

RESOLUTION 06-01-2019

DIGEST

Court e-filing: Tolling of Deadlines

Amends Code of Civil Procedure section 1010.6 to toll filing deadlines from electronic submission.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1010.6, to read as follows:

1 §1010.6

2 (a) A document may be served electronically in an action filed with the court as provided
3 in this section, in accordance with rules adopted pursuant to subdivision (e).

4 (1) For purposes of this section:

5 (A) "Electronic service" means service of a document, on a party or other person, by
6 either electronic transmission or electronic notification. Electronic service may be performed
7 directly by a party or other person, by an agent of a party or other person, including the party or
8 other person's attorney, or through an electronic filing service provider.

9 (B) "Electronic transmission" means the transmission of a document by electronic means
10 to the electronic service address at or through which a party or other person has authorized
11 electronic service.

12 (C) "Electronic notification" means the notification of the party or other person that a
13 document is served by sending an electronic message to the electronic address at or through
14 which the party or other person has authorized electronic service, specifying the exact name of
15 the document served, and providing a hyperlink at which the served document may be viewed
16 and downloaded.

17 (2)(A)(i) For cases filed on or before December 31, 2018, if a document may be served
18 by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the
19 document is not authorized unless a party or other person has agreed to accept electronic service
20 in that specific action or the court has ordered electronic service on a represented party or other
21 represented person under subdivision (c) or (d).

22 (ii) For cases filed on or after January 1, 2019, if a document may be served by mail,
23 express mail, overnight delivery, or facsimile transmission, electronic service of the document is
24 not authorized unless a party or other person has expressly consented to receive electronic
25 service in that specific action or the court has ordered electronic service on a represented party or
26 other represented person under subdivision (c) or (d). Express consent to electronic service may
27 be accomplished either by (I) serving a notice on all the parties and filing the notice with the
28 court, or (II) manifesting affirmative consent through electronic means with the court or the
29 court's electronic filing service provider, and concurrently providing the party's electronic
30 address with that consent for the purpose of receiving electronic service. The act of electronic
31 filing shall not be construed as express consent.

32 (B) If a document is required to be served by certified or registered mail, electronic
33 service of the document is not authorized.

34 (3) In any action in which a party or other person has agreed or provided express consent,
35 as applicable, to accept electronic service under paragraph (2), or in which the court has ordered
36 electronic service on a represented party or other represented person under subdivision (c) or (d),
37 the court may electronically serve any document issued by the court that is not required to be
38 personally served in the same manner that parties electronically serve documents. The electronic
39 service of documents by the court shall have the same legal effect as service by mail, except as
40 provided in paragraph (4).

41 (4)(A) If a document may be served by mail, express mail, overnight delivery, or
42 facsimile transmission, electronic service of that document is deemed complete at the time of the
43 electronic transmission of the document or at the time that the electronic notification of service
44 of the document is sent.

45 (B) Any period of notice, or any right or duty to do any act or make any response within
46 any period or on a date certain after the service of the document, which time period or date is
47 prescribed by statute or rule of court, shall be extended after service by electronic means by two
48 court days, but the extension shall not apply to extend the time for filing any of the following:

49 (i) A notice of intention to move for new trial.

50 (ii) A notice of intention to move to vacate judgment under Section 663a.

51 (iii) A notice of appeal.

52 (C) This extension applies in the absence of a specific exception provided by any other
53 statute or rule of court.

54 (5) Any document that is served electronically between 12:00 a.m. and 11:59:59 p.m. on
55 a court day shall be deemed served on that court day. Any document that is served electronically
56 on a noncourt day shall be deemed served on the next court day.

57 (6) A party or other person who has provided express consent to accept service
58 electronically may withdraw consent at any time by completing and filing with the court the
59 appropriate Judicial Council form. The Judicial Council shall create the form by January 1, 2019.

60 (7) Consent, or the withdrawal of consent, to receive electronic service may only be
61 completed by a party or other person entitled to service or that person's attorney.

62 (8) Confidential or sealed records shall be electronically served through encrypted
63 methods to ensure that the documents are not improperly disclosed.

64 (b) A trial court may adopt local rules permitting electronic filing of documents, subject
65 to rules adopted pursuant to subdivision (e) and the following conditions:

66 (1) A document that is filed electronically shall have the same legal effect as an original
67 paper document.

68 (2)(A) When a document to be filed requires the signature of any person, not under
69 penalty of perjury, the document shall be deemed to have been signed by the person who filed
70 the document electronically.

71 (B) When a document to be filed requires the signature, under penalty of perjury, of any
72 person, the document shall be deemed to have been signed by that person if filed electronically
73 and if either of the following conditions is satisfied:

74 (i) The person has signed a printed form of the document before, or on the same day as,
75 the date of filing. The attorney or other person filing the document represents, by the act of
76 filing, that the declarant has complied with this section. The attorney or other person filing the
77 document shall maintain the printed form of the document bearing the original signature until
78 final disposition of the case, as defined in subdivision (c) of Section 68151 of the Government

79 Code, and make it available for review and copying upon the request of the court or any party to
80 the action or proceeding in which it is filed.

81 (ii) The person has signed the document using a computer or other technology pursuant to
82 the procedure set forth in a rule of court adopted by the Judicial Council by January 1, 2019.

83 (3) Any document received electronically by the court between 12:00 a.m. and 11:59:59
84 p.m. on a court day shall be deemed filed on that court day. Any document that is received
85 electronically on a noncourt day shall be deemed filed on the next court day.

86 (4) The court receiving a document filed electronically shall issue a confirmation that the
87 document has been received and filed. The confirmation shall serve as proof that the document
88 has been filed. Any filing deadline arising from a statute, including, without limitation, a statute
89 of limitations; state rule of court; local rule of court; and/or order by the court, shall be tolled for
90 any period during which the court has not issued a confirmation of both receipt and filing of an
91 electronically filed document. The date of such tolling shall run from the date on which the
92 document is first submitted electronically to the court, and the tolling period shall run from the
93 date of that first submission until the court issues confirmation of both receipt and filing of the
94 document.

95 (5) Upon electronic filing of a complaint, petition, or other document that must be served
96 with a summons, a trial court, upon request of the party filing the action, shall issue a summons
97 with the court seal and the case number. The court shall keep the summons in its records and
98 may electronically transmit a copy of the summons to the requesting party. Personal service of a
99 printed form of the electronic summons shall have the same legal effect as personal service of an
100 original summons. If a trial court plans to electronically transmit a summons to the party filing a
101 complaint, the court shall immediately, upon receipt of the complaint, notify the attorney or party
102 that a summons will be electronically transmitted to the electronic address given by the person
103 filing the complaint.

