**RESOLUTION 08-01-2018**

**DIGEST**
Judges: Delete Obsolete Provision for Defense of Judges by County Counsel
Deletes Government Code section 27647, which allows trial court judges to be defended by county counsel upon request.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution deletes Government Code section 27647, which allows trial court judges to be defended by county counsel upon request. This resolution should be approved in principle because subject to limited exceptions, trial court judges are now defended by the State of California, which eliminates the need for representation by county counsel.

On June 2, 1998, California voters approved Proposition 220, which consolidated superior and municipal courts and centralized the administration of California's state court system. Consequently, the State of California assumed financial responsibility for the courts, including defending trial court judges in lawsuits. Since county counsels no longer defend trial judges in lawsuits, Government Code section 27647 is obsolete. Under Government Code section 811.9, all judges are now considered state officers and the Judicial Council provides for representation, defense, and indemnification of those individuals. Therefore, Government Code section 27647 should be deleted.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to delete Government Code section 27647 to read as follows:

~~§ 27647.~~
~~(a) If requested so to do by the superior court of the county of the county counsel, or by any municipal court in such county, or by any judge thereof, and insofar as such duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent any such court or judge thereof in all matters and questions of law pertaining to any of such judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, such court or judge is concerned or is a party.~~
~~(b) This section shall not apply to any of the following:~~
~~(1) Any criminal proceedings in which a judge is a defendant.~~
~~(2) Any grand jury proceedings.~~
~~(3) Any proceeding before the Commission on Judicial Qualifications.~~

~~(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.~~

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

**PROPONENT**: San Diego County Bar Association

**STATEMENT OF REASONS**

The Problem: California voters authorized the state assumption of the functions of the consolidated superior courts throughout California. This eliminated many of the obligations of counties with regard to trial courts, including county counsel defending trial courts and their judicial officers in litigation, subject to specific exceptions. This change rendered obsolete the provisions of Government Code section 27647 setting forth as one of the enumerated functions of the County Counsel, the provision of representation to the trial court or trial court judges.

The Solution: This resolution deletes Government Code section 26740 because it is now obsolete with the state having assumed the obligation of providing representation to judicial officers.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT**: Darin L. Wessel, Office of the County Counsel, 1600 Pacific Highway, Rm. 355, San Diego, CA 92101; (619) 531-4680; darin.wessel@sdcounty.ca.gov. (This resolution is solely the opinion of the author and not that of the author's employer.)

**RESPONSIBLE FLOOR DELEGATE**: Darin L. Wessel

**RESOLUTION 08-02-2018**

**DIGEST**
Judges: Motion to Disqualify
Amends Code of Civil Procedure section 170.4 to prohibit a judge from striking motions to disqualify that judge which are untimely or disclose no legal grounds for disqualification.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 170.4 to prohibit a judge from striking motions to disqualify that judge which are untimely or disclose no legal grounds for disqualification. This resolution should be disapproved because it eliminates an important tool to strike a narrow category of defective motions to disqualify, those that are untimely and fail to facially identify a legal basis for disqualification.

Code of Civil Procedure section 170.3 precludes a judicial officer from ruling on the merits of a motion to disqualify that judicial officer. Code of Civil Procedure section 170.4 sets forth the limited matters that a judicial officer facing a motion to disqualify may act or rule on while a motion to disqualify is pending. Specifically, current subdivision (b) of section 170.4 allows the judicial officer to strike an untimely motion to disqualify and to strike a motion to disqualify that fails to identify, on its face, "no legal grounds for disqualification."

The proponent erroneously argues that subdivision (b) allows the judicial officer to rule on the merits of the motion to disqualify. Not so. The judicial officer is taking the ministerial action of striking facially defective motions. In the case of an untimely motion to disqualify, there is no possibility that the motion could be granted by any judicial officer and giving the power to the challenged judicial officer to strike it makes complete sense, particularly in relation to the conservation of judicial resources. In the case of a timely motion that fails to identify any legal grounds for disqualification, the limited power to strike it also makes sense in relation to the conservation of judicial resources. The party is not precluded from re-filing a facially sufficient motion, in which case a different judicial officer would be required to rule on that motion.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure 170.4 to read as follows:

§ 170.4

(a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court

pending the assignment of a judge not disqualified.

(2) Request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

~~(b) Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.~~

~~(c)~~ (b)

(1) If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge for decision as provided in subdivision (a) of Section 170.3, and if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated.

(2) For the purposes of this subdivision, if (A) a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, and (B) the proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time, the trial or hearing shall be deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time.

(3) A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed.

~~(d)~~ (c) Except as provided in this section, a disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS**

The Problem: Code of Civil Procedure section 170.3, subdivision (c)(5) is essential to ensure the integrity of the judicial process, appearance of judicial impartiality and public trust in the judiciary. It is unreasonable and illogical to allow a judge that is challenged for the appearance of bias to decide if he/she is biased, which is, in essence, what happens when a judge strikes a petition for disqualification under Code of Civil Procedure section 170.4, subdivision (b).

Specifically, Code of Civil Procedure section 170.3, subdivision (c)(5) states in pertinent part: "(5) A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of

disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all of the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson."

However, Code of Civil Procedure section 170.4, subdivision (b), see above, on its face, negates Code of Civil Procedure section 170.3, subdivision (c)(5). In other words, Code of Civil Procedure section 170.4, subdivision (b), permits a challenged judge to circumvent Code of Civil Procedure section 170.3, subdivision (c)(5).

The Solution: Accordingly, Code of Civil Procedure section 170.4, subdivision (b), should be deleted.

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

**CURRENT OR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Carla DiMare, Law Office of Carla DiMare, PC, P.O. Box 1668, Rancho Santa Fe, CA 92067; 858-775-0707; cdimare@att.net.

**RESPONSIBLE FLOOR DELEGATE:** Carla DiMare

**RESOLUTION 08-03-2018**

**DIGEST**
Court Reporters: Authorize Recording of Proceedings When No Court Reporter
Amends Government Code section 69957 to authorize the court to record proceedings in counties where the superior court discontinued funding for official court reporters.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
Similar to Resolutions 07-03-2012, 06-02-2013, 08-03-2013, and 08-10-2016, which were all approved in principle.

Reasons:
This resolution amends Government Code section 69957 to authorize the court to record proceedings in counties where the superior court discontinued funding for official court reporters. This resolution should be approved in principle because a means to provide the reviewing court with a transcript of oral proceedings should be available in all California courts, particularly where the court no longer provides official court reporters.

Since many courts have stopped providing certified shorthand reporters in non-criminal matters, litigants in family law, probate and unlimited civil proceedings are forced to pay for a private reporter if they wish to have a full and proper record. This is very expensive for litigants and in particular for many pro per litigants. The lack of a transcript of the oral proceedings is frequently fatal to any effort to appeal an unfavorable result. As the Court of Appeal held in *Taylor v. Nu Digital Marketing, Inc.* (2015) 245 Cal.App.4th 283:

> A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. Where, as here, the appeal is on the judgment roll alone, the question of the sufficiency of the evidence to support the findings of the trial court is not open. Instead, the evidence is conclusively presumed to support the findings, and the only questions presented are the sufficiency of the pleadings and whether the findings support the judgment. (*Id*. at 287.)

