

RESOLUTION 12-01-2019

DIGEST

Discovery: Defines Time for Delivery of Examiner’s Report

Amends Code of Civil Procedure section 2032.620 to define “timely” delivery of examiner’s report and allow for ex-parte relief

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 2032.620 to read as follows:

1 § 2032.620

2 (a) If the party at whose instance an examination was made fails to make a timely
3 delivery of the reports demanded under Section 2032.610, within twenty (20) days of the later of
4 the exam or the demand, the demanding party may move for an order compelling their delivery.
5 This motion may be made ex-parte and shall be accompanied by a meet and confer declaration
6 under Section 2016.040.

7 (b) The court shall impose a monetary sanction under Chapter 7 (commencing with
8 Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a
9 motion to compel delivery of medical reports under this section, unless it finds that the one
10 subject to the sanction acted with substantial justification or that other circumstances make the
11 imposition of the sanction unjust.

12 (c) If a party then fails to obey an order compelling delivery of demanded medical
13 reports, the court may make those orders that are just, including the imposition of an issue
14 sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with
15 Section 2023.010). In lieu of or in addition to those sanctions, the court may impose a monetary
16 sanction under Chapter 7 (commencing with Section 2023.010). The court shall exclude at trial
17 the testimony of any examiner whose report has not been provided by a party.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS:

The Problem: The code currently does not define “timely” delivery of the examiner’s reports, and often such examinations are not performed until very close to the discovery and motion cutoff dates.

The Solution: Would amend Code of Civil Procedure Section 2032.620 to define “timely” as “within twenty (20) days of the later of the exam or the demand” and would allow for ex-parte relief to enforce delivery.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION:

AUTHOR AND PERMANENT CONTACT: Russell S. Kohn, Esq., Kohn Law Office, 2170 S. El Camino Real, Suite 201, Oceanside, CA 92054 (760) 721-8182.

RESPONSIBLE FLOOR DELEGATE: Russell S. Kohn, Esq., Kohn Law Office, 2170 S. El Camino Real, Suite 201, Oceanside, CA 92054 (760) 721-8182.

RESOLUTION 12-02-2019

DIGEST

Discovery: Verification of Responses Under Oath

Adds Code of Civil Procedure section 2016.090 clarifying the language used in Verifications.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add Code of Civil Procedure section 2016.090.

1 § 2016.090
2 Where any written discovery response pursuant to this Civil Discovery Act is required to be
3 made “under oath” or otherwise verified, excluding deposition testimony, said verification shall:
4 (a) Be certified or declared under penalty of perjury pursuant to Code of Civil
5 Procedure section 2015.5; and
6 (b) For a verification by an individual party, such verification shall be in the
7 following format:
8 I, [NAME], hereby declare and state:
9 1. I am a party to the above-referenced matter.
10 2. I have read the foregoing [name of document] and know the
11 contents thereof.
12 3. I have made reasonable and good faith efforts to review relevant
13 documents, records, and information in my possession, custody, and control.
14 4. Based on such review and upon my personal knowledge, the
15 matters stated in the foregoing document are true and correct.
16 (c) For a verification by a representative of an entity, including but not limited to a
17 corporation, partnership, or limited liability company, such verification shall be in the following
18 format:
19 I, [NAME], hereby declare and state:
20 1. I am the [representative’s capacity] of [entity name], a party to the
21 above-referenced matter, and am authorized to make this Verification on its
22 behalf.
23 2. I have read the foregoing [name of document] and know the
24 contents thereof.
25 3. I have made reasonable and good faith efforts to review relevant
26 documents, records, and information in the possession, custody, and control of, or
27 known to, [entity name], and its officers and employees.
28 4. Based on such review, the facts stated in the foregoing document
29 are true and correct.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Responses to written discovery under the Civil Discovery Act are to be made “under oath.” The typical method for satisfying this requirement is for the responding party to execute a verification. However, a responding party is also required to conduct a reasonable and good faith review and search of documents, including documents obtained by counsel, and thus may also include matters based on “information and belief” and hearsay. Typically this problem is solved by providing verifications using language for verifying pleadings pursuant to CCP § 446. However, Courts have held that a verification on “information and belief” cannot be used as evidence. (See, e.g., *Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 919, *Thiebaut v. Blue Cross of Indiana* (1986) 178 Cal.App.3d 1157, 1161, *Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1019, and *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) This problem is further exacerbated where the party verifying the discovery is a representative of an entity, who may be required to rely solely on information provided to him or her as opposed to personal knowledge. Nothing in the Discovery Act clarifies the content of a Verification.