104 (6) The court shall permit a party or attorney to file an application for waiver of court
105 fees and costs, in lieu of requiring the payment of the filing fee, as part of the process involving
106 the electronic filing of a document. The court shall consider and determine the application in
107 accordance with Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the
108 Government Code and shall not require the party or attorney to submit any documentation other
109 than that set forth in Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the
110 Government Code. Nothing in this section shall require the court to waive a filing fee that is not
111 otherwise waivable.

112 (7) A fee, if any, charged by the court, an electronic filing manager, or an electronic filing
113 service provider to process a payment for filing fees and other court fees shall not exceed the
114 costs incurred in processing the payment.

115 (c) If a trial court adopts rules conforming to subdivision (b), it may provide by order that
116 all parties to an action file and serve documents electronically in a class action, a consolidated
117 action, a group of actions, a coordinated action, or an action that is deemed complex under
118 Judicial Council rules, provided that the trial court's order does not cause undue hardship or
119 significant prejudice to any party in the action.

120 (d) A trial court may, by local rule, require electronic filing and service in civil actions,
121 subject to the requirements and conditions stated in subdivision (b), the rules adopted by the
122 Judicial Council under subdivision (f), and the following conditions:

123 (1) The court shall have the ability to maintain the official court record in electronic
124 format for all cases where electronic filing is required.

125 (2) The court and the parties shall have access to more than one electronic filing service
126 provider capable of electronically filing documents with the court or to electronic filing access
127 directly through the court. The court may charge fees of no more than the actual cost of the
128 electronic filing and service of the documents. Any fees charged by an electronic filing service
129 provider shall be reasonable. The court, an electronic filing manager, or an electronic filing
130 service provider shall waive any fees charged if the court deems a waiver appropriate, including
131 in instances where a party has received a fee waiver.

132 (3) The court shall have a procedure for the filing of nonelectronic documents in order to
133 prevent the program from causing undue hardship or significant prejudice to any party in an
134 action, including, but not limited to, unrepresented parties. The Judicial Council shall make a
135 form available to allow a party to seek an exemption from mandatory electronic filing and
136 service on the grounds provided in this paragraph.

137 (4) Unrepresented persons are exempt from mandatory electronic filing and service.

138 (5) Until January 1, 2021, a local child support agency, as defined in subdivision (h) of
139 Section 17000 of the Family Code, is exempt from a trial court's mandatory electronic filing and
140 service requirements, unless the Department of Child Support Services and the local child
141 support agency determine it has the capacity and functionality to comply with the trial court's
142 mandatory electronic filing and service requirements.

143 (e) The Judicial Council shall adopt uniform rules for the electronic filing and service of
144 documents in the trial courts of the state, which shall include statewide policies on vendor
145 contracts, privacy, and access to public records, and rules relating to the integrity of electronic
146 service. These rules shall conform to the conditions set forth in this section, as amended from
147 time to time.

148 (f) The Judicial Council shall adopt uniform rules to permit the mandatory electronic
149 filing and service of documents for specified civil actions in the trial courts of the state, which
150 shall include statewide policies on vendor contracts, privacy, access to public records,
151 unrepresented parties, parties with fee waivers, hardships, reasonable exceptions to electronic
152 filing, and rules relating to the integrity of electronic service. These rules shall conform to the
153 conditions set forth in this section, as amended from time to time.

154 (g)(1) The Judicial Council shall adopt uniform rules to implement this subdivision as
155 soon as practicable, but no later than June 30, 2019.

156 (2) Any system for the electronic filing and service of documents, including any
157 information technology applications, Internet Web sites, and Web-based applications, used by an
158 electronic service provider or any other vendor or contractor that provides an electronic filing
159 and service system to a trial court, regardless of the case management system used by the trial
160 court, shall satisfy both of the following requirements:

161 (A) The system shall be accessible to individuals with disabilities, including parties and
162 attorneys with disabilities, in accordance with Section 508 of the federal Rehabilitation Act of
163 1973 (29 U.S.C. Sec. 794d), as amended, the regulations implementing that act set forth in Part
164 1194 of Title 36 of the Code of Federal Regulations and Appendices A, C, and D of that part,
165 and the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

166 (B) The system shall comply with the Web Content Accessibility Guidelines 2.0 at a
167 Level AA success criteria.

168 (3) A vendor or contractor that provides an electronic filing and service system to a trial
169 court shall comply with paragraph (2) as soon as practicable, but no later than June 30, 2019.

170 Commencing on June 27, 2017, the vendor or contractor shall provide an accommodation to an
171 individual with a disability in accordance with subparagraph (D) of paragraph (4).

172 (4) A trial court that contracts with an entity for the provision of a system for electronic
173 filing and service of documents shall require the entity, in the trial court's contract with the
174 entity, to do all of the following:

175 (A) Test and verify that the entity's system complies with this subdivision and provide
176 the verification to the Judicial Council no later than June 30, 2019.

177 (B) Respond to, and resolve, any complaints regarding the accessibility of the system that
178 are brought to the attention of the entity.

179 (C) Designate a lead individual to whom any complaints concerning accessibility may be
180 addressed and post the individual's name and contact information on the entity's Internet Web
181 site.

182 (D) Provide to an individual with a disability, upon request, an accommodation to enable
183 the individual to file and serve documents electronically at no additional charge for any time
184 period that the entity is not compliant with paragraph (2) of this subdivision. Exempting an
185 individual with a disability from mandatory electronic filing and service of documents shall not
186 be deemed an accommodation unless the person chooses that as an accommodation. The vendor
187 or contractor shall clearly state in its Internet Web site that an individual with a disability may
188 request an accommodation and the process for submitting a request for an accommodation.

189 (5) A trial court that provides electronic filing and service of documents directly to the
190 public shall comply with this subdivision to the same extent as a vendor or contractor that
191 provides electronic filing and services to a trial court.

192 (6)(A) The Judicial Council shall submit four reports to the appropriate committees of the
193 Legislature relating to the trial courts that have implemented a system of electronic filing and
194 service of documents. The first report is due by June 30, 2018; the second report is due by
195 December 31, 2019; the third report is due by December 31, 2021; and the fourth report is due by
196 December 31, 2023.

197 (B) The Judicial Council's reports shall include all of the following information:

198 (i) The name of each court that has implemented a system of electronic filing and service
199 of documents.

200 (ii) A description of the system of electronic filing and service.

201 (iii) The name of the entity or entities providing the system.

202 (iv) A statement as to whether the system complies with this subdivision and, if the
203 system is not fully compliant, a description of the actions that have been taken to make the
204 system compliant.