This analysis would also apply to such issues as objections on the record and other oral proceedings that are not apparent in the court's file. Although the provision for the official transcription of the proceedings will involve some costs, this resolution would at least make such transcripts more readily available when needed and the costs involved in using an electronic reporter are often lower than those associated with the use of a certified shorthand reporter.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 69957 to read as follows:

§ 69957

(a) If an official reporter or an official reporter pro tempore is unavailable to report an action or proceeding in a court or if the Superior Court has discontinued funding for official reporters, subject to the availability of approved equipment and equipment monitors, the court may order that, in a limited civil case, unlimited civil case, family case, probate case, domestic violence restraining order hearings or a misdemeanor or infraction case, the action or proceeding be electronically recorded, including all the testimony, the objections made, the ruling of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the attorneys to the jury, and all statements and remarks made and oral instructions given by the judge. A transcript derived from an electronic recording may be utilized whenever a transcript of court proceedings is required. Transcripts derived from electronic recordings shall include a designation of "inaudible" or "unintelligible" for those portions of the recording that contain no audible sound or are not discernible. The electronic recording device and appurtenant equipment shall be of a type approved by the Judicial Council for courtroom use and shall only be purchased for use as provided by this section. A court shall not expend funds for or use electronic recording technology or equipment to make an unofficial record of an action or proceeding, including for purposes of judicial notetaking, or to make the official record of an action or proceeding in circumstances not authorized by this section.

(b) Notwithstanding subdivision (a), a court may use electronic recording equipment for the internal personnel purpose of monitoring the performance of subordinate judicial officers, as defined in Section 71601 of the Government Code, hearing officers, and temporary judges while proceedings are conducted in the courtroom, if notice is provided to the subordinate judicial officer, hearing officer, or temporary judge, and to the litigants, that the proceeding may be recorded for that purpose. An electronic recording made for the purpose of monitoring that performance shall not be used for any other purpose and shall not be made publicly available. Any recording made pursuant to this subdivision shall be destroyed two years after the date of the proceeding unless a personnel matter is pending relating to performance of the subordinate judicial officer, hearing officer, or temporary judge.

(c) Prior to purchasing or leasing any electronic recording technology or equipment, a court shall obtain advance approval from the Judicial Council, which may grant that approval only if the use of the technology or equipment will be consistent with this section.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS**

The Problem: As the budgets continued to be slashed for the judicial branch, courts continue to cut back on staff and expenses and one of the victims of the budget cuts has been official court reporters. In San Diego County, official court reporters have been eliminated in all matters

except felony criminal cases, juvenile matter and domestic violence restraining order hearings over 40 minutes.

The Solution: This would allow the court to electronically record the hearings in order to make a record. This is necessary so that sort of a record is in place. The court reporters will still have an opportunity to transcribe the recorded hearing if a transcript is requested.

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

**CURRENT OR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

**RESPONSIBLE FLOOR DELEGATE:** Melissa L. Bustarde

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## COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

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**TRUSTS AND ESTATES SECTION - SUPPORT**

Courts are already empowered under Government Code section 69957 to order that proceedings in limited civil cases be electronically recorded. Given that probate proceedings are particularly affected by the discontinued funding for official court reporters, this resolution proposes a sensible expansion of the power to probate cases (among other types of cases). Moreover, based on the experience of TEXCOM members, in certain counties, a court reporter cannot be engaged to serve as an official pro tempore reporter without the stipulation of all parties; this effectively gives each party the right to deprive the others of the services of a court reporter. Expansion of the ability to electronically record proceedings (from which a transcript may be derived) would facilitate the administration of justice in probate cases.

**RESOLUTION 08-04-2018**

**DIGEST**
Government Code: Delete Obsolete Reference to Municipal Court
Amends Government Code section 27647 to delete the reference to municipal court, which was rendered obsolete by court consolidation.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
Similar to Resolution 11-05-2014, which was approved in principle.

Reasons:
This resolution amends Government Code section 27647 to delete the reference to municipal court, which was rendered obsolete by court consolidation. This resolution should be approved in principle because the 1998 court consolidation made all trial courts superior courts, which made reference to municipal courts archaic.

Government Code section 27647 currently refers to both the superior court and the municipal court and their respective judges. This section was amended in 1998 to eliminate reference to justice courts because of the amendment to Section 1 of Article VI of the California Constitution made by Proposition 220 (approved by the electors June 2, 1998). Despite the unification of the municipal and superior courts in 2002 (Prop. 48, approved Nov. 5, 2002, eff. Nov. 6, 2002), section 27647 was not amended to eliminate reference to the now eliminated municipal courts. This resolution would delete the continued archaic reference to municipal court in Government Code section 27647.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 27647 to read as follows:

§ 27647.

(a) If requested so to do by the superior court of the county of the county counsel, ~~or by any municipal court in such county,~~ or by any judge thereof, and insofar as such duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent any such court or judge thereof in all matters and questions of law pertaining to any of such judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, such court or judge is concerned or is a party.

(b) This section shall not apply to any of the following:

(1) Any criminal proceedings in which a judge is a defendant.

(2) Any grand jury proceedings.

(3) Any proceeding before the Commission on Judicial Qualifications.

(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.

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

**PROPONENT**: San Diego County Bar Association

**STATEMENT OF REASONS**

The Problem: California voters authorized the consolidation of municipal courts into the superior courts. The courts in all 58 counties are now consolidated and there no longer exists any municipal courts in California. Nevertheless, there remain statutory references to the municipal courts, references which are obsolete.

California law provides that the Board of Supervisors of a county may appoint a County Counsel for the county. (Gov. Code, § 27640.) One of the enumerated functions of the County Counsel is to provide, subject to specified limitations, representation to the trial court or trial court judges in matters related to their duties. The current statutory language, however, contains obsolete references to the "municipal court."

The Solution: This resolution seeks to amend Government Code section 26740 to delete obsolete references to the municipal court.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT**: Darin L. Wessel, Office of the County Counsel, 1600 Pacific Highway, Rm. 355, San Diego, CA 92101; (619) 531-4680; darin.wessel@sdcounty.ca.gov. (This resolution is solely the opinion of the author and not that of the author's employer.)

**RESPONSIBLE FLOOR DELEGATE**: Darin L. Wessel

**RESOLUTION 08-05-2018**

**DIGEST**
Paralegals: Permits Government Paralegals to Draft and Explain Legal Documents to Clients
Amends Business and Professions Code section 6456 to exempt paralegals employed by local government agencies from the prohibition against the selection, drafting, explanation or use of legal documents for individuals.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 6456 to exempt paralegals employed by local government agencies from the prohibition against the selection, drafting, explanation or use of legal documents for individuals. This resolution should be disapproved because it is overbroad and would allow paralegals to engage in the unauthorized practice of law.

Business and Professions Code sections 6450-6455 outline the tasks and duties paralegals may perform, the limits on their services, and the fact that the attorney supervising the paralegal is ultimately liable for the paralegal's mistakes. Business and Professions Code section 6450, subdivision (b)(3) specifically provides that a paralegal shall not "select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal." (Bus. & Prof. Code, § 6450, subd. (b)(3).)

The proponents argue this resolution is necessary because it will permit paralegals employed by city and county government agencies to assist clients in understanding and processing simple legal forms. However, the resolution is not so limited because it would allow a government paralegal to "select, explain, draft" any legal document. In addition, even if the document at issue is a simple legal form, the form, especially in the context of criminal law, has significant legal ramifications. For example, when a defendant pleads guilty or nolo contendre to a felony or misdemeanor crime, there is a plea form that is used. Although the plea form is simple to complete from the perspective of an attorney or paralegal, that plea form affects the criminal defendant's constitutional rights and could have significant legal ramifications that go beyond the guilty plea. A guilty plea may affect one's immigration status, the right to vote, and whether the person can continue to hold a professional license, among other consequences. A discussion with a licensed attorney is necessary for a person to fully understand the ramifications of their plea. Since a paralegal may not understand all of these issues this resolution should be disapproved.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6456 to read as follows:

§ 6456

An individual employed by the state as a paralegal, legal assistant, legal analyst, or similar title, is exempt from the provisions of this chapter. An individual employed by County Public Defender's Office, or a County Alternate or Conflict Public Defender's office, a City Attorney or District Attorney's Office, as a paralegal, legal assistant, legal analyst, or similar title, is exempt from the provisions of section 6450, subdivision (b) (3), relating to the selection, drafting, explanation or use of any legal document.