The Solution: This resolution sets out specifically the content of verifications for both individual parties and for entity parties, and acknowledges that the responses are provided based both on personal knowledge and on review of information within the party’s possession, custody and control. The entity verification is based on language suggested by Weil & Brown, *California Civil Procedure Before Trial*, § 8:1106, which is modeled on federal practice.

IMPACT STATEMENT

This Resolution will affect the California Civil Discovery Act.

CURRENT OR PRIOR RELATED LEGISLATION

AUTHOR AND/OR PERMANENT CONTACT: Mary V.J. Cataldo, Procopio, Cory, Hargreaves & Savitch, LLP, 12544 High Bluff Drive, Ste. 300, San Diego, CA 92130; (760) 444-1773; mary.cataldo@procopio.com.

RESPONSIBLE FLOOR DELEGATE: Mary V.J. Cataldo, Procopio, Cory, Hargreaves & Savitch, LLP, 12544 High Bluff Drive, Ste. 300, San Diego, CA 92130; (760) 444-1773; mary.cataldo@procopio.com.

RESOLUTION 12-03-2019

DIGEST

Subpoenas: Permits Non-Parties to File Motions to Quash

Amends Code of Civil Procedure section 1987.1 to permit a non-party to file a motion to quash a subpoena seeking the non-party's records.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1987.1 to read as follows:

- 1 § 1987.1.
2 (a) If a subpoena requires the attendance of a witness or the production of books,
3 documents, electronically stored information, or other things before a court, or at the trial of an
4 issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any
5 person described in subdivision (b), or upon the court's own motion after giving counsel notice
6 and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it,
7 or directing compliance with it upon those terms or conditions as the court shall declare,
8 including protective orders. In addition, the court may make any other order as may be
9 appropriate to protect the person from unreasonable or oppressive demands, including
10 unreasonable violations of the right of privacy of the person.
11 (b) The following persons may make a motion pursuant to subdivision (a):
12 (1) A party.
13 (2) A witness.
14 (3) A consumer described in Section 1985.3.
15 (4) An employee described in Section 1985.6.
16 (5) A person whose personally identifying information, as defined in subdivision (b) of
17 Section 1798.79.8 of the Civil Code, is sought in connection with an underlying action involving
18 that person's exercise of free speech rights.
19 (6) A non-party who books, documents, electronically stored information or other things
20 are being sought by the subpoena.
21 (c) Nothing in this section shall require any person to move to quash, modify, or
22 condition any subpoena duces tecum of personal records of any consumer served under
23 paragraph (1) of subdivision (b) of Section 1985.3 or employment records of any employee
24 served under paragraph (1) of subdivision (b) of Section 1985.6.

(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, only certain persons can file a motion to quash. Those persons are limited to a party, the witness, a consumer, an employee, or a person whose PII is sought. If a subpoena seeks the records of a non-party who does not qualify as a consumer or an employee,

that non-party has no rights to object or file a motion to quash the subpoena. This situation has arisen where records of an entity (corporation or LLC) are sought by a record holder. The most common instance is where the entity's banking and financial records are being sought by a bank. The entity does not qualify as a consumer and thus does not have objections rights and since the documents are not being requested from the entity directly, the entity has no standing to file a motion to quash to protect their financial records, even if those records are not relevant to the action.

The Solution: This resolution authorizes a non-party whose records are being sought by a subpoena to file a motion to quash.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Esq., Branfman Mayfield Bustarde Reichenthal LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075; (858) 793-8090.