205 (7) An entity that contracts with a trial court to provide a system for electronic filing and
206 service of documents shall cooperate with the Judicial Council by providing all information, and
207 by permitting all testing, necessary for the Judicial Council to prepare its reports to the
208 Legislature in a complete and timely manner.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: Existing law provides that a document submitted electronically to a court for electronic filing shall be deemed filed on the court day of electronic receipt. (Code Civ. Proc., § 1010.6, subd. (b)(3).) However, Section 1010.6, subdivision (b)(4) also states that proof of such electronic filing arises from the court’s issuance of a “confirmation of receipt and filing” (i.e., the clerk’s endorsement of a filed document). In reality, courts usually do not issue such “confirmation” of filing until one or more days after the date on which the party has submitted the document for filing through the e-filing system; and then, too, the “confirmation” is dated as of the date of issuance of the “confirmation”, which is a date subsequent to the date of submission.

Thus, Code of Civil Procedure section 1010.6 presents an inherent ambiguity and conflict that leaves the litigant who has timely filed a document to comply with a statute of limitations or rule of court, with no proof of timely filing when the court issues an untimely confirmation, or, worse, the court rejects the document a week after the deadline, leaving no opportunity to cure any defect. At that point, the filing litigant is left with no recourse or remedy, and has no legal “proof” of compliance with a statute of limitations or rule of court. In short, the litigant would lose his or her legal rights because of the court’s delay in processing the electronic filing of a document. That is clearly not the outcome intended by the statute.

The Solution: This resolution amends Code of Civil Procedure, section 1010.6, subdivision (b)(4), to toll any filing deadline (such as a statute of limitations or deadline pursuant to a briefing schedule) related to a document filed through the court’s e-filing system, as of the date on which the document was submitted electronically to the court for filing, and the tolling period would run from the date of that first submission until the court issues confirmation of both receipt and filing of the document. Such tolling will resolve the existing ambiguity and conflict in Code of Civil Procedure section 1010.6, and thereby preserve the rights of litigants who timely submit documents to the court but do not receive from the court any confirmation of filing on the day of submission.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

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RESOLUTION 06-02-2019

DIGEST

Torts: Personal Injury Statute of Limitations

Amends Government Code sections 911.2, 911.8, and Civil Code section 335.1 to increase the statute of limitations for certain tort claims.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code sections 911.2 and 911.8, and Civil Code § 335.1 to read as follows:

1 § 911.2

2 (a) A claim relating to a cause of action ~~for death or for injury to person or to personal~~
3 property or growing crops shall be presented as provided in Article 2 (commencing with Section
4 915) not later than six months after the accrual of the cause of action. A claim relating to any
5 other cause of action shall be presented as provided in Article 2 (commencing with Section 915)
6 not later than one year after the accrual of the cause of action.

7 (b) For purposes of determining whether a claim was commenced within the period
8 provided by law, the date the claim was presented to the Department of General Services is one
9 of the following:

10 (1) The date the claim is submitted with a twenty-five dollar (\$25) filing fee.

11 (2) If a fee waiver is granted, the date the claim was submitted with the affidavit
12 requesting the fee waiver.

13 (3) If a fee waiver is denied, the date the claim was submitted with the affidavit
14 requesting the fee waiver, provided the filing fee is paid to the department within 10 calendar
15 days of the mailing of the notice of the denial of the fee waiver.

16
17 § 911.8

18 (a) Written notice of the board’s action upon the application shall be given in the manner
19 prescribed by Section 915.4.

20 (b) If the application is denied, the notice shall include a warning in substantially the
21 following form:

22 “WARNING
23

24 “If you wish to file a court action on this matter, you must first petition the appropriate court for
25 an order relieving you from the provisions of Government Code Section 945.4 (claims
26 presentation requirement). See Government Code Section 946.6. Such petition must be filed with
27 the court within 2 years ~~six (6) months~~ from the date your application for leave to present a late
28 claim was denied.

29 “You may seek the advice of an attorney of your choice in connection with this matter. If you
30 desire to consult an attorney, you should do so immediately.”

31
32 Civil Code § 335.1

33 Within ~~two~~ four years: An action for assault, battery, or injury to, or for the death of, an
34 individual caused by the wrongful act or neglect of another.

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

PROPONENT: Bay Area Lawyers for Individual Freedom (BALIF)

STATEMENT OF REASONS

The Problem: Existing law provides for much longer statutes of limitations for civil suits related to contracts (4 years) and a personal property (3 years) than personal injury and death (1-2 years). People's claims too often expire under these very short statutes. California has some of the shortest personal injury statutes of limitations in the country. This flies in the face of justice and Californians' values.

It is not uncommon for a victim to need time to recover before pursuing legal recourse through the courts. To require victims to do so or be barred from all remedies under the current statutes of limitations is just plain cruel. Furthermore, criminal statutes of limitations often far exceed the civil statutes for assault, battery and murder, so criminal cases are not likely to have commenced, let alone have been adjudicated before a plaintiff must file their civil claims.

Potential defendants typically engage in a cost-benefit analysis before considering whether to stop a wrongful action (such as polluting or not enacting proper measures for safety). If the defendant decides that the cost of changing a wrongful practice would be greater than the cost of continuing it then a key deterrent of the tort system is lost.

The Solution: By extending these statutes of limitations by up to an additional 2 years, victims would have a more viable avenue through the courts to seek accountability for the most egregious of injustices. By reducing the number of potential claims that are barred due to the short statutes of limitations, aggrieved parties have a fairer and more just amount of time to seek treatment and recover before having to endure the additional stress of a civil suit. Furthermore, increasing the time to file a claim in state court better allows for plaintiffs to obtain criminal evidence arising from any criminal charges and cases resulting from the injury, as well as other evidence related to the injury. The damages related to the injuries would have more time to be assessed and the courts and jurists would be provided with more information about the impact of the alleged damages.

The current system is far too tilted to allow the perpetrators of violence, whether private citizens or government actors, to avoid accountability and consequences for their actions. The public's perception of our civil legal system as a means to justice is rapidly declining and this is one of many measures we can take to improve people's access to justice and the public's perception of the legal system's ability to dole out just outcomes.

IMPACT STATEMENT

This resolution may require additional statutory changes. [Click or tap here to enter text if additional explanation is necessary.](#)

CURRENT OR PRIOR RELATED LEGISLATION:

None known.

AUTHOR AND/OR PERMANENT CONTACT:

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RESOLUTION 06-03-2019

DIGEST

Pleadings: Deletes Requirement to Cite to Subsection of Statute of Limitations

Amends Code of Civil Procedure section 458 to delete the requirement to cite to specific subsections in asserting a statute of limitations defense.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 458, to read as follows:

1 § 458

2 In pleading the Statute of Limitations it is not necessary to state the facts showing the
3 defense, but it may be stated generally that the cause of action is barred by the provisions of
4 Section ____ (giving the number of the section ~~and subdivision thereof, if it is so divided,~~ relied
5 upon) of The Code of Civil Procedure; and if such allegation be controverted, the party pleading
6 must establish, on the trial, the facts showing that the cause of action is so barred.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, when using the Statute of Limitation as an affirmative defense in an answer, both the section and the subsection must technically be cited. This is an archaic law and unnecessary procedural requirement. Some Statutes of Limitations have subsections, but others do not (even though it may contain a laundry list of applicable claims). It is also unclear whether some statutes are considered to have subsections or not because most start with a “With X years” and then list situations either letters or numbers (i.e. (a), (b), (c) or 1. 2. 3.) See, for example, CCP 335.1, 336, 336a, 337, 337.5, 338, 339, 340, 341, and 349 ³/₄.

