it in before service. ~~Subpeonas~~ Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

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

PROPONENT: BNANSDC

STATEMENT OF REASONS

The Problem (including Existing Law): There is a typo in subsection (c). How embarrassing! Let's fix it.

The Solution: Properly spelling the word subpoenas.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule. 36T

CURRENT OR PRIOR RELATED LEGISLATION

None known

AUTHOR AND/OR PERMANENT CONTACT:

Melissa L. Bustarde, Esq., Branfman Mayfield Bustarde Reichenthal LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, melissa@bmbr.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 04-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2020.410, to read as follows:

§ 2020.410

(a) A deposition subpoena that commands only the production of business records for copying shall designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item, and shall specify the form in which any electronically stored information is to be produced, if a particular form is desired.

(b) Notwithstanding subdivision (a), specific information identifiable only to the deponent's records system, like a policy number or the date when a consumer interacted with the witness, is not required.

(c) A deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it. It shall be directed to the custodian of those records or another person qualified to certify the records, and may be served personally, by overnight delivery, by facsimile transmission if the business entity publicly agrees to accept service via facsimile, or by electronic means if the business entity publicly agrees to accept service via electronic means. ~~It~~ The deposition subpoena that commands only the production of business records shall command compliance in accordance with Section 2020.430 on a date that is no earlier than 20 days after the issuance, or 15 days after ~~the~~ receipt of service, of the deposition subpoena, whichever date is later.

(d) If, under Section 1985.3 or 1985.6, the one to whom the deposition subpoena is directed is a witness, and the business records described in the deposition subpoena are personal records pertaining to a consumer, the service of the deposition subpoena shall be accompanied either by a copy of the proof of service of the notice to the consumer described in subdivision (e) of Section 1985.3, or subdivision (b) of Section 1985.6, as applicable, or by the consumer's written authorization to release personal records described in paragraph (2) of subdivision (c) of Section 1985.3, or paragraph (2) of subdivision (c) of Section 1985.6, as applicable.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Requiring "personal" service on a business that is typically required to have a designated agent for service of process is unnecessarily burdensome and costly on parties that have a right to seek business records pursuant to a subpoena duces tecum from such entity. Less expensive and burdensome means of service, including overnight mail, facsimile or electronic means (if the entity agrees), are typically acceptable for service of process in other contexts, and there is no good reason for requiring personal service as the sole

manner to legally serve a business with a subpoena demanding only the production of business records. In practice, the "personal service" requirement has been used by corporations and other entities to "reject" service attempted by mail or other means, even after actual service has been effected (by FedEx delivery, for example). Personal service can also be harassing to third parties that may be burdened by process servers that must currently serve subpoenas, in person, to their business, which is potentially needlessly disrupting to business during business hours. Thus, the personal service requirement can be used to make service more difficult on the propounding party and/or as a way to harass businesses or permit third parties to avoid/delay responding to discovery. It also unnecessarily increases the costs to obtain discovery on litigants because personal service costs are typically higher than service by other, equally effective, means.

The Solution: Offering other recognized means to serve a subpoenas duces tecum for business records, including by overnight delivery, facsimile transmission, and possibly even electronic service (when a business offers an electronic mailbox to accept service of process) will provide less expensive and less burdensome options to serve third party subpoenas on corporate entities, while still protecting the entities' legal right to proper notice of the same.

IMPACT STATEMENT
This resolution would expand the means of service for subpoenas exclusively seeking the production of business records in a civil case, and is not intended to impact any other type of deposition subpoena. This resolution will require review and possible conforming changes to Code of Civil Procedure section 1987, Civil Procedure section 2020.220, and Evidence Code section 1560. (*See* Cal. Code Civ. Proc. § 2020.030, noting the provisions of Civil Procedure Code section 1985 et seq., and Evidence Code section 1560 et seq., also apply to deposition subpoenas under the Civil Discovery Act that section 2020.410 is a part of.)

CURRENT OR PRIOR RELATED LEGISLATION
Unknown.

AUTHOR AND/OR PERMANENT CONTACT:
Kelly A. Ernby, 21822 Oceanbreeze Lane, Huntington Beach, CA (949) 903-5439, kellyernby@gmail.com

RESPONSIBLE FLOOR DELEGATE: Kelly A. Ernby

RESOLUTION 05-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 730, to read as follows:

§ 730

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court. When an indigent criminal defendant moves the court for appointment of an expert, the fact that a motion has been made or that an order has been issued is confidential and shall be sealed by the court upon the request of the defense without having to comply with the procedure contained in Rules of Court 2.551. Any hearing to be held on an indigent criminal defendant's motion shall be ex parte, in camera, and the transcript of the proceeding shall be sealed.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Indigent defendants are entitled to effective assistance of counsel, which includes appointment of confidential experts to assist in their defense. (*Torres v. Municipal Court* (1975) 50 Cal.App.3d 778, 783-4.) In order for the court to cover the cost of such an expert, the defense must make an adequate showing to the judge. Historically, this showing was made by way of a motion filed ex parte and under seal, which the judge would either grant or deny. In either case, the prosecution was not given notice of the request for the expert.

Recently, judges have begun citing California Rule of Court 2.551 which has various requirements for filing documents under seal. One of the requirements is that all of the parties receive notice of the request for sealing. This forces indigent defendants to reveal aspects of their defense to the prosecution. Not only does that violate the work product privilege, it violates equal protection. It results in indigent defendants being forced to choose between effective assistance of counsel and the confidentiality of defense strategy, when wealthy defendants – who pay for expert assistance on their own – do not.

The Solution: This clarifies that defense expert appointment motions are confidential, and states explicitly that California Rules of Court 2.551 does not apply.

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:
Lara Kislinger; 626-755-4169; Lkislinger@pubdef.lacounty.gov

RESPONSIBLE FLOOR DELEGATE: Lara Kislinger

RESOLUTION 06-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 859, to read as follows:

§ 859

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property in addition to the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): For many years, the court had the power to award double damages for wrongful taking in Trust, Estate, Guardianship and Conservatorship matters. There has been confusion by the courts whether the double damages are to be added to the damage award or is the damage award only to be doubled. The appellate courts in published and unpublished decision have disagreed as to how Section 859 is to be applied. The most recent case is *Conservatorship of Ribal* (*Rogers v. Nguyen*) (January 18, 2019) 2018 DJDAR 561, where the court held that the damage award was to be doubled and not have double damages added to the damage award.

The Solution: The past application of Section 859 was treated in its application as if it was similar to an award of punitive damages. In cases involving punitive damages, punitive damages are added to the award of actual damages. Similar penalties (such as triple damages) in civil litigation are also added to the actual damage award. The *Ribal* case is the first published case that interprets a penalty provision to not be added to an actual damage award. This would reduce the protection as to the elderly and minors from those that attempt to wrongfully exploit them. The proposed amendment is to ensure that the purpose of the statue would be maintained and protect this vulnerable population.

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:
Marc L. Sallus, Oldman, Cooley, Sallus, Birnberg, Coleman, & Gold LLP, 16133 Ventura Blvd., Penthouse, Encino, California 91436 818-986-8080 msallus@oclslaw.com

RESPONSIBLE FLOOR DELEGATE: Marc L. Sallus

RESOLUTION 06-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 5600, to read as follows:

§ 5600

(a) This part applies to a revocable transfer on death deed made by a transferor who dies on or after January 1, 2016, whether the deed was executed or recorded before, on, or after January 1, 2016.

(b) Nothing in this part invalidates an otherwise valid transfer under Section 5602.

(c) This part shall remain in effect only until January 1, ~~2022~~2032, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, ~~2022~~2032, deletes or extends that date. The repeal of this part pursuant to this subdivision shall not affect the validity or effect of a revocable transfer on death deed that is executed before January 1, ~~2022~~2032, and shall not affect the authority of the transferor to revoke a transfer on death deed by recording a signed and notarized instrument that is substantially in the form specified in Section 5644.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): From the introduction to SB 1305 (Roth, Reg. Sess. 2019-2020): "Existing law governs the execution, revocation, and effectiveness of a revocable transfer on death (TOD) deed, defined as an instrument that makes a donative transfer of property to a named beneficiary, as defined, that operates on the transferor's death, and remains revocable until the transferor's death. Existing law establishes statutory forms for executing and revoking a revocable TOD deed that include provisions and instructions for the forms to be notarized by the transferor and recorded with the county recorder. Existing law requires that subsequent pages of the form to execute a revocable TOD deed include statutory 'common questions' regarding the use of that form. Existing law requires that, in order to be effective, a revocable TOD deed be recorded on or before 60 days after the date it was executed." These are all good things. The problem with Probate Code section 5600 is that it will cause all of the provisions for Revocable Transfer Upon Death Deeds (RTDDs) to expire on January 1, 2022.

The Solution: Revocable Transfer Upon Death Deeds (RTDDs) are an economical way to avoid probate for transfers of real property, without having to rely on an attorney. California's RTDD provisions have been in effect in excess of five years now. In November 2019, the California Law Revision Commission (CLRC) issued a study about RTDDs. The CLRC study recommended that the provisions for RTDDs be extended for another ten (10) years. This resolution follows the CLRC's recommendation to extend the RTDD provisions for an additional ten (10) years (as of January 1, 2022). See *Revocable Transfer on Death Deed: Follow-Up*

Study, 46 Cal. L. Revision Comm'n Reports 135 (2019). See also *Assembly Committee on Judiciary Bill Analysis Report*, SB -1305 (Reg. Sess. 2019-2020) (Aug. 07, 2020).

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

CURRENT OR PRIOR RELATED LEGISLATION
Amended by Stats. 2020, Ch. 238, Sec. 1. (SB 1305) Effective January 1, 2021 (which extended the expiration date from January 1, 2021 until January 1, 2022).

AUTHOR AND/OR PERMANENT CONTACT:
Meera Balat, Aaron Riechert Carpol & Riffle, 333 Twin Dolphin Dr. Ste. 350, Redwood City, CA 94065-1489; tel. 650-368-4662; mbalat@arcr.com.

RESPONSIBLE FLOOR DELEGATE: Meera Balat

RESOLUTION 07-01-2021

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 70641 as follows:

§ 70641

(a) In the City and County of San Francisco, the Clerk of the Superior Court may impose a reasonable surcharge to print paper copies of any electronically filed document for which the Uniform Local Rules of Court of the Superior Court of San Francisco would otherwise require the delivery of a paper courtesy copies to the Court by the party, to the extent that a party requests that the Court print courtesy copies in lieu of the party delivering paper courtesy copies to the Court. Notwithstanding this section, parties may deliver paper courtesy copies to the Court in lieu of paying this surcharge.

(b) If the Court adopts the procedure described in subdivision (a), for purposes of that subdivision:

(i) The amount of the reasonable surcharge shall be determined by the Clerk of the Court from time to time on a per page basis taking into account all of the costs of printing the document, which amount shall be multiplied by the number of pages necessary to print two copies of the document. The Court shall post the amount of the reasonable surcharge in a conspicuous place in its courthouses and on its website.

(ii) The Presiding Judge of the Court shall designate the Court personnel authorized to print the copies described in subdivision (a).

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

PROPONENT: Jim Lamping, David Bigeleisen, James Brosnahan, Frank Leidman, Joachim Steinberg, Ciaran O'Sullivan, Ujvala Singh, Alicia Gamez, Melissa Allain, Jeff Heyden

STATEMENT OF REASONS

The Problem (including Existing Law): The San Francisco Superior Court has adopted an electronic filing system; however, the local rules still require parties to deliver paper courtesy copies of pleadings after they have been filed. This is required because hard copies are needed to review certain lengthy pleadings, such as accountings. The current rules require that parties hand deliver the courtesy copies to the Court. In many instances, there are continuances if the courtesy copies are misplaced or otherwise do not find their way to the appropriate court personnel. Additionally, the delivery of these documents requires parties to travel to the courthouse (or arrange for a runner to do so), resulting in an increase in the carbon footprint associated with this process. The Court does not have funding to print all of the pleadings filed with it and may not charge for printing the documents in the absence of an authorizing statute.

The Solution: This proposal would authorize the Court to charge a reasonable fee to those parties who elect to have the Court print their documents in lieu of delivering hard copy courtesy copies to the Court.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

AUTHOR AND/OR PERMANENT CONTACT:
James P. Lamping, The Law Office of James P. Lamping, 100 Pine Street, Suite 1250, San Francisco, CA 94111

RESPONSIBLE FLOOR DELEGATE: James P. Lamping

RESOLUTION 07-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Gov. Code section 69954, to read as follows:

§69954

(a) Transcripts prepared by a reporter using computer assistance and delivered on a medium other than paper shall be compensated at the same rate set for paper transcripts, except the reporter may also charge an additional fee not to exceed the cost of the medium or any copies thereof.

(b) The fee for a second copy of a transcript on appeal in computer-readable format ordered by or on behalf of a requesting party within 120 days of the filing or delivery of the original transcript shall be compensated at one-third the rate set forth for a second copy of a transcript as provided in Section 69950. A reporter may also charge an additional fee not to exceed the cost of the medium or any copies thereof.

(c) The fee for a computer-readable transcript shall be paid by the requesting court, party, or person, unless the computer-readable transcript is requested by a party in lieu of a paper transcript required to be delivered to that party by the rules of court. In that event, the fee shall be chargeable as statute or rule provides for the paper transcript.

(d) Any court, party, or person who has purchased a transcript ~~may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but~~ shall not ~~otherwise provide or~~ sell a copy or copies to any other party or person.

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

PROPONENTS: H. Thomas Watson, Barry R. Levy, David M. Axelrad, David S. Ettinger, Lisa Perrochet, John A. Taylor, Robert H. Wright, Jason R. Litt, Karen M. Bray, Brad S. Pauley, Dean A. Bochner, Steven S. Fleischman, Mark A. Kressel

STATEMENT OF REASONS

The Problem: AB 3125 (1991), which enacted Gov. Code section 69954 and Code of Civil Procedure section 269, stated that "[t]he purpose of this bill is to allow courts and other parties more access to transcripts in computer-readable form." (8/17/93 Cal. Bill Analysis, Senate Com. on Judiciary; accord, 8/19/93 Cal. Bill Analysis, Senate Floor.) Electronic transcripts have always been useful; they are now essential. The COVID pandemic has forced attorneys and courts to work remotely, and many will continue to do so after the pandemic subsides. While existing law allows litigants to secure electronic transcripts, it prohibits them from *sharing* them with others without the reporter's permission. This delays access to transcripts and often increases the cost of litigation, such as when reporters (who have already been fully compensated) demand additional payment for granting permission to share transcripts. This statutory prohibition against sharing transcripts is in tension with California Rules of Court, rule 8.153, which *mandates lending* the record on appeal to another litigant upon a timely request.

The proposed amendment eliminates that tension, and also promotes access to justice for litigants who have difficulty paying for transcripts but do not qualify for waiver of the transcript fee.

The Solution: Amend subdivision (d) of Gov. Code section 69954 so that it only prohibits persons who have purchased a reporters' transcript from selling it to others, but does not prohibit the sharing of transcripts. The deletion of the language regarding not having to pay a further fee to the reporter when reproducing a copy etc., is not intended to create an inference that any fee would be owed in those circumstances. This amendment help realize the purpose of allowing the "courts and other parties more access to transcripts in computer-readable form." Because the reporter will have already been paid in full for preparing the electronic transcript, there is no reason why it should not be freely shared without any delay or additional cost.

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

CURRENT OR PRIOR RELATED LEGISLATION
None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 07-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code 905.2, to read as follows:

§ 905.2

(a) This section shall apply to claims against the state filed with the Department of General Services except as provided in subparagraph (B) of paragraph (2) of subdivision (b).

(b) There shall be presented in accordance with this chapter and Chapter 2 (commencing with Section 910) all claims for money or damages against the state:

(1) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(2) (A) For which the appropriation made or fund designated is exhausted.

(B) Claims for reissuance of stale, dated, or replacement warrants shall be filed with the state entity that originally issued the warrant and, if allowed, shall be paid from the issuing entity's current appropriation or from any funds that are otherwise legally available to the entity to be used for that purpose. If an issuing entity determines that it is unable to issue a replacement warrant from its current appropriation or from any funds that are otherwise legally available to the entity to be used for that purpose, that entity may submit a request to include a claim for reimbursement of that warrant in a claims bill referenced in Section 14659.10 pursuant to a process prescribed by the Department of General Services.

(3) For money or damages on express contract, or for an injury for which the state is liable.

(4) For which settlement is not otherwise provided for by statute or constitutional provision.

(c) Claimants shall pay a filing fee of twenty-five dollars ($25) for filing a claim described in subdivision (b), except for claims for reissuance of stale, dated, or replacement warrants as described in subparagraph (B) of paragraph (2) of subdivision (b). This fee shall be deposited into the Service Revolving Fund and shall only be available for the support of the Department of General Services upon appropriation by the Legislature.

(1) The fee shall not apply to the following persons:

(A) Persons who are receiving benefits pursuant to the Supplemental Security Income (SSI) and State Supplementary Payment (SSP) programs (Article 5 (commencing with Section 12200) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code), the California Work Opportunity and Responsibility to Kids Act (CalWORKs) program (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code), the federal Supplemental Nutrition Assistance Program (SNAP; 7 U.S.C. Sec. 2011 et seq.), or Section 17000 of the Welfare and Institutions Code.

(B) Persons whose monthly income is 125 percent or less of the current monthly poverty line annually established by the Secretary of California Health and Human Services pursuant to the federal Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended. <u>If their income is less than $100 above 125 percent of the current monthly poverty line, the fee assessed shall be 25 percent of the difference between their income and 125 percent of the current monthly poverty line.</u>

(C) Persons who are sentenced to imprisonment in a state prison or confined in a county jail, or who are residents in a state institution and, within 90 days prior to the date the claim is filed, have a balance of one hundred dollars ($100) or less credited to the inmate's or resident's trust account. A certified copy of the statement of the account shall be submitted. If the inmate's or resident's trust account, within 90 days before the date the claim is filed, has a balance greater than $100 and less than $200, the fee assessed shall be 25 percent of the difference between the inmate's or resident's balance and $100.

(2) Any claimant who requests a fee waiver shall attach to the application a signed affidavit requesting the waiver and verification of benefits or income and any other required financial information in support of the request for the waiver.

(3) Notwithstanding any other law, an applicant shall not be entitled to a hearing regarding the denial of a request for a fee waiver.

(d) The time for the Department of General Services to determine the sufficiency, timeliness, or any other aspect of the claim shall begin when any of the following occur:

(1) The claim is submitted with the filing fee.

(2) The fee waiver is granted.

(3) The filing fee is paid to the department upon the department's denial of the fee waiver request, so long as payment is received within 10 calendar days of the mailing of the notice of the denial.

(e) Upon approval of the claim by the Department of General Services, the fee shall be reimbursed to the claimant, except that no fee shall be reimbursed if the approved claim was for the payment of an expired warrant. Reimbursement of the filing fee shall be paid by the state entity against which the approved claim was filed. If the claimant was granted a fee waiver pursuant to this section, the amount of the fee shall be paid by the state entity to the department. The reimbursement to the claimant or the payment to the department shall be made at the time the claim is paid by the state entity, or shall be added to the amount appropriated for the claim in an equity claims bill.

(f) The Department of General Services may assess a surcharge to the state entity against which the approved claim was filed in an amount not to exceed 15 percent of the total approved claim. The department shall not include the refunded filing fee in the surcharge calculation. This surcharge shall be deposited into the Service Revolving Fund and may be appropriated in support of the department in the annual Budget Act.