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-04-2019

DIGEST

Discovery: Proportionality in E-Discovery

Amends Code of Civil Procedure section 2019.040 to reinforce that that the scope of permissible discovery of electronically stored information should be tempered by proportionality constraints.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Section 2019.040 of the Code of Civil Procedure, to read as follows:

§ 2019.040.

1 (a) When any method of discovery permits the production, inspection, copying, testing,
2 or sampling of documents or tangible things, that method shall also permit the production,
3 inspection, copying, testing, or sampling of electronically stored information, except when the
4 likely burden or expense of the proposed discovery of electronically stored information
5 outweighs the likely benefit, taking into account the amount in controversy, the resources of the
6 parties, the importance of the issues in the litigation, and the importance of the requested
7 discovery in resolving the issues.

8 (b) All procedures available under this title to compel, prevent, or limit the production,
9 inspection, copying, testing, or sampling of documents or tangible things shall be available to
10 compel, prevent, or limit the production, inspection, copying, testing, or sampling of
11 electronically stored information.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: E-discovery costs overwhelm many cases due to the explosion in the amount of electronically stored information (ESI) available to parties. Retrieval, review and production of ESI is time consuming and expensive, while often generating large quantities of useless information. Federal courts and other states have responded to this problem by imposing proportionality constraints on discovery of ESI to discourage costly over-discovery. California took a half step towards recognition of proportionality for ESI when the electronic discovery act was enacted in 2009, but inconsistency in the statutory scheme, and subsequent state bar opinions and appellate decisions have created uncertainty in its application. Under the current statutes, proportionality considerations do not govern discovery of ESI unless and until a court issues an order in response to a motion for protective order or an opposition to a motion to compel (e.g., CCP secs. 2019.030, 2031.060(f)(4), 2031.310 (f)(4). Absent court intervention, e-discovery is presumptively unrestricted at present. In addition, litigants are dissuaded from efficiently responding to e-discovery requests by countervailing authority such as State Bar

Formal Opinion 2015-193 and appellate decisions including *Williams v. Superior Court*, 3 Cal.5th 531 (2017).

The Solution: This resolution harmonizes conflicting provisions of the discovery code and places the proportionality factors for electronic discovery to the forefront. Including proportionality in the scope of discovery will encourage parties in cases involving large volumes of ESI to reduce costs by searching for information efficiently and using reliable technology. The proposed revision is based on similar changes to the Federal Rules of Civil Procedure in 2015 that have been favorably received by practitioners.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT

Richard V. Normington, King & Spalding, 101 2nd Street, Floor 23, San Francisco, CA 94105; (415) 318-1200; rnormington@kslaw.com.

RESPONSIBLE FLOOR DELEGATE

Richard V. Normington

RESOLUTION 12-05-2019

DIGEST

Summary Judgment: Electronic Service

Amends Code of Civil Procedure section 437c to clarify that electronic service of summary judgment motions is permitted if authorized by the Code of Civil Procedure.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 437c to read as follows:

1 § 437c.

2 (a) (1) A party may move for summary judgment in an action or proceeding if it is
3 contended that the action has no merit or that there is no defense to the action or proceeding. The
4 motion may be made at any time after 60 days have elapsed since the general appearance in the
5 action or proceeding of each party against whom the motion is directed or at any earlier time
6 after the general appearance that the court, with or without notice and upon good cause shown,
7 may direct.

8 (2) Notice of the motion and supporting papers shall be served on all other parties to the
9 action at least 75 days before the time appointed for hearing. If the notice is served by mail, the
10 required 75-day period of notice shall be increased by 5 days if the place of address is within the
11 State of California, 10 days if the place of address is outside the State of California but within the
12 United States, and 20 days if the place of address is outside the United States. If the notice is
13 served by facsimile transmission, express mail, or another method of delivery providing for
14 overnight delivery, or by electronic service if authorized by Section 1010.6, the required 75-day
15 period of notice shall be increased by two court days.