The Solution: This resolution deletes the requirement to cite to specific subsections of the Statute of Limitations, but retains the requirement that the party cite to the specific section number relied upon.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-04-2019

DIGEST

Prejudgment Interest: Fixes Time for Motion to Recover Prejudgment Interest

Amends Civil Code sections 3287 and 3291 to establish a deadline for filing a motion to recover prejudgment interest.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code sections 3287 and 3291 to read as follows:

1 § 3287

2 (a) A person who is entitled to recover damages certain, or capable of being made certain
3 by calculation, and the right to recover which is vested in the person upon a particular day, is
4 entitled also to recover interest thereon from that day, except when the debtor is prevented by
5 law, or by the act of the creditor from paying the debt. This section is applicable to recovery of
6 damages and interest from any debtor, including the state or any county, city, city and county,
7 municipal corporation, public district, public agency, or any political subdivision of the state.

8 (b) Every person who is entitled under any judgment to receive damages based upon a
9 cause of action in contract where the claim was unliquidated, may also recover interest thereon
10 from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event
11 earlier than the date the action was filed.

12 (c) Unless another statute provides a different interest rate, in a tax or fee claim against a
13 public entity that results in a judgment against the public entity, interest shall accrue at a rate
14 equal to the weekly average one year constant maturity United States Treasury yield, but shall
15 not exceed 7 percent per annum. That rate shall control until the judgment becomes enforceable
16 under Section 965.5 or 970.1 of the Government Code, at which time interest shall accrue at an
17 annual rate equal to the weekly average one year constant maturity United States Treasury yield
18 at the time of the judgment plus 2 percent, but shall not exceed 7 percent per annum.

19 (d) A motion to recover interest under this section must be filed no later than fifteen days
20 after written notice of entry of judgment.

21
22 § 3291

23 (a) In any action brought to recover damages for personal injury sustained by any person
24 resulting from or occasioned by the tort of any other person, corporation, association, or
25 partnership, whether by negligence or by willful intent of the other person, corporation,
26 association, or partnership, and whether the injury was fatal or otherwise, it is lawful for the
27 plaintiff in the complaint to claim interest on the damages alleged as provided in this section.

28 (b) If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure
29 which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and
30 the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate
31 of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section
32 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue
33 until the satisfaction of judgment.

34 (c) This section shall not apply to a public entity, or to a public employee for an act or
35 omission within the scope of employment, and neither the public entity nor the public employee
36 shall be liable, directly or indirectly, to any person for any interest imposed by this section.
37 (d) A motion to recover interest under this section must be filed no later than fifteen days
38 after written notice of entry of judgment.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Civil Code section 3287 provides for the award prejudgment interest by the court in contract actions. Civil Code section 3291 provides for an award of prejudgment interest in certain tort actions and in relation to Code of Civil Procedure section 998 offers. However, these sections do not set a time limit for moving to recover prejudgment interest as recognized by the appellate court in *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824. This ambiguity has resulted in differing conclusions on whether there is a time limit and what a time limit should be for bringing such a motion. (See, e.g., *Rockroller v. Koljonen* (2015) 2015 WL 1456033 at 13 [“Under the particular facts here, we conclude a formal motion was not required and [plaintiff]’s request was sufficient. Neither the Legislature nor the Judicial Council has prescribed a noticed motion procedure for recovery of prejudgment interest, and we decline to impose one when the damages are undisputedly liquidated. A noticed motion would not have added anything to the analysis, it would have been a mere formality.”].)

The Solution: This resolution solves the current ambiguity by fixing the time limit to bring a motion to claim prejudgment interest. It sets that time limit as similar to the time for claiming costs under Code of Civil Procedure section 1034 and related rules fixed by the Judicial Council, currently found in California Rules of Court, rule 3.1700. This time limit is chosen over that of the time for filing a motion for new trial as adopted by the *North Oakland Medical Clinic* Court because it would give an additional five days where notice of entry of judgment is served by mail.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-05-2019

DIGEST

Government: Tolls Deadline for Claimants Incapacitated Under Six Months Post-Incident
Amends Government Code section 911.6 to extend the filing deadline for people incapacitated less than six months after the incident.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

- 1 § 911.6
- 2 (a) The board shall grant or deny the application within 45 days after it is presented to the
- 3 board. The claimant and the board may extend the period within which the board is required to
- 4 act on the application by written agreement made before the expiration of the period.
- 5 (b) The board shall grant the application where one or more of the following is
- 6 applicable:
- 7 (1) The failure to present the claim was through mistake, inadvertence, surprise or
- 8 excusable neglect and the public entity was not prejudiced in its defense of the claim by the
- 9 failure to present the claim within the time specified in Section 911.2.
- 10 (2) The person who sustained the alleged injury, damage or loss was a minor during all of
- 11 the time specified in Section 911.2 for the presentation of the claim.
- 12 (3) The person who sustained the alleged injury, damage or loss was physically or
- 13 mentally incapacitated during ~~all~~ any of the time specified in Section 911.2 for the presentation
- 14 of the claim and by reason of such disability failed to present a claim during such time, provided
- 15 the application is presented within six months of the person no longer being physically or
- 16 mentally incapacitated, or a year after the claim accrued, whichever comes first.
- 17 (4) The person who sustained the alleged injury, damage or loss died before the
- 18 expiration of the time specified in Section 911.2 for the presentation of the claim.
- 19 (c) If the board fails or refuses to act on an application within the time prescribed by this
- 20 section, the application shall be deemed to have been denied on the 45th day or, if the period
- 21 within which the board is required to act is extended by agreement pursuant to this section, the
- 22 last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The California Tort Claims Act statute of limitations is far more black-and-white than others. With most statutes of limitations, any tolling provisions are applied insofar as the tolling circumstance (e.g., claimant was unconscious) occurs. Some of them have a cap (e.g., being in prison tolls an SOL for as long as the inmate is in prison, but it maxes out at two years. If the individual was in prison for less than two years since the incident, it tolls only as long as

the person was in prison). Claims under the California Tort Claims Act, however, have a tolling cap at six months and no partial tolling.

When anyone, under color of state law, commits a tort against a private person or entity, that person or entity has to file a claim with the Government Claims Program within six months of the incident to preserve their claims under state law and give the state an opportunity to resolve the complaint without it going to a lawsuit.