(1) The surcharge shall not apply to approved claims to reissue expired warrants.

(2) Upon the request of the department in a form prescribed by the Controller, the Controller shall transfer the fees from the state entity's appropriation to the appropriation for the support of the department. However, the department shall not request an amount that shall be submitted for legislative approval pursuant to Section 14659.10.

(g) The filing fee required by subdivision (c) shall apply to all claims filed after June 30, 2004, or August 16, 2004. The surcharge authorized by subdivision (f) may be calculated and included in claims paid after June 30, 2004, or August 16, 2004.

(h) This section shall not apply to claims made for a violation of the California Whistleblower Protection Act (Article 3 (commencing with Section 8547) of Chapter 6.5 of Division 1 of Title 2).

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): In 2004, a $25 fee was enacted for those who file a California Government Claims Form, or a form to preserve state-law claims against a governmental entity or employee (SB 1102). A year later, a fee waiver was enacted for those who meet certain conditions (AB 346). Namely, those whose monthly income is under 125% of the "current monthly poverty line," and inmates whose trust account balance is up to $100 for the past 90 days. If their monthly income or trust balance is above those thresholds at all, a full $25 fee is assessed. For these purposes, that renders someone better off with less money. For example, if an inmate's balance is $110, paying the full $25 brings it down to $85. By contrast, at $100, the inmate pays $0. Fee waivers should not be implemented so they make people better off with less money.

The Solution: This resolution implements a sliding scale for the fee assessed on those whose income or balance is just above the threshold. The fee would be 25% of their income of balance above the threshold, until it maxes out at $25. An inmate with a balance of $110 would pay $2.50 instead of $25 now. An inmate with a $100 balance or less would still pay $0. An inmate with a balance of $200 and above would still pay $25.

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

CURRENT OR PRIOR RELATED LEGISLATION
SB 1102 (2004), AB 2116 (2004), AB 346 (2005), SB 496 (2013).

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 07-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Elections Code section 6906, to read as follows:

§ 6906

(a) The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state.

(1) The Secretary of State or designee shall not accept and shall not count an elector's presidential or vice-presidential ballot if the elector has not marked both ballots, or has marked a ballot in violation of this section.

(2) An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of this law vacates the office of elector, and creates an absence of the elector under Elections Code section 6905. If the elector cannot physically complete a ballot, the elector may direct another individual in the elector's presence to complete the ballot.

(3) The Secretary of State or designee shall distribute ballots to and collect ballots from an elector newly elected under this section and Elections Code section 6905 and repeat the process under this section of examining ballots, declaring an absence of electors as required, and recording appropriately completed ballots from the newly elected elector until all of California's electoral votes have been cast and recorded.

(4) After the vote of this state's electors is completed, if the final list of electors differs from any list previously included on a certificate of ascertainment prepared and transmitted under 3 U.S.C. Section 6, the Secretary of State or designee shall immediately prepare an amended certificate of ascertainment and transmit it to the Governor for the Governor's signature.

(5) The Governor shall immediately deliver the signed amended certificate of ascertainment to the Secretary of State or designee and a signed duplicate original of the amended certificate of ascertainment to all individuals entitled to receive this state's certificate of ascertainment, indicating that the amended certificate of ascertainment is to be substituted for the certificate of ascertainment previously submitted.

(6) The Secretary of State or designee shall prepare a certificate of vote. The electors on the final list shall sign the certificate. The Secretary of State or designee shall process and transmit the signed certificate with the amended certificate of ascertainment under 3 U.S.C. Sections 9, 10, and 11.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Like many states, California has a law prohibiting faithless electors, or presidential electors who vote for someone other than the presidential or vice presidential candidates who received the most votes. Unlike many states, a faithless elector's vote in California remains counted as cast, and the faithless elector is instead penalized. Most states with faithless elector laws cancel the votes of faithless electors and replace them. This election showed we cannot take for granted cracks in our institutions. The day the electors officially vote has been a formality for most of our modern history, but this year, it was a day to watch closely. The possibility of electors being threatened into voting for someone else was real, and had the electoral vote count been closer, that possibility is conceivable to have occurred and made the difference. Although penalties exist in California for faithless electors, duress could negate such a penalty, or the threats to not comply might be greater than the penalty for not complying. Preventing the effects of faithless electors is far more important than punishing them.

The Solution: This resolution prohibits counting as cast the votes of faithless electors, and establishes that if an elector votes faithlessly, an absence is automatically created and that elector is replaced with a faithful one. That not only prevents any negative effects of a faithless elector, but it removes any incentive to threaten them because of the impossibility that the threat can amount to anything.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 07-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11517, to read as follows:

§ 11517

(a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or he shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including

the transcript. The agency shall review the proposed decision, and record, utilizing appellate standards of review. The findings of fact shall be reviewed using the substantial evidence standard; discretionary decisions shall be reviewed for an abuse of discretion; and, the conclusions of law shall be reviewed de novo. Rationale for the agencies' rejection must be in writing with reference to specific evidence and be supported by the record. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.

(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(d) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

The Problem (including Existing Law): Various governmental agencies are tasked with the issuing and regulating California's professional licensees. The Administrative Procedures Act, the Government Code, the Business & Professions Code, and the California Code of Regulations collectively govern how these agencies issue professional licenses and discipline licensees.

Once formal disciplinary proceedings are initiated against licensees or license applicants, those individuals have a right to an administrative hearing. The agencies have the discretion to either hear the matter themselves or delegate this authority to an Administrative Law Judge ("ALJ.") When agencies delegate their authority, the ALJ acts as the neutral arbiter of the facts and issues a rational and logical Proposed Decision and Order which is based on the legal principles, facts, and evidence adduced at the hearing.

However, Government Code §11517(c)(2)(E) permits the Boards, Departments, Bureaus and Committees ("Boards") of these licensing agencies to reject the ALJ's Proposed Decision and Order without providing justification or meeting any legal standard. The agencies' board members can override an experienced ALJ's learned application of legal principles and thoughtful weighing of the evidence. Because the licensing agencies may recoup the costs of

handling these administrative cases when any level is discipline is imposed on the licensees or applicants, there is a financial incentive for the Boards to unfairly disregard an ALJ's rational and reasoned Proposed Decision and Order. They have a financial interest to impose harsher discipline, which subverts justice and casts doubt on the legitimacy of proceedings. This subversion is even more egregious given that many of these Board members are individuals with very little to no legal experience or training and have not received any evidence. When this happens, the agency's actions completely undermine the fairness and validity of the entire administrative disciplinary hearing process.

The Solution: The resolution requires government agencies to utilize the appellate standards of review when rejecting the ALJ's Proposed Decision and Order after a hearing on the merits of the case to ensure there is no incorrect or erroneous legal basis for their rejection, and that their rejection is consistent with and supported by the law and facts.

IMPACT STATEMENT
This resolution may require additional statutory changes. This statutory change would require state agencies to adopt conforming changes to applicable sections of the California Code of Regulations and Business and Professions Code.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: Kevin C. Murphy, Esq. & Heather A. Melone, Esq.

RESOLUTION 08-01-2021

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Education Code Section 66271.4, to read as follows:

§ 6271.4.

(a) For purposes of this section, "public postsecondary educational institution" or "institution" means a campus of the University of California, the California State University, or the California Community Colleges.

(b) If a public postsecondary educational institution receives government-issued documentation, as described in subdivision (c), from a former student demonstrating that the former student's legal name or gender has been changed, the institution shall update the former student's records to include the updated legal name or gender. If requested by the former student, the institution shall reissue any documents conferred upon the former student with the former student's updated legal name or gender. Documents that shall be reissued by the institution upon request include, but are not necessarily limited to, a transcript or a diploma conferred by the institution.

(c) The documentation of a former student sufficient to demonstrate a legal name or gender change includes, but is not necessarily limited to, any of the following:

(1) State-issued driver's license.

(2) Birth certificate.

(3) Passport.

(4) Social security card.

(5) Court order indicating a name change or a gender change, or both.

(d) This section does not require the institution to modify records that the former student has not requested for modification or reissuance.

(e) Commencing with the 2023–24 graduating class, an institution shall provide an option for a graduating student to request that the diploma to be conferred by the institution list the student's chosen name. Commencing with the 2023–24 graduating class, an institution shall not require a graduating student to provide legal documentation sufficient to demonstrate a legal name or gender change in order to have the student's chosen name listed on the student's diploma.

(f) Notwithstanding Section 67400, this section shall apply to a campus of the University of California.

SEC. 2.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and 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: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem (including Existing Law): California public colleges do not have a standardized process for updating records of a student's legal name or gender changes after a student graduates. Transgender and nonbinary Californians often face discrimination, violence, and barriers to employment. These existing barriers can be exacerbated by student records that do not reflect their name and gender. If a person's name does not match the name on a transcript or diploma, that can present real challenges when applying for graduate school or employment opportunities. It can also "out" individuals who may not wish to be outed as transgender or may not feel safe in their current situation to openly identify as transgender or nonbinary. Many California colleges have taken steps to give students the opportunity to designate their affirmed name and gender in a variety of areas like student identification cards and school email accounts. However, those opportunities are not always extended to diplomas, and colleges across the state have vastly different processes for updating student records after graduation. The lack of a uniform process to leads to "Deadnaming"-referring to someone by the name they were assigned at birth instead of the name they currently use- and is a traumatic and unnecessary experience faced by far too many transgender and nonbinary Californians.

The Solution: This resolution gives students at California public colleges, especially transgender and nonbinary students, the ability to have their chosen names printed on their diplomas. This bill will ensure that diplomas do not "deadname" or call the graduate by the name they were assigned at birth rather than the name they use. This resolution will require public colleges to provide graduating students the option to have their chosen name printed on their college diploma. It will also standardize the process for updating records after a student graduates, clarifying which forms of legal identification are sufficient to update student records. In order to update records after graduation, a student would need one form of legal identification, including, but not limited to, a driver's license, birth certificate, passport, social security card, or court order indicating a name or gender change. This resolution builds off of AB 711, authored by Assemblymember Chiu and signed into law in 2019 by Governor Newsom, which required school districts to update the diplomas and transcripts of former K-12 students, particularly for transgender and nonbinary students, to reflect their accurate names and gender markers.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule. 36T

CURRENT OR PRIOR RELATED LEGISLATION
Assembly Bill No. 245 (2021-2022 Reg. Sess.) proposed by Assemblymember Chiu

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: Michael Wolchansky

RESOLUTION 08-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Education Code Section 35292.6, to read as follows:

§ 35292.6

(a) A public school maintaining any combination of classes from grade ~~6~~ 3 to grade 12, inclusive, that meets the 40-percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code shall stock at least 50 percent of the school's restrooms with feminine hygiene products at all times.

(b) A public school described in subdivision (a) shall not charge for any menstrual products provided to pupils, including, but not limited to, feminine hygiene products.

(c) For purposes of this section, "feminine hygiene products" means tampons and sanitary napkins for use in connection with the menstrual cycle.

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

PROPONENT: Women Lawyers of Sacramento

STATEMENT OF REASONS

The Problem (including Existing Law): Existing law requires elementary school grades 6 through 12 that meet certain requirements to provide feminine hygiene products. However, a study published by the American Academy of Pediatrics shows that approximately 10% of young girls will have their first period, or menarche, by 11 years old. William Cameron Chumlea, et al., Age at Menarche and Racial Comparisons in US Girls, 111 PEDIATRICS, 110, 110-113 (2003). Moreover, socioeconomic status has been found to play a factor in early age at menarche, making the need for access to feminine hygiene products in high poverty elementary schools even more significant. Feminine hygiene products are a necessity for the health, well-being, and full participation for those who menstruate. No person who menstruates should ever need to worry about access to tampons or sanitary pads, especially not the youngest and most vulnerable subset of our population.

The Solution: Amend Education Code section 35292.6 to require public schools teaching grade 3 and above (rather than grade 6 and above as currently provided), and which meet specific pupil poverty thresholds, to provide feminine hygiene products in at least 50 percent of the school's restrooms. The amendment will ensure that children who experience menses at a young age have access to necessary hygiene products.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

Assembly Bill No. 10 (2017-2018 Reg. Sess.).

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: Carmen Nicole-Cox and/or Cecilia L. Martin. Contact information listed above.

RESOLUTION 09-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Financial Code sections 1049, 1049.1, and 1049.3 to read as follows:

§ 1049:

No corporation subject to the Banking Law, as defined by California Corporations Code section 163 and California Financial Code sections 1000 *et seq*., shall provide financing for or invest in the stocks, securities, debentures, or other obligations of any institution, company, or subsidiary that owns or contracts with the government to manage or run a prison, jail, or detention facility.

§ 1049.1: This act shall apply to:

(a) All corporations engaging in commercial banking, industrial banking, or the trust business.

(b) All national banking associations authorized to transact business in this state to the extent that the provisions of this division are not inconsistent with and do not infringe paramount federal laws governing national banking associations.

(c) All other corporations that subject themselves to the special provisions and sections of this division.

(d) All other persons, associations, copartnerships, or corporations who, by violating any of its provisions, become subject to the penalties provided for in this division.

§ 1049.3 This act shall take effect immediately and shall apply to all contracts entered into, renewed, modified or amended on or after such effective date.

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

PROPONENTS: Joachim Steinberg, David Bigeleisen, Jim Brosnahan, Gerry Richardson, Mary Vail, Frank Leidman, James Lamping, Melissa Alain, Ciarán O'Sullivan, and Tulasi Hosain

STATEMENT OF REASONS

The Problem (including Existing Law): Private prisons and the private management of prisons are abominations that corrode our society and should be abolished entirely. In the meantime, restricting their financing will have to do. California has already banned for-profit prisons and detention facilities but has not restricted financial institutions operating within the state from financing or investing in those facilities. Preventing locally chartered financial institutions is the logical next step to ridding our state of these horrible institutions.

The Solution: California should restrict banks that operate under its laws from investing in for-profit prisons.

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

CURRENT OR PRIOR RELATED LEGISLATION
None.

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: Joachim B. Steinberg

RESOLUTION 09-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend the Truth in Lending Act, (Regulation Z) under 12 Code of Federal Regulations (CFR) Section 1026.43, to read as follows:

§ 1026.43

(a) Scope. This section applies to any consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than:

(1) A home equity line of credit subject to § 1026.40; (2) A mortgage transaction secured by a consumer's interest in a timeshare plan, as defined in 11 U.S.C. 101(53(D)); or (3) For purposes of paragraphs (c) through (f) of this section: (i) A reverse mortgage subject to § 1026.33;

(ii) A temporary or “bridge” loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling; (iii) A construction phase of 12 months or less of a construction-to-permanent loan; (iv) An extension of credit made pursuant to a program administered by a Housing Finance Agency, as defined under 24 CFR 266.5;

(v) An extension of credit made by: (A) A creditor designated as a Community Development Financial Institution, as defined under 12 CFR 1805.104(h); (B) A creditor designated as a Downpayment Assistance through Secondary Financing Provider, pursuant to 24 CFR 200.194(a), operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons; (C) A creditor designated as a Community Housing Development Organization provided that the creditor has entered into a commitment with a participating jurisdiction and is undertaking a project under the HOME program, pursuant to the provisions of 24 CFR 92.300(a), and as the terms community housing development organization, commitment, participating jurisdiction, and project are defined under 24 CFR 92.2; or (D) A creditor with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)-1), provided that: (1) During the calendar year preceding receipt of the consumer's application, the creditor extended credit secured by a dwelling no more than 200 times, except as provided in paragraph (a)(3)(vii) of this section; (2) During the calendar year preceding receipt of the consumer's application, the creditor extended credit secured by a dwelling only to consumers with income that did not exceed the low- and moderate-income household limit as established pursuant to section 102 of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(20)) and amended from time to time by the U.S. Department of Housing and Urban Development, pursuant to 24 CFR 570.3; (3) The extension of credit is to a consumer with income that does not exceed the household limit specified in paragraph (a)(3)(v)(D)(2) of this section; and (4) The creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit.

(vi) An extension of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211; 5219); (vii)

Consumer credit transactions that meet the following criteria are not considered in determining whether a creditor exceeds the credit extension limitation in paragraph (a)(3)(v)(D)(1) of this section:

(A) The transaction is secured by a subordinate lien; (B) The transaction is for the purpose of:

(1) Downpayment, closing costs, or other similar home buyer assistance, such as principal or interest subsidies; (2) Property rehabilitation assistance; (3) Energy efficiency assistance; or (4) Foreclosure avoidance or prevention; (C) The credit contract does not require payment of interest; (D) The credit contract provides that repayment of the amount of the credit extended is:

(1) Forgiven either incrementally or in whole, at a date certain, and subject only to specified ownership and occupancy conditions, such as a requirement that the consumer maintain the property as the consumer's principal dwelling for five years; (2) Deferred for a minimum of 20 years after consummation of the transaction; (3) Deferred until sale of the property securing the transaction; or (4) Deferred until the property securing the transaction is no longer the principal dwelling of the consumer; (E) The total of costs payable by the consumer in connection with the transaction at consummation is less than 1 percent of the amount of credit extended and includes no charges other than: (1) Fees for recordation of security instruments, deeds, and similar documents; (2) A bona fide and reasonable application fee; and (3) A bona fide and reasonable fee for housing counseling services; and (F) The creditor complies with all other applicable requirements of this part in connection with the transaction.

(b) Definitions. For purposes of this section:

(1) Covered transaction means a consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than a transaction exempt from coverage under paragraph (a) of this section.

(2) Fully amortizing payment means a periodic payment of principal and interest that will fully repay the loan amount over the loan term. (3) Fully indexed rate means the interest rate calculated using the index or formula that will apply after recast, as determined at the time of consummation, and the maximum margin that can apply at any time during the loan term.

(4) Higher-priced covered transaction means a covered transaction with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction, other than a qualified mortgage under paragraph (e)(5), (e)(6), or (f) of this section; by 3.5 or more percentage points for a first-lien covered transaction that is a qualified mortgage under paragraph (e)(5), (e)(6), or (f) of this section; or by 3.5 or more percentage points for a subordinate-lien covered transaction. For purposes of a qualified mortgage under paragraph (e)(2) of this section, for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due, the creditor must determine the annual percentage rate for purposes of this paragraph (b)(4) by treating the maximum interest rate that may apply during that five-year period as the interest rate for the full term of the loan.

(5) Loan amount means the principal amount the consumer will borrow as reflected in the promissory note or loan contract.

(6) Loan term means the period of time to repay the obligation in full.

(7) Maximum loan amount means the loan amount plus any increase in principal balance that results from negative amortization, as defined in § 1026.18(s)(7)(v), based on the terms of

the legal obligation assuming: (i) The consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments; and (ii) The maximum interest rate is reached at the earliest possible time.

(8) Mortgage-related obligations mean property taxes; premiums and similar charges identified in § 1026.4(b)(5), (7), (8), and (10) that are required by the creditor; fees and special assessments imposed by a condominium, cooperative, or homeowners association; ground rent; and leasehold payments.

(9) Points and fees has the same meaning as in § 1026.32(b)(1).

(10) Prepayment penalty has the same meaning as in § 1026.32(b)(6). (11) Recast means: (i) For an adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), the expiration of the period during which payments based on the introductory fixed interest rate are permitted under the terms of the legal obligation; (ii) For an interest-only loan, as defined in § 1026.18(s)(7)(iv), the expiration of the period during which interest-only payments are permitted under the terms of the legal obligation; and (iii) For a negative amortization loan, as defined in § 1026.18(s)(7)(v), the expiration of the period during which negatively amortizing payments are permitted under the terms of the legal obligation. (12) Simultaneous loan means another covered transaction or home equity line of credit subject to § 1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction or, if to be made after consummation, will cover closing costs of the first covered transaction.