16 (3) The motion shall be heard no later than 30 days before the date of trial, unless the
17 court for good cause orders otherwise. The filing of the motion shall not extend the time within
18 which a party must otherwise file a responsive pleading.

19 (b) (1) The motion shall be supported by affidavits, declarations, admissions, answers to
20 interrogatories, depositions, and matters of which judicial notice shall or may be taken. The
21 supporting papers shall include a separate statement setting forth plainly and concisely all
22 material facts that the moving party contends are undisputed. Each of the material facts stated
23 shall be followed by a reference to the supporting evidence. The failure to comply with this
24 requirement of a separate statement may in the court's discretion constitute a sufficient ground
25 for denying the motion.

26 (2) An opposition to the motion shall be served and filed not less than 14 days preceding
27 the noticed or continued date of hearing, unless the court for good cause orders otherwise. The
28 opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to
29 interrogatories, depositions, and matters of which judicial notice shall or may be taken.

30 (3) The opposition papers shall include a separate statement that responds to each of the
31 material facts contended by the moving party to be undisputed, indicating if the opposing party
32 agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and
33 concisely any other material facts the opposing party contends are disputed. Each material fact
34 contended by the opposing party to be disputed shall be followed by a reference to the supporting

35 evidence. Failure to comply with this requirement of a separate statement may constitute a
36 sufficient ground, in the court's discretion, for granting the motion.

37 (4) A reply to the opposition shall be served and filed by the moving party not less than
38 five days preceding the noticed or continued date of hearing, unless the court for good cause
39 orders otherwise.

40 (5) Evidentiary objections not made at the hearing shall be deemed waived.

41 (6) Except for subdivision (c) of Section 1005 relating to the method of service of
42 opposition and reply papers, Sections 1005 and 1013, extending the time within which a right
43 may be exercised or an act may be done, do not apply to this section.

44 (7) An incorporation by reference of a matter in the court's file shall set forth with
45 specificity the exact matter to which reference is being made and shall not incorporate the entire
46 file.

47 (c) The motion for summary judgment shall be granted if all the papers submitted show
48 that there is no triable issue as to any material fact and that the moving party is entitled to a
49 judgment as a matter of law. In determining if the papers show that there is no triable issue as to
50 any material fact, the court shall consider all of the evidence set forth in the papers, except the
51 evidence to which objections have been made and sustained by the court, and all inferences
52 reasonably deducible from the evidence, except summary judgment shall not be granted by the
53 court based on inferences reasonably deducible from the evidence if contradicted by other
54 inferences or evidence that raise a triable issue as to any material fact.

55 (d) Supporting and opposing affidavits or declarations shall be made by a person on
56 personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the
57 affiant is competent to testify to the matters stated in the affidavits or declarations. An objection
58 based on the failure to comply with the requirements of this subdivision, if not made at the
59 hearing, shall be deemed waived.

60 (e) If a party is otherwise entitled to summary judgment pursuant to this section,
61 summary judgment shall not be denied on grounds of credibility or for want of cross-
62 examination of witnesses furnishing affidavits or declarations in support of the summary
63 judgment, except that summary judgment may be denied in the discretion of the court if the only
64 proof of a material fact offered in support of the summary judgment is an affidavit or declaration
65 made by an individual who was the sole witness to that fact; or if a material fact is an
66 individual's state of mind, or lack thereof, and that fact is sought to be established solely by the
67 individual's affirmation thereof.

68 (f)(1) A party may move for summary adjudication as to one or more causes of action
69 within an action, one or more affirmative defenses, one or more claims for damages, or one or
70 more issues of duty, if the party contends that the cause of action has no merit, that there is no
71 affirmative defense to the cause of action, that there is no merit to an affirmative defense as to
72 any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of
73 the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff
74 or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes
75 of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

76 (2) A motion for summary adjudication may be made by itself or as an alternative to a
77 motion for summary judgment and shall proceed in all procedural respects as a motion for
78 summary judgment. A party shall not move for summary judgment based on issues asserted in a
79 prior motion for summary adjudication and denied by the court unless that party establishes, to

80 the satisfaction of the court, newly discovered facts or circumstances or a change of law
81 supporting the issues reasserted in the summary judgment motion.