Under a few circumstances, the six-month deadline is tolled to a year. One of those circumstances is if the person was incapacitated for the **whole six months**. If, however, the person was incapacitated for only part of the six months, the six-month deadline does not toll by however long the person was incapacitated; it does not toll at all. In other words, if a person awoke from a coma one day before the six months expired, the person would have to file it by the next day. Additionally, if the person went into a coma one day after the incident, the deadline would still be six months even if the person has not awoken. In short, it either gets extended six months or not at all. That is far too black-and-white for a statute of limitations.

The Solution: This resolution enables a partial tolling of the statutes of limitations under the California Tort Claims Act if the claimant was incapacitated for less than six months after the incident. If the person was disabled for three months after the event, the deadline to file a Government Claim is delayed by three months. If it is one day under six months, it is tolled by six months minus one day. This will ensure that fewer people run out the clock on their claims by giving more people a solid six months to file once they regain their capacity. This does not change the law if a person awakens after six months, in which the deadline remains one year after the incident.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 06-06-2019

DIGEST

Tort Claims Act: Extends Deadline for Claimants Who Were Minors

Amends Government Code section 911.6 to extend the filing deadline for minors.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

- 1 § 911.6
- 2 (a) The board shall grant or deny the application within 45 days after it is presented to the
- 3 board. The claimant and the board may extend the period within which the board is required to
- 4 act on the application by written agreement made before the expiration of the period.
- 5 (b) The board shall grant the application where one or more of the following is
- 6 applicable:
- 7 (1) The failure to present the claim was through mistake, inadvertence, surprise or
- 8 excusable neglect and the public entity was not prejudiced in its defense of the claim by the
- 9 failure to present the claim within the time specified in Section 911.2.
- 10 (2) The person who sustained the alleged injury, damage or loss was a minor during ~~all~~
- 11 any of the time specified in Section 911.2 for the presentation of the claim, provided the
- 12 application is presented within six months of the person turning eighteen (18) years old or a year
- 13 after the claim accrues, whichever comes first.
- 14 (3) The person who sustained the alleged injury, damage or loss was physically or
- 15 mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the
- 16 claim and by reason of such disability failed to present a claim during such time.
- 17 (4) The person who sustained the alleged injury, damage or loss died before the
- 18 expiration of the time specified in Section 911.2 for the presentation of the claim.
- 19 (c) If the board fails or refuses to act on an application within the time prescribed by this
- 20 section, the application shall be deemed to have been denied on the 45th day or, if the period
- 21 within which the board is required to act is extended by agreement pursuant to this section, the
- 22 last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: The California Tort Claims Act statute of limitations is far more black-and-white than others. With most statutes of limitations, any tolling provisions are applied insofar as the tolling circumstance (e.g., claimant was a minor) occurs. Some of them have a cap (e.g., being in prison tolls an SOL for as long as the inmate is in prison, but it maxes out at two years. If the individual was in prison for less than two years since the incident, it tolls only as long as the

person was in prison). Claims under the California Tort Claims Act, however, have a tolling cap at six months and no partial tolling.

When anyone, under color of state law, commits a tort against a private person or entity, that person or entity has to file a claim with the Government Claims Program within six months of the incident to preserve their claims under state law and give the state an opportunity to resolve the complaint without it going to a lawsuit.

Under a few circumstances, the six-month deadline is tolled to a year. One of those circumstances is if the person was a minor for the **whole six months**. If, however, the person was a minor for only part of the six months, the six-month deadline does not toll by however long the person was a minor; it does not toll at all. In other words, if a person turned 18 one day before the six months expired, the person would have to file it by the next day. In short, it either gets extended six months or not at all. That is far too black-and-white for a statute of limitations.

The Solution: This resolution enables a partial tolling of the statutes of limitations under the California Tort Claims Act if the claimant was a minor for less than six months after the incident. If the person was a minor for three months after the event, the deadline to file a Government Claim is delayed by three months. If it is one day under six months, it is tolled by six months minus one day. This will ensure that fewer people run out the clock on their claims by giving more people a solid six months to file once they turn 18. This does not change the law if a person becomes 18 after six months, in which the deadline remains one year after the incident.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 06-07-2019

DIGEST

Tort Claims: Tolls Deadline for Inmates Who File Internal Grievance

Amends Government Code section 911.6 to extend the deadline to file for damages for inmates who file a prison grievance.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amends Government Code section 911.6, to read as follows:

- 1 § 911.6
- 2 (a) The board shall grant or deny the application within 45 days after it is presented to the
- 3 board. The claimant and the board may extend the period within which the board is required to
- 4 act on the application by written agreement made before the expiration of the period.
- 5 (b) The board shall grant the application where one or more of the following is
- 6 applicable:
- 7 (1) The failure to present the claim was through mistake, inadvertence, surprise or
- 8 excusable neglect and the public entity was not prejudiced in its defense of the claim by the
- 9 failure to present the claim within the time specified in Section 911.2.
- 10 (2) The person who sustained the alleged injury, damage or loss was a minor during all of
- 11 the time specified in Section 911.2 for the presentation of the claim.
- 12 (3) The person who sustained the alleged injury, damage or loss was physically or
- 13 mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the
- 14 claim and by reason of such disability failed to present a claim during such time.
- 15 (4) The person who sustained the alleged injury, damage or loss died before the
- 16 expiration of the time specified in Section 911.2 for the presentation of the claim.
- 17 (5) The person who sustained the alleged injury, damage, or loss is an inmate or parolee
- 18 and filed a claim about that alleged injury, damage, or loss against a prison, jail, or employee
- 19 under the process of California Code of Regulations Title 15, sections 3084, et seq.
- 20 (c) If the board fails or refuses to act on an application within the time prescribed by this
- 21 section, the application shall be deemed to have been denied on the 45th day or, if the period
- 22 within which the board is required to act is extended by agreement pursuant to this section, the
- 23 last day of the period specified in the agreement.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Many inmates run out the clock on their state law claims for damages without realizing it. Although being an inmate usually tolls the statute of limitations for up to two years (unless imprisoned for life without parole per Code Civ. Proc., § 352.1(a)), it does not toll the six-month deadline to file a Government Claims form for actions against public employees or

public entities, which is one of two prerequisites for inmates to sue them (Code Civ. Proc., § 352(b)).

When subject to excessive force by a guard, or a failure to protect, they often just file a complaint with the Department of Corrections (CDCR) known as a 602. That is their only prerequisite to filing a federal civil rights (42 U.S.C. § 1983) claim, and the other prerequisite to filing a state-law claim against a public entity or employee. While inmates are usually well aware of the need to file the 602, they are often unaware that they need to submit a separate form for their state-law claims, resulting in their loss of opportunity to make any claims or receive any remedies under state law.

