RESOLUTION LF-01-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 8209, to read as follows:

§ 8209

(a) If any notary public resigns, is disqualified, removed from office, or allows his or her appointment to expire without obtaining reappointment within 30 days, all notarial records and papers shall be delivered within 30 days to the clerk of the county in which the notary public's current official oath of office is on file. If the notary public willfully fails or refuses to deliver all notarial records and papers to the county clerk within 30 days, the person is guilty of a misdemeanor and shall be personally liable for damages to any person injured by that action or inaction.

(b) In the case of the death of a notary public, either the personal representative of the deceased, the successor in interest of the deceased (as defined in Code of Civil Procedure section 377.11, or the person who is in actual or constructive possession of the notarial records and papers of the deceased notary public, shall promptly notify the Secretary of State of the death of the notary public and shall deliver all notarial records and papers of the deceased to the clerk of the county in which the notary public's official oath of office is on file.

(c) After 10 years from the date of deposit with the county clerk, if no request for, or reference to such records has been made, they may be destroyed upon order of court.

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

PROPNENT: Ciarán O'Sullivan; James P. Lamping, Mark Harvis; K. Martin White; Joachim Steinberg; Gerald Richards; Mary Vail; Phillip Lindsley; John W. Short; Daniel H. Galindo

STATEMENT OF REASONS

The Problem: Under Government Code §8209(b), upon the death of a notary public, the personal representative of the deceased shall notify the Secretary of State of the death of the notary public and shall deliver all notarial records and papers of the deceased to the clerk of the county in which the notary public's official oath of office is on file.

The term "personal representative" means a person who is appointed by the probate court to administer a decedent's estate. A personal representative will not be appointed if a deceased person's assets are not subject to probate, which can occur if the assets are less than $166,250 (a "small estate"), are held in joint tenancy with another person, have a listed designated beneficiary, or are held in a living trust. Since many notaries have estates that will not be subject to probate, it is unclear who is responsible for notifying the Secretary of State of the notary's death and turning over the notary's records to the county clerk

The Solution: The solution to this problem is to extend the persons who are required to comply with Government Code §8209(b) by adding language providing that in the absence of a personal

representative, the successor in interest of the deceased notary public or the person who is in actual or constructive possession of the notarial records and papers of the deceased notary public shall comply with these requirements.

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

CURRENT OR PRIOR RELATED LEGISLATION
This Resolution may have an impact on AB 1093 (Jones-Sawyer) related to online notaries, which is currently pending in the Senate, and may require a similar amendment to proposed new Government Code section 8231.6, if that bill is enacted into law.

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RESPONSIBLE FLOOR DELEGATE
Ciarán O'Sullivan

RESOLUTION LF-02-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend section 7.5 of Article I of the California Constitution, to read as follows:

§ 7.5

~~Only marriage between a man and a woman is valid or recognized in California.~~

(a) The State of California and its political subdivisions shall recognize marriages and issue marriage licenses to couples regardless of gender.

(b) Religious organizations and members of the clergy have the right to refuse to solemnize a marriage, and no person has the right to make any claim against a religious organization or member of the clergy for such a refusal.

(c) All legally valid marriages must be treated equally under the law.

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

PROPONENT: Michael Fern, Kelly Borelli, Margaret Grover, Ujvala Singh, Darin Wessel, Michele Anderson, David Bigeleisen, Catherine Rucker, Shaun Jacobs, Christopher Cooke