(13) Third-party record means: (i) A document or other record prepared or reviewed by an appropriate person other than the consumer, the creditor, or the mortgage broker, as defined in § 1026.36(a)(2), or an agent of the creditor or mortgage broker; (ii) A copy of a tax return filed with the Internal Revenue Service or a State taxing authority; (iii) A record the creditor maintains for an account of the consumer held by the creditor; or (iv) If the consumer is an employee of the creditor or the mortgage broker, a document or other record maintained by the creditor or mortgage broker regarding the consumer's employment status or employment income.

(c) Repayment ability — (1) General requirement. A creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms. (2) Basis for determination. Except as provided otherwise in paragraphs (d), (e), and (f) of this section, in making the repayment ability determination required under paragraph (c)(1) of this section, a creditor must consider the following: (i) The consumer's current or reasonably expected income or assets, other than the value of the dwelling, including any real property attached to the dwelling, that secures the loan; (ii) If the creditor relies on income from the consumer's employment in determining repayment ability, the consumer's current employment status; (iii) The consumer's monthly payment on the covered transaction, calculated in accordance with paragraph (c)(5) of this section; (iv) The consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made, calculated in accordance with paragraph (c)(6) of this section; (v) The consumer's monthly payment for mortgage-related obligations; (vi) The consumer's current debt obligations, alimony, and child support; (vii) The consumer's monthly debt-to-income ratio or residual income in accordance with paragraph (c)(7) of this section; and (viii) The consumer's credit history.

(3) Verification using third-party records. A creditor must verify the information that the creditor relies on in determining a consumer's repayment ability under §1026.43(c)(2) using reasonably reliable third-party records, except that: (i) For purposes of paragraph (c)(2)(i) of this section, a creditor must verify a consumer's income or assets that the creditor relies on in

accordance with §1026.43(c)(4); (ii) For purposes of paragraph (c)(2)(ii) of this section, a creditor may verify a consumer's employment status orally if the creditor prepares a record of the information obtained orally; and (iii) For purposes of paragraph (c)(2)(vi) of this section, if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and a consumer's application states a current debt obligation not shown in the consumer's credit report, the creditor need not independently verify such an obligation. (4) Verification of income or assets. A creditor must verify the amounts of income or assets that the creditor relies on under §1026.43(c)(2)(i) to determine a consumer's ability to repay a covered transaction using third-party records that provide reasonably reliable evidence of the consumer's income or assets. A creditor may verify the consumer's income using a tax-return transcript issued by the Internal Revenue Service (IRS). Examples of other records the creditor may use to verify the consumer's income or assets include: (i) Copies of tax returns the consumer filed with the IRS or a State taxing authority; (ii) IRS Form W-2s or similar IRS forms used for reporting wages or tax withholding; (iii) Payroll statements, including military Leave and Earnings Statements; (iv) Financial institution records; (v) Records from the consumer's employer or a third party that obtained information from the employer; (vi) Records from a Federal, State, or local government agency stating the consumer's income from benefits or entitlements; (vii) Receipts from the consumer's use of check cashing services; and (viii) Receipts from the consumer's use of a funds transfer service.

(5) Payment calculation—(i) General rule. Except as provided in paragraph (c)(5)(ii) of this section, a creditor must make the consideration required under paragraph (c)(2)(iii) of this section using: (A) The fully indexed rate or any introductory interest rate, whichever is greater; and (B) Monthly, fully amortizing payments that are substantially equal, except for monthly student loan obligations as determined under paragraph (c)(6) of this section. (ii) Special rules for loans with a balloon payment, interest-only loans, and negative amortization loans. A creditor must make the consideration required under paragraph (c)(2)(iii) of this section for: (A) A loan with a balloon payment, as defined in §1026.18(s)(5)(i), using:(1) The maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due for a loan that is not a higher-priced covered transaction; or (2) The maximum payment in the payment schedule, including any balloon payment, for a higher-priced covered transaction; (B) An interest-only loan, as defined in §1026.18(s)(7)(iv), using: (1) The fully indexed rate or any introductory interest rate, whichever is greater; and (2) Substantially equal, monthly payments of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast. (C) A negative amortization loan, as defined in §1026.18(s)(7)(v), using:(1) The fully indexed rate or any introductory interest rate, whichever is greater; and (2) Substantially equal, monthly payments of principal and interest that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast.

(6) Payment calculation for simultaneous loans. For purposes of making the evaluation required under paragraph (c)(2)(iv) of this section, a creditor must consider, taking into account any mortgage-related obligations, a consumer's payment on a simultaneous loan that is: (i) A covered transaction, by following paragraph (c)(5)of this section except for federal education student loan obligations the payment considered in the calculation shall be the actual monthly payment rather than the fully amortized payment of the student loan, provided the consumer provides documentation that the consumer is enrolled in a federal income contingent repayment plan (ICR) or income based repayment (IBR) plan, or other federal Public Service Loan Forgiveness (PSLF) program, and has demonstrated satisfactory payment history on the IBR,

ICP plans, or PSLF program for a minimum of three years (36 calendar months) prior to consummation of the covered transaction; or (ii) A home equity line of credit subject to §1026.40, by using the periodic payment required under the terms of the plan and the amount of credit to be drawn at or before consummation of the covered transaction.

(7) Monthly debt-to-income ratio or residual income—(i) Definitions. For purposes of this paragraph (c)(7), the following definitions apply: (A) Total monthly debt obligations. The term total monthly debt obligations means the sum of: the payment on the covered transaction, as required to be calculated by paragraphs (c)(2)(iii) and (c)(5) of this section; simultaneous loans, as required by paragraphs (c)(2)(iv) and (c)(6) of this section; mortgage-related obligations, as required by paragraph (c)(2)(v) of this section; and current debt obligations, alimony, and child support, as required by paragraph (c)(2)(vi) of this section. (B) Total monthly income. The term total monthly income means the sum of the consumer's current or reasonably expected income, including any income from assets, as required by paragraphs (c)(2)(i) and (c)(4) of this section. (ii) Calculations—(A) Monthly debt-to-income ratio. If a creditor considers the consumer's monthly debt-to-income ratio under paragraph (c)(2)(vii) of this section, the creditor must consider the ratio of the consumer's total monthly debt obligations to the consumer's total monthly income. (B) Monthly residual income. If a creditor considers the consumer's monthly residual income under paragraph (c)(2)(vii) of this section, the creditor must consider the consumer's remaining income after subtracting the consumer's total monthly debt obligations from the consumer's total monthly income.

(d) Refinancing of non-standard mortgages - (1) Definitions. For purposes of this paragraph (d), the following definitions apply:

(i) Non-standard mortgage. The term non-standard mortgage means a covered transaction that is: (A) An adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), with an introductory fixed interest rate for a period of one year or longer; (B) An interest-only loan, as defined in § 1026.18(s)(7)(iv); or (C) A negative amortization loan, as defined in § 1026.18(s)(7)(v).

(ii) Standard mortgage. The term standard mortgage means a covered transaction: (A) That provides for regular periodic payments that do not: (1) Cause the principal balance to increase; (2) Allow the consumer to defer repayment of principal; or (3) Result in a balloon payment, as defined in § 1026.18(s)(5)(i); (B) For which the total points and fees payable in connection with the transaction do not exceed the amounts specified in paragraph (e)(3) of this section;

(C) For which the term does not exceed 40 years; (D) For which the interest rate is fixed for at least the first five years after consummation; and (E) For which the proceeds from the loan are used solely for the following purposes: (1) To pay off the outstanding principal balance on the non-standard mortgage; and (2) To pay closing or settlement charges required to be disclosed under the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq.

(iii) Refinancing. The term refinancing has the same meaning as in § 1026.20(a).

(2) Scope. The provisions of this paragraph (d) apply to the refinancing of a non-standard mortgage into a standard mortgage when the following conditions are met:

(i) The creditor for the standard mortgage is the current holder of the existing non-standard mortgage or the servicer acting on behalf of the current holder;

(ii) The monthly payment for the standard mortgage is materially lower than the monthly payment for the non-standard mortgage, as calculated under paragraph (d)(5) of this section.

(iii) The creditor receives the consumer's written application for the standard mortgage no later than two months after the non-standard mortgage has recast.

(iv) The consumer has made no more than one payment more than 30 days late on the non-standard mortgage during the 12 months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage.

(v) The consumer has made no payments more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage; and

(vi) If the non-standard mortgage was consummated on or after January 10, 2014, the non-standard mortgage was made in accordance with paragraph (c) or (e) of this section, as applicable.

(3) Exemption from repayment ability requirements. A creditor is not required to comply with the requirements of paragraph (c) of this section if:

(i) The conditions in paragraph (d)(2) of this section are met; and

(ii) The creditor has considered whether the standard mortgage likely will prevent a default by the consumer on the non-standard mortgage once the loan is recast.

(4) Offer of rate discounts and other favorable terms. A creditor making a covered transaction under this paragraph (d) may offer to the consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms that the creditor offers to new consumers, consistent with the creditor's documented underwriting practices and to the extent not prohibited by applicable State or Federal law.

(5) Payment calculations. For purposes of determining whether the consumer's monthly payment for a standard mortgage will be materially lower than the monthly payment for the non-standard mortgage, the following provisions shall be used:

(i) Non-standard mortgage. For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the creditor must calculate the monthly payment for a non-standard mortgage based on substantially equal, monthly, fully amortizing payments of principal and interest using: (A) The fully indexed rate as of a reasonable period of time before or after the date on which the creditor receives the consumer's written application for the standard mortgage;

(B) The term of the loan remaining as of the date on which the recast occurs, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; and (C) A remaining loan amount that is: (1) For an adjustable-rate mortgage under paragraph (d)(1)(i)(A) of this section, the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; (2) For an interest-only loan under paragraph (d)(1)(i)(B) of this section, the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; or (3) For a negative amortization loan under paragraph (d)(1)(i)(C) of this section, the maximum loan amount, determined after adjusting for the outstanding principal balance.

(ii) Standard mortgage. For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the monthly payment for a standard mortgage must be based on substantially equal, monthly, fully amortizing payments based on the maximum interest rate that may apply during the first five years after consummation.

(e) Qualified mortgages - (1) Safe harbor and presumption of compliance -

(i) Safe harbor for loans that are not higher-priced covered transactions and for seasoned loans. A creditor or assignee of a qualified mortgage complies with the repayment ability requirements of paragraph (c) of this section if: (A) The loan is a qualified mortgage as defined

in paragraph (e)(2), (4), (5), (6), or (f) of this section that is not a higher-priced covered transaction, as defined in paragraph (b)(4) of this section; or (B) The loan is a qualified mortgage as defined in paragraph (e)(7) of this section, regardless of whether the loan is a higher-priced covered transaction.

(ii) Presumption of compliance for higher-priced covered transactions.

(A) A creditor or assignee of a qualified mortgage, as defined in paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, that is a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, is presumed to comply with the repayment ability requirements of paragraph (c) of this section. (B) To rebut the presumption of compliance described in paragraph (e)(1)(ii)(A) of this section, it must be proven that, despite meeting the prerequisites of paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, the creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.

(2) Qualified mortgage defined - general. Except as provided in paragraph (e)(4), (5), (6), (7), or (f) of this section, a qualified mortgage is a covered transaction:

(i) That provides for regular periodic payments that are substantially equal, except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage, that do not: (A) Result in an increase of the principal balance;

(B) Allow the consumer to defer repayment of principal, except as provided in paragraph (f) of this section; or (C) Result in a balloon payment, as defined in § 1026.18(s)(5)(i), except as provided in paragraph (f) of this section;

(ii) For which the loan term does not exceed 30 years;

(iii) For which the total points and fees payable in connection with the loan do not exceed the amounts specified in paragraph (e)(3) of this section;

(iv) For which the creditor underwrites the loan, taking into account the monthly payment for mortgage-related obligations, using: (A) The maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due; and

(B) Periodic payments of principal and interest that will repay either: (1) The outstanding principal balance over the remaining term of the loan as of the date the interest rate adjusts to the maximum interest rate set forth in paragraph (e)(2)(iv)(A) of this section, assuming the consumer will have made all required payments as due prior to that date; or (2) The loan amount over the loan term; (v) For which the creditor, at or before consummation:

(A) Considers the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income, using the amounts determined from paragraph (e)(2)(v)(B) of this section. For purposes of this paragraph (e)(2)(v)(A), the consumer's monthly debt-to-income ratio or residual income is determined in accordance with paragraph (c)(7) of this section, except that the consumer's

monthly payment on the covered transaction, including the monthly payment for mortgage-related obligations, is calculated in accordance with paragraph (e)(2)(iv) of this section.

(B)(1) Verifies the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan using third-party records that provide reasonably reliable evidence of the consumer's income or assets, in accordance with paragraph (c)(4) of this section; and (2) Verifies the consumer's current debt obligations, alimony, and child support using reasonably reliable third-party records in accordance with paragraph (c)(3) of this section. (vi) For which the annual percentage rate does not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the amounts specified in paragraphs (e)(2)(vi)(A) through (F) of this section. The amounts specified here shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) that was reported on the preceding June 1. For purposes of this paragraph (e)(2)(vi), the creditor must determine the annual percentage rate for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due by treating the maximum interest rate that may apply during that five-year period as the interest rate for the full term of the loan.

(A) For a first-lien covered transaction with a loan amount greater than or equal to $110,260 (indexed for inflation), 2.25 or more percentage points; (B) For a first-lien covered transaction with a loan amount greater than or equal to $66,156 (indexed for inflation) but less than $110,260 (indexed for inflation), 3.5 or more percentage points;(C) For a first-lien covered transaction with a loan amount less than $66,156 (indexed for inflation), 6.5 or more percentage points;(D) For a first-lien covered transaction secured by a manufactured home with a loan amount less than $110,260 (indexed for inflation), 6.5 or more percentage points; (E) For a subordinate-lien covered transaction with a loan amount greater than or equal to $66,156 (indexed for inflation), 3.5 or more percentage points; (F) For a subordinate-lien covered transaction with a loan amount less than $66,156 (indexed for inflation), 6.5 or more percentage points.

(3) Limits on points and fees for qualified mortgages.

(i) Except as provided in paragraph (e)(3)(iii) of this section, a covered transaction is not a qualified mortgage unless the transaction's total points and fees, as defined in § 1026.32(b)(1), do not exceed: (A) For a loan amount greater than or equal to $100,000 (indexed for inflation): 3 percent of the total loan amount; (B) For a loan amount greater than or equal to $60,000 (indexed for inflation) but less than $100,000 (indexed for inflation): $3,000 (indexed for inflation); (C) For a loan amount greater than or equal to $20,000 (indexed for inflation) but less than $60,000 (indexed for inflation): 5 percent of the total loan amount; (D) For a loan amount greater than or equal to $12,500 (indexed for inflation) but less than $20,000 (indexed for inflation): $1,000 (indexed for inflation); (E) For a loan amount less than $12,500 (indexed for inflation): 8 percent of the total loan amount.

(ii) The dollar amounts, including the loan amounts, in paragraph (e)(3)(i) of this section shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) that was reported on the preceding June 1. See the official commentary to this paragraph (e)(3)(ii) for the current dollar amounts.

(iii) For covered transactions consummated on or before January 10, 2021, if the creditor or assignee determines after consummation that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section, the loan is not precluded from being a

qualified mortgage, provided: (A) The loan otherwise meets the requirements of paragraphs (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, as applicable; (B) The creditor or assignee pays to the consumer the amount described in paragraph (e)(3)(iv) of this section within 210 days after consummation and prior to the occurrence of any of the following events: (1) The institution of any action by the consumer in connection with the loan; (2) The receipt by the creditor, assignee, or servicer of written notice from the consumer that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section; or (3) The consumer becoming 60 days past due on the legal obligation; and (C) The creditor or assignee, as applicable, maintains and follows policies and procedures for post-consummation review of points and fees and for making payments to consumers in accordance with paragraphs (e)(3)(iii)(B) and (e)(3)(iv) of this section.

(iv) For purposes of paragraph (e)(3)(iii) of this section, the creditor or assignee must pay to the consumer an amount that is not less than the sum of the following:

(A) The dollar amount by which the transaction's total points and fees exceeds the applicable limit under paragraph (e)(3)(i) of this section; and (B) Interest on the dollar amount described in paragraph (e)(3)(iv)(A) of this section, calculated using the contract interest rate applicable during the period from consummation until the payment described in this paragraph (e)(3)(iv) is made to the consumer.

(4) Qualified mortgage defined - other agencies. Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction that is defined as a qualified mortgage by the U.S. Department of Housing and Urban Development under 24 CFR 201.7 and 24 CFR 203.19, the U.S. Department of Veterans Affairs under 38 CFR 36.4300 and 38 CFR 36.4500, or the U.S. Department of Agriculture under 7 CFR 3555.109.

(5) Qualified mortgage defined - small creditor portfolio loans. (i) Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction: (A) That satisfies the requirements of paragraph (e)(2) of this section other than the requirements of paragraphs (e)(2)(v) and (vi) of this section; (B) For which the creditor: (1) Considers and verifies at or before consummation the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, in accordance with paragraphs (c)(2)(i) and (c)(4) of this section; (2) Considers and verifies at or before consummation the consumer's current debt obligations, alimony, and child support in accordance with paragraphs (c)(2)(vi) and (c)(3) of this section; (3) Considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in paragraph (c)(7)(i)(A) shall be determined in accordance with paragraph (e)(2)(iv) of this section instead of paragraph (c)(5) of this section; (C) That is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (e)(5)(i)(D) of this section; and(D) For which the creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(B) and (C).

(ii) A qualified mortgage extended pursuant to paragraph (e)(5)(i) of this section immediately loses its status as a qualified mortgage under paragraph (e)(5)(i) if legal title to the qualified mortgage is sold, assigned, or otherwise transferred to another person except when: (A) The qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the qualified mortgage; (B) The qualified mortgage is sold,

assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (e)(5)(i)(D) of this section; (C) The qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee, an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or (D) The qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

(6) Qualified mortgage defined - temporary balloon-payment qualified mortgage rules.

(i) Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction: (A) That satisfies the requirements of paragraph (f) of this section other than the requirements of paragraph (f)(1)(vi); and (B) For which the creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(B) and (C).

(ii) The provisions of this paragraph (e)(6) apply only to covered transactions for which the application was received before April 1, 2016.

(7) Qualified mortgage defined - seasoned loans -

(i) General. Notwithstanding paragraph (e)(2) of this section, and except as provided in paragraph (e)(7)(iv) of this section, a qualified mortgage is a first-lien covered transaction that:

(A) Is a fixed-rate mortgage as defined in § 1026.18(s)(7)(iii) with fully amortizing payments as defined in paragraph (b)(2) of this section;

(B) Satisfies the requirements in paragraphs (e)(2)(i) through (v) of this section;

(C) Has met the requirements in paragraph (e)(7)(ii) of this section at the end of the seasoning period as defined in paragraph (e)(7)(iv)(C) of this section;

(D) Satisfies the requirements in paragraph (e)(7)(iii) of this section; and

(E) Is not a high-cost mortgage as defined in § 1026.32(a).

(ii) Performance requirements. To be a qualified mortgage under this paragraph (e)(7) of this section, the covered transaction must have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period.