Furthermore, the time to exhaust the CDCR complaint process can take over six months, and it does not toll the six-month requirement to file a Government Claims form. The purpose of the CDCR complaint process is to give inmates and the prisons a chance to resolve the issues internally and prevent future damages. Requiring they file a claim for damages concurrently can wholly or partially defeat the purpose of the prison grievance process.

The Solution: This resolution ensures that if the inmate files a complaint with the Department of Corrections, he or she gets a year to file the claim for damages with the Government Claims Board. Although the CDCR complaint process can take over six months, it usually takes under a year. Giving them this six-month extension helps prevent them from unknowingly running out the clock on their state claims, and gives the CDCR grievance process a chance to resolve before the inmate has to file a Government Claims form.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known. Similar to Resolution 12-06-2018.

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RESOLUTION 06-08-2019

DIGEST

Civil Procedure: Clarification of Certificate of Merit Requirement

Amends section 411.35 of the Code of Civil Procedure to clarify that a Certificate of Merit must be filed as to each discipline being sued

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Procedure Code section 411.35, to read as follows:

1 § 411.35

2 (a) In every action, including a cross-complaint for damages or indemnity, arising out of
3 the professional negligence of a person holding a valid architect's certificate issued pursuant to
4 Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code,
5 or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7
6 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a
7 person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with
8 Section 8700) of Division 3 of the Business and Professions Code on or before the date of
9 service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney
10 for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision
11 (b).

12 (b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant
13 declaring one of the following:

14 (1) That the attorney has reviewed the facts of the case, that the attorney has consulted
15 with and received an opinion from at least one architect, professional engineer, or land surveyor
16 who is licensed to practice and practices in this state or any other state, or who teaches at an
17 accredited college or university and is licensed to practice in this state or any other state, in the
18 same discipline as the defendant or cross-defendant and who the attorney reasonably believes is
19 knowledgeable in the relevant issues involved in the particular action, and that the attorney has
20 concluded on the basis of this review and consultation that there is reasonable and meritorious
21 cause for the filing of this action. The person consulted may not be a party to the litigation. The
22 person consulted shall render his or her opinion that the named defendant or cross-defendant was
23 negligent or was not negligent in the performance of the applicable professional services.

24 (2) That the attorney was unable to obtain the consultation required by paragraph (1)
25 because a statute of limitations would impair the action and that the certificate required by
26 paragraph (1) could not be obtained before the impairment of the action. If a certificate is
27 executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within
28 60 days after filing the complaint.

29 (3) That the attorney was unable to obtain the consultation required by paragraph (1)
30 because the attorney had made three separate good faith attempts with three separate architects,
31 professional engineers, or land surveyors to obtain this consultation and none of those contacted
32 would agree to the consultation.

33 (c) Where a certificate is required pursuant to this section, only one certificate shall be
34 filed per discipline, notwithstanding that multiple defendants have been named in the complaint

35 or may be named at a later time. Certificates reflecting consultations with multiple disciplines
36 may be combined into one certificate or filed separately.

37 (d) Where the attorney intends to rely solely on the doctrine of “res ipsa loquitur,” as
38 defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the
39 consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify
40 upon filing of the complaint that the attorney is solely relying on the doctrines of “res ipsa
41 loquitur” or failure to inform of the consequences of a procedure or both, and for that reason is
42 not filing a certificate required by this section.

43 (e) For purposes of this section, and subject to Section 912 of the Evidence Code, an
44 attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a
45 privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor
46 consulted and the contents of the consultation. The privilege shall also be held by the architect,
47 professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim
48 under paragraph (3) of subdivision (b) that he or she was unable to obtain the required
49 consultation with the architect, professional engineer, or land surveyor, the court may require the
50 attorney to divulge the names of architects, professional engineers, or land surveyors refusing the
51 consultation.

52 (f) A violation of this section may constitute unprofessional conduct and be grounds for
53 discipline against the attorney, except that the failure to file the certificate required by paragraph
54 (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by
55 paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

56 (g) The failure to file a certificate in accordance with this section shall be grounds for a
57 demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

58 (h) Upon the favorable conclusion of the litigation with respect to any party for whom a
59 certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to
60 this section, the trial court may, upon the motion of a party or upon the court’s own motion,
61 verify compliance with this section, by requiring the attorney for the plaintiff or cross-
62 complainant who was required by subdivision (b) to execute the certificate to reveal the name,
63 address, and telephone number of the person or persons consulted with pursuant to subdivision
64 (b) that were relied upon by the attorney in preparation of the certificate of merit. The name,
65 address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at
66 which the moving party shall not be present. If the trial judge finds there has been a failure to
67 comply with this section, the court may order a party, a party’s attorney, or both, to pay any
68 reasonable expenses, including attorney’s fees, incurred by another party as a result of the failure
69 to comply with this section.

70 (i) For purposes of this section, “action” includes a complaint or cross-complaint for
71 equitable indemnity arising out of the rendition of professional services whether or not the
72 complaint or cross-complaint specifically asserts or utilizes the terms “professional negligence”
73 or “negligence.”

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

PROPOSER: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: As reflected in subdivision (b)(1) of section 411.35, existing law states that in every action arising out of professional negligence of an architect, a professional engineer, or a surveyor, a certificate shall be executed by the attorney for the plaintiff declaring that the attorney has “consulted with and received an opinion from at least one architect, professional engineer, or land surveyor in the same discipline as the defendant.”

However, subdivision (c) of section 411.35 states that “only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.”

Thus, a question arises whether a party who sues multiple disciplines may file a Certificate of Merit reflecting a consultation with an expert in only one of them. This problem may have arisen in 1983 when the Legislature amended the language of subdivision (b) to require a consultation with an expert in the same discipline, but left in place the language in subdivision (c) stating that only one certificate shall be filed. A case illustrating how the problem may arise and one solution for it is *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 Cal.App.4th 913. However, that case does not address all fact patterns, such as when a person does not or cannot obtain an opinion from the second specialty or fails to do so on time (see *Curtis Engineering Corp. v. Superior Court* (2017) 16 Cal.App.5th 542, 548-549), but attempts to excuse his non-compliance by arguing that only one certificate is required.

The Solution: The addition of some clarifying language would make clear that a person suing an architect, an engineer, and a surveyor must not only consult with an expert in each discipline but also file a Certificate reflecting that he has done so.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-09-2019

DIGEST

Civil Procedure: Change in Standard of Proof Relating to Anti-SLAPP Motions and Medical Punitive Damages

Amends Code of Civil Procedure sections 425.16 and 425.13 to change the standard of proof from probability of prevailing to a prima facie case of liability.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 425.16 and 425.13, to read as follows:

1 § 425.16

2 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits
3 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and
4 petition for the redress of grievances. The Legislature finds and declares that it is in the public
5 interest to encourage continued participation in matters of public significance, and that this
6 participation should not be chilled through abuse of the judicial process. To this end, this section
7 shall be construed broadly.