82 (g) Upon the denial of a motion for summary judgment on the ground that there is a
83 triable issue as to one or more material facts, the court shall, by written or oral order, specify one
84 or more material facts raised by the motion that the court has determined there exists a triable
85 controversy. This determination shall specifically refer to the evidence proffered in support of
86 and in opposition to the motion that indicates that a triable controversy exists. Upon the grant of
87 a motion for summary judgment on the ground that there is no triable issue of material fact, the
88 court shall, by written or oral order, specify the reasons for its determination. The order shall
89 specifically refer to the evidence proffered in support of and, if applicable, in opposition to the
90 motion that indicates no triable issue exists. The court shall also state its reasons for any other
91 determination. The court shall record its determination by court reporter or written order.

92 (h) If it appears from the affidavits submitted in opposition to a motion for summary
93 judgment or summary adjudication, or both, that facts essential to justify opposition may exist
94 but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance
95 to permit affidavits to be obtained or discovery to be had, or make any other order as may be
96 just. The application to continue the motion to obtain necessary discovery may also be made by
97 ex parte motion at any time on or before the date the opposition response to the motion is due.

98 (i) If, after granting a continuance to allow specified additional discovery, the court
99 determines that the party seeking summary judgment has unreasonably failed to allow the
100 discovery to be conducted, the court shall grant a continuance to permit the discovery to go
101 forward or deny the motion for summary judgment or summary adjudication. This section does
102 not affect or limit the ability of a party to compel discovery under the Civil Discovery Act (Title
103 4 (commencing with Section 2016.010) of Part 4).

104 (j) If the court determines at any time that an affidavit was presented in bad faith or solely
105 for the purpose of delay, the court shall order the party who presented the affidavit to pay the
106 other party the amount of the reasonable expenses the filing of the affidavit caused the other
107 party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice
108 contained in a party's papers or on the court's own noticed motion, and after an opportunity to be
109 heard.

110 (k) Unless a separate judgment may properly be awarded in the action, a final judgment
111 shall not be entered on a motion for summary judgment before the termination of the action, but
112 the final judgment shall, in addition to any matters determined in the action, award judgment as
113 established by the summary proceeding provided for in this section.

114 (l) In an action arising out of an injury to the person or to property, if a motion for
115 summary judgment is granted on the basis that the defendant was without fault, no other
116 defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment
117 on, the absence or involvement of the defendant who was granted the motion.

118 (m) (1) A summary judgment entered under this section is an appealable judgment as in
119 other cases. Upon entry of an order pursuant to this section, except the entry of summary
120 judgment, a party may, within 20 days after service upon him or her of a written notice of entry
121 of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served
122 by mail, the initial period within which to file the petition shall be increased by five days if the
123 place of address is within the State of California, 10 days if the place of address is outside the
124 State of California but within the United States, and 20 days if the place of address is outside the
125 United States. If the notice is served by facsimile transmission, express mail, or another method

126 of delivery providing for overnight delivery, the initial period within which to file the petition
127 shall be increased by two court days. The superior court may, for good cause, and before the
128 expiration of the initial period, extend the time for one additional period not to exceed 10 days.

129 (2) Before a reviewing court affirms an order granting summary judgment or summary
130 adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the
131 parties an opportunity to present their views on the issue by submitting supplemental briefs. The
132 supplemental briefs may include an argument that additional evidence relating to that ground
133 exists, but the party has not had an adequate opportunity to present the evidence or to conduct
134 discovery on the issue. The court may reverse or remand based upon the supplemental briefs to
135 allow the parties to present additional evidence or to conduct discovery on the issue. If the court
136 fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party.

137 (n) (1) If a motion for summary adjudication is granted, at the trial of the action, the
138 cause or causes of action within the action, affirmative defense or defenses, claim for damages,
139 or issue or issues of duty as to the motion that has been granted shall be deemed to be established
140 and the action shall proceed as to the cause or causes of action, affirmative defense or defenses,
141 claim for damages, or issue or issues of duty remaining.