(iii) Portfolio requirements. To be a qualified mortgage under this paragraph (e)(7) of this section, the covered transaction must satisfy the following requirements: (A) The covered transaction is not subject, at consummation, to a commitment to be acquired by another person, except for a sale, assignment, or transfer permitted by paragraph (e)(7)(iii)(B)(3) of this section; and (B) Legal title to the covered transaction is not sold, assigned, or otherwise transferred to another person before the end of the seasoning period, except that:

(1) The covered transaction may be sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee, an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency;

(2) The covered transaction may be sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor; or (3) The covered transaction may be sold, assigned, or otherwise transferred once before the end of the seasoning period, provided that the covered transaction is not securitized as part of the sale, assignment, or transfer or at any other time before the end of the seasoning period as defined in § 1026.43(e)(7)(iv)(C).

(iv) Definitions. For purposes of paragraph (e)(7) of this section:

(A) Delinquency means the failure to make a periodic payment (in one full payment or in two or more partial payments) sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle by the date the periodic payment is due under the terms of the legal obligation. Other amounts, such as any late fees, are not considered for this purpose.

(1) A periodic payment is 30 days delinquent when it is not paid before the due date of the following scheduled periodic payment.

(2) A periodic payment is 60 days delinquent if the consumer is more than 30 days delinquent on the first of two sequential scheduled periodic payments and does not make both sequential scheduled periodic payments before the due date of the next scheduled periodic payment after the two sequential scheduled periodic payments.

(3) For any given billing cycle for which a consumer's payment is less than the periodic payment due, a consumer is not delinquent as defined in this paragraph (e)(7) if:

(i) The servicer chooses not to treat the payment as delinquent for purposes of any section of subpart C of Regulation X, 12 CFR part 1024, if applicable;

(ii) The payment is deficient by $50 or less; and

(iii) There are no more than three such deficient payments treated as not delinquent during the seasoning period.

(4) The principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid are the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation, except:

(i) If a qualifying change as defined in paragraph (e)(7)(iv)(B) of this section is made to the loan obligation, the principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid are the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation as modified by the qualifying change.

(ii) If, due to reasons related to the timing of delivery, set up, or availability for occupancy of the dwelling securing the obligation, the first payment due date is modified before the first payment due date in the legal obligation at consummation, the modified first payment due date shall be considered in lieu of the first payment due date in the legal obligation at consummation in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid.

(5) Except for purposes of making up the deficiency amount set forth in paragraph (e)(7)(iv)(A)(3)(ii) of this section, payments from the following sources are not considered in assessing delinquency under paragraph (e)(7)(iv)(A) of this section:

(i) Funds in escrow in connection with the covered transaction; or

(ii) Funds paid on behalf of the consumer by the creditor, servicer, or assignee of the covered transaction, or any other person acting on behalf of such creditor, servicer, or assignee.

(B) Qualifying change means an agreement that meets the following conditions:

(1) The agreement is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency as defined in paragraph (e)(7)(iv)(D) of this section and ends any pre-existing delinquency on the loan obligation upon taking effect; (2) The amount of interest charged over the full term of the loan does not increase as a result of the agreement;

(3) The servicer does not charge any fee in connection with the agreement; and

(4) Promptly upon the consumer's acceptance of the agreement, the servicer waives all late charges, penalties, stop payment fees, or similar charges incurred during a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, as well as all late charges, penalties, stop payment fees, or similar charges incurred during the delinquency that led to a temporary payment accommodation in connection with a disaster or pandemic-related national emergency. (C) Seasoning period means a period of 36 months beginning on the date on which the first periodic payment is due after consummation of the covered transaction, except that: (1) Notwithstanding any other provision of this section, if there is a delinquency of 30 days or more at the end of the 36th month of the seasoning period, the seasoning period does not end until there is no delinquency; and (2) The seasoning period does not include any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change as defined in paragraph (e)(7)(iv)(B) of this section or the consumer cures the loan's delinquency under its original terms. If during or at the end of the temporary payment accommodation in connection with a disaster or pandemic-related national emergency there is a qualifying change or the consumer cures the loan's delinquency under its original terms, the seasoning period consists of the period from the date on which the first periodic payment was due after consummation of the covered transaction to the beginning of the temporary payment accommodation and an additional period immediately after the temporary payment accommodation ends, which together must equal at least 36 months. (D) Temporary payment accommodation in connection with a disaster or pandemic-related national emergency means temporary payment relief granted to a consumer due to financial hardship caused directly or indirectly by a presidentially declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) or a presidentially declared pandemic-related national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

(f) Balloon-payment qualified mortgages made by certain creditors -

(1) Exemption. Notwithstanding paragraph (e)(2) of this section, a qualified mortgage may provide for a balloon payment, provided:

(i) The loan satisfies the requirements for a qualified mortgage in paragraphs (e)(2)(i)(A) and (e)(2)(ii) and (iii) of this section;

(ii) The creditor determines at or before consummation that the consumer can make all of the scheduled payments under the terms of the legal obligation, as described in paragraph (f)(1)(iv) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment, from the consumer's current or reasonably expected income or assets other than the dwelling that secures the loan;

(iii) The creditor: (A) Considers and verifies at or before consummation the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, in accordance with paragraphs (c)(2)(i) and (c)(4) of this section; (B) Considers and verifies at or before consummation the consumer's current debt obligations, alimony, and child support in accordance with paragraphs (c)(2)(vi) and (c)(3) of this section; (C) Considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's

total monthly debt obligations in (c)(7)(i)(A) shall be determined in accordance with paragraph (f)(1)(iv)(A) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment;

(iv) The legal obligation provides for: (A) Scheduled payments that are substantially equal, calculated using an amortization period that does not exceed 30 years; (B) An interest rate that does not increase over the term of the loan; and (C) A loan term of five years or longer.

(v) The loan is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (f)(1)(vi) of this section; and (vi) The creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(A), (B), and (C).

(2) Post-consummation transfer of balloon-payment qualified mortgage. A balloon-payment qualified mortgage, extended pursuant to paragraph (f)(1), immediately loses its status as a qualified mortgage under paragraph (f)(1) if legal title to the balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person except when:

(i) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the balloon-payment qualified mortgage; (ii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (f)(1)(vi) of this section;

(iii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver or bankruptcy trustee, an order of a State or Federal governmental agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or

(iv) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

(g) Prepayment penalties - (1) When permitted. A covered transaction must not include a prepayment penalty unless:

(i) The prepayment penalty is otherwise permitted by law; and

(ii) The transaction: (A) Has an annual percentage rate that cannot increase after consummation; (B) Is a qualified mortgage under paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section; and (C) Is not a higher-priced mortgage loan, as defined in § 1026.35(a).

(2) Limits on prepayment penalties. A prepayment penalty:

(i) Must not apply after the three-year period following consummation; and

(ii) Must not exceed the following percentages of the amount of the outstanding loan balance prepaid: (A) 2 percent, if incurred during the first two years following consummation; and (B) 1 percent, if incurred during the third year following consummation.

(3) Alternative offer required. A creditor must not offer a consumer a covered transaction with a prepayment penalty unless the creditor also offers the consumer an alternative covered transaction without a prepayment penalty and the alternative covered transaction:

(i) Has an annual percentage rate that cannot increase after consummation and has the same type of interest rate as the covered transaction with a prepayment penalty; for purposes of this paragraph (g), the term “type of interest rate” refers to whether a transaction:

(A) Is a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii); or (B) Is a step-rate mortgage, as defined in § 1026.18(s)(7)(ii); (ii) Has the same loan term as the loan term for the covered transaction with a prepayment penalty; (iii) Satisfies the periodic payment conditions under paragraph (e)(2)(i) of this section; (iv) Satisfies the points and fees conditions under

paragraph (e)(2)(iii) of this section, based on the information known to the creditor at the time the transaction is offered; and (v) Is a transaction for which the creditor has a good faith belief that the consumer likely qualifies, based on the information known to the creditor at the time the creditor offers the covered transaction without a prepayment penalty.

(4) Offer through a mortgage broker. If the creditor offers a covered transaction with a prepayment penalty to the consumer through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must:

(i) Present the mortgage broker an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section; and

(ii) Establish by agreement that the mortgage broker must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by: (A) The creditor; or (B) Another creditor, if the transaction offered by the other creditor has a lower interest rate or a lower total dollar amount of discount points and origination points or fees. (5) Creditor that is a loan originator. If the creditor is a loan originator, as defined in § 1026.36(a)(1), and the creditor presents the consumer a covered transaction offered by a person to which the creditor would assign the covered transaction after consummation, the creditor must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by: (i) The assignee; or(ii) Another person, if the transaction offered by the other person has a lower interest rate or a lower total dollar amount of origination discount points and points or fees. (6) Applicability. This paragraph (g) applies only if a covered transaction is consummated with a prepayment penalty and is not violated if: (i) A covered transaction is consummated without a prepayment penalty; or (ii) The creditor and consumer do not consummate a covered transaction.

(h) Evasion; open-end credit. In connection with credit secured by a consumer's dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20), a creditor shall not structure the loan as an open-end plan to evade the requirements of this section.

(language to be added underlined, language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Studies show many student loan borrowers are financially responsible, yet current federal law prevents them from home ownership. For example, the 2019 US Federal Reserve (Fed) “Report on the Economic Well Being of US Households” showed 77% of student loan borrowers owing more than $75,000 had never defaulted on their loans. However, the 2017 National Association of Realtors (NAR) report, “Student Loan Debt and Housing Report, 2017, When Debt Holds You Back,” showed 83% of student loan borrowers surveyed could not buy a home because of student debt, and 52% surveyed cited the Debt to Income (DTI) underwriting rules as the main reason for not attempting to buy a home. The Ability to Repay (ATR) rule, in 12 CFR Section 1026.43 (c), subsections (c) (1), (5), (6) and (7), requires mortgage applicants to include the fully amortized student loan payment in their DTI ratio calculation, even if the applicant is enrolled in federal repayment programs with lower actual payments. As a result, many mortgage applicants with

student loans cannot obtain Federal Housing Authority mortgage loans because their overall debt is automatically determined to be too high.

The Solution: Inclusion of the fully amortized payment for many applicants who are participating in federal repayment programs such as Income Contingent Repayment (ICR), Public Service Loan Forgiveness (PSLF), or Income Based Repayment (IBR), excludes them from home ownership because the fully amortized payment is often much higher than the borrower's actual payments in those programs. As a result, the overly inflated DTI calculation does not accurately reflect the borrower's actual financial condition while under ICR, IBR or PSLF. Therefore, this resolution recommends that Regulation Z be modified to revise the DTI calculation for home mortgage applicant qualifications to rely on the borrower's actual student loan payment amount, in place of the fully amortized student loan payment. This more accurately reflects each applicant's eligibility for a mortgage loan based on the actual total monthly debt obligations required in 12 CFR Section 1026.43 (c) (2) (vii). Based on the 2017 NAR study and the 2019 Fed report, relying on the actual student loan payment amount would solve the problem by making these excluded applicants eligible for home ownership. Note: this resolution is directed to the federal government because federal law precludes California law about home mortgages. See, for example, the California Financial Code sections 22000-22780.1, "California Financing Law."

IMPACT STATEMENT
The impact of this resolution is uncertain. Complimentary modifications to California Finance Law and private lending guidelines may result.

CURRENT OR PRIOR RELATED LEGISLATION
SB482 (Hueso, Reg. Sess. 2019-2020) introduced to amend California Finance Code to incorporate the ATR requirement of Regulation Z for consumer loans. The legislation would have amended Sections 22329 and 22337, and added Section 22320.3 to the California Financial Code, relating to lending for consumer loans, but not mortgage lending. Although the bill was withdrawn by the author on April 23, 2019 prior to the first Senate Judiciary hearing, this bill demonstrates that California Finance Code could be amended to incorporate the proposed changes for mortgage lending following a change at the federal level. (source: https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200SB482, accessed 2/25/21).

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RESOLUTION 10-01-2021

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) This section shall be known, and may be cited as the Unarmed Decedent Agency Liability and Family Compensation Act of 2022.

(b) Law enforcement firearm deployment is an ultrahazardous activity. Law enforcement firearm deployment resulting in the death of a nonthreatening, unarmed person shall be compensable.

(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 the deceased 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, submitting, 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.

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

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

The Problem (including Existing Law): Law enforcement firearm deaths of non-threatening unarmed persons are a source of great 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. Georgetown law professor Rosa Brooks who served as an armed reserve police officer with the DC Metro Police Department reports in her 2021 book, "Tangled Up in Blue," police are sometimes trained to be on edge constantly.

Beyond the challenge of understanding factors that can influence law officer behavior when discharging a firearm, there is reluctance within the public to find wrongdoing by law enforcement. In a South Carolina police officer's 2015 criminal trial for fatally shooting fleeing unarmed motorist Walter Scott, the jury received video evidence and bystander testimony that after the shooting, the officer went to his vehicle, retrieved a taser weapon then placed that taser next to the deceased Mr. Scott's 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 annually reports law enforcement fatal shootings nationwide. From 2015 through 2020, 71 unarmed persons were fatally shot by California law enforcement. Data for 2020 show 10 fatalities of unarmed persons with four additional decedents classified as "weapon unknown."

The Solution: The solution is reliable recourse to compensation for family survivors of a non-threatening unarmed decedent. The proposed law enforcement agency strict liability statute authorizing compensation without requiring a finding of individual law officer wrongdoing meets that need. Proof of an unnecessary firearm fatality is sufficient under the proposed statute to establish agency liability. In ambiguous 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 does not impose personal liability, only agency liability, and expressly prohibits filing claims against individual agency employees. There is no persuasive reason to not treat unnecessary deaths as compensable without requiring proof of individual law officer wrongful conduct.

Handling a loaded firearm is an ultrahazardous activity and appropriate for strict liability. When construction demolition explosions cause unintended damage, strict liability imposes responsibility on the demolition enterprise, not the individual engineer who pushed the plunger and ignited the explosives. Adoption of the proposed statute would give attorneys a reliable option to secure compensation for survivors of unnecessary law enforcement firearm fatalities in cases where causation or fault are ambiguous, unclear, or unprovable.

IMPACT STATEMENT
The impact of this resolution is uncertain. While this proposed statue creates a form of strict liability for claims made under the proposed statute, there is also a potential savings to law enforcement agencies by eliminating defense litigation costs and significantly reducing potential attorney fee awards that would otherwise be incurred if the claims were litigated in court.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 11-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Family Code section 217.5, to read as follows:

§ 217.5

(a) At the initial hearing on a request for order brought under the Family Code, if a party seeks to present live testimony pursuant to section 217 of the Family Code, and the court grants their request, the court shall:

(1) continue the matter to allow a party an adequate opportunity to prepare for that live testimony, whether set as a short-cause or long-cause matter;

(2) shall not expect the parties to present that live testimony on the date of the initial hearing;

(3) if the court determines the need for temporary orders pending hearing, the court may grant such orders, without prejudice, pending the continued hearing date; and,

(4) the court shall issue case management orders to facilitate the parties getting ready for the special setting even if the matter is transferred to another department to accommodate what the court determines to be the need for a long-cause setting.

(b) The Judicial Council shall, by January 1, 2022, prescribe a case management order form in conformity with subsection (a).

(c) The Judicial Council shall, by January 1, 2022, modify its existing forms FL-300 and FL- 320 to require a party to give notice of intent to present live testimony.

(d) The Judicial Council shall, by January 1, 2022, adopt a statewide rule of court pertaining to case management on requests for orders and modify existing court rules in conformity therewith.

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

PROPONENT: Vicki Greene, Dena Kleeman, Annie Wishengrad, Ruth Kremen, Heather Patrick, Wendy Sharp, Rozanna Velen, Stephen Gershman, Robert Brandt, Stephen Cawelti, Claudia Ribet, Anthony Storn, Barbara Zipperman, Warren Shiell, Jennifer Skolnick, Joel Schwartz, Michael Maguire, Andrew Breitman, Marshall Waller.

STATEMENT OF REASONS

The Problem (including existing law): Family Code section 217 provides that the trial court must grant a request for live testimony at a hearing on a request for order (involving significant *pendente lite* or post-judgment issues, such as prejudgment interim orders for, or post-judgment modification of, child custody, spousal support and child support, among other issues) unless the Court finds good cause for denying the request. These issues are often very complex and involve third party witnesses and forensics (expert testimony).

However, this determination, of whether a party will be granted or denied the right to present live testimony is not made until the parties show up in court on the initial date of hearing. Therefore,

the parties do not know whether the Court will find good cause to deny the request (and section 217 clarifies the factors to be considered) or will allow the parties live testimony. Long-cause matters may be reassigned to a different judge.

Today, with remote and video hearings, it is extremely difficult, costly and at times not possible to prepare for court without knowing whether the Court will grant a 217 request. Live hearings requiring calling witnesses (through Court Connect and other avenues) and making sure all witnesses and the Court have all non-impeachment exhibits/evidence available and from different remote locations. In short, plans need to be made in advance and those plans depend upon whether the Court grants the request for live testimony.

Moreover, the initial determination cannot be made by conference call to the Court or judicial assistant because parties get to present their reason for wanting or needing live testimony and the Court must make specific findings if denied (pursuant to the factors delineated in section 217), that are reviewable on appeal. Therefore, the parties need an opportunity to address their request with the court before they are expected to announce ready and present the live witnesses' testimony and to arrange for the sharing of exhibits, and impeachment exhibits.

There also is no reason to require all of this work effort and expenditure of funds to prepare witnesses and share exhibits if the Court will not grant the 217 request for live testimony. Similarly, if the Court is going to grant the request, then the parties need time to prepare for that live hearing, with witnesses and documentary evidence/exhibits.

The Solution: This resolution would alleviate the problem and the uncertainty by making sure that the first date, when the parties appear in court, they will not be expected to start putting on their live witnesses (whether remotely or in person). Rather, instead, on that first appearance the parties can argue their respective positions, obtain a judicial ruling and then, be assured that another date will be set for the taking of live testimony (giving the parties time to prepare their witnesses, exhibits and case for that live hearing) whether the witnesses, parties and/or counsel decide to appear remotely or in person or in various combinations of remote or in person attendance.

IMPACT STATEMENT
This resolution may require the Judicial Council to adopt conforming changes to Rules of Court.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESOLUTION 11-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to to amend Family Code section 7820, to read as follows:

§ 7820

A proceeding may be brought under this part for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in this chapter, or if all of the requirements set forth in Section 1516.5 of the Probate Code are satisfied.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Probate Code section 1516.5 provides an alternative avenue for long-term guardians to seek termination of parental rights if the three requirements enumerated in subdivision (a) of the statute are met. Section 1516.5 specifies that the action is to be brought "in accordance with the procedures specified in Part 4 (commencing with Section 7800) of Division 12 of the Family Code . . ." However, in Part 4 of Division 12 of the Family Code, under Chapter 2 (Circumstances Where Proceeding May Be Brought), there is no reference to Probate Code section 1516.5.

The Solution: This resolution serves to conform Family Code section 7820 to the language in Probate Code section 1516.5 by including section 1516.5 as one of the ways in which a proceeding to free a minor may be brought.