8 (b)

9 (1) A cause of action against a person arising from any act of that person in furtherance
10 of the person's right of petition or free speech under the United States Constitution or the
11 California Constitution in connection with a public issue shall be subject to a special motion to
12 strike, unless the court determines that the plaintiff has established ~~that there is a probability that~~
13 ~~the plaintiff will prevail~~ a prima facie case of liability on the claim. As used herein, to establish
14 a "prima facie case of liability" means the plaintiff must demonstrate that the complaint is both
15 legally sufficient and supported by a sufficient prima facie showing of facts to sustain a
16 favorable judgment if the evidence submitted by the plaintiff is credited. This definition is
17 intended to incorporate rather than to change existing case law.

18 (2) In making its determination, the court shall consider the pleadings, and supporting
19 and opposing affidavits stating the facts upon which the liability or defense is based.

20 (3) If the court determines that the plaintiff has established a ~~probability that he or she~~
21 ~~will prevail~~ prima facie case of liability on the claim, neither that determination nor the fact of
22 that determination shall be admissible in evidence at any later stage of the case, or in any
23 subsequent action, and no burden of proof or degree of proof otherwise applicable shall be
24 affected by that determination in any later stage of the case or in any subsequent proceeding.

25 (c)

26 (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a
27 prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's
28 fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to
29 cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff
30 prevailing on the motion, pursuant to Section 128.5.

31 (2) A defendant who prevails on a special motion to strike in an action subject to
32 paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought
33 pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing

34 in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's
35 fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the
36 Government Code.

37 (d) This section shall not apply to any enforcement action brought in the name of the
38 people of the State of California by the Attorney General, district attorney, or city attorney,
39 acting as a public prosecutor.

40 (e) As used in this section, "act in furtherance of a person's right of petition or free
41 speech under the United States or California Constitution in connection with a public issue"
42 includes: (1) any written or oral statement or writing made before a legislative, executive, or
43 judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral
44 statement or writing made in connection with an issue under consideration or review by a
45 legislative, executive, or judicial body, or any other official proceeding authorized by law, (3)
46 any written or oral statement or writing made in a place open to the public or a public forum in
47 connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise
48 of the constitutional right of petition or the constitutional right of free speech in connection with
49 a public issue or an issue of public interest.

50 (f) The special motion may be filed within 60 days of the service of the complaint or, in
51 the court's discretion, at any later time upon terms it deems proper. The motion shall be
52 scheduled by the clerk of the court for a hearing not more than 30 days after the service of the
53 motion unless the docket conditions of the court require a later hearing.

54 (g) All discovery proceedings in the action shall be stayed upon the filing of a notice of
55 motion made pursuant to this section. The stay of discovery shall remain in effect until notice of
56 entry of the order ruling on the motion. The court, on noticed motion and for good cause shown,
57 may order that specified discovery be conducted notwithstanding this subdivision.

58 (h) For purposes of this section, "complaint" includes "cross-complaint" and "petition,"
59 "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-
60 defendant" and "respondent."

61 (i) An order granting or denying a special motion to strike shall be appealable under
62 Section 904.1.

63 (j)

64 (1) Any party who files a special motion to strike pursuant to this section, and any party
65 who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to
66 the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the
67 motion or opposition, a copy of any related notice of appeal or petition for a writ, and a
68 conformed copy of any order issued pursuant to this section, including any order granting or
69 denying a special motion to strike, discovery, or fees.

70 (2) The Judicial Council shall maintain a public record of information transmitted
71 pursuant to this subdivision for at least three years, and may store the information on microfilm
72 or other appropriate electronic media.

73
74 §425.13

75 (a) In any action for damages arising out of the professional negligence of a health care
76 provider, no claim for punitive damages shall be included in a complaint or other pleading unless
77 the court enters an order allowing an amended pleading that includes a claim for punitive
78 damages to be filed. The court may allow the filing of an amended pleading claiming punitive
79 damages on a motion by the party seeking the amended pleading and on the basis of the

80 supporting and opposing affidavits presented that the plaintiff has established ~~that there is a~~
81 ~~substantial probability that the plaintiff will prevail~~ a prima facie case of liability on the claim
82 pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing
83 of an amended pleading that includes a claim for punitive damages if the motion for such an
84 order is not filed within two years after the complaint or initial pleading is filed or not less than
85 nine months before the date the matter is first set for trial, whichever is earlier. As used herein,
86 to establish a “prima facie case of liability” means the plaintiff must demonstrate that the
87 complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to
88 sustain a favorable judgment if the evidence submitted by the plaintiff is credited. This
89 definition is intended to incorporate rather than to change existing case law.

90 (b) For the purposes of this section, “health care provider” means any person licensed or
91 certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions
92 Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or
93 licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health
94 and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to
95 Division 2 (commencing with Section 1200) of the Health and Safety Code, “Health care
96 provider” includes the legal representatives of a health care provider.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Various provisions of existing law provide for consequences upon a showing of a “probability that the plaintiff will prevail” on a claim. For instance, this language is used in the statute defining the showing that is required to obtain a writ of attachment (CCP 488.220 (a)(2)), to maintain a lis pendens (CCP 405.32), to allege punitive damages against a healthcare provider (CCP 425.13), and to maintain a suit that a defendant establishes involves protected speech (CCP § 425.16.) However, in the first two examples, to establish probable validity means to establish that, after weighing the evidence submitted, the plaintiff will probably win the lawsuit. On the other hand, in the latter two examples, courts have construed the requirement of establishing probable validity to mean only that the plaintiff must submit sufficient evidence to support a verdict in his favor if his evidence is credited, without being weighed against competing evidence. When the same words are used in different statutes, they should, wherever possible, have the same meaning. They should not serve as a trap for unknowledgeable lay persons or unwary attorneys. Case law even states that the Legislature intends that the same language used in two different statutes means the same thing unless it expressly states otherwise. (See *Korbel v. Chou* (1994) 27 Cal.App.4th 1427, 1431.) The reader should not have to consult secondary sources to determine that language in a statute which appears to have a clear meaning based on how it is used in other statutes, really means something else..

The Solution: In sections 425.16 and 425.16 the “probable validity” language should be abandoned in favor of the actual test that courts employ. The definition of prima facie validity used here is taken from *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714. In the medical

malpractice context, existing case law equating probable validity to a prima face case of liability is represented by *Looney v. Superior Court* (1993) 16 Cal.App.4th 521. However, *Looney* adds additional gloss to the phrase, given the punitive damages context. Therefore, the proposed amendment makes clear it is not meant to change, but rather to incorporate, existing case law.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-10-2019

DIGEST

Civil Procedure: Repeal Special Motion to Strike Reporting Requirement

Amends Code of Civil Procedure section 425.16 to repeal the requirement of parties to make reports to the Judicial Council regarding motion activity.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

1 § 425.16

2 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits
3 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and
4 petition for the redress of grievances. The Legislature finds and declares that it is in the public
5 interest to encourage continued participation in matters of public significance, and that this
6 participation should not be chilled through abuse of the judicial process. To this end, this section
7 shall be construed broadly.