142 (2) In the trial of the action, the fact that a motion for summary adjudication is granted as
143 to one or more causes of action, affirmative defenses, claims for damages, or issues of duty
144 within the action shall not bar any cause of action, affirmative defense, claim for damages, or
145 issue of duty as to which summary adjudication was either not sought or denied.

146 (3) In the trial of an action, neither a party, a witness, nor the court shall comment to a
147 jury upon the grant or denial of a motion for summary adjudication.

148 (o) A cause of action has no merit if either of the following exists:

149 (1) One or more of the elements of the cause of action cannot be separately established,
150 even if that element is separately pleaded.

151 (2) A defendant establishes an affirmative defense to that cause of action.

152 (p) For purposes of motions for summary judgment and summary adjudication:

153 (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no
154 defense to a cause of action if that party has proved each element of the cause of action entitling
155 the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that
156 burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one
157 or more material facts exists as to the cause of action or a defense thereto. The defendant or
158 cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a
159 triable issue of material fact exists but, instead, shall set forth the specific facts showing that a
160 triable issue of material fact exists as to the cause of action or a defense thereto.

161 (2) A defendant or cross-defendant has met his or her burden of showing that a cause of
162 action has no merit if the party has shown that one or more elements of the cause of action, even
163 if not separately pleaded, cannot be established, or that there is a complete defense to the cause
164 of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the
165 plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as
166 to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon
167 the allegations or denials of its pleadings to show that a triable issue of material fact exists but,
168 instead, shall set forth the specific facts showing that a triable issue of material fact exists as to
169 the cause of action or a defense thereto.

170 (q) In granting or denying a motion for summary judgment or summary adjudication, the
171 court need rule only on those objections to evidence that it deems material to its disposition of

172 the motion. Objections to evidence that are not ruled on for purposes of the motion shall be
173 preserved for appellate review.

174 (r) This section does not extend the period for trial provided by Section 1170.5.

175 (s) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4
176 (commencing with Section 1159) of Title 3 of Part 3.

177 (t) Notwithstanding subdivision (f), a party may move for summary adjudication of a
178 legal issue or a claim for damages other than punitive damages that does not completely dispose
179 of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision.

180 (1) (A) Before filing a motion pursuant to this subdivision, the parties whose claims or
181 defenses are put at issue by the motion shall submit to the court both of the following:

182 (i) A joint stipulation stating the issue or issues to be adjudicated.

183 (ii) A declaration from each stipulating party that the motion will further the interest of
184 judicial economy by decreasing trial time or significantly increasing the likelihood of settlement.

185 (B) The joint stipulation shall be served on any party to the civil action who is not also a
186 party to the motion.

187 (2) Within 15 days of receipt of the stipulation and declarations, unless the court has good
188 cause for extending the time, the court shall notify the stipulating parties if the motion may be
189 filed. In making this determination, the court may consider objections by a nonstipulating party
190 made within 10 days of the submission of the stipulation and declarations.

191 (3) If the court elects not to allow the filing of the motion, the stipulating parties may
192 request, and upon request the court shall conduct, an informal conference with the stipulating
193 parties to permit further evaluation of the proposed stipulation. The stipulating parties shall not
194 file additional papers in support of the motion.

195 (4) (A) A motion for summary adjudication made pursuant to this subdivision shall
196 contain a statement in the notice of motion that reads substantially similar to the following: "This
197 motion is made pursuant to subdivision (t) of Section 437c of the Code of Civil Procedure. The
198 parties to this motion stipulate that the court shall hear this motion and that the resolution of this
199 motion will further the interest of judicial economy by decreasing trial time or significantly
200 increasing the likelihood of settlement."

201 (B) The notice of motion shall be signed by counsel for all parties, and by those parties in
202 propria persona, to the motion.

203 (5) A motion filed pursuant to this subdivision may be made by itself or as an alternative
204 to a motion for summary judgment and shall proceed in all procedural respects as a motion for
205 summary judgment.