IMPACT STATEMENT
This resolution serves to clarify existing law under the Probate and Family Codes and does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: Ami Sheth Sagel

RESOLUTION 11-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 215, to read as follows:

§ 215

(a) Except as provided in subdivision (b) or (c), after entry of a judgment of dissolution of marriage, nullity of marriage, legal separation of the parties, or paternity, or after a permanent order in any other proceeding in which there was at issue the visitation, custody, or support of a child, no modification of the judgment or order, and no subsequent order in the proceedings, is valid unless any prior notice otherwise required to be given to a party to the proceeding is served, in the same manner as the notice is otherwise permitted by law to be served, upon the party. For the purposes of this section, service upon the attorney of record is not sufficient.

(b) A postjudgment motion to modify a custody, visitation, or child support order may be served on the other party or parties by first-class mail or airmail, postage prepaid, to the persons to be served. For any party served by mail, the proof of service shall include an address verification.

(c) This section does not apply if the court has ordered an issue or issues bifurcated for separate trial in advance of the disposition of the entire case. In those cases, service of a motion on any outstanding matter shall be served either upon the attorney of record, if the parties are represented, or upon the parties, if unrepresented. However, if there has been no pleading filed in the action for a period of six months after the entry of the bifurcated judgment, service shall be upon both the party, at the party's last known address, and the attorney of record.

(d) Nothing contained herein requires service of the postjudgment motion pursuant to subdivision (a) and (b) to be by personal delivery upon the party on whom service is made unless such personal delivery is otherwise required by law.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The proposed language clarifies a potential ambiguity in the existing statute regarding whether the party must be personally served with notice when the post-judgment motion does not involve a modification of "custody, visitation, or child support."

Subdivision (b) states service may be by first-class mail or airmail, postage prepaid, to the persons to be served, along with an address verification when the subject of the motion is custody, visitation or child support.

However, regarding other requests (spousal support modification request being one example), the code leaves us with, "in the same manner as the notice is otherwise permitted by law to be served, upon the party…"

Courts have invalidated post-judgment orders where actual notice was not given to the party. See *In re Marriage of Roden* (1987) 193 Cal.App.3d 939, 945; *In re Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, 1039–1040.

In *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, the court, in a footnote, addressed this potential ambiguity and service requirement on a post-judgment party: "Some cases have expressed reservations, as do we, about an actual notice exception. (*In re Marriage of Roden* (1987) 193 Cal.App.3d 939, 944; *In re Marriage of Kreiss, supra*, 224 Cal.App.3d at pp. 1038-1039.) If the Legislature had intended to permit service by actual notice of post-judgment modification requests, it could have drafted Family Code section 215 to so permit. But the Legislature enacted section 215 as requiring service "in the same manner as the notice is otherwise permitted by law to be served . . . upon the party." *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1130, fn. 5.

The Solution: The proposed language adding subsection (d) states personal delivery upon the party is not required under section 215 unless it is otherwise required by law.

This avoids reservation by the courts and any alleged ambiguity that may cause a trial court to require personal service before ruling on a post judgment motion.

One example of the “otherwise required by law” exception are orders to show cause regarding contempt where the moving party may include a modification request of an order within the order to show cause. Current law requires orders to show cause regarding contempt to be personally served.

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:
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RESPONSIBLE FLOOR DELEGATE: B. Robert Farzad

RESOLUTION 11-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 270, to read as follows:

§ 270

Except as set forth in Sections 1101 and 3027.1, if a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Family Code section 270's use of the words, "under this code" encompasses the entire Family Code.

There are certain Family Code sections that either permit or require the court to order attorney's fees and costs in the form of sanctions.

Section 1101 addresses violations of fiduciary duties. Subsection (g) mandates an award of attorney's fees and costs if there is a finding of a fiduciary duty breach. To mandate fees and costs if there is a finding of a fiduciary duty breach, but then eliminate the mandate to award fees and costs due to an inability to pay is contradictory.

Our appellate courts noted the ambiguity in the application of section 270 to 1101. In footnote 9 of *In re Marriage of Schleich* (2017) 8 Cal.App.5th 267, the court noted: "The parties dispute whether the section 270's ability to pay requirement applies to an award of attorney's fees as a sanction under section 1101, subdivision (g). We do not reach that issue because the trial court's ability to pay determination implicitly encompassed the sanctions award." (Fn. 9, *Schleich*, Id. at 297)

Section 3027.1 addresses a *knowingly* false accusation of child abuse or neglect during a child custody proceeding. If the court makes such a finding, it may award sanctions against the person who knowingly made the false allegation. Unlike section 1101, this statute does not use "shall" or other mandatory language. However, like sections 271 and 1101, 3027.1 is a sanctions-based statute.

A sanctions-based statute intended to deter significant misconduct by a person who knowingly makes false allegations of child abuse should not relieve that person of the sanctions because that person may not have the ability to pay the sanction. To allow such an escape from the sanction accomplishes the opposite of what 3027.1 intends - to deter such misconduct.

The Solution: The solution is to amend Family Code section 270 so "ability to pay" is not a consideration when a party asks the court to order sanctions pursuant to sections 1101 or 3027.1.

If the legislature intended sanctions-based statutes such as 1101 and 3027.1 to include an analysis of ability to pay, it would have included such language within the section. The solution proposed directly addresses this issue so there is no further ambiguity on this subject and our trial courts know ability to pay is not a consideration if it first finds conduct justifies sanctions.

The solution is consistent with how the Family Code addresses other sanctions-based code sections. The best example is Family Code section 271, which, by its terms, does not have an "ability to pay" component.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: B. Robert Farzad

RESOLUTION 11-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 271, to read as follows:

§ 271

(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. <u>The party against whom the sanction is sought has the burden of proving an unreasonable financial burden by a preponderance of the evidence.</u> In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.

(b) An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of attorney's fees and costs as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

<u>The Problem (including Existing Law)</u>: The current language of Family Code section 271 does not specify which party must establish the "unreasonable financial burden."

Family law judges are therefore unclear whether the moving party or responding party has the burden of proof on this issue.

To place the burden on the moving party is unreasonable. A moving party often seeks sanctions pursuant to section 271 due to the responding party’s nondisclosure or incomplete disclosure of financial information.

In addition, the moving party often does not have the necessary financial information of the responding party to address the issue of unreasonable financial burden. This is especially true in parentage cases and many post-judgment requests for order.

The Solution: The proposed language resolves this ambiguity.

It assigns the burden of proving an "unreasonable financial burden" as a defense to the sanctions request on the responding party against whom the sanction is sought.

Placing the burden on the responding party is logical because "unreasonable financial burden" is a defense to a section 271 sanctions request, and the court only reaches the issue of whether there is "unreasonable financial burden" if it first finds the responding party's litigation conduct is sanctionable.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 11-06-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3027.1, to read as follows:

§ 3027.1

(a) If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purposes of this section, "person" includes a witness, a party, or a party's attorney.

~~(b) On motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served on the person against whom the sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served.~~

(b) An award of monetary sanctions and reasonable attorney's fees pursuant to this section shall only be imposed after the court's own motion or the motion of a party and notice to the person against whom the monetary sanctions and reasonable attorney's fees is proposed to be imposed and opportunity for that person to be heard.

(c) The remedy provided by this section is in addition to any other remedy provided by law.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The current version of subdivision (b) creates a confusing and ambiguous procedure to seek sanctions and have the court hear and rule on the request.

This procedure is unnecessarily inconsistent with other sanctions-based Family Code sections such as Family Code section 271.

Section 3027.1 is outdated and refers to an order to show cause proceeding instead of the request for order proceeding.

The Solution: The proposed modification brings subdivision (b) in line with the language of section 271, which is also a sanctions-based statute.

With the modification, such a request may be by the court's own motion or the motion of a party, the latter of which is generally by a request for order or at a trial so long as there is proper notice to the person against whom the sanctions and fees are sought.

The motion may be prejudgment or post judgment.

Like sanctions pursuant to section 271, such a request for order or trial request affords each party due process and does not unduly limit the court with the unnecessary procedural complexities of a separate and distinct order to show cause process.

The proposed language liberally borrows from section 271. Therefore, there is already ample precedent regarding what constitutes proper notice and opportunity to be heard because such cases interpreted nearly identical language in the context of a section 271 sanctions request. See *Parker v Harbert* (2012) 212 Cal.App.4th 1172, 1178; *Marriage of Duris & Urbany* (2011) 193 Cal.App.4th 510, 513; *Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1529.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: B. Robert Farzad

RESOLUTION 11-07-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3110, to read as follows:

§ 3110

(a) As used in this chapter, "court-appointed investigator" means a probation officer, domestic relations investigator, or court-appointed evaluator directed by the court to conduct an investigation pursuant to this chapter.

(b) The holding in the decision of People v. Sanchez (2016) 63 Cal.4th 665 is abrogated as to a court-appointed investigator who may testify to their opinion based upon case-specific hearsay so long as that testimony includes either otherwise admissible evidence or is hearsay that experts in the field routinely rely upon.

(c) The Legislature requests the Judicial Council make rules to implement this statute including amendment to California Rules of Court Rule 5.220 and/or 5.230.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The California Supreme Court holding in *People v. Sanchez* (2016) 63 Cal.4th 665 constrained the presentation of expert witness testimony if the opinion of the expert relied upon case-specific hearsay that was otherwise inadmissible. This rule has been extended in cases such as *Sargon Enterprises, Inc. v. U.S.C.* (2017) 17 Cal.App.5th 51 that requires an expert witness's testimony to be "tethered" to admissible evidence.

However, in a Family Law matter with complex child custody issues, the court may allow an expert to be designated under Evidence Code section 730 and Family Code section 3111 to assist the court in its assessment of the best interests of the child. To do so that expert must rely upon case-specific hearsay – interviews with the child(ren), relatives, collateral witness such as teachers, psychometric test results – in forming that opinion.

The issue is what the expert can testify to regarding their best interests analysis. The *Sanchez* and *Sargon* progeny of cases boil down to: the expert may rely upon case-specific hearsay but may not relay that case-specific hearsay as a basis for their opinion. *People v. Perez* (2018) 4 Cal.5th 421. This does not allow the trier of fact to consider all the circumstances bearing on the child custody decision before them.

The American Psychological Association, The Association of Family and Conciliation Courts, as well as the California Rules of Court require the mental health professional to interview the children, to make specific assessments based upon observations outside of court, as well as collection of data from a variety of sources.

The Solution: The solution is to amend Family Code section 3110 so that the holding in *People v. Sanchez* is expressly abrogated to the court-appointed child custody investigator (thus no amendment required to Family Code sections 3111, 3116 and 3118), and if the court makes a finding that the case-specific hearsay, even if otherwise inadmissible, is that routine relied upon by experts in the field.

The solution avoids amendment to any Evidence Code statutes regarding witness and expert witness testimony, allowing other areas of practice and other expert witnesses to still comply with the holding in *People v. Sanchez.*

The solution also requires the Legislature to request the Judicial Council revise California Rules of Court Rules 5.220 and 5.230 to conform with the amended Family Code section 3110.

IMPACT STATEMENT
This resolution affects Family Code sections 3110.5, 3111, 3112, 3113, 3114, 3115, 3116, 3117, and 3118, as well as California Rules of Court Rules 5.220 and 5.230.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Steven G. Hittelman

RESOLUTION 11-08-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 4331, to read as follows:

§ 4331

(a) In a proceeding for dissolution of marriage or for legal separation of the parties, the court may order a party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain their marital standard of living.

(b) The order may be made only on motion, for good cause, and on notice to the party to be examined and to all parties. The order shall specify the time, place, manner, conditions, scope of the examination, and the person or persons by whom it is to be made.

(c) A party who does not comply with an order under this section is subject to the same consequences provided for failure to comply with an examination ordered pursuant to Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(d) "Vocational training counselor" for the purpose of this section means an individual with sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market, to qualify as an expert in vocational training under Section 720 of the Evidence Code.

(e) A vocational training counselor shall have at least the following qualifications:

(1) A master's degree in the behavioral sciences, or other postgraduate degree that the court finds provides sufficient training to perform a vocational evaluation.

(2) Qualification to administer and interpret inventories for assessing career potential.

(3) Demonstrated ability in interviewing clients and assessing marketable skills with an understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints.

(4) Knowledge of current employment conditions, job market, and wages in the indicated geographic area.

(5) Knowledge of education and training programs in the area with costs and time plans for these programs.

(f) The court may order the supporting spouse to pay, in addition to spousal support, the necessary expenses and costs of the counseling, retraining, or education.

(g) The written report and testimony of the vocational training counselor shall not be made inadmissible if the opinion relied upon case-specific hearsay that is, itself, inadmissible so long as the hearsay relied upon is that which is routinely relied upon by experts in the field.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The California Supreme Court holding in *People v. Sanchez* (2016) 63 Cal.4th 665 constrained the presentation of expert witness testimony if the opinion of the expert relied upon case-specific hearsay that was otherwise inadmissible. This rule has been extended in cases such as *Sargon Enterprises, Inc. v. U.S.C.* (2017) 17 Cal.App.5th 51 that requires an expert witness's testimony to be "tethered" to admissible evidence.

However, California Family Code section 4331 provides for the court to allow a vocational examination to be conducted of one of the parties is unemployed or under-employed, either by choice or circumstance, when child or spousal support is at issue. Family Code section 4331, as well as the professional qualifications of the vocational training counselor, require the use of case-specific hearsay.

The concept of "imputation of income" or "earning capacity" is central to the relief provided under Family Code section 4331 and is defined by *In re Marriage Padilla* (1995) 38 Cal.App.4th 1212:

"'Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.'" If a parent is unwilling to work despite the ability and the opportunity, earning capacity may be imputed. A parent's motivation for not pursuing income opportunities is irrelevant when applying the *Regnery* test. [Citations omitted.]

More recent Appellate Court decisions provide guidance as to why the *Sanchez* holding should be abrogated under these circumstances. *In re Marriage of LaBass and Munsee* (1997) 56 Cal.App.4th 1331 held that want ads are not hearsay and that a party (similarly situated in education, training, and employment as the other party) could testify as to whether those job offers would apply to the other party.

Further, the holding of *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291 puts the burden of proof and persuasion on the party seeking to impute an ability to earn on the other party. Testimony from a qualified vocational training counselor would meet that burden, but to do so the counselor would have to rely upon case-specific hearsay, i.e., whether the party met the qualifications required by the employer and would be considered for hire (the third prong, above).

The Solution: The solution is to amend Family Code section 4331to add the language expressly abrogating the holding of *People v. Sanchez* if the case-specific hearsay used by the vocational expert is the kind routinely relied upon by experts in the field.

Limiting the exception to Family Code section 4331, which provides a unique statutory designation of an expert, avoids amendment to any Evidence Code sections regarding expert

witness testimony. The resolution still allows other areas of practice to fully litigate the circumstances of case-specific hearsay relied upon by an expert witness.

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:
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RESPONSIBLE FLOOR DELEGATE: Steven G. Hittelman

RESOLUTION 12-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code Section 4935, to read as follows:

§ 4935

(a) The board may adjourn to, or meet solely in, executive session to consider litigation, matters relating to the formation of contracts with third parties, but not the approval of such contracts which must be done in non-executive session, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 5665.

(b) The board shall adjourn to, or meet solely in, executive session to discuss member discipline, if requested by the member who is the subject of the discussion. That member shall be entitled to attend the executive session.

(c) The board shall adjourn to, or meet solely in, executive session to discuss a payment plan pursuant to Section 5665.

(d) The board shall adjourn to, or meet solely in, executive session to decide whether to foreclose on a lien pursuant to subdivision (b) of Section 5705.

(e) Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem (including Existing Law): This statute address what items can and must be addressed in executive session of common interest development (aka HOA) board of directors. Subdivision (a) allows (but does not require) board of directors to discuss matters relating to the formation of contracts with third parties. This statute has been interpreted to mean that board of directors can not only discuss but also approve those contracts in executive session, where homeowners are not allowed to attend. This results in contract approval being made in private without the knowledge of the members. Unfortunately, many HOAs have taken advantage of this loophole, to the detriment of its members. See: https://www.davis-stirling.com/HOME/Contract-Formation#axzz1eLb9uUe9. Although there is a need to openly and frankly discuss bids and contract terms in private, the actual approval of those contracts should be made in the open session in order to provide more transparency to the members as to how their money is being spent.

The Solution: This resolution would require HOA boards to approve any contracts in the open, general session of the board of directors' meetings where homeowners are allowed to be present. This creates more transparency and accountability. The resolution will still give the board of

directors the option to discuss bids and contract terms in executive session, protecting the privacy of competing bids and frank discussions about bid, vendors, pricing and contract terms.

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

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code Section 5105 be amended to read as follows:

§ 5105

(a) An association shall adopt operating rules in accordance with the procedures prescribed by Article 5 (commencing with Section 4340) of Chapter 3, that do all of the following:

(1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or internet websites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content.

(2) Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

(3) Specify the qualifications for candidates for the board and any other elected position, subject to subdivision (b), and procedures for the nomination of candidates, consistent with the governing documents. A nomination or election procedure shall not be deemed reasonable if it disallows any member from nominating themself for election to the board.

(4) Specify the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close, consistent with the governing documents.

(5) Specify a method of selecting one or three independent third parties as inspector or inspectors of elections utilizing one of the following methods:

(A) Appointment of the inspector or inspectors by the board.

(B) Election of the inspector or inspectors by the members of the association.

(C) Any other method for selecting the inspector or inspectors.

(6) Allow the inspector or inspectors to appoint and oversee additional persons to verify signatures and to count and tabulate votes as the inspector or inspectors deem appropriate, provided that the persons are independent third parties.

(7) Require retention of, as association election materials, both a candidate registration list and a voter list. The voter list shall include name, voting power, and either the physical address of the voter's separate interest, the parcel number, or both. The mailing address for the ballot shall be listed on the voter list if it differs from the physical address of the voter's separate interest or if only the parcel number is used. The association shall permit members to verify the accuracy of their individual information on both lists at least 30 days before the ballots are distributed. The association or member shall report any errors or omissions to either list to the inspector or inspectors who shall make the corrections within two business days.

(b) An association shall disqualify a person from a nomination as a candidate for not being a member of the association at the time of the nomination.

(1) This subdivision does not restrict a developer from making a nomination of a nonmember candidate consistent with the voting power of the developer as set forth in the regulations of the Department of Real Estate and the association's governing documents.

(2) If title to a separate interest parcel is held by a legal entity that is not a natural person, the governing authority of that legal entity shall have the power to appoint a natural person to be a member for purposes of this article.

(c) Through its bylaws or election operating rules adopted pursuant to subdivision (a) of Section 5105 only, an association may disqualify a person from nomination as a candidate pursuant to any of the following:

(1) Subject to paragraph (2) of subdivision (d), an association may require a nominee for a board seat, and a director during their board tenure, to be current in the payment of regular and special assessments, which are consumer debts subject to validation. If an association requires a nominee to be current in the payment of regular and special assessments, it shall also require a director to be current in the payment of regular and special assessments.

(2) An association may disqualify a person from nomination as a candidate if the person, if elected, would be serving on the board at the same time as another person who holds a joint ownership interest in the same separate interest parcel as the person and the other person is either properly nominated for the current election or an incumbent director.

(3) An association may disqualify a nominee if that person has been a member of the association for less than one year.

(4) An association may disqualify a nominee if that person discloses, or if the association is aware or becomes aware of, a past criminal conviction that would, if the person was elected, either prevent the association from purchasing the fidelity bond coverage required by Section 5806 or terminate the association's existing fidelity bond coverage.

(d) An association shall disqualify a person from serving on the board if the person, at the time of being elected or appointed, the election or appointment would violate any term limit qualification imposed by the association's bylaws or election operating rules.