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

**PROPONENT**: Los Angeles County Bar Association

**STATEMENT OF REASONS**

The Problem: The Los Angeles County Public Defender utilizes Paralegals for a huge variety of tasks, always under the supervision of a lawyer. Paralegals are also used to assist members of the public to fill out the forms necessary to obtain Proposition 47 relief, all done for no charge. The paralegals are all well trained and under the supervision of a lawyer, yet the law seems to prohibit using paralegals to help the public in this way. (See Government Code section 6450, subdivision (b).) Without paralegals it would not be possible for the Public Defender to assist the public because there are potentially hundreds of thousands of Proposition 47-eligible persons and not nearly enough available lawyers. The same applies to the District Attorney and City Attorney.

The Solution: Paralegals employed by the state are completely exempt from the restrictions found in Chapter 5.6 of the Business and Professions Code. It is interesting that persons known as "legal document assistants" can help people fill out forms even though these "assistants" have much less training than paralegals. This resolution gives paralegals employed by County Public Defender's Offices, District Attorneys, and City Attorneys a very specific and limited exception allowing them to assist the public with filling out legal forms in furtherance of those offices' missions.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

**AUTHOR AND/OR PERMANENT CONTACT**: Mark Harvis, Los Angeles County Public Defender, 320 W. Temple Street, Suite 590, Los Angeles, CA 90012, phone: 213-974-3066, e-mail: mharvis@pubdef.lacounty.gov

**RESPONSIBLE FLOOR DELEGATE**: Mark Harvis

## COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

### ORANGE COUNTY BAR ASSOCIATION

This resolution seeks to exempt "paralegals, legal assistants, legal analysts, or similar title" who are employed by the County Public Defender's Office, County Alternate or Conflict Public Defender's Office, City Attorney, or District Attorney's Office, from the restrictions of Cal. Bus. & Prof. Code 6450(b)(3).

Bus. & Prof. Code 6450(b)(3) prohibits a paralegal from selecting, explaining, drafting, or recommending the use of any legal document to or for any person without the direct supervision of an attorney. The proponent wants paralegals working for the proposed offices to be free from the direction and supervision of attorneys in "filling out legal forms."

This resolution is problematic because it allows paralegals to practice law without a license.

First, proponent's Statement of Reasons and the plain language of the Text of Resolution are contradictory. The proponent explains that the paralegal would only be "filling out legal forms," but the resolution itself allows a paralegal to select, draft, explain or use "any legal document." A legal document is not limited to simply forms, but could mean a wide range of things, such as motions, briefs, and legal correspondence.

Second, the proposal would allow paralegals to use their own judgment in the "selection" and "drafting" of legal documents without the direct supervision of an attorney. The selection of an incorrect form, or the decision to choose one form over another, has grave legal consequences. If a paralegal "explains" issues incorrectly, or does not fully anticipate all the issues involved, the paralegal would be committing malpractice unfettered from any disciplinary action. It is for this reason that our State Bar maintains such high standards for licensure and discipline if malpractice were to occur. Each member of our Bar are officers of the court and owes duties to the administration of justice. This resolution would allow the unauthorized practice of law by a paralegal who is not subject to these strict standards and duties.

Finally, the resolution would create disparate procedures and inconsistent application across 58 counties and 482 cities within the State of California. The proponent does not explain how uniformity would be achieved among so many different employers. It is also unclear why the Public Defender, District Attorney, and City Attorney's offices are given preference while other employers such as public interest groups and county court services groups are not given the same consideration.

Accordingly, the Orange County Bar Association recommends disapproval.

**RESOLUTION 08-06-2018**

**DIGEST**

Dispute Resolution Programs: Increase Allocation from Civil Filing Fees

Amends Business and Professions Code section 470.5 to increase the amount that may be distributed for dispute resolution programs from $8 to $12 per civil filing fee

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Business and Professions Code section 470.5 to increase the amount that may be distributed for dispute resolution programs from $8 to $12 per civil filing fee. This resolution should be approved in principle because each court would retain authority to make a determination as to the amount to be distributed to dispute resolution programs.

Despite the ongoing underfunding of California's judicial branch, courts have wide latitude to allocate their resources as best to serve their communities. In many courts, dispute resolution programs are valuable for reducing burdens on courts. Dispute resolution programs often help parties come to terms with their disagreements without civil litigation, which imposes significant costs and burdens on courts and the parties. Even in those circumstances where the parties still end up in trial, dispute resolution services help narrow and tailor the parties' disagreements, which likely helps to shorten trials and reduce the costs and other impacts of civil litigation on the parties and the courts. This is especially true for low-income litigants for whom an alternative to trial may mean the difference between access to justice and no access if they cannot compete with a more financially robust opponent in a litigation setting. Dispute resolution programs serve to level the playing field for the parties to a civil dispute.

Current law caps at $8.00 per civil filing fee the amount that a court can allocate to dispute resolution programs. This cap has been in statute for over 30 years – since 1986 – and simply deserves to be increased so that courts may, but are not required to, increase the amount allocated from civil filing fees to the services that otherwise help reduce civil litigation. Because the courts' discretion is maintained, some courts may determine that it is not appropriate or necessary to increase the resources allocated to dispute resolution programs. However, that same discretion and an increased cap will allow other courts to increase the distribution and thereby better serve court users.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 470.5 to read as follows:

§ 470.5

(a) On and after January 1, 2006, as described in Section 68085.1 of the Government Code, the Administrative Office of the Courts shall make monthly distributions from superior

court filing fees for the support of dispute resolution programs under this chapter in each county that has acted to establish a program. The amount distributed in each county shall be equal to the following:

(1) From each first paper filing fee collected by the court as provided under Section 70611 or 70612, subdivision (a) of Section 70613, subdivision (a) of Section 70614, or Section 70670 of the Government Code, and each first paper or petition filing fee collected by the court in a probate matter as provided under Section 70650, 70651, 70652, 70653, or 70655 of the Government Code, the same amount as was required to be collected for the support of dispute resolution programs in that county as of December 31, 2005, when a fee was collected for the filing of a first paper in a civil action under Section 26820.4 of the Government Code.

(2) From each first paper filing fee in a limited civil case collected by the court as provided under subdivision (b) of Section 70613 or subdivision (b) of Section 70614 of the Government Code, and each first paper or petition filing fee collected by the court in a probate matter as provided under Section 70654, 70656, or 70658 of the Government Code, the same amount as was required to be collected for the support of dispute resolution programs in that county as of December 31, 2005, when a fee was collected for the filing of a first paper in a civil action under Section 72055 of the Government Code where the amount demanded, excluding attorney's fees and costs, was ten thousand dollars ($10,000) or less.

(b) Distributions under this section shall be used only for the support of dispute resolution programs authorized by this chapter. The county shall deposit the amounts distributed under this section in an account created and maintained for this purpose by the county. Records of these distributions shall be available for inspection by the public upon request.

(c) After January 1, 2006, a county that does not already have a distribution from superior court filing fees under this section and that establishes a dispute resolution program authorized by this chapter may approve a distribution under this section. A county that already has a distribution under this section may change the amount of the distribution. The total amount to be distributed for the support of dispute resolution programs under this section may not exceed ~~eight dollars ($8)~~ twelve dollars ($12) per filing fee.