206 (u) For purposes of this section, a change in law does not include a later enacted statute
207 without retroactive application.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Electronic service is authorized under Code of Civil Procedure Section 1010.6 if certain conditions are met, and electronic service is being used more frequently as many courts turn to electronic filing systems. However, CCP 437c creates an ambiguity on the authorized

methods of service of motions for summary judgment in that it calls out the extension of time for certain service methods, but is silent on electronic service. Thus, it is unclear whether electronic service of motions for summary judgment or adjudication is permitted.

The Solution: This resolution adds electronic service into the 2-day extension of time (consistent with CCP 1010.6(a)(4)(B) which states electronic service extends the time by two court days). This removes any doubt that motions for summary judgment can be served electronically.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Esq., Branfman Mayfield Bustarde Reichenthal LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075; (858) 793-8090.

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-06-2019

DIGEST

Arbitration: Time to Respond to Petition to Confirm Award

Amends Code of Civil Procedure sections 1288.2 and 1290.6 to harmonize conflicts in statutes on timing to respond to petition to confirm arbitration award.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 1288.2 and 1290.6, to read as follows:

1 § 1288.2

2 A response requesting that an award be vacated or that an award be corrected shall be
3 served and filed by the deadline provided in Section 1290.6 and not later than 100 days after the
4 date of service of a signed copy of the award upon:

- 5 (a) The respondent if he was a party to the arbitration; or
- 6 (b) The respondent’s representative if the respondent was not a party to the arbitration.

7
8 § 1290.6

9 A response shall be served and filed within 10-30 days after service of the petition ~~except~~
10 ~~that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section~~
11 ~~1290.4, the response shall be served and filed within 30 days after service of the petition.~~ The
12 time provided in this section for serving and filing a response may be extended by an agreement
13 in writing between the parties to the court proceeding or, for good cause, by order of the court.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem (including Existing Law): Code of Civil Procedure sections 1288.2 and 1290.6, read together, are confusing as to when a response to a petition to confirm must be filed. Section 1288.2 indicates that a response can be filed up to 100 days after service of the award, but Section 1290.6 only grants 10 days to respond. The purpose of the two statutes is different (the first providing an outer limit on when an award can be challenged and the second providing a deadline on when any response can be filed). This causes confusion as to when a response must be filed. In addition, the 10 day window to file a response is quite short, especially in situations where the party is not represented, or even worse, did not appear at the arbitration hearing. Additional time is needed for those unrepresented parties to secure counsel and file a response to the petition.

The Solution: This resolution expands the time to respond to a petition to 30 days, in order to give parties time to secure counsel, if necessary, and adds a cross-reference to Section 1288.2 in order to avoid any further confusion as to the deadline to respond to a petition.

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:

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

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-07-2019

DIGEST

Arbitration: Manner of Appointing Arbitrators

Amends Code of Civil Procedure section 1281.6 to promote a fairer arbitrator selection process.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1281.6 as follows:

1 § 1281.6

2 If the arbitration agreement provides a method of appointing an arbitrator, that method
3 shall be followed. If the arbitration agreement does not provide a method for appointing an
4 arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is
5 sought may agree on a method of appointing an arbitrator and that method shall be followed. In
6 the absence of an agreed method, or if the agreed method fails or for any reason cannot be
7 followed, or when an arbitrator appointed fails to act and his or her successor has not been
8 appointed, ~~the court, on petition of a party to the arbitration agreement, shall appoint the~~
9 arbitrator shall be appointed as provided herein.