(1) Term limits may be adopted and incorporated in the association's election operating rules by the board under article 5 of Chapter 3 (beginning with Section 4340).

(2) Term limits may be incorporated in the association's election operating rules by approval of the members under Corporations Code section 5034, after adoption by either the board or by written petition signed by at least 5% of the members.

(3) In event of a conflict between any term limits provisions adopted by the board and those adopted by the membership, the provisions adopted by the membership shall prevail and no term limit provision approved by the membership shall be altered or changed except by approval of the membership per Corporations Code section 5034.

(4) If a conflict arises between two term limit provisions appearing on the same ballot, and both are approved, the provision having the greater number of affirmative votes shall prevail.

~~(d)~~(e). An association may disqualify a person from nomination for nonpayment of regular and special assessments, but may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. The person shall not be disqualified for failure to be current in payment of regular and special assessments if either of the following circumstances is true:

(1) The person has paid the regular or special assessment under protest pursuant to Section 5658.

(2) The person has entered into a payment plan pursuant to Section 5665.

~~(e)~~(f) An association shall not disqualify a person from nomination if the person has not been provided the opportunity to engage in internal dispute resolution pursuant to Article 2 (commencing with Section 5900) of Chapter 10.

~~(f)~~(g) Notwithstanding any other law, the rules adopted pursuant to this section may provide for the nomination of candidates from the floor of membership meetings or nomination by any other manner. Those rules may permit write-in candidates for ballots.

~~(g)~~ (h) Notwithstanding any other law, the rules adopted pursuant to this section shall do all of the following:

(1) Prohibit the denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed.

(2) Prohibit the denial of a ballot to a person with general power of attorney for a member.

(3) Require the ballot of a person with general power of attorney for a member to be counted if returned in a timely manner.

(4) Require the inspector or inspectors of elections to deliver, or cause to be delivered, at least 30 days before an election, to each member both of the following documents:

(A) The ballot or ballots.

(B) A copy of the election operating rules. Delivery of the election operating rules may be accomplished by either of the following methods:

(i) Posting the election operating rules to an internet website and including the corresponding internet website address on the ballot together with the phrase, in at least 12-point font: “The rules governing this election may be found here:”

(ii) Individual delivery.

~~(h)~~(i). Election operating rules adopted pursuant to this section shall not be amended less than 90 days prior to an election.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The elimination of term limits for HOA directors was an unintended consequence of SB 323. In the next legislative session, Senator Wieckowski, the author of SB 323, introduced SB 969, which would have allowed HOA’s to re-install term limits. However, it is unlikely that SB 969 will be effective in re-establishing term limits among HOA’s, given that due to SB 323, many HOA’s have already removed term limits from their governing documents. Amending those documents to re-impose term limits is unlikely to occur because the required procedures for amending governing document requires support from the board, and board members are likely to be reticent about imposing term limits on themselves.

An essential goal of SB 323, which came into effect on January 1, 2020, was to allow more open elections for homeowners in Common Interest Development Associations, commonly known as

"homeowner associations" ("HOA's"). SB 323 eliminated *board* imposed qualifications against persons running for a director's seat excepting only those qualifications provided for in the bill. By strictly controlling which sorts of qualifications could be imposed, SB 323 also eliminated any *term limit* provisions the HOA *members* might already have in their bylaws or election rules.

In an HOA, "term limits" typically means preventing someone from serving as a director more than X number of years before having to not run for re-election for a specified time, or that a person could only serve for some consecutive or commulative terms. Term limits benefit the membership by rotating the board and keeping elections open to challengers with new ideas and fresh enthusiasm. Eliminating term limits was an unintended consequence of SB 323 because term limits are typically imposed *by the membership*, while SB323's goal was to eliminate arbitrary qualifications *imposed by incumbent directors* against challengers to their seats. Presently, Civil Code section 4340, et seq., only allows the HOA's board to change election rules.

The Solution: This resolution would allow for term limits in HOA's, including those adopted and approved by the members themselves.

This Resolution would reinstate any term limits provision that already appears in the association's bylaws besides allowing term limits to be initiated and adopted by members.

Associations must be able to adopt term limitations to get more openness and transparency and get new people with new ideas involved with the HOA operations. The membership should also be allowed to adopt term limitations because Board members are typically unwilling to impose term limits upon themselves. This Resolution allows the members themselves, by direct action, to change their HOA's election rules.

CURRENT OR PRIOR RELATED LEGISLATION:
Senate Bill 323 (2019-2020 Reg. Sess.)prohibited any director qualifications not explicitly allowed within the bill. While SB323 eliminated qualifications imposed by the incumbent directors to thwart challengers for their seats, it unintentionally also eliminated restrictions imposed by an association's bylaws or election rules.
SB969 (2019-2020 Reg. Sess., rescinded due to the shortened 2020 Legislative Calendar) would have re-established term limits for HOA's. However, unlike this Resolution, SB969 only allows term limits to be adopted by the HOA's board and does not allow for term limits to be adopted and approved by the HOA's membership. Since many board members likely would not impose term limits on themselves, the benefits of term limits wouldn't be achieved by SB 969 in its present form.

IMPACT STATEMENT
This Resolution affects Civil Code Article 5, Chapter 3, Part 5 (beginning with section 4340). That Article only allows the HOA's Board of Directors to initiate and adopt changes to the association's election rules. This Resolution creates a narrow exception to that Article to allow members to initiate and adopt changes to their association's election rules related to term limits.

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RESOLUTION 12-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code sections 5105 & 5115 be amended to read as follows:

§ 5105

(a) An association shall adopt operating rules in accordance with the procedures prescribed by Article 5 (commencing with Section 4340) of Chapter 3, that do all of the following:

(1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or internet websites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content.

(2) Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

(3) Specify the qualifications for candidates for the board and any other elected position, subject to subdivision (b), and procedures for the nomination of candidates, consistent with the governing documents. A nomination or election procedure shall not be deemed reasonable if it disallows any member from nominating themself for election to the board.

(4) Specify the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close, consistent with the governing documents.

(5) Specify a method of selecting one or three independent third parties as inspector or inspectors of elections utilizing one of the following methods:

(A) Appointment of the inspector or inspectors by the board.

(B) Election of the inspector or inspectors by the members of the association.

(C) Any other method for selecting the inspector or inspectors.

(6) Allow the inspector or inspectors to appoint and oversee additional persons to verify signatures and to count and tabulate votes as the inspector or inspectors deem appropriate, provided that the persons are independent third parties.

(7) Require retention of, as association election materials, both a candidate registration list and a voter list. The voter list shall include name, voting power, and either the physical address of the voter's separate interest, the parcel number, or both. The mailing address for the ballot shall be listed on the voter list if it differs from the physical address of the voter's separate interest or if only the parcel number is used. The association shall permit members to verify the accuracy of their individual information on both lists <u>until</u> ~~at least 30 days before the ballots are distributed~~ <u>eight (8) days after the deadline for nominations</u>. The association or member shall report any errors or omissions to either list to the inspector or inspectors who shall make the corrections within two business days.

(b) An association shall disqualify a person from a nomination as a candidate for not being a member of the association at the time of the nomination.

(1) This subdivision does not restrict a developer from making a nomination of a nonmember candidate consistent with the voting power of the developer as set forth in the regulations of the Department of Real Estate and the association's governing documents.

(2) If title to a separate interest parcel is held by a legal entity that is not a natural person, the governing authority of that legal entity shall have the power to appoint a natural person to be a member for purposes of this article.

(c) Through its bylaws or election operating rules adopted pursuant to subdivision (a) of Section 5105 only, an association may disqualify a person from nomination as a candidate pursuant to any of the following:

(1) Subject to paragraph (2) of subdivision (d), an association may require a nominee for a board seat, and a director during their board tenure, to be current in the payment of regular and special assessments, which are consumer debts subject to validation. If an association requires a nominee to be current in the payment of regular and special assessments, it shall also require a director to be current in the payment of regular and special assessments.

(2) An association may disqualify a person from nomination as a candidate if the person, if elected, would be serving on the board at the same time as another person who holds a joint ownership interest in the same separate interest parcel as the person and the other person is either properly nominated for the current election or an incumbent director.

(3) An association may disqualify a nominee if that person has been a member of the association for less than one year.

(4) An association may disqualify a nominee if that person discloses, or if the association is aware or becomes aware of, a past criminal conviction that would, if the person was elected, either prevent the association from purchasing the fidelity bond coverage required by Section 5806 or terminate the association's existing fidelity bond coverage.

(d) An association may disqualify a person from nomination for nonpayment of regular and special assessments, but may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. The person shall not be disqualified for failure to be current in payment of regular and special assessments if either of the following circumstances is true:

(1) The person has paid the regular or special assessment under protest pursuant to Section 5658.

(2) The person has entered into a payment plan pursuant to Section 5665.

(e) An association shall not disqualify a person from nomination if the person has not been provided the opportunity to engage in internal dispute resolution pursuant to Article 2 (commencing with Section 5900) of Chapter 10.

(f) Notwithstanding any other law, the rules adopted pursuant to this section may provide for the nomination of candidates from the floor of membership meetings or nomination by any other manner. Those rules may permit write-in candidates for ballots.

(g) Notwithstanding any other law, the rules adopted pursuant to this section shall do all of the following:

(1) Prohibit the denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed.

(2) Prohibit the denial of a ballot to a person with general power of attorney for a member.

(3) Require the ballot of a person with general power of attorney for a member to be counted if returned in a timely manner.

(4) Require the association to deliver, or cause to be delivered in the manner and by the deadline specified, all of the notices and documents required under Section 5115 (a).

~~(4)~~ (5) Require the association to cause the inspector or inspectors of elections to deliver, or cause to be delivered in the manner and by the deadline specified, ~~by individual delivery, at least 30 days before an election, to each member~~ all of the ~~following~~ notices and documents required under Section 5115 (b).

~~(A) The ballot or ballots.~~

~~(B) A copy of the election operating rules. Delivery of the election operating rules may be accomplished by either of the following methods:~~

~~(i) Posting the election operating rules to an internet website and including the corresponding internet website address on the ballot together with the phrase, in at least 12-point font: "The rules governing this election may be found here:"~~

~~(ii) Individual delivery.~~

(h) ~~Election~~ Changes to the election operating rules ~~adopted pursuant to this section~~ shall not be ~~amended~~ adopted or become effective less than 90 days prior to an election.

§ 5115

(a) ~~An association shall provide general notice of the procedure and deadline for submitting a nomination at~~ At least 30 days before any deadline for submitting a ~~nomination.~~ nomination an association shall provide general notice of all of the following: ~~Individual notice shall be delivered pursuant to Section 4040 if individual notice is requested by a member.~~

(1) The date, time, and location of the meeting at which ballots will be counted

(2) The date by which ballots will be distributed .

(3) A copy of the election operating rules. Delivery of the election operating rules may be accomplished by either of the following methods:

(A) Posting the election operating rules to an Internet website and including in the notice the corresponding website address in the notice with the phrase, in at least 12-point font: "The rules governing this election may be found here:"

(B) Individual delivery.

(4) The procedure and deadline for submitting a nomination.

(5) A list of candidate qualifications along with a statement, in accordance with Civil Code Section 5105 (e), noticing that any potential candidate's right to participate in IDR with the association, if the potential candidate is subject to disqualification.

(6) The procedure and deadline for members to verify the accuracy of their individual information on both the voter list and list of candidates. The deadline to verify such information shall be not earlier than the deadline stated in Section 5105(a)(7).

(7) Individual notice of the above paragraphs shall be delivered pursuant to Section 4040 if individual notice is requested by a member.

(b) An association shall ~~provide general notice~~ cause the inspector or inspectors of election to deliver or mail by first-class mail to all of the voters on the voter list notice of all of the following at least 30 days ~~before the ballots are distributed~~ prior to the deadline for voting:

(1) The date and time by which, and the physical address where, ballots are to be returned by mail or handed to the inspector or inspectors of elections.

(2) The date, time, and location of the meeting at which ballots will be counted.

~~(3) The list of all candidates' names that will appear on the ballot.~~

~~(4) Individual notice of the above paragraphs shall be delivered pursuant to Section 4040 if individual notice is requested by a member.~~

~~(c)~~ (3) The ballots and two preaddressed envelopes with instructions on how to return ballots~~. shall be mailed by first-class mail or delivered by the association to every member not less than 30 days prior to the deadline for voting~~. In order to preserve confidentiality, a voter may not be identified by name, address, or lot, parcel, or unit number on the ballot. The association shall use as a model those procedures used by California counties for ensuring confidentiality of vote by mail ballots, including all of the following:

~~(1)~~ (A) The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left-hand corner of the second envelope, the voter shall sign the voter's name, indicate the voter's name, and indicate the address or separate interest identifier that entitles the voter to vote.

~~(2)~~ (B) The second envelope is addressed to the inspector or inspectors of elections, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of elections. The member may request a receipt for delivery.

~~(d)~~ (c) A quorum shall be required only if so stated in the governing documents or other provisions of law. If a quorum is required by the governing documents, each ballot received by the inspector of elections shall be treated as a member present at a meeting for purposes of establishing a quorum.

~~(e)~~ (d) An association shall allow for cumulative voting using the secret ballot procedures provided in this section, if cumulative voting is provided for in the governing documents.

~~(f)~~ (e) Except for the meeting to count the votes required in subdivision (a) of Section 5120, an election may be conducted entirely by mail unless otherwise specified in the governing documents.

~~(g)~~ (f) In an election to approve an amendment of the governing documents, the text of the proposed amendment shall be delivered to the members with the ballot.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): SB 323, which became effective on January 1, 2020, unnecessarily extended the time required for conducting elections in Common Interest Developments, commonly known as "homeowner associations" ("HOA's). Before SB 323, elections typically took about 60 days from the announcement date to tallying the votes. Presently, because of the extra steps required by SB 323 and the statutorily specified time of 30 days for each step, elections take up to 105 days, and even longer sometimes. This is too long! Not every step takes 30 days! The verification of the voters' and candidates' lists only needs to be about eight (8) days, saving about three (3) weeks.

Also, some steps required by SB 323 seem out of their logical order. For example, it is strange that under SB 323, the distribution of the rules for the election doesn't happen until the ballots are already being distributed and which is *after* the candidates have announced. Logically, the rules should be distributed when the election is first called and *before* anyone has become a candidate.

There needs to be clarification regarding whether the Inspector or the Association must distribute the ballots, and what other election materials are to be sent with those ballots.

The Solution: The statutes can, and should, be amended to reduce the time for conducting the HOA elections from about 105 days to about 70 days and eliminating no steps that would reduce the accountability and transparency of the election processes. This can and should be done by combining steps an allowing for reducing costs by combining mailings. This time reduction is possible by also reducing the time allowed for members and candidates to check and correct their information on the lists held by the Inspector from 30 days to just eight(8) days, which is adequate.

IMPACT STATEMENT
This Resolution would not have any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
Senate Bill SB 323 (2019-2020) Reg. Sess., which prescribes about 30 days for every step in the HOA election process.

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RESOLUTION 12-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code section 4365 be amended to read as follows:

§4365

(a) Members of an association owning 5 percent or more of the separate interests may call a ~~special vote~~ referendum ~~of~~ by the members to ~~reverse~~ require membership approval of ~~a~~ any rule. ~~change.~~

(b) A ~~special vote~~ referendum ~~of~~ by the members may be called by delivering a ~~written request~~ signed petition to the ~~association.~~ association's inspector of elections who shall verify, but keep private, the identifying information of the separate interests. Not less than 35 days nor more than 90 days after receipt of a proper request, the association shall hold a vote of the members on whether to affirm or reject the rule ~~change~~, pursuant to Article 4 (commencing with Section 5100) of Chapter 6. The vote of the members required by this section may be consolidated within a regularly scheduled election. ~~The written request may not be delivered more than 30 days after the association gives general notice of the rule change, pursuant to Section 4045.~~

(c) If the written request is delivered not more than 30 days after the association gives general notice of the rule change as required under Section 4360(c), then the adoption and enforcement of the rule change shall be suspended until after the results of the vote on the referendum.

~~(c)~~(d) For the purposes of Section 5225 of this code and Section 8330 of the Corporations Code, collection of signatures to call a ~~special~~ referendum vote under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.

~~(d)~~ (e) The rule ~~change may be reversed by~~ shall be deemed rejected unless the referendum receives the affirmative vote of a majority of a quorum of the members, pursuant to Section 4070, or if the declaration or bylaws require a greater percentage, by the affirmative vote of the percentage required.

~~(e)~~ (f) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

~~(f)~~ (g) A rule ~~change reversed~~ rejected under this section may not be readopted for one year after the date of the vote ~~reversing~~ on the rule ~~change~~. Nothing in this section precludes the board from adopting a different rule on the same subject as the rule ~~change~~ that has been ~~reversed~~ rejected.

~~(g)~~ (h) As soon as possible after the close of voting, but not more than 15 days after the close of voting, the board shall provide general notice pursuant to Section 4045 of the results of the member vote.

~~(j)~~ (i) This section does not apply to an emergency rule change made by the board under subdivision (d) of Section 4360.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Homeowners living in a common interest development have little control over the rules made by their board of directors. Like they already do with state and local governments, a citizen living in HOA's should have more influence over the rules that direct their daily lives.

HOA's have long been described as "quasi-governmental agencies:

> "Indeed, the homeowners associations function almost as a second municipal government, regulating many aspects of [the homeowners'] daily lives. [U]pon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. (*Villa Milano Homeowners Ass'n v. Il Davorge* (2000) 84 Cal. App.4th 819, 836; internal cites and quotation marks omitted).

Nevertheless, given the tremendous power that HOA's have over their citizens' daily lives, it is inexplicable those citizens cannot repudiate operating rules for their own HOA, even though they can initiate and vote on legislation at both the state and local levels. Instead, they must live under whatever rules their board of directors decides for them!

Even former Governor Jerry Brown was unaware that HOA's are more like dictatorships than democracies. In his letter rejecting SB 1265 (a bill that would make HOA elections more open and transparent), he wrote, "If changes to an [HOA] election process are needed, they should be resolved *by the members of that community*." (Ltr to Senate dtd. 9/30/2018, re: SB 1265. Italics added for emphasis.) Hence, even the Governor was unaware that the law doesn't give the HOA community members the power to change their own operating rules even though he felt they already had and should have that power.

The Solution: This Resolution:

(a) Allows the members of a homeowners association to eliminate those rules with which they disagree.
(b) Provides practical limitations over the power of the members: For example, that any referendum can only be called by written petition signed by not less than 5% of the members. Approval must be by a majority of a quorum of the members voting on the initiative. It provides no means of allowing the membership to create or propose any rules, but only to either accept or reject those rules already adopted by the board. The membership cannot hold a referendum on any rules deemed by the board to be an emergency measure.
(c) Ensures that petition signers for HOA initiatives have a similar guarantee of privacy afforded signers of petitions for state and local initiatives. (See, Elec. C. §18650.)

IMPACT STATEMENT

This Resolution does not any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESOLUTION 12-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code Section 5135 be amended, to read as follows:

§5135

(a) Association funds shall not be used for campaign purposes in connection with any association ~~board~~ election. Funds of the association or access to association media, newsletters, or internet websites shall not be used for campaign purposes in connection with any ~~other~~ association election except to the extent necessary to comply with duties of the association imposed by law.

(b) For the purposes of this section, "campaign purposes" includes, but is not limited to, the following:

(1) ~~Expressly advocating~~ Any communication advocating for the election or defeat of any candidate or for the approval or defeat of any issue that is on the association election ballot.