(d) The county may make changes under subdivision (c) to be effective January 1 or July 1 of any year, on and after January 1, 2006. The county shall provide the Administrative Office of the Courts with a copy of the action of the board of supervisors that establishes the change at least 151 days before the date that the change goes into effect.

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

**PROPONENT:** National Lawyers Guild, San Francisco Bay Area Chapter

**STATEMENT OF REASONS**

The Problem: 1. While these programs are widely effective at efficiently resolving disputes and reducing the burdens on both civil and criminal courts, the reduction of disputes ending up in court has resulted in a severe decrease in civil case filings, resulting in diminished funding for the programs.

2. The $8 cap set in 1986 has not changed to meet the cost of doing business in California. Despite the fact that these programs rely in large part on volunteer community members, the cost

of training and administration have soured over the past forty years. CPI reflects that $100.00 in 1987 has the same buying power as $221.69 in 2017. Minimum wage in 1987 was $3.35, and is presently $11.00.

3. Historically DRPA funding was used to fund community mediation programs, not alternatives to the criminal courts. With the influx of criminal programs, DRPA funded ADR programs have been severely affected. In order to fund both types of programs adequately, counties require additional funding.

4. The high price of legal representation has increased the number of litigants forced to represent themselves requiring additional court time.

5. The number of litigants requiring the services of interpreters has also drastically increased.

The Solution: The National Lawyers Guild urges the Conference to ask the California Legislature to amend Bus. & Prof. Code, § 470.5 to raise the $8 cap to $12.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESPONSIBLE FLOOR DELEGATE:** Richard P. Koch

**RESOLUTION 08-07-2018**

**DIGEST**
Attorney's Fees Arbitration: Statute of Limitations For All Proceedings
Amends Business and Professions Code section 6206 to make it consistent with Business and Professions Code section 6201, subdivision (b).

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 6206 to make it consistent with Business and Professions Code section 6201, subdivision (b). This resolution should be approved in principle because it would bring the section into conformity with the language employed in other parts of the legislative scheme.

Business and Professions Code section 6201, subdivisions (b) and (c) specify that if an attorney commences a "court action," "or any other proceeding," when the client would be entitled to maintain a mandatory arbitration of fees charged by the attorney, then the client may file a request for arbitration and automatically stay "the action or other proceeding" until the arbitration is terminated. While section 6206 allows a client to demand mandatory fee arbitration when the attorney files a "civil action" against the client, it does not provide a similar right where the attorney brings "any other proceeding," such as an arbitration. The resolution would remedy that discrepancy and apparent omission. In would bring the language of section 6206 in consonance with section 6201 by tracking the more inclusive references in section 6201. It would allow a client to demand arbitration any time the attorney commences a "court action" "or any other proceeding," bringing the language of section 6206 in line with section 6201. There is no good reason why the language and construct of these two provisions should not be parallel in meaning and intent.

This resolution is related to Resolution 08-08-2018.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6206 to read as follows:

§ 6206

The time for filing a civil action seeking judicial resolution of a dispute subject to arbitration under this article shall be tolled from the time an arbitration is initiated in accordance with the rules adopted by the board of trustees until (a) 30 days after receipt of notice of the award of the arbitrators, or (b) receipt of notice that the arbitration is otherwise terminated, whichever comes first. Arbitration may not be commenced under this article if a civil action

requesting the same relief would be barred by any provision of Title 2 (commencing with Section 312) of Part 2 of the Code of Civil Procedure; provided that this limitation shall not apply to a request for arbitration by a client, pursuant to the provisions of subdivision (b) of Section 6201, following the commencement of an action in any court or any other proceeding ~~filing of a civil action~~ by the attorney.

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

**PROPONENT:** Bar Association of San Francisco

**STATEMENT OF REASONS**

The Problem: Business and Professions Code section 6206 creates an exception to the statute of limitations and allows a client to request mandatory fee arbitration pursuant to Section 6201(b) following the filing of a civil action by the attorney. However, limiting this exception to an attorney's filing of a "civil action" is inconsistent with Section 6201(b), which addresses an attorney's commencement of "any action in any court or any other proceeding." Furthermore, there is no reasoned basis for allowing an exception to the statute of limitations if a client demands mandatory fee arbitration only following an attorney's commencement of a "civil action," but disallowing the exception following the attorney's commencement of arbitration. Given that clients are often constrained by a one-year statute of limitations under Code of Civil Procedure section 340.6 for an attorneys' wrongful act or omission, and attorneys' claims against a client for failure to pay are covered by longer statute of limitations, it is not reasonable to disallow a client to seek mandatory fee arbitration if an attorney brings an action in any court or any other proceeding against the client.

The Solution: This resolution addresses this problem by revising 6206 to track the language of Section 6201(b), which is expressly referenced in section 6206.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESPONSIBLE FLOOR DELEGATE:** Cathleen S. Yonahara

**RESOLUTION 08-08-2018**

**DIGEST**
Legal Malpractice: Tolling Statute of Limitations Pending Mandatory Fee Arbitration
Amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE

History:
Identical to Resolution 04-06-2017, which was disapproved.

Reasons:
This resolution amends Code of Civil Procedure section 340.6 to toll the statute of limitations for legal malpractice actions during Mandatory Fee Arbitration. This resolution should be approved in principle because it protects clients from unknowingly waiving their rights and upholds the policy underpinning the Mandatory Fee Arbitration program, which is a client protection statute designed to allow a quick and inexpensive resolution of attorney-client fee disputes.

Under existing law, the statute of limitations for a client's claim against her/his attorney for any attorney wrongdoing (except actual fraud) is complex, purely a creature of statute, and depends upon a number of factors. First, the claim does not accrue until the client discovers (or could have discovered) the facts constituting the wrongdoing, and the client has one year from the date of discovery to commence the lawsuit. (Code Civ. Proc., § 340.6, subd. (a).) Second, the statute provides an outside time limit of four years from the date of wrongdoing, and further provides that the limitations period is one year from discovery or four years from wrongdoing, whichever occurs first. (Code Civ. Proc., § 340.6, subd. (a).) Third, if a client must first prove factual innocence of an underlying crime, the limitations period is two years after the client is exonerated, and the four-year outside limit does not apply. (Code Civ. Proc., § 340.6, subd. (a).) Fourth, and where the claim is based on an instrument in writing with an effective date governed by a future act or event, the limitations period for that claim begins to run only when that future act or event occurs. (Code Civ. Proc., § 340.6, subd. (b).) Finally, all of these interconnected limitations periods are statutorily tolled, (see Code Civ. Proc., § 340.6, subds. (a)(1) – (4)) (which apply only to attorney wrongdoing); and see also Code Civ. Proc., §§ 350-353 (which apply to all civil actions).)

Therefore, under current law, it can be many years before a client's claims against a former attorney accrue. And sometimes, the claims continue to be tolled even after they accrue. For this reason, the argument that allowing tolling while a Mandatory Fee Arbitration is pending will unreasonably delay claims against attorneys is not persuasive. As demonstrated below, such tolling is needed to effectuate the policy purpose for such fee arbitration, which is a consumer protection program designed to provide clients with a low cost and speedy means to resolve fee disputes with their attorneys.

Mandatory Fee Arbitration is currently governed by Business and Professions Code, sections 6200-6206, and is administered by local county bar associations. It is a separate proceeding from a civil action, and is limited to adjudicating only the amount of fees or costs owed. While the client may assert malpractice and breach of fiduciary duty as defenses in this proceeding, these defenses only provide an off-set against the attorney's fee claim. The Mandatory Fee Arbitration proceeding does not toll the limitations period for the civil lawsuit.