STATEMENT OF REASONS

The Problem (including Existing Law): In 2008, 52 percent of Californians voted to approve Proposition 8, which amended the California Constitution to prohibit recognition of any marriage not between a man and a woman. (See *Proposition 8 is passed in California, banning same-sex marriage* (Jun. 30, 2022) History.com, https://www.history.com/this-day-in-history/prop-8-passed-california-gay-marriage.) In 2010, Judge Vaughn Walker enjoined enforcement of Proposition 8, finding that it violated the 14th Amendment's Due Process and Equal Protection Clauses. (See *Perry v. Schwarzenegger* (N.D.Cal. 2010) 704 F.Supp.2d 921.) In 2015, the United States Supreme Court, in a 5-4 ruling, held that same-sex couples had a fundamental right to marry under the 14th Amendment's Due Process and Equal Protection Clauses. (See *Obergefell v. Hodges* (2015) 576 U.S. 644.) But recently, in *Dobbs v. Jackson Women's Health Org.,* 2022 U.S. LEXIS 3057, Justice Thomas's concurrence called for the Court to reconsider its substantive due process precedents, including *Obergefell*. While unlikely, a reversal of *Obergefell* is no longer unthinkable and could revive the California Constitution's dormant provision prohibiting same-sex marriage.

The Solution: This resolution would recognize and safeguard the right of all couples to marry by replacing section 7.5 of Article I of the California Constitution with the voter-approved language found in section 21 of Article I of the Nevada Constitution. (See *The Constitution of the State of Nevada*, https://www.leg.state.nv.us/const/nvconst.html#Art1Sec21.) In 2020, 62 percent of Nevadans voted to amend their state constitution to enshrine a right to marry that is inclusive of same-sex couples, overturning a previous ban on gay marriage. (See Avery, *Nevada becomes first state to recognize gay marriage in state constitution* (Nov. 5, 2020) NBC News, https://www.nbcnews.com/feature/nbc-out/nevada-becomes-first-state-recognize-gay-marriage-

state-constitution-n1246607.) Similarly, any change to the California Constitution would need to be approved by a majority of voters and should adhere to what has succeeded elsewhere.

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

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE:
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RESOLUTION LF-03-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 832.7, to read as follows:

§ 832.7
(a) Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and records maintained by a state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section does not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.
(b) (1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by a state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):
(A) A record relating to the report, investigation, or findings of any of the following:
(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
(ii) An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury.
(iii) A sustained finding involving a complaint that alleges unreasonable or excessive force.
(iv) A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.
(B) (i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
(ii) As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.
(iii) As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.
(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency involving dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any false statements, filing false reports, destruction, falsifying, or concealing of evidence, or perjury.
(D) Any record relating to an incident in which a sustained finding was made by any law

enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

(E) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that the peace officer made an unlawful arrest or conducted an unlawful search.

(2) Records that are subject to disclosure under clause (iii) or (iv) of subparagraph (A) of paragraph (1), or under subparagraph (D) or (E) of paragraph (1), relating to an incident that occurs before January 1, 2022, shall not be subject to the time limitations in paragraph (11) until January 1, 2023.

(3) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action. Records that shall be released pursuant to this subdivision also include records relating to an incident specified in paragraph (1) in which the peace officer or custodial officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

(4) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(5) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B), (C), (D), or (E) of paragraph (1), unless it relates to a sustained finding regarding that officer that is itself subject to disclosure pursuant to this section. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a finding against another officer that is subject to release pursuant to subparagraph (B), (C), (D), or (E) of paragraph (1).

(6) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of whistleblowers, complainants, victims, and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.
(7) Notwithstanding paragraph (6), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.
(8) An agency may withhold a record of an incident described in paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:
(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the misconduct or use of force occurred or until the district attorney determines whether to file criminal charges related to the misconduct or use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.
(ii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who engaged in misconduct or used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.
(iii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who engaged in the misconduct or used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about misconduct or use of force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.
(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which misconduct occurred or force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.
(C) During an administrative investigation into an incident described in paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the misconduct or use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the misconduct or use of force, or allegation of misconduct or use of force, by a person authorized to initiate an investigation.
(9) A record of a complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.
(10) The cost of copies of records subject to disclosure pursuant to this subdivision that are made available upon the payment of fees covering direct costs of duplication pursuant to subdivision (b) of Section 6253 of the Government Code shall not include the costs of searching for, editing, or redacting the records.
(11) Except to the extent temporary withholding for a longer period is permitted pursuant to paragraph (8), records subject to disclosure under this subdivision shall be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure.
(12) (A) For purposes of releasing records pursuant to this subdivision, the lawyer-client privilege does not prohibit the disclosure of either of the following:
(i) Factual information provided by the public entity to its attorney or factual information discovered in any investigation conducted by, or on behalf of, the public entity's attorney.
(ii) Billing records related to the work done by the attorney so long as the records do not relate to active and ongoing litigation and do not disclose information for the purpose of legal consultation between the public entity and its attorney.
(B) This paragraph does not prohibit the public entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law.
(c) Notwithstanding subdivisions (a) and (b), a department or agency shall release to the complaining party a copy of the complaining party's own statements at the time the complaint is filed.
(d) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.
(e) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement they know to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that