(2) Including the photograph or prominently featuring the name of any candidate or promoting a position on an issue, on a communication from the association or its board, excepting the ballot, ballot materials, or a communication that is legally required, within ~~30~~ 60 days ~~of an election~~ before the ballots are distributed and extending at least until the time the ballots are counted. This is not a campaign purpose if the communication is one for which subdivision (a) of Section 5105 requires that equal access be provided to another candidate or advocate.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law: Board members of homeowner associations have used their position and control over their association's money and media to advocate for their re-election or promote election issues while denying equal access to other members of the association with divergent views.

It would seem that Civil Code section 5135 was written to make sure that no one side can monopolize the association's funds or media. However, unscrupulous HOA boards have used any opening in that language to thwart that intent.

For example, that section's prohibition against "expressly" advocating doesn't prevent directors on the board from promoting themselves by using association media and email lists to send, at homeowner expense and just before the election, letters and emails that give fawning praise to the board's "hard work and accomplishment's during the past year." Even though such a communication doesn't "expressly" state, "Re-elect the Board!" the conscious reader would nevertheless recognize it as subtle campaign advocacy that should be prohibited unless the

opposition is given equal access. The legislature probably did not anticipate that the directors on an HOA board would be so devious. However, a judge's hand is constrained by the exact words of the statute.

Also, the phrase "within 30 days of an election" is ambiguous since "an election" can mean the date that the ballots are counted, or it could mean the entire election campaign process, such as the time starting when candidates first announce their candidacy. For example, the court in one case, *Wittenburg v Beachwalk Homeowners Association* (2013) 217 Cal.App.4th 654, held that a period of about 18 months and three elections was one election campaign for the purpose of enforcing members' rights. In any event, if the right to equal access is to be meaningful, it must at least include the time when either side might be campaigning for the hearts and minds of the voters.

Also, section 5135 does not adequately cover elections dealing with issues, and not just candidates. To ensure fairness to all sides, there isn't any reason to distinguish board elections from any other type of election.

The Solution: This resolution solves all the above-identified problems with Civil Code section 5135 because it:

a. Applies fairness and equal time to any manner of election, whether for a board seat or any other election.
b. Amends subsection (b)(1) to prohibit one-sided campaign advocacy even if that advocacy doesn't explicitly instruct the reader how to vote.
c. Specifies a readily determinable period—that the time includes but is not limited to 60 days before the ballots are distributed and until the ballots are counted.

IMPACT STATEMENT
This Resolution would not have any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESOLUTION 12-06-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code Section 5120 be amended, to read as follows:

§ 5120

(a) All votes shall be counted and tabulated by the inspector or inspectors of elections, or the designee of the inspector of elections, in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open either the first or second ballot envelope or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated. The inspector of elections, or the designee of the inspector of elections, may verify the member's information and signature on the outer envelope prior to the meeting at which ballots are tabulated. Once a secret ballot is received by the inspector of elections, it shall be irrevocable.

(b) The tabulated results of the election shall be promptly reported to the board and shall be recorded in the minutes of the next meeting of the board and shall be available for review by members of the association. Within 15 days of the election, the board shall give general notice pursuant to Section 4045 of the tabulated results of the election.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law: A lack of specificity in the Davis-Stirling Act allows an easy way for a corrupt board member or inspector of elections to alter the outcome of an election improperly. This resolution would explicitly prohibit the opening of either the inner or outer ballot envelopes except by the inspector of elections and at the meeting held for publicly opening and counting the ballots.

The procedures for elections in Common Interest Developments, more commonly known as homeowner associations, or "HOA's," are found in that part of the Civil Code known as the Davis-Stirling Act at sections 5100-5145. Those sections allow that except for the meeting at which the ballots are opened and tallied, elections may be conducted entirely by mail, provided specific procedures are followed.

Existing law requires that to ensure voter secrecy while simultaneously confirming who has and who hasn't voted, a two envelope process be used, and preventing someone from casting multiple ballots. The ballot is sealed inside a first envelope that does not identify the voter. It is sealed inside a second envelope with the voter's name, address, and signature and is sent to the inspector of elections. Upon receipt, the inspector verifies the name and signature on the outer envelope and checks off that name on the list of allowed voters signifying that that voter has cast

his or her ballot. There is nothing further the inspector need do at that time. Indeed, section 5120 states, "No person…shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated." (See, § 5120 (a).)

There is, however, an ambiguity because the phrase "open or otherwise review any ballot" could be considered to mean to the prohibition against "opening" only applies to the unmarked inner envelope, i.e., the envelope containing the ballot, and doesn't prohibit the opening of the outer envelope. However, allowing the opening of envelopes before the public meeting for that purpose would allow an unscrupulous person from secretly replacing valid ballot envelopes with counterfeit ballot envelopes—'stuffing the ballot box.'

The Solution: Explicitly prohibit the opening of any ballots until and unless it is done at the public meeting held for the purpose of opening and counting the ballots.

The purpose of requiring that the opening and tallying of the ballot be held at a public meeting is to ensure the membership that the ballot envelopes are being opened are the ones delivered in the second envelopes mailed by the members. When the interested members can see for themselves that the counting process starts with sealed envelopes only, they have some confidence valid ballot envelopes haven't been surreptitiously swapped out with phony ones.

IMPACT STATEMENT
This Resolution would not have any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESPONSIBLE FLOOR DELEGATE: Edward M Teyssier

RESOLUTION 12-07-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code Section 5145 be amended, to read as follows:

§ 5145

(a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date that ~~the inspector or inspectors of elections notifies~~ the board ~~and~~ notifies the membership of the election results or the cause of action accrues, whichever is later. If a member establishes, by a preponderance of the evidence, that the election procedures of this article, or the adoption of and adherence to rules provided by Article 5 (commencing with Section 4340) of Chapter 3, were not followed, a court shall void any results of the election unless the association establishes, by a preponderance of the evidence, that the association's noncompliance with this article or the election operating rules did not affect the results of the election. The findings of the court shall be stated in writing as part of the record.

(b) A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation. If a member prevails in a civil action brought in small claims court, the member shall be awarded court costs and reasonable attorney's fees incurred for consulting an attorney in connection with this civil action.

(c) A cause of action under subdivision (a) may be brought in either the superior court or, if the amount of the demand does not exceed the jurisdictional amount of the small claims court, in small claims court.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Among the many positive changes made by Senate Bill SB 323, which became effective on January 1, 2020, it also inadvertently changed the statute of limitation under Civil Code § 5145, extending that time to infinity, under most circumstances. There is an apparent error in the language of section 5145 that needs a simple fix.

Under existing law, the SOL for enforcement actions under section 5145 starts when the *Inspector* notifies both the Board *and membership* of the election results, whichever is later. However, that means the SOL never runs because notifying *the membership* isn't part of the Inspector's duties! Instead, notifying the membership is the board's duty. The language of

section 5145 does not presently recognize that the duty to notify the membership is the board's duty, not the inspector's.

The portion of section 5145 establishing its statute of limitations provision implicitly and falsely assumes that the inspector gives notice to both the board *and the rest of the membership.* That portion states:

> "…within one year of the date that the inspector or inspectors of elections notifies the board *and membership* of the election results or the cause of action accrues, whichever is later." (Excerpted from Civ. C. §5145(a), italics added for emphasis.)

That assumption is false because, under existing law, only the board is responsible for giving notice to the membership. Civil Code section 5120 (b) specifies that "[w]ithin 15 days of the election, the board shall give general notice pursuant to Section 4045 of the tabulated results of the election." (See, Civ. C. §5120(b).) Outside of this assumption, there is no mention in the code that the inspector is tasked with giving the membership notice of the election results. Given that the board is already tasked with notifying the membership of the election results, it would be absurd, and an unnecessary and expensive duplication of effort, to require the inspector to give the same notice to the same membership.

A fundamental goal for having a statute of limitations is to promote justice. Here, justice would not be served if the statute could, even theoretically, be extended to infinity if the inspector never gives notice to the membership, because that task wasn't among her duties, and when the board gave the prospective plaintiff(s) adequate notice.

The Solution: The statute of limitations under Section 5145 should be amended to specify it begins when *the Board* notifies the membership of the election results.

IMPACT STATEMENT
This Resolution does not impact on any other statue.

CURRENT OR PRIOR RELATED LEGISLATION
Senate Bill SB 323 (2019-2020) Reg. Sess., which changed the wording of section 5145 to include language that the statute of limitations runs when the inspector gives notice to both the board and membership.

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RESOLUTION 12-08-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code Sections 4920 and 5200 be amended, to read as follows:

§ 4920

(a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.

(b) (1) If a board meeting is an emergency meeting held pursuant to Section 4923, the association is not required to give notice of the time and place of the meeting.

(2) If a nonemergency board meeting is held solely in executive session, the association shall give notice of the time and place of the meeting at least two days prior to the meeting.

(3) If the association's governing documents require a longer period of notice than is required by this section, the association shall comply with the period stated in its governing documents. For the purposes of this paragraph, a governing document provision does not apply to a notice of an emergency meeting or a meeting held solely in executive session unless it specifically states that it applies to those types of meetings.

(c) Notice of a board meeting shall be given by general delivery pursuant to Section 4045.

(d) Notice of a board meeting shall contain the agenda for the meeting, with instructions on how a member may get a copy of the agenda packet for the open session portion of the meeting.

(e) Any member may request in writing that a copy of the documents constituting the agenda packet of the board meeting be mailed either by postal mail or electronically to that member. Upon receipt of the written request, the association shall cause the requested materials to be mailed when the agenda is posted or distributed to all or a majority of all legislative body members, whichever occurs first. The association may not charge more than the actual costs of copying and mailing the documentation.

§ 5200

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

(a) "Association records" means all of the following:

(1) Any financial document required to be provided to a member in Article 7 (commencing with Section 5300) or in Sections 5565 and 5810.

(2) Any financial document or statement required to be provided in Article 2 (commencing with Section 4525) of Chapter 4.

(3) Interim financial statements, periodic or as compiled, containing any of the following:

(A) Balance sheet.

(B) Income and expense statement.

(C) Budget comparison.

(D) General ledger. A "general ledger" is a report that shows all transactions that occurred in an association account over a specified period of time.

The records described in this paragraph shall be prepared in accordance with an accrual or modified accrual basis of accounting.

(4) Executed contracts not otherwise privileged under law.

(5) Written board approval of vendor or contractor proposals or invoices.
(6) State and federal tax returns.
(7) Reserve account balances and records of payments made from reserve accounts.
(8) Agendas and minutes and all the documents constituting the agenda packet, of meetings of the members, the board, and any committees appointed by the board pursuant to Section 7212 of the Corporations Code; excluding, however, minutes and other information from executive sessions of the board as described in Article 2 (commencing with Section 4900).
(9) Membership lists, including name, property address, mailing address, and email address, but not including information for members who have opted out pursuant to Section 5220.
(10) Check registers.
(11) The governing documents.
(12) An accounting prepared pursuant to subdivision (b) of Section 5520.
(13) An "enhanced association record" as defined in subdivision (b).
(14) "Association election materials" as defined in subdivision (c).
(b) "Enhanced association records" means invoices, receipts and canceled checks for payments made by the association, purchase orders approved by the association, credit card statements for credit cards issued in the name of the association, statements for services rendered, and reimbursement requests submitted to the association.
(c) "Association election materials" means returned ballots, signed voter envelopes, the voter list of names, parcel numbers, and voters to whom ballots were to be sent, proxies, and the candidate registration list. Signed voter envelopes may be inspected but may not be copied.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Homeowner association board meetings are governed by the Open Meeting Act like governmental agency meetings are by the Brown Act. Homeowner Board meetings are supposed to be open to the membership like meetings governed by the Brown Act are supposed to be open to the public. However, unlike the Brown Act, the Open Meeting Act does not provide that the membership may view the agenda packet of all the documents provided to the board. Hence, members attending board meetings cannot discern what the board is talking about when the board refers to documents which aren't made available to the members. The Open Meeting Act's purpose is thwarted when the board meeting is conducted by reference to documents that the members cannot access.

Even after the meeting is over, the membership cannot expect to get copies of what the board considered because the documents in the agenda packet are not on the list of the documents in Civil Code section 5200.

The Solution: This resolution requires the association to make the agenda packets for association meetings available to the membership like Gov. C §54954.1 makes those packets available to the

public. Include the documents constituting the agenda packets for the association's meeting in the list of documents available to the membership under Civil Code section 5200.

IMPACT STATEMENT
This Resolution would not have any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESOLUTION 12-09-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code sections 4340, 4350, 4355, 4360, 4365, & 4370 be amended, and 4375 added, to read as follows:

§4340

For the purposes of this article:

(a) "Operating rule" means a regulation adopted by the board or the members that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association.

(b) "Rule change" means the adoption, amendment, or repeal of an operating rule ~~by the board~~.

§4350

An operating rule adopted by either the board or by the membership is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

(b) The rule, if adopted by the board, is within the authority of the board conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association.

(c) The rule is not in conflict with governing law and the declaration, articles of incorporation or association, or bylaws of the association.

(d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.

(e) The rule is reasonable.

§4355

(a) Sections 4360 and 4365 only apply to an operating rule adopted by the board and that relates to one or more of the following subjects:

(1) Use of the common area or of an exclusive use common area.

(2) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.

(3) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.

(4) Any standards for delinquent assessment payment plans.

(5) Any procedures adopted by the association for resolution of disputes.

(6) Any procedures for reviewing and approving or disapproving a proposed physical change to a member's separate interest or to the common area.

(7) Procedures for elections.

(b) Sections 4360 and 4365 do not apply to the following actions by the board:

(1) A decision regarding maintenance of the common area.

(2) A decision on a specific matter that is not intended to apply generally.

(3) A decision setting the amount of a regular or special assessment.

(4) A rule change that is required by law, if the board has no discretion as to the substantive effect of the rule change.

(5) Issuance of a document that merely repeats existing law or the governing documents.

§4360

(a) The board shall provide general notice pursuant to Section 4045 of a board proposed rule change at least 28 days before making the rule change. The notice shall include the text of the proposed rule change and a description of the purpose and effect of the proposed rule change. Notice is not required under this subdivision if the board determines that an immediate rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association.

(b) A decision on a proposed rule change shall be made at a board meeting, after consideration of any comments made by association members.

(c) As soon as possible after making a rule change, but not more than 15 days after making the rule change, the board shall deliver general notice pursuant to Section 4045 of the rule change. The notice shall include the text of the rule change, a description of the purpose and effect of the rule change and, if the rule change was an emergency rule change made under subdivision (d), the notice shall include the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires.

(d) If the board determines that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make an emergency rule change, and no notice is required, as specified in subdivision (a). An emergency rule change is effective for 120 days, unless the rule change provides for a shorter effective period. A rule change made under this subdivision may not be readopted under this subdivision.

§4365

(a) Members of an association owning 5 percent or more of the separate interests may call a special vote of the members to reverse a rule change by the board.

(b) A special vote of the members may be called by delivering a written request to the association. Not less than 35 days nor more than 90 days after receipt of a proper request, the association shall hold a vote of the members on whether to reverse the rule change, pursuant to Article 4 (commencing with Section 5100) of Chapter 6. The written request may not be delivered more than 30 days after the association gives general notice of the rule change, pursuant to Section 4045.

(c) For the purposes of Section 5225 of this code and Section 8330 of the Corporations Code, collection of signatures to call a special vote under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.

(d) The rule change may be reversed by the affirmative vote of a majority of a quorum of the members, pursuant to Section 4070, or if the declaration or bylaws require a greater percentage, by the affirmative vote of the percentage required.

(e) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

(f) A rule change reversed under this section may not be readopted for one year after the date of the vote reversing the rule change. Nothing in this section precludes the board from adopting a different rule on the same subject as the rule change that has been reversed.

(g) As soon as possible after the close of voting, but not more than 15 days after the close of voting, the board shall provide general notice pursuant to Section 4045 of the results of the member vote.

(j) This section does not apply to an emergency rule change made by the board under subdivision (d) of Section 4360.

§ 4370

(a) This article applies to a rule change commenced on or after January 1, 2004.

(b) Nothing in this article affects the validity of a rule change commenced before January 1, 2004.

(c) For the purposes of this section, a rule change by the board is commenced when the board takes its first official action leading to adoption of the rule change.

§ 4375

Members of an association owning five percent or more of the separate interests may, by written petition, call for a vote of the members to adopt a rule change.

(a)The rule change may be for any lawful purpose as described in section 4350(c), but not for any purpose listed in section 4355(b).

(b)The rule change embracing more than one subject may not be proposed or have any effect. A proposed rule change does not violate this single-subject requirement if, despite its varied collateral effects, all of its parts are reasonably germane to each other, and to the general purpose or objective of the proposal.

(c)The signatures on the petition may be presented in sections, provided that each section includes the text of the call of the question to be voted on.

(d)Each section of the signed petition shall be presented to the inspector of elections, who shall verify the signatures on the petition within two business days of delivery. Any signature on the petition shall be kept confidential and, once presented, becomes irrevocable.

(e)For Section 5225 of this Code and Section 8330 of the Corporations Code, collection of signatures to call for a vote on a rule change under this section is a purpose reasonably related to the interests of the association members. A member request to copy or inspect the membership list solely for that purpose may not be denied because the purpose is not reasonably related to the member's interests as a member.

(f)Unless otherwise provided in the declaration or bylaws, for this section, a member may cast one vote per separate interest owned.

(g)The election required by this section shall be consolidated with a regularly scheduled general election for board members.

(h)The rule shall be adopted by the affirmative vote of a majority of a quorum of the members, under Section 4070.

(i)Soon after the close of voting, but not over 15 days after the close of voting, the board shall provide general notice under Section 4045 of the results of the member vote.

(j)A rule change adopted under this section may not be modified by the board, nor may the board adopt a rule change in conflict with a membership adopted rule change without another vote by the members approving any such changes.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Unlike at our state and municipal governmental agencies, there isn't any legal framework for homeowners living in homeowner associations ("HOA's") to initiate and vote on their association's operating rules. Homeowners can only "reverse" rules recently adopted by the board. Like they already do with state and local governments, a citizen living in HOA's should have more influence over the rules that direct their daily lives.

HOA's have long been described as "quasi-governmental agencies:

> "Indeed, the homeowners associations function almost as a second municipal government, regulating many aspects of [the homeowners'] daily lives. [U]pon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. (*Villa Milano Homeowners Ass'n v. Il Davorge* (2000) 84 Cal. App.4th 819, 836; internal cites and quotation marks omitted).

Nevertheless, given the tremendous power that HOA's have over their citizens' daily lives, it is inexplicable those citizens cannot initiate or adopt their own operating rules for their own HOA, even though they can initiate and vote on legislation at both the state and local levels. Instead, they must live under whatever rules their board of directors decides for them!

Even former Governor Jerry Brown was unaware that HOA's are more like dictatorships than democracies. In his letter rejecting SB 1265 (a bill that would make HOA elections more open and transparent), he wrote, "If changes to an [HOA] election process are needed, they should be resolved *by the members of that community*." (Ltr to Senate dtd. 9/30/2018, re: SB 1265. Italics added for emphasis.)Hence, even the Governor was unaware that the law doesn't give the HOA community members the power to change their own operating rules even though he felt they already had and should have that power.