Thus, for affirmative damages based on legal malpractice and fiduciary breach claims, the client must file a separate civil action within the limitations period prescribed by Code of Civil Procedure section 340.6. The damages claimed in these civil actions often include damages related to attorney over-billing. But, the problem is that if the over-billing claims are included in this civil action, the client waives the right to Mandatory Fee Arbitration by filing the lawsuit.

Thus, the client faces the unfair choice **either** 1) to initiate a Mandatory Fee Arbitration and take the chance that the limitations period for affirmative claims will be lost during the pendency of the arbitration; **or** 2) to proceed with a civil lawsuit for all attorney wrongdoing, including overbilling, waiving the right to a Mandatory Fee Arbitration; **or** 3) to proceed simultaneously with two parallel proceedings, namely the fee arbitration for the fee dispute and the civil action for the malpractice / breach of fiduciary duty claims (but without the overbilling claims). If the client chooses the third option for two parallel proceedings, the client faces significant procedural and substantive hurdles. Procedurally, the client has no certainty that (a) the defendant attorney and court will agree to stay the lawsuit while the fee arbitration is pending (there is no right to such a stay); nor that (b) the court will later allow the client to add the overbilling claims to the lawsuit if the fee arbitration does not resolve those claims. Substantively, if the fee dispute involves malpractice / breach of fiduciary duty as a defense to the claimed fees, there is a danger of inconsistent rulings and results from the two proceedings.

This unfair choice effectively undermines the client protection purpose of the Mandatory Fee Arbitration Act, which is designed to allow the clients a cost-effective way to resolve attorney fee disputes. The proposed tolling provision corrects this very real problem in furtherance of the legislative purpose of the Mandatory Fee Arbitration Act.

The resolution adds a tolling provision to Code of Civil Procedure section 340.6 which tolls the limitations periods for the client's legal malpractice and fiduciary breach claims against a former attorney while the Mandatory Fee Arbitration is pending. This will effectuate the policy for the Mandatory Fee Arbitration program, allowing clients to avail themselves of the low cost and speedy remedy to resolve fee disputes without having to face this very unfair choice, which works in the attorney's favor and to the client's prejudice.

Related to Resolution 08-07-2018.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 340.6 to read as follows:

§ 340.6

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury.

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(5) A dispute between the lawyer and client concerning fees, costs, or both is pending resolution under Business & Professions Code Sections 6200-6206. As used in this subsection, "pending" means from the date a request for arbitration is filed until 30 days after receipt of notice of the award of the arbitrators, or receipt of notice that the arbitration is otherwise terminated, whichever comes first.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

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

**PROPONENT**: Sacramento County Bar Association

**STATEMENT OF REASONS**

The Problem: The purpose of the Mandatory Fee Arbitration Act ("MFAA") is to provide an effective and inexpensive forum for resolving fee disputes between clients and attorneys without the necessity of a client hiring another attorney. However, under Code of Civil Procedure §340.6's current deadlines for attorney-client disputes, clients must often give up the efficiency of the MFAA to preserve their civil claims; attorneys then have to incur time and costs defending a civil lawsuit. This undermines the purpose and efficiency of the MFAA.

Business & Professions Code §6206 tolls the time for filing a civil action regarding a dispute subject to the MFAA until 30 days after an award is served, or the arbitration is otherwise terminated. However, it does not toll Code of Civil Procedure §340.6's one-year statute of limitations regarding a client's action against an attorney for any other matter arising from the

attorney's services (other than actual fraud).

The Solution: Amending Code of Civil Procedure §340.6 to allow time for the parties to fully participate in a fee arbitration will promote efficiency, preserve costs, and allow both attorneys and clients to actually benefit from the MFAA. Currently, Business & Professions Code §6201(d)(2) provides that a client waives their right to maintain arbitration under the MFAA if the client files an action against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct. Therefore, with the current, unwaivering, one-year statute of limitations on all client claims against attorneys (except for actual fraud), to ensure that they are made whole from an attorney's alleged error, clients often have to file and litigate an extremely expensive, multi-year, civil lawsuit, and give up the opportunity to resolve their financial dispute through a quick, low-cost fee arbitration. This also means that attorneys have to defend such civil suits. This problem was exacerbated by the California Supreme Court's decision in *Lee v Hanley* (2015) 61 Cal.4th 1225, where the Court held that Code of Civil Procedure section 340.6 applies to a client's claim for the return of unearned fees held by the attorney after the representation terminated. Tolling the statute of limitations until a fee arbitration is concluded would allow clients and attorneys the opportunity to actually benefit from the MFAA.

By amending Code of Civil Procedure §340.6(a), to add a new subsection (5), expressly providing that the statute of limitations for a client's civil claim is tolled during the pendency of a fee dispute between the attorney and client under the MFAA, both attorneys and clients will have the opportunity to fully avail themselves of the benefit of the MFAA, without the additional cost of a civil litigation.

**IMPACT STATEMENT**
This resolution would impact/expand tolling pursuant to Business & Professions Code section 6206.

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESPONSIBLE FLOOR DELEGATE:** Kenneth E. Bacon.

**RESOLUTION 08-09-2018**

**DIGEST**
Evidence: Admissibility of Mediation Communications for Attorney-Client Disputes
Amends Evidence Code section 1120 to allow attorney-client communications made during mediation to be admissible in State Bar disciplinary proceedings or civil actions for malpractice.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:
Similar to Resolution 10-06-2011, which was approved in principle.

Reasons:
This resolution amends Evidence Code section 1120 to allow attorney-client communications made during mediation to be admissible in State Bar disciplinary proceedings or civil actions for malpractice. This resolution should be approved in principle with recommended amendments because it protects clients from unscrupulous attorneys who use the confidentiality of mediation to cloak their own wrongdoing, to the detriment of their clients, and allows clients to seek redress for attorney negligence in the context of mediations.

Mediation does not excuse attorneys from their fiduciary duties and professional obligations to their clients or from abiding by other duties set out in the California Rules of Professional Conduct. But, under current law, because nothing the attorneys say in the course of mediation is admissible for any purpose, in any venue, attorneys have absolute immunity to shirk their duties. (See Cassel v. Superior Court (*Wasserman, Comden, Casselman & Pearson, L.L.P.)* (2011), 51 Cal. 4th 113.) Such attorneys can neither be disciplined nor held financially accountable for their mediation misdeeds.

When the Conference passed Resolution 10-06-2011, the Legislature understood the importance of the issue, and referred it to the California Law Revision Commission ("CLRC") to study. The CLRC received and reviewed extensive public comment, held numerous public meetings to discuss the issues and receive further public comment, and recently issued a 178 page report, recommending that an exception to mediation confidentiality be enacted to allow information and communications to be admissible. This 178-page report is available at http://www.clrc.ca.gov/K402.html. Unfortunately, the Legislature has not yet acted on CLRC's learned and considered study and recommendation. The resolution proposes a narrowly tailored provision which limits the scope of admissibility of the mediation statements to the client's civil lawsuit against the attorney and the State Bar's disciplinary proceedings.