specifically refute the false statements made public by the peace or custodial officer or their agent or representative.
(f) (1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.
(2) The notification described in this subdivision is not conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.
(g) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, or the holding in Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, records and information obtained from records maintained by an agency or body established by a city, county, city and county, local government entity, state agency, or state department for the purpose of civilian oversight of peace officers shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). A record disclosed pursuant to this paragraph shall be redacted only to remove personal data or information such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by peace officers and custodial officers, or where there is a specific, particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or others.
~~(g)~~(h) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.
~~(h)~~(i) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531.
~~(i)~~(j) Nothing in this chapter is intended to limit the public's right of access as provided for in Long Beach Police Officers Association v. City of Long Beach (2014) 59 Cal.4th 59.

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

PROPONENT: Mary Vail, Joachim Steinberg, Catherine Rucker, David M. Bigeleisen, Nick Stewart-Oaten, James Brosnahan, Edward Teyssier, Mark Harvis, Frank Z. Leidman, and J. Kevin Allen

STATEMENT OF REASONS
The Problem (including Existing Law): Civilian oversight agencies operate as a needed check on law enforcement. At least 25 California municipalities, including most of our largest cities, have established civilian law enforcement oversight boards to provide necessary public oversight of policing activities in the community.
Unfortunately, because of a 2006 California Supreme Court decision, Copley Press, Inc. v. Superior Court, (2006) 39 Cal.4th 1272, these agencies have been required to withhold from the public, most if not all, records of investigations of law enforcement misconduct. This is because

the court in Copley Press Inc. v. Superior Court held that records and information obtained from records of civilian law enforcement oversight agencies are confidential personnel records and cannot be disclosed under the California Public Records Act. Prior to the Copley Press decision, civilian law enforcement oversight agencies, many of which have been around for decades, operated with greater transparency. This 16-year-old ruling from the California Supreme Court has caused the work of California civilian oversight boards to be unreasonably constrained by confidentiality requirements that are antithetical to the public work those boards are mandated to undertake.

The Solution: This resolution copies the language from AB 2557 (Bonta, 2021-2022 Reg. Sess.) to insert language into Penal Code section 832.7 (g) to abrogate the Copley Press decision. The resolution would allow civilian oversight agencies to once again operate in the light of day by legislatively repealing the Copley Press, Inc. decision. This resolution will not only have California show its commitment to current civilian oversight agencies but will also encourage other jurisdictions to create civilian oversight agencies to ensure that law enforcement in California is truly working for all people. Please note that the CCBA relied on Resolution 07-02-2015 (BASF) to support AB 2557 (M. Bonta, 2021-2022 Reg. Sess.).

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

CURRENT OR PRIOR RELATED LEGISLATION
AB 200, Section 5 (Comm. on Budget, 2021-2022 Reg. Sess.); AB 2557 (Bonta, 2021-2022 Reg. Sess.) (did not pass the Assembly Public Safety Committee); SB 16, Section 3 (Skinner, 2021-2022 Reg. Sess., approved by the Governor); SB 2, Section 5 (Bradford, Reg. Sess. 2021-2022, approved by the Governor); SB 1421, Section 2 (Skinner, 2017-2018 Reg. Sess., approved by the Governor); SB 1019, Section 1 (Romero, 2007-2008 Reg. Sess.) (did not pass the Assembly Public Safety Committee); AB 1648 (Leno, 2007-2008 Reg. Sess.) (the language to amend Penal Code section 832.7 was deleted in the last version); and Resolution 07-02-2015 (BASF).