The Solution: This resolution allows homeowners to initiate and create operating rules for their association. Specifically:

a. Modify the Code to reflect that members, not just the board, may initiate and adopt rules.
b. Create a new section of the Code here, section 4375, -to provide the structure (petitioning requirements, verification of signatures, voting rights, scheduling of elections, etc.), to allow the members this level of direct democracy.
c. Provide practical limitations: For example, that initiatives must be by written petition signed by not less than 5% of the members. Adoption must be by a majority of a quorum of the members voting on the initiative. Also, restrict member initiatives to those subjects not under the ministerial duty of the board.

IMPACT STATEMENT

This Resolution does not any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESOLUTION 12-10-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that Civil Code section 4515 be amended to read as follows:

§ 4515

(a) It is the intent of the Legislature to ensure that members and residents of common interest developments have the ability to exercise their rights under law to peacefully assemble and freely communicate with one another and with others with respect to common interest development living or for social, political, or educational purposes.

(b) The governing documents, including bylaws and operating rules, shall not prohibit a member or resident of a common interest development from doing any of the following:

(1) Peacefully assembling or meeting with members, residents, and their invitees or guests during reasonable hours and in a reasonable manner for purposes relating to common interest development living, association elections, legislation, election to public office, or the initiative, referendum, or recall processes.

(2) Inviting public officials, candidates for public office, or representatives of homeowner organizations to meet with members, residents, and their invitees or guests and speak on matters of public interest.

(3) Using the common area, including the community or recreation hall or clubhouse, or, with the consent of the member, the area of a separate interest, for an assembly or meeting described in paragraph (1) or (2) when that facility or separate interest is not otherwise in use.

(4) (i) Canvassing and petitioning the members, the association board, and residents for the activities described in paragraphs (1) and (2) at reasonable hours and in a reasonable manner.

(ii) No one shall knowingly or willfully permit the list of signatures on a petition to be used for any purpose other than qualification of the question for the ballot. Violation of this subsection is a misdemeanor.

(5) Distributing or circulating, without prior permission, information about common interest development living, association elections, legislation, election to public office, or the initiative, referendum, or recall processes, or other issues of concern to members and residents at reasonable hours and in a reasonable manner.

(c) A member or resident of a common interest development shall not be required to pay a fee, make a deposit, obtain liability insurance, or pay the premium or deductible on the association's insurance policy, in order to use a common area for the activities described in paragraphs (1), (2), and (3) of subdivision (b).

(d) A member or resident of a common interest development who is prevented by the association or its agents from engaging in any of the activities described in this section may bring a civil or small claims court action to enjoin the enforcement of a governing document, including a bylaw and operating rule, that violates this section. The court may assess a civil penalty of not more than five hundred dollars ($500) for each violation.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Unlike at our federal, state, and municipal governmental agencies, there isn't any protection of privacy for homeowners living in a homeowners association who sign a petition calling for a vote on some association issue.

If, for example, a petition is circulated in a homeowner association calling for a vote to recall a member of the association's board of directors, then it is likely that that board member would get the list of signers and then call or confront each signer and probably 'request' that they 'reconsider' their support for that petition.

If the Governor were to seek retribution against anyone who signed a recall petition, then that would be considered outrageous misconduct! It would be considered intimidation and a violation of the right of petitioning of those people who had signed. That's why Elections Code Section 18650 prohibits allowing anyone to view those recall petitions except only to validate the signatures.

But the First Amendment's protection for citizens to petition their government for redress of grievances doesn't apply to homeowners living in an association. Nor does Section 18650 of the Elections Code, the statute that protects the privacy of signers of state and local petitions, apply to homeowners to keep them free from intimidation and retribution from their board of directors.

This Resolution provides the same protection of privacy and freedom from intimidation that a homeowner has when signing a petition for her association, that she already has under Elections Code § 18650 when signing a petition dealing with state or municipal petition issue.

The Solution: This Resolution ensures that petition signers for HOA initiatives have a similar guarantee of privacy afforded signers of petitions for state and local initiatives. (See, Elec. C. §18650.)

IMPACT STATEMENT
This Resolution does not any impact on any other statues.

CURRENT OR PRIOR RELATED LEGISLATION
No related legislation.

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RESPONSIBLE FLOOR DELEGATE: Edward M. Teyssier

RESOLUTION 12-11-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 5120, to read as follows:

§ 5120

(a) All votes shall be counted and tabulated by the inspector or inspectors of elections, or the designee of the inspector of elections, in public at a properly noticed open meeting of the board or members. The type of meeting shall be consistent with the governing documents. Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated. The inspector of elections, or the designee of the inspector of elections, may verify the member's information and signature on the outer envelope prior to the meeting at which ballots are tabulated. Once a secret ballot is received by the inspector of elections, it shall be irrevocable.

(b) The tabulated results of the election shall be promptly reported to the board and shall be recorded in the minutes of the next meeting of the board and shall be available for review by members of the association. Within 15 days of the election, the board shall give general notice pursuant to Section 4045 of the tabulated results of the election.

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

PROPONENT: The San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The California Legislature has estimated that dwellings within HOAs account for approximately a quarter of the state's overall housing stock. As a result, the laws governing HOAs have a large impact on the population. See Sept. 9, 2019 Bill Analysis for SB 323 (Reg. Sess. 2019-2020). The Davis-Stirling Act sets out two types of meetings. They are "Board meeting" and "Member meeting." Civil Code sections 4900-4955 and 5000. Because section 5120 states that the votes shall be counted and tabulated during either a board meeting or a member meeting, there is ambiguity. Because the section provides two options, HOA Boards may believe that they must follow the statutory language instead of the requirements in the HOA governing documents. See section 4205, which sets out the various document hierarchies.

The Solution: By requiring the type of meeting to be consistent with the requirements in the HOA's governing documents, the ambiguity will be eliminated. As another example, section 5105(a)(4), within the same article, also requires certain information to be "consistent with the governing documents."

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

CURRENT OR PRIOR RELATED LEGISLATION
Civil Code section 4920 was Added by Stats. 2012, Ch. 180, Sec. 2. (AB 805).

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RESOLUTION 12-12-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code sections 4935 and 5855, to read as follows:

§ 4935

(a) The board may adjourn to, or meet solely in, executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member~~, upon the member's request,~~ regarding the member's payment of assessments, as specified in Section 5665.

(b) The board shall adjourn to, or meet solely in, executive session to discuss member discipline~~, if requested by the member who is the subject of the discussion. That~~The board shall invite each affected member ~~shall be entitled~~ to attend the executive session. If the affected member requests that the hearing to be held during open session, the board shall invite the member to attend the open session, to conform to the procedures of this article.

(c) The board shall adjourn to, or meet solely in, executive session to discuss a payment plan pursuant to Section 5665. The board shall invite each affected member to attend the executive session. If the affected member requests that the hearing to be held during open session, the board shall invite the member to attend the open session, to conform to the procedures of this article.

(d) The board shall adjourn to, or meet solely in, executive session to decide whether to foreclose on a lien pursuant to subdivision (b) of Section 5705.

(e) Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.

§ 5855

(a) When the board is to meet to consider or impose discipline upon a member, or to impose a monetary charge as a means of reimbursing the association for costs incurred by the association in the repair of damage to common area and facilities caused by a member or the member's guest or tenant, the board shall notify the member in writing, by either personal delivery or individual delivery pursuant to Section 4040, at least 10 days prior to the meeting. The disciplinary hearing shall be conducted during executive session, unless the member requests a hearing during open session.

(b) The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined or the nature of the damage to the common area and facilities for which a monetary charge may be imposed, and a statement that the member has a right to attend and may address the board at the meeting. The board shall ~~meet in executive session if requested by the member~~invite each affected member to attend the executive session, consistent with the requirements of Section 4935. If the member requests that the hearing be held during open session, the board shall invite the member to attend the open session, consistent with the requirements of Article 2 (commencing with Section 4900) of Chapter 6.

(c) If the board imposes discipline on a member or imposes a monetary charge on the member for damage to the common area and facilities, the board shall provide the member a

written notification of the decision, by either personal delivery or individual delivery pursuant to Section 4040, within 15 days following the action.

(d) A disciplinary action or the imposition of a monetary charge for damage to the common area shall not be effective against a member unless the board fulfills the requirements of this section.

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

PROPONENT: The San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): (Note: In section 4935, the term "executive session" means "closed session.") When the Board intends to discuss member discipline or discuss a member's plan for the payment of assessments, these are "confrontational" hearings. Consequently, the members have the right to confront the Board to defend their interests by attending such hearings. As a result, it is not proper for the member to have the burden to "request to appear" to protect the member's interests. In addition, the Board should not have the option of holding such hearings without having invited the affected member to attend. Further, section 4935(b) and section 5855 currently allow the Board to hold member discipline hearings either during executive or open sessions. Holding disciplinary hearings during an open session is harmful because the affected members would then be subjected to public ridicule. In addition, the Board's open session discussions are recorded in the meeting minutes – which all of the members can request copies of.

The Solution: Because Board discussions about member discipline or member payment plans are confrontational hearings, then the members should always have the right to attend. This resolution protects member rights by requiring HOA Boards to conduct discussions about member violations and member payment plans during executive session and by requiring the Board to invite the affected members to attend. This resolution also ensures the privacy of the affected members by defaulting to always requiring HOA Boards to always hold such hearings during executive session, unless the member requests a hearing during open session. Note: the Section 4935(b)&(c) references to "this article" refer to Civil Code Division 4, Part 5 (the "Davis-Stirling Act"), Chapter 6, Article 2, for "Board Meeting."

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:
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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

RESOLUTION 12-13-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 4920 and to add section 4940, to read as follows:

§ 4920

(a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.

(b) (1) If a board meeting is an emergency meeting held pursuant to Section 4923, the association is not required to give notice of the time and place of the meeting.

(2) If a nonemergency board meeting is held solely in executive session, the association shall give notice of the time and place of the meeting at least two days prior to the meeting.

(3) If the association's governing documents require a longer period of notice than is required by this section, the association shall comply with the period stated in its governing documents. For the purposes of this paragraph, a governing document provision does not apply to a notice of an emergency meeting or a meeting held solely in executive session unless it specifically states that it applies to those types of meetings.

(c) Notice of a board meeting shall be given by general delivery pursuant to Section 4045.

(d) Notice of a board meeting shall contain the agenda for the meeting. The agenda shall contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in executive session. A brief general description of an item generally need not exceed 20 words.

§ 4940

(a) For purposes of describing executive session items pursuant to Section 4920, the agenda may describe executive sessions as provided below. No Common Interest Development Association shall be in violation of Section 4920 if the executive session items were described in substantial compliance with this section. Substantial compliance is satisfied by including the information provided below, irrespective of its format.

(b) With respect to an executive session held pursuant to Section 4935, the following descriptions shall be used: CONSIDER LITIGATION, CONSIDER MATTERS RELATING TO THE FORMATION OF CONTRACTS WITH THIRD PARTIES, CONSIDER MEMBER DISCIPLINE, CONSIDER PERSONNEL MATTERS, or MEET WITH A MEMBER REGARDING THE MEMBER'S PAYMENT OF ASSESSMENTS.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Homeowner association (HOA) Board meetings are controlled by the "Common Interest Development Open Meeting Act" in Civil Code sections 4900-4955. The Act requires that an agenda be included with each meeting notice – and there

are no minimum standards for the information to be included in each agenda. This creates a problem for the members because it is likely that the Board will not provide enough information about the issues to be discussed during the meetings. Civil Code section 4935 includes a few limited exceptions to the Act, for issues that an HOA Board is allowed to discuss during closed "executive" session. (Note: The Brown Act uses the term "closed session," whereas section Civil Code section 4935 uses the term "executive session." As such, this resolution uses the term "executive session" to amend section 4920 and to add section 4940.) If a Board meeting agenda reveals too much information about what an HOA Board plans to discuss during an executive session, the Board could expose the association to litigation. And this is probably the reason why there currently are no specific agenda requirements for HOA Board meetings.

The Solution: The "Brown Act," which controls all county, city, and other local public agency meetings, sets out minimum standards for the meetings. Government Code sections 54950-54963. This resolution essentially inserts the Brown Act standards for "open meeting" agendas into Civil Code section 4920, for HOAs. In addition, to protect HOAs from liability about the agenda descriptions for executive sessions, this resolution proposes copying the language from Government Code section 54954.5, which is within the Brown Act, into a new Civil Code section 4940, for HOAs. The goals of the proposals in the resolution are to ensure that HOA members will be better informed about the topics of Board discussions and decisions in advance, for both open sessions and executive sessions, while also preventing HOA Boards from sharing sensitive information.

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

CURRENT OR PRIOR RELATED LEGISLATION
Section 4920: Amended by Stats. 2013, Ch. 183, Sec. 17. (SB 745) Effective January 1, 2014.

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RESOLUTION 12-14-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 5135, to read as follows:

§ 5135

(a) Association funds shall not be used for campaign purposes in connection with any association board election. Funds of the association shall not be used for campaign purposes in connection with any other association election except to the extent necessary to comply with duties of the association imposed by law.

(b) For the purposes of this section, "campaign purposes" includes, but is not limited to, the following:

(1) Expressly advocating the election or defeat of any candidate that is on the association election ballot.

(2) Including the photograph or prominently featuring the name of any candidate on a communication from the association or its board, excepting the ballot, ballot materials, or a communication that is legally required, within ~~30 days of an~~ the election period. This is not a campaign purpose if the communication is one for which subdivision (a) of Section 5105 requires that equal access be provided to another candidate or advocate.

(c) For the purposes of this section:

1) The "election period" for board elections begins when the association provides the notice for submitting nominations, pursuant to Section 5115(a).

2) The "election period" for all other association elections begins when the association provides the notice for the election, pursuant to Section 5115(b).

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): The meaning of Section 5135 is vague because it does not establish when the periods for "board elections" and "other association elections" begin.

The Solution: To provide clarity and certainty, this resolution would define the beginning of "board elections" as the date of the notice for submitting nominations, and it would define the beginning of "other association elections" as the date of the notice for the election. In addition, if the "election period" is clearly defined, then (b)(2) should simply apply to that period – and the "30 day" requirement should be deleted.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

RESOLUTION 12-15-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 4035, to read as follows:

§ 4035

(a) If a provision of this act requires that a document be delivered to an association, the document shall be delivered to the person designated in the annual policy statement, prepared pursuant to Section 5310, to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.

(b) A document delivered pursuant to this section may be delivered by any of the following methods:

(1) By email, facsimile, or other electronic means, if available to the association ~~has assented to that method of delivery~~.

(2) By personal delivery, if the association has assented to that method of delivery. If the association accepts a document by personal delivery it shall provide a written receipt acknowledging delivery of the document.

(3) By first-class mail, postage prepaid, registered or certified mail, express mail, or overnight delivery by an express service center.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Homeowner association ("HOA") members should not be required to ask for "permission" each time they want to send an email (or a fax or use some other electronic means) to ask a question or submit comments to the HOA Board. Forcing the members to submit their communications to the Board by snail mail (USPS mail) and to wait for the Board's response by snail mail is simply not warranted (in the year 2021), and it will cause needless delays.

The Solution: This resolution would require all HOAs to accept email, facsimile, or other electronic communications all the time, if they have the ability to do so.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known

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RESOLUTION 13-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Labor Code section 230.9, to read as follows:

§ 230.9

(a) An employer must provide to California employees a minimum of twenty-four hours of paid time off if the employee is selected to serve on a trial by jury or required to appear for jury selection for more than one day, as required by state law in California.

(b) Paid time off under this section need only be provided when an employee receives a California state juror summons and is required to serve on a trial by jury or appear for jury selection for more than one day. Paid time off under this section is not intended to be automatically provided to employees on an annual, regular, or accrual basis and is not intended to compensate employees during any period they are "on call" for jury service and not required to report to court.

(c) This section applies to employers with one hundred or more employees in California.

(d) The amount of pay to be provided under this section is the same base wage as the employee normally earns during regular work hours.

(e) Paid time off under this section need only be provided during an employee's regularly scheduled work time. If the employee does not have a regular schedule, then the employer must provide paid time off under this section.

(f) Paid time off under this section need not be provided more than once a year.

(g) Paid time off under this section shall commence upon the employee's first day of selection to serve on a trial by jury or the second day that the employee is required to appear for jury selection.

(h) This section applies to full-time employees, part-time employees, hourly employees, and salaried employees. It does not apply to seasonal employees, temporary employees, or paid interns.

(i) If an employee is selected to serve on a trial by jury or required to appear for jury selection under this section and completes jury service in less than twenty-four hours, then an employer satisfies its obligations under this section and need only provide paid time off for the number of hours the employee actually served on a trial by jury or appeared for jury selection.

(j) An employer satisfies its obligations under this section by providing twenty-four hours of paid time off under this section.

(k) As for timing of pay, an employer must pay an employee for time off under this section as it normally would as if the employee was performing work for the employer during the time the employee served jury duty.

(l) Paid time off under this section is not distinguishable from an employee's regular wages and is subject to tax withholding at the employee's normal rate.

(m) This section is not intended to be used to require an employee to serve on a jury if that employee otherwise qualifies for an exception.

(n) This section is not intended to prevent a court from exercising its discretion to excuse a juror on grounds of financial, or other, hardship.

(o) Under this section, an employer is permitted to request documentation from the employee verifying proof of jury service, including dates and times of service.

(p) Hours spent by employees under this section serving jury duty are not considered hours worked for purposes of California wage and hour laws.

(q) Under this section, employers may, but are not required to, track the amount of paid time off used and any balance remaining on an employee's wage statement.

(r) Employers must keep records of paid time off under this section provided to employees and the amount of paid time off used by employees for at least three years.

(s) Employers under this section must adopt and distribute a written policy informing employees of paid time off for jury service under this section.

(t) Employers may not satisfy their obligations under this section by requiring employees to use their vacation time, sick time, their own wages, or other paid time off for jury service.

(u) If an employer fails to provide an employee paid time off under this section, the employee may file a complaint with the Division of Labor Standards Enforcement of the Department of Industrial Relations within three years from the date of occurrence of the violation.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Existing law does not require employers to pay employees for any lost wages due to jury duty. Employees have the option of using vacation hours, paid time off, sick leave, or other personal time and wages to participate in jury duty. However, many potential jurors, particularly lower wage employees, cannot afford to take unpaid time off for jury duty nor can they afford to use their own wages to do so. This leads to a disproportionate number of lower wage employees unable to serve on juries, which hinders their constitutional right to have an equal opportunity to be considered for jury duty, as well as the parties' right to have a jury made up of a representative cross-section of the relevant population. Many companies have recently made public their stance against racial injustice and discrimination, acknowledging the reality of a lack of justice for racially and other diverse populations, and rising to a call to action to implement change and progress towards racial justice. If employers provided paid jury duty to employees, they would be part of the change and progress towards racial justice in our legal system.

The Solution: By adding a requirement that employers compensate employees for jury service, this resolution will decrease the number of prospective jurors that cite loss of pay as a legitimate reason for not serving on a jury, ensuring that a more diverse population of prospective jurors are actually available to serve on juries when called, which will enhance our system of justice.

IMPACT STATEMENT

This resolution may require additional statutory changes. Code of Civil Procedure, section 215, provides that a fifteen dollar a day juror fee shall be provided for each day's attendance as a juror after the first day, except for jurors employed by federal, state, or local government entities, or

by any other public entity as defined in section 481.200, who receives regular compensation and benefits while performing jury service. If Labor Code section 230.9 becomes effective, Code of Civil Procedure section 215(b), would also need to be amended to exclude employees receiving paid time off for jury service under Labor Code section 230.9. Also, Labor Code section 2699.5 will need to be amended to include a reference to Labor Code section 230.9.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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