The resolution should be amended so that its language is in accordance with Code of Civil Procedure section 340.6, i.e. making the statements admissible in civil lawsuits for an attorney's wrongful act or omission arising in the performance of professional services. The proposed amendment would make the resolution consistent with the existing statutory scheme governing attorney duties because "legal malpractice" is not a statutorily defined term, and using it could unintentionally cause uncertainty in that statutory scheme.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 1120 to read as follows:

§ 1120

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(4) The admissibility, in a State Bar disciplinary action or an action for legal malpractice, only, of relevant communications directly between the client and his or her attorney, only, where breach of a professional obligation in a mediation context forms the basis of the client's allegations against the client's attorney, provided that the evidence does not constitute or disclose a mediation communication of any mediation participant other than the client and attorney. Admission or disclosure of evidence under this subdivision does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

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

**PROPONENT:** Contra Costa County Bar Association

**STATEMENT OF REASONS**

The Problem: In 2011, the California Supreme Court decided *Cassel v. Superior Court* (2011) 51 Cal.4th 113, in which it held that the policy underlying mediation confidentiality trumps the ability of a party to a mediation to sue his attorney for alleged professional negligence occurring at the mediation. In response to *Cassel*, the Conference of California Bar Associations adopted Resolution 10-06-2011, which became the basis of AB 2025 by Wagner/Gorrel. After widespread opposition to AB 2025 was submitted, the Legislature referred the issue to the Law Revision Commission, which conducted Study K-402 and has proposed legislation that has the potential to significantly damage mediation confidentiality. The Consumer Attorneys of California and the California Defense Council explained in a rare joint letter of opposition "Confidentiality promotes candor, which in turn leads to successful mediation...and the use of mediation is critical to successful out of court resolution of disputes." The CCCBA's ADR section concurs that mediation confidentiality is imperative to successful resolution of cases.

The Solution: This resolution provides a middle ground between protecting clients from malpractice and preserving mediation confidentiality, by allowing evidence of communications made in mediation if they are relevant to a State Bar disciplinary action or an action for legal malpractice, but clearly limits the use of the evidence, prohibiting its use for any other purpose.

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

**CURRENT OR PRIOR RELATED LEGISLATION**
None known.

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**RESPONSIBLE FLOOR DELEGATE:** Margaret J. Grover

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## COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

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### ORANGE COUNTY BAR ASSOCIATION

Statements made in opposition to this resolution should in no way be construed as condoning or facilitating breach by an attorney of any professional obligation when representing a client, or as support for the recommendation of the CLRC made in connection with its Study K-402.

This resolution would make current statutory mediation confidentiality protections inapplicable to attorney-client communications where certain attorney misconduct is alleged. Problems with this approach include:

Allowing a client to support a malpractice claim with excerpts from private lawyer-client mediation-related discussion, while barring that lawyer from placing such discussion, i.e., advice given, in context by citing communications made in the mediation, would violate fundamental fairness. This uneven treatment would yield unjust results and erode confidence in the justice system.

Often, private lawyer-client mediation-related discussion will disclose what others have said in the mediation. When this private discussion is introduced in a subsequent lawyer-client dispute, harm to the interests, or at least the sensibilities, of these others not involved in that dispute is likely. The possibility of such disclosure would lead to less open mediation discussions and impede the effectiveness of the process.

Current confidentiality protections for lawyer-client communications facilitate mediation use and effectiveness. It is virtually the only process which allows unreserved discussions between lawyer and client. Discussion of strengths and weaknesses, terms of possible settlement, or maybe things the client doesn't want to hear, may be had without concern what is said by either attorney or client will come back to hurt them. To except attorney-client communications from such protection would eliminate this opportunity.

Whether attorney or client, a mediation participant subsequently could have difficulty recalling whether a comment was made in private lawyer-client discussion, or in mediation discussion involving other participants. Hard-fought disputes over admissibility are a certainty, given its importance and difficult proof.

Even if a participant correctly recalls what did or did not occur in a private lawyer-client discussion, when testifying, the participant might inadvertently refer to what happened in another phase of the mediation involving participants other than the lawyer and client. This could harm the interests of a participant not involved in the lawyer-client dispute. Retaining private attorney-client discussion and communications in the current statutory protections provide maximum assurance that disclosure of ancillary mediation communications will not, accidently or otherwise, breach the confidentiality of a mediation, to the damage of other participants.

It is claimed this resolution "provides a middle ground." It would seem this "middle" is between current, robust (*not* absolute), statutory protections, and the approach of the CLRC's recommendation which would make admissible all types of mediation communications, not just those between the attorney and client locked in a subsequent dispute. Proponents point out this recommendation has "the potential to significantly damage mediation confidentiality." The CLRC recommendation, however, is not law. With opposition from 32 respected organizations and support from only one (the CCBA), it may never become law. This resolution has at least equal potential to do significant damage to mediation confidentiality.

**RESOLUTION 08-10-2018**

**DIGEST**
State Bar of California: Oversight by an Inspector General
Adds Business and Professions Code section 6075.1 to create a State Bar Inspector General position to monitor and evaluate disciplinary systems, programs, and procedures of the State Bar of California.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Business and Professions Code section 6075.1 to create a State Bar Inspector General position to monitor and evaluate disciplinary systems, programs, and procedures of the State Bar of California. This resolution should be disapproved because it is premature given that the State Bar's new structure became law on January 1, 2018, and there has not yet been an opportunity for the State Bar's executive director to effect changes in State Bar operations that might obviate the need for this proposal.

As properly characterized in the resolution's Statement of Reasons, pursuant to the adoption of Business and Professions Code section 6031.5, effective January 1, 2018, the focus of the State Bar will be on its regulatory functions. The State Bar recently completed a classification and compensation study that will provide essential data on the labor markets that impact all of its functions. Subsequent to that study, the State Bar created a new executive management team position entitled Chief Programs Officer (CPO). This position will be responsible for essential programs including the offices of Admissions, Professional Competence, Member Records and Compliance, Client Security Fund, and Case Management and Supervision. Under the State Bar's former organizational structure, the Legislature created temporary monitors to report to the Supreme Court the efficiency and effectiveness of the Bar's disciplinary system, finances, and other operations. The new CPO position is untested; as such, it is premature to presume that a full-time, long-term inspector general – in effect, another layer of bureaucracy – is needed to scrutinize State Bar functions and operations.

The position is unnecessary given the radical restructuring of the State Bar. In addition to being premature to presume that an inspector general position would improve the efficiency and supervisory capacity of the CPO, the creation of an inspector general position would create a permanent and independent internal affairs bureaucracy prior to an identified need for one, and before the "new" State Bar has an opportunity to establish itself pursuant to legislative mandate. By enacting significant changes to State Bar operations and mandates in 2017, the Legislature declared that the previous incarnation of the State Bar was unacceptable, and legislated it out of existence. Such would be a likely recommendation of an internal affairs position absent legislative oversight. However, in the case of the State Bar, there is active legislative oversight and involvement. As such, the timing is inappropriate to support the proposed position, and the

need unclear for a position charged with investigating incidents of alleged managerial misconduct, financial mismanagement, and failure to apply policy directives that arise from its operations.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to add Business and Professions Code section 6075.1 to read as follows:

§ 6075.1

(a)(1) The Chief Justice of the California Supreme Court shall appoint a State Bar Inspector General prior to January 1, 2019. The Chief Justice of the California Supreme Court shall advertise the availability of the position and conduct interviews of candidates for the position. The applicant for the position shall have investigative experience, shall be familiar with California laws and procedures, and, preferably, shall be familiar with the rules, procedures, and programs of the State Bar lawyer discipline system and relevant administrative procedures. The Inspector may be a state employee or his or her services may be provided pursuant to contract. The Supreme Court shall compensate the Inspector and shall provide the Inspector with sufficient support staff to carry out his or her duties. The State Bar shall annually reimburse the Supreme Court for the expense of the Inspector, including salaries, contract expenses and any related costs.

(2) The Chief Justice of the California Supreme Court shall supervise the inspector and may terminate or dismiss him or her from this position.

(b)(1) The inspector shall monitor and evaluate the disciplinary system, programs, and procedures of the State Bar. The inspector general shall make his or her highest priority the effectiveness and efficiency of the State Ba of the State so that the State Bar is successfully and consistently protecting the public.