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RESPONSIBLE FLOOR DELEGATE:
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RESOLUTION ELF-01-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 6603, to read as follows:

§ 6603

(a) A person subject to this article is entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on the person's behalf, and to have access to all relevant medical and psychological records and reports. If the person is indigent, the court shall appoint counsel to assist that person and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. Any right that may exist under this section to request DNA testing on prior cases shall be made in conformity with Section 1405 of the Penal Code.

(b) The attorney petitioning for commitment under this article has the right to demand that the trial be before a jury.

(c) To continue a trial, written notice shall be filed and served on all parties to the proceeding, together with affidavits or declarations detailing specific facts showing that a continuance is necessary.

(1) All moving and supporting papers shall be served and filed at least 10 court days before the hearing, except as provided in paragraph (2). The moving and supporting papers served shall be a copy of the papers filed or to be filed with the court.

(2) If the written notice is served by mail, the 10-day period of notice before the hearing shall be increased as follows:

(A) Five calendar days if the place of mailing and the place of address are within the State of California.

(B) Ten calendar days if either the place of mailing or the place of address is outside the State of California, but within the United States.

(C) Twenty calendar days if either the place of mailing or the place of address is outside the United States.

(D) Two calendar days if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery.

(3) All papers opposing a continuance motion noticed pursuant to this subdivision shall be filed with the court and a copy shall be served on each party at least four court days before the hearing. All reply papers shall be served on each party at least two court days before the hearing. A party may waive the right to have documents served in a timely manner after receiving actual notice of the request for continuance.

(4) If a party makes a motion for a continuance that does not comply with the requirements described in this subdivision, the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted.

(5) Continuances shall be granted only upon a showing of good cause. The court shall not find good cause solely based on the convenience of the parties or a stipulation of the parties. At the conclusion of the motion for continuance, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding.

(6) In determining good cause, the court shall consider the general convenience and prior commitments of all witnesses. The court shall also consider the general convenience and prior commitments of each witness in selecting a continuance date if the motion is granted. The facts as to inconvenience or prior commitments may be offered by the witness or by a party to the case.

(7) Except as specified in paragraph (8), a continuance shall be granted only for the period of time shown to be necessary by the evidence considered at the hearing on the motion. If a continuance is granted, the court shall state on the record the facts proved that justify the length of the continuance.

(8) For purposes of this subdivision, "good cause" includes, but is not limited to, those cases in which the attorney assigned to the case has another trial or probable cause hearing in progress. A continuance granted pursuant to this subdivision as the result of another trial or hearing in progress shall not exceed 10 court days after the conclusion of that trial or hearing.

(d) (1) If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of State Hospitals to perform updated evaluations. If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the State Department of State Hospitals to perform replacement evaluations. When a request is made for updated or replacement evaluations, the State Department of State Hospitals shall perform the requested evaluations and forward them to the petitioning attorney and to the counsel for the person subject to this article. However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings. These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order. If an updated or replacement evaluation results in a split opinion as to whether the person subject to this article meets the criteria for commitment, the State Department of State Hospitals shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601.

(2) For purposes of this subdivision, "no longer available to testify for the petitioner in court proceedings" means that the evaluator is no longer authorized by the Director of State Hospitals to perform evaluations regarding sexually violent predators as a result of any of the following:

(A) The evaluator has failed to adhere to the protocol of the State Department of State Hospitals.

(B) The evaluator's license has been suspended or revoked.

(C) The evaluator is unavailable pursuant to Section 240 of the Evidence Code.

(D) The independent professional or state employee who has served as the evaluator has resigned or retired and has not entered into a new contract to continue as an evaluator in the case,

unless this evaluator, in the evaluator's most recent evaluation of the person subject to this article, opined that the person subject to this article does not meet the criteria for commitment.

(e) This section does not prevent the ~~defense~~ parties from presenting otherwise relevant and admissible evidence.