8 (b)(1) A cause of action against a person arising from any act of that person in
9 furtherance of the person's right of petition or free speech under the United States Constitution or
10 the California Constitution in connection with a public issue shall be subject to a special motion
11 to strike, unless the court determines that the plaintiff has established that there is a probability
12 that the plaintiff will prevail on the claim.

13 (2) In making its determination, the court shall consider the pleadings, and supporting
14 and opposing affidavits stating the facts upon which the liability or defense is based.

15 (3) If the court determines that the plaintiff has established a probability that he or she
16 will prevail on the claim, neither that determination nor the fact of that determination shall be
17 admissible in evidence at any later stage of the case, or in any subsequent action, and no burden
18 of proof or degree of proof otherwise applicable shall be affected by that determination in any
19 later stage of the case or in any subsequent proceeding.

20 (c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a
21 prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's
22 fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to
23 cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff
24 prevailing on the motion, pursuant to Section 128.5.

25 (2) A defendant who prevails on a special motion to strike in an action subject to
26 paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought
27 pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing
28 in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's
29 fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the
30 Government Code.

31 (d) This section shall not apply to any enforcement action brought in the name of the
32 people of the State of California by the Attorney General, district attorney, or city attorney,
33 acting as a public prosecutor.

34 (e) As used in this section, "act in furtherance of a person's right of petition or free speech

35 under the United States or California Constitution in connection with a public issue” includes:
36 (1) any written or oral statement or writing made before a legislative, executive, or judicial
37 proceeding, or any other official proceeding authorized by law, (2) any written or oral statement
38 or writing made in connection with an issue under consideration or review by a legislative,
39 executive, or judicial body, or any other official proceeding authorized by law, (3) any written or
40 oral statement or writing made in a place open to the public or a public forum in connection with
41 an issue of public interest, or (4) any other conduct in furtherance of the exercise of the
42 constitutional right of petition or the constitutional right of free speech in connection with a
43 public issue or an issue of public interest.

44 (f) The special motion may be filed within 60 days of the service of the complaint or, in
45 the court's discretion, at any later time upon terms it deems proper. The motion shall be
46 scheduled by the clerk of the court for a hearing not more than 30 days after the service of the
47 motion unless the docket conditions of the court require a later hearing.

48 (g) All discovery proceedings in the action shall be stayed upon the filing of a notice of
49 motion made pursuant to this section. The stay of discovery shall remain in effect until notice of
50 entry of the order ruling on the motion. The court, on noticed motion and for good cause shown,
51 may order that specified discovery be conducted notwithstanding this subdivision.

52 (h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,”
53 “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-
54 defendant” and “respondent.”

55 (i) An order granting or denying a special motion to strike shall be appealable under
56 Section 904.1.

57 ~~(j)(1) Any party who files a special motion to strike pursuant to this section, and any~~
58 ~~party who files an opposition to a special motion to strike, shall, promptly upon so filing,~~
59 ~~transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption~~
60 ~~page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and~~
61 ~~a conformed copy of any order issued pursuant to this section, including any order granting or~~
62 ~~denying a special motion to strike, discovery, or fees.~~

63 ~~(2) The Judicial Council shall maintain a public record of information transmitted~~
64 ~~pursuant to this subdivision for at least three years, and may store the information on microfilm~~
65 ~~or other appropriate electronic media.~~

(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 425.16 was enacted in 1992 for the purpose of discouraging litigation that interferes with free speech rights. Because it was then a new procedure, the legislature included subdivision (j), requiring litigants to report related motion activity to the Judicial Council and giving it reporting and record keeping responsibilities related to such motion. The reporting requirements were expanded in 1999 based on the argument of necessity for evaluation of the effectiveness of the Special Motion to Strike process. Subdivision (j) includes no sanction for anyone who fails to comply with this reporting process. It is now 2019, and the Special Motion to Strike process has been thoroughly examined by the courts.

For example, as of January 4, 2019, the WestLaw database reflects 4,577 appellate cases in which section 425.16 is cited.

The Solution: This resolution would eliminate the reporting and record maintenance requirements, and thereby avoid unnecessary effort by conscientious attorneys and the concomitant unnecessary costs to them and/or their clients and/or the Judicial Council.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known.

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RESOLUTION 06-11-2019

DIGEST

Civil Procedure: Correction to Omit Reference to Outdated Code Section.

Amends Code of Civil Procedure section 430.10 to delete reference to an outdated code section.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.10, to read as follows:

- 1 § 430.10
- 2 The party against whom a complaint or cross-complaint has been filed may object, by
- 3 demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the
- 4 following grounds:
- 5 (a) The court has no jurisdiction of the subject of the cause of action alleged in the
- 6 pleading.
- 7 (b) The person who filed the pleading does not have the legal capacity to sue.
- 8 (c) There is another action pending between the same parties on the same cause of action.
- 9 (d) There is a defect of misjoinder of parties.
- 10 (e) The pleading does not state facts sufficient to constitute a cause of action.
- 11 (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes
- 12 ambiguous and unintelligible.
- 13 (g) In an action founded upon a contract, it cannot be ascertained from the pleading
- 14 whether the contract is written, is oral, or is implied by conduct.
- 15 (h) No certificate was filed as required by Section 411.35.
- 16 (i) ~~No certificate was filed as required by Section 411.36.~~

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem (including Existing Law): Section 430.10 of the Code of Civil Procedure presently cites to another Section of the Code of Civil Procedure that has been repealed.

The Solution: Legislation to amend Section 430.10 to omit outdated citation.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 06-12-2019

DIGEST

Civil Procedure: Limit Demurrers to Claims Against Demurring Party

Amends Code of Civil Procedure section 430.50 to limit demurrers to causes of action filed against the demurring party.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 430.50 to read as follows:

1 § 430.50

2 (a) A demurrer to a complaint or cross-complaint may be taken to the whole complaint or
3 cross-complaint or to any of the causes of action stated therein against the demurring party.

4 (b) A demurrer to an answer may be taken to the whole answer or to any one or more of
5 the several defenses set up in the answer.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, it is unclear whether a party can demurrer to a cause of action not asserted against that party. In a multi-defendant case, there have been demurrers (especially when joint demurrers are filed by multiple defendants) filed by defendants against causes of action not asserted against them. This causes unnecessary work by the litigants and the courts.

The Solution: This resolution provides that a party can only demurrer to causes of action that is asserted against the demurring party.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known.

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