(2) This inspection duty shall include, but not be limited to, providing contemporaneous oversight of internal affairs investigations, and the human resources disciplinary process of the State Bar; when authorized by the Supreme Court, the Governor, the State Assembly, or the State Senate, conduct reviews of State Bar policies and practices and, when completed, report back to the authorizing agency with findings and recommendations; maintain a state-wide intake function and process to receive communications from any individual regarding allegations of improper activity by the State Bar and initiate a review of such activity; conduct assessments of retaliation complaints submitted by State Bar employees against a member of State Bar managementt;review allegations of mishandling of incidents of discrimination, sexual abuse, or sexual harassment by the State Bar; and annually report to the Supreme Court a summary of the Inspector's reports and the State Bar's responses to the Inspector's recommendations.

(3) The inspector shall exercise no authority over the State Bar's operations or staff, however, the State Bar and its staff shall cooperate with the Inspector and the State Bar shall provide data, information, and case files as requested by the Inspector to perform all of his or her duties. The Inspector shall have the same access to documents as the Chief Justice of the California Supreme Court.

(c) The Inspector shall submit an initial written report of his or her annual report to the State Bar, the Supreme Court, and the Legislature no later than January 1, 2020, and be available to make oral reports to each if requested to do so. The inspector may also provide additional

information to either the Supreme Court, the State Bar, or the Legislature at his or her discretion or at the request of the Supreme Court, the State Bar, or the Legislature. The Inspector general shall make his or her reports available to the public or the media. Pursuant to the amendment of Business & Professions Code section 6031.5, the Inspector shall make every effort to provide the State Bar with an opportunity to reply to any facts, findings, issues, or conclusions in his or her reports with which the State Bar may disagree.

(d) This section shall remain in effect until it is repealed.

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

**PROPONENT**: Los Angeles County Bar Association

**STATEMENT OF REASONS**

The Problem: Pursuant to the adoption of Business & Professions Code section 6031.5, effective January 1, 2018, focus of the State Bar will be on its regulatory functions. The legislature has previously created temporary monitors to report to the Supreme Court concerning the efficiency and effectiveness of the bar's disciplinary system, finances, and other operations. However, the monitors' missions did not encompass the whole of the State Bar's regulatory system, including, e.g., admissions, human resource management, administration of specializations, or diversity and inclusion. The State Bar has recently completed a classification and compensation study that will provide essential data on the labor markets that impact all of its functions. In the aftermath of that study, the bar has created a new executive management team position entitled Chief Programs Officer. This position will be responsible for essential programs not previously addressed by ad hoc monitors, including: the offices of Admissions, Professional Competence, Member Records and Compliance, Client Security Fund, and Case Management and Supervision. The CPO will provide a broader spectrum of data and accountability that the Inspector can use to enhance the State Bar's organizational accountability to all of its constituents.

The Solution: The State Bar's lawyer discipline operations fall under the direction of the Chief Trial Counsel, a statutory position created. The proposed legislation would provide oversight of the State Bar as an organization. It would provide a permanent and independent internal affairs office to receive and investigate incidents of alleged managerial misconduct, financial mismanagement, or failure to apply policy directives that arise from all of its operations. The position is modelled on the prior monitor appointments and similar job descriptions for public Inspectors General, but provides permanent and more comprehensive oversight reporting directly to the Supreme Court, not only on lawyer regulation, but also on all of the other programs that relate to the bar's effectiveness and efficiency in its new role. The State Bar's Office of the Inspector General should provide a formal independent resource for the investigation of internal affairs where aggrieved parties have no independent recourse other than the civil courts or direct appeal to the California Supreme Court as the plenary authority over the admission and discipline of lawyers in California. The OIG would report directly to the Chief Justice of the Supreme Court and would also provide annual public reports and such other independent investigations, reports, and recommendations as may be required of and about the State Bar in the discharge of its public protection mission. Because the OIG would be permanent rather than

ad hoc, it would have continuous access to critical information, which would both improve the quality of independent reporting as well as reduce the cost of periodic hiring of special personnel to address specialized concerns.

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

**CURRENT OR PRIOR RELATED LEGISLATI**ON
None known.

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**RESPONSIBLE FLOOR DELEGATE**: Teresa Schmid

**RESOLUTION 08-11-2018**

**DIGEST**
Attorneys: Temporary License for Attorney Spouses of Active Duty Military Personnel
Amends Business and Professions Code section 6062 and adds California Rules of Court, rule 9.49, to provide attorney spouses of active duty military personnel with temporary admission to the California Bar.

**RESOLUTIONS COMMITTEE RECOMMENDATION**
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 6062 and adds California Rules of Court, rule 9.49, to provide attorney spouses of active duty military personnel with temporary admission to the California Bar. This resolution should be disapproved because, although it serves a worthy purpose and provides some appropriate restrictions and requirements, any such licensing should be a short term solution with supervised practice throughout its duration, similar to the temporary license for legal service attorneys.

It is important and necessary to support military personnel by helping them keep their families together during their active duty postings in California. To further this goal, Military Spouse Attorneys should be granted a temporary license to practice in California while his/her spouse is posted to California on active duty.

While wishing to create a short term solution, this resolution grants an long term temporary license without requiring bar exam passage for three years. California policy is to maintain one of the most stringent (if not the most stringent) admisions requirements in the country. A three year temporary license with no bar passage requirement does not take this policy into account.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6062 and that the California Judicial Council add California Rules of Court, rule 9.49 to read as follows:

§ 6062

(a) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire shall:

(1) Be of the age of at least 18 years.

(2) Be of good moral character.

(3) Have passed the general bar examination given by the examining committee.

However, if that person has been an active member in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years

immediately preceding the first day of the examination applied for, he or she may elect to take the Attorneys' Examination rather than the general bar examination. Attorneys admitted less than four years and attorneys admitted four years or more in another jurisdiction but who have not been active members in good standing of their admitting jurisdiction for at least four years immediately preceding the first day of the examination applied for must take the general bar examination administered to general applicants not admitted as attorneys in other jurisdictions.

(4) Have passed an examination in professional responsibility or legal ethics as the examining committee may prescribe.

(b) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a jurisdiction other than in a sister state, United States jurisdiction, possession, or territory shall:

(1) Be of the age of at least 18 years.

(2) Be of good moral character.

(3) Have passed the general bar examination given by the examining committee.

(4) Have passed an examination in professional responsibility or legal ethics as the examining committee may prescribe.

(c) (1) An individual who is an active member in good standing of the bar of an admitting sister state of United States state, jurisdiction, possession, territory or dependency who is a spouse, registered domestic partner or civil union with, an active duty member of the Armed Forces of the United States who is assigned to a duty station in California under official active duty military orders, may apply to receive a temporary license to practice law in California, under such rules and regulations adopted by the California Supreme Court and State Bar of California.

(2) To be eligible for temporary licensing under this subdivision, an individual must:

(A) Supply evidence satisfactory to the State Bar of California that he or she is married to, or in a domestic partnership or other legal union with, an active duty member of the Armed Forces of the United States who is assigned to or being assigned to a duty station in California under official active duty military orders.

(B) Hold a current license to practice law in another state, district, territory, or dependency of the United States.

(C) Establish that he or she is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction and is of good moral character.

(D) Pay such fees set by the State Bar for temporary admission under this subdivision and for moral character determination.

(3) Temporary licensing under this subdivision may be limited to a reasonable period determined by the State Bar of California, but in no case less than a period of three years.

(4) To maintain temporary licensing under this subdivision, an individual must:

(A) Pay annual bar membership dues and such other fees as set by the State Bar of California necessary to cover the costs of the program implementing temporary licensing under this subdivision.

(B) Comply with all ethical, legal, and continuing legal education obligations required of members of the State Bar of California.

(C) Comply with such other rules and regulations adopted by the State Bar of California implementing temporary licensing under this subdivision.