(f) If the person subject to this article or the petitioning attorney does not demand a jury trial, the trial shall be before the court without a jury.

(g) A unanimous verdict shall be required in any jury trial.

(h) The court shall notify the State Department of State Hospitals of the outcome of the trial by forwarding to the department a copy of the minute order of the court within 72 hours of the decision.

(i) This section does not limit any legal or equitable right that a person may have to request DNA testing.

(j) Subparagraph (D) of paragraph (2) of subdivision (d) does not affect the authority of the State Department of State Hospitals to conduct two additional evaluations when an updated or replacement evaluation results in a split opinion.

(k) (1) Notwithstanding any other law, the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator pursuant to subdivision (d). The court shall issue a subpoena, upon the request of either party, for a certified copy of these records. The records shall be provided to the attorney petitioning for commitment and the counsel for the person subject to this article. The attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose.

(2) This subdivision does not affect the right of a party to object to the introduction at trial of all or a portion of a record subpoenaed under paragraph (1) on the ground that it is more prejudicial than probative pursuant to Section 352 of the Evidence Code or that it is not material to the issue of whether the person subject to this article is a sexually violent predator, as defined in subdivision (a) of Section 6600, or to any other issue to be decided by the court. If the relief is granted, in whole or in part, the record or records shall retain any confidentiality that may apply under Section 5328 of this code and Section 1014 of the Evidence Code.

(3) This subdivision does not affect any right of a party to seek to obtain other records regarding the person subject to this article.

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

PROPONENT: Michael Fern, Marc Sallus, H. Thomas Watson, Carol Shining, Sean McCoy, Joseph Goldstein, Catherine Rucker, Tara Crabill, Kim Tran, Erin Tenner

STATEMENT OF REASONS

The Problem (including Existing Law): "'Sexually violent predator' means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, § 6601, subd. (a).) "'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (Id., subd. (c).)

"The process for determining whether a convicted sex offender meets the foregoing requirements takes place in several stages, both administrative and judicial." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 903.) "As a prisoner's release date approaches, the Department of Corrections and Rehabilitation (CDCR) is required to screen the inmate as a potential SVP. If the screening indicates the offender is a potential SVP, he or she is referred for evaluation by two psychologists or psychiatrists. If after evaluating the inmate both professionals agree the inmate has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, an involuntary commitment petition shall be filed. When there is a split of opinion between the original evaluators, independent professionals are contacted to evaluate the inmate again. A petition shall only be filed if both independent evaluators believe the offender meets the criteria for involuntary commitment." (*People v. Morrison* (2019) 34 Cal.App.5th 980, 985 (cleaned up).)

In *Needham v. Superior Court* (Aug. 8, 2022, G060670) __ 5th __ (available at https://www.courts.ca.gov/opinions/documents/G060670.PDF), the Fourth District held, 2-1, that the prosecution cannot call a retained expert witness at trial, only an evaluator selected by the State Department of State Hospitals. Per the majority, retaining a testifying expert is a "one-sided right" held by the defendant exclusively, as Section 6603 "does not prevent the *defense* from presenting otherwise relevant and admissible evidence." (See Welf. & Inst. Code, § 6603, subds. (a), (e).) Dissenting, Justice Goethals criticized the majority's interpretation that silence manifested an intent to exclude, noting prior opinions that recognized the prosecution's right to retain its own expert in SVPA proceedings in accordance with the Civil Discovery Act. (See, e.g., *People v. Landau* (2013) 214 Cal.App.4th 1, 25-26; *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, 462, 470-471.) If it stands, *Needham* denies the prosecution an equal opportunity to present relevant and admissible evidence at trial, forbids the exercise of judicial discretion, and is antithetical to the adversarial system.

The Solution: This resolution would replace the word "defense" with "parties" in subdivision (e) to protect the right of both sides to present relevant and admissible evidence in an SVPA trial, which requires proof beyond a reasonable doubt that the defendant is a sexually violent predator. (See Welf. & Inst. Code, § 6604.)

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

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

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