(5) A temporary licensee under this subdivision shall be subject to discipline, reproval, suspension and revocation under all rules and regulations applicable to members of the State Bar of California.

(6) An individual eligible for temporary licensing under this subdivision shall also be eligible to take the Attorney's Examination rather than the general bar examination and a concurrent application to take such examination will have no effect on eligibility for temporary licensing or the continuation of temporary licensing under this subdivision.

~~(c)~~(d) The amendments to this section made at the 1997–98 Regular Session of the Legislature shall be applicable on and after January 1, 1997, and do not constitute a change in, but are declaratory of, existing law.

Rule 9.49

Registered Military Spouse Attorneys.

(a) Purpose. Due to the unique mobility requirements of military families who support the defense of our nation, an attorney who is a spouse of, a registered domestic partner of, or in a Civil Union with an active duty member of the United States Uniformed Services ("service member") may be required to relocate to this jurisdiction when the service member spouse is stationed within this jurisdiction. This rule is intended to provide attorney spouses of service members assigned to duty in California the option of obtaining a temporary license to practice law within the State of California without examination under the provisions of Business and Professions Code section 6062 and this rule.

(b) Definitions. The following definitions apply in this rule:

(1) "Military Spouse Attorney" is an active member in good standing of the bar of the bar of a United States state, jurisdiction, possession, territory, or dependency and who is a spouse or registered domestic partner of a Service Member.

(2) "Service Member" means an active duty member of the United States Uniformed Services, as defined by the United States Department of Defense, who has been ordered stationed within California.

(3) "Spouse" shall have the ordinary meaning accorded by California law, and includes registered domestic partnerships and Civil Unions.

(4) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency other than California while practicing law as a registered Military Spouse Attorney in California; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

(c) Scope of practice. Subject to all applicable rules, regulations, and statutes, and as specifically required under this rule, an attorney practicing law under this rule may practice law in California in all forms of legal practice that are permissible for a member of the State Bar of California.

(d) Requirements. For an attorney to practice law under this rule, the attorney must:

(1) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency, and be a spouse or registered domestic partner of a Service Member;

(2) Register with the State Bar of California and file an Application for Determination of Moral Character;

(3) Meet all of the requirements for admission to the State Bar of California, except that the attorney:

(A) Need not take the California bar examination or the Multistate Professional Responsibility Examination; and

(B) May practice law while awaiting the result of his or her Application for Determination of Moral Character;

(4) Comply with the rules adopted by the Board of Governors relating to the State Bar Registered Military Spouse Attorney Program;

(5) Abide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements;

(6) Satisfy in his or her first year of practice under this rule all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years; and

(7) Not have taken and failed the California bar examination within five years immediately preceding application to register under this rule.

(e) Application. To qualify to practice law as a registered Military Spouse Attorney, the attorney must:

(1) Register as an attorney applicant and file an Application for Determination of Moral Character with the Committee of Bar Examiners;

(2) Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than as provided under this rule, except that, if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as registered in-house counsel; and

(3) Submit to the State Bar of California a declaration signed by a qualifying supervising attorney attesting that the applicant will be supervised as specified in this rule and the supervising attorney assumes professional responsibility for any work performed by the applicant under this rule. The applicant need not be directly employed by the qualifying supervising attorney.

(f) Duration of practice

(1) An attorney may practice for no more than a total of three years under this rule, unless the State Bar of California, by duly adopted rule, determines that a longer period temporary licensing under this program is warranted.

(2) The license to practice law under this rule shall terminate after any one of the following events or such period as specified in the enumerated events:

(A) The Service Member is no longer a member of the United States Uniformed Services;

(B) Sixty days after entry of a judgment of dissolution of the Military Spouse Attorney's marriage, civil union, or registered domestic partnership;

(C) The service member receives a permanent transfer outside the jurisdiction, except that if the service member has been assigned to an unaccompanied or remote assignment with no

dependents authorized, the Military Spouse Attorney may continue to practice pursuant to the provisions of this rule until the service member is assigned to a location with dependents authorized; or

(D) One year after the death, permanent disability, or disability resulting in discharge of the service member.

(E) In accordance with rules for reciprocal discipline.

(3) In the event that any of the events listed in paragraph (f)(2)(A)-(F) occur, the attorney licensed under this rule shall notify the State Bar of California of the event in writing within thirty (30) days of the date upon which the event occurs. If the event occurs because the service member is deceased or disabled, the attorney shall notify the State Bar of California within one hundred eight (180) days of the date upon which the event occurs.

(4) Each attorney admitted to practice under this rule shall report to the State Bar of California, within thirty (30) days, or such other time as provided:

(A) Any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the attorney has been admitted to the practice of law;

(B) The initiation of any disciplinary proceedings by any federal or state court or agency; or

(C) Immediately upon the imposition of any permanent or temporary professional disciplinary sanction by any federal or state court or agency.

(5) An attorney's authority to practice under this rule shall be suspended when the attorney is suspended, and revoked when the attorney is disbarred in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which the attorney has been admitted to practice.

(g) Application and registration fees. The State Bar of California may set appropriate application fees and annual registration fees, as necessary to cover the costs of the program, to be paid by registered Military Spouse Attorneys.

(h) State Bar Registered Military Spouse Attorney Program. The State Bar may establish and administer a program for registering California Military Spouse Attorneys under rules adopted by the Board of Governors of the State Bar and consistent with Business and Professions Code section 6062 and this rule.

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

**PROPONENT**: San Diego County Bar Association

**STATEMENT OF REASONS**

The Problem: Active duty members of the United States Armed Forces are often required to relocate to California as part of their military service and this imposes burdens on the member's spouse and family, inclusive of the spouse's need to find new employment in California. Where the spouse of the service member is an attorney licesned to practice law in another state or U.S. territory, this presents the added problem of seeking admission to practice law in California. Currently, the attorney spouse would need to take and pass the attorney bar examination, if admitted to the other jurisdiction and actively engaged in the practice of law for at least four years, or take the general bar examination, and must pass the moral character background. This process takes a minimum of eight months from the deadline for submission of the application to

take the bar examination until results are posted, and often takes upwards of one year, or nearly one quarter of a service member's normal 4-year deployment order.

Since the Conference passed Resolution 01-02-2015 in principle with amendments recommended by ResCom, a total of 29 other states have adopted rules permitting temporary licensing of Military Spouse Attorneys with less burdensome requirements.

This Solution: This Resolution seeks to amend Business and Professions Code section 6062 to authorize temporary licensing and to make clear the Judicial Council and State Bar of California are authorized to adopt rules and regulations creating a program for temporary licensing of Military Spouse Attorneys while their spouse or registered domestic partner is stationed in California. It authorizes the State Bar to impose a reasonable time constraint on the duration of temporary licensing, of not less than three years – a time frame that has been found by the majority of jurisdictions implementing such temporary licensing as a reasonable accommodation to the Military Spouse Attorney to obtain full admission through examination. It requires compliance with MCLE requirements and all other rules and regulations applicable to California attorneys. It provides a temporary licensee is subject to the same discipline as any member of the State Bar of California. It clarifies that an individual eligible for temporary licensing under this program is concurrently eligible to take the Attorney's Examination.

**IMPACT STATEMENT**
The proposed resolution would require the State Bar of California adopt such other rules and regulations necessary to implement the program for temporary licensing. It authorizes the State Bar to charge fees to applicants and temporary licensees, in addition to annual state bar dues, as necessary to cover the costs of implementing and maintaining the program for temporary licensing.

**CURRENT OR PRIOR RELATED LEGISLATION**
Related to Resolution 01-02-2015 which was approved in principle with Resolutions Committee recommended amendments. Similar to Assembly Bill 296 (2013-2014 Reg. Sess.) (Wagner).

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