10 When a petition is made to the court to appoint a neutral arbitrator, the court shall
11 ~~nominate five persons from lists of persons supplied jointly by the parties to the arbitration or~~
12 compile a list of nominees for appointment as arbitrator. The list shall be composed of the
13 following persons: two supplied by each side; two supplied jointly by the parties to the
14 arbitration; in personal injury cases, two obtained at random from the court’s panel list of
15 arbitrators as provided in Rule of Court 3.814; the court may, at its discretion, augment the list
16 by adding to it up to two nominees. The names of nominees augmented by the court shall be
17 obtained from a governmental agency concerned with arbitration or private disinterested
18 association concerned with arbitration. The parties to the agreement who seek arbitration and
19 against whom arbitration is sought may within five days of receipt of notice of the list of
20 nominees from the court jointly select the arbitrator whether or not the arbitrator is among the
21 nominees. If the parties fail to select an arbitrator within the five-day period, the court shall
22 appoint the arbitrator from the nominees. forward the list of nominees to the court’s ADR
23 administrator who shall serve as the arbitration administrator pursuant to Rule of Court 3.813.
24 The arbitration administrator shall send the list of nominees to counsel for the parties and the
25 arbitrator shall be appointed as provided in Rule of Court 3.815(b)(3-5). If the first arbitrator
26 appointed declines to serve, the administrator shall vacate the appointment of the arbitrator and
27 may either:

28 (1) In personal injury cases, replace the arbitrator’s name on the list of nominees with one
29 name obtained at random from the court’s panel list of arbitrators as provided in Rule of Court
30 3.814, restore to the list of nominees the names previously rejected by the parties pursuant to
31 Rule of Court 3.815(b)(3), and repeat the process of selection of the arbitrator as provided in
32 Rule of Court 3.815(b)(3-5);

33 (2) In cases other than personal injury cases, allow the parties 10 days to jointly submit
34 the name of a replacement nominee to replace the arbitrator’s name on the list of nominees,
35 restore to the list of nominees the names previously rejected by the parties pursuant to Rule of

36 Court 3.815(b)(3), and repeat the process of selection of the arbitrator as provided in Rule of
37 Court 3.815(b)(3-5); or
38 (3) Certify the case to the court for further selection proceedings in conformity with this
39 article.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: The courts and, by extension, arbitrations are supposed to be a completely “level playing field.” While this ideal is entirely achievable, it is increasingly non-existent in practice. On the one hand defendants - often through no fault of their own - are repeatedly forced into court by plaintiffs who file suit. On the other hand, the present system allows parties to refuse to agree upon a truly “neutral” arbitrator. When this occurs, the opposing party’s only remedy is to seek appointment of an arbitrator by the court. As written, C.C.P. §1281.6 allows the court to appoint someone of the Court’s choosing irrespective of the preferences of the litigants. This often results in the court appointing arbitrators from entities that derive a large percentage of their income from repeat clients. Nobody likes to bite the hand that feeds them. Target defendants, and insurers - through easily identifiable insurance defense firms - “feed” private mediation entities hundreds of times more often than any individual plaintiff, or any plaintiff’s firm. At a minimum, the existing dynamic creates the appearance of favoritism.

The Solution: Changing Code of Civil Procedure section 1281.6 to allow parties to submit names while mirroring the selection process utilized for judicial arbitration will allow the parties to each strike truly “bad” arbitrators while insuring that the arbitrator is randomly selected. A controlled, but still random, selection process will restore faith in the system on the public’s part while unshackling arbitrators from any qualms that they might have from calling it “as they see it” without worrying about the impact of their award upon future work.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None.

AUTHOR AND/OR PERMANENT CONTACT: Rolando Pasquali, Pasquali Law, 1220 Howard Ave., Suite 250, Burlingame, CA 94010 (650)579-0100; r@LawSuite.net

RESPONSIBLE FLOOR DELEGATE: Rolando Pasquali

RESOLUTION 12-08-2019

DIGEST

Arbitration: Requires Service of Award on all Parties

Amends Code of Civil Procedure section 1288.4 to require service of arbitration award on all parties before filing petition to confirm arbitration.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1288.4, to read as follows:

1 § 1288.4

2 No petition may be served and filed under this chapter until at least 10 days after service
3 of the signed copy of the award upon ~~the petitioner~~ all of the parties to the arbitration. If the
4 parties are served on different days or by different methods, then the latest date of service shall
5 be deemed the effective date of service of the signed copy of the award.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem (including Existing Law): This statute only requires service of an arbitration award on the petitioner before a petition to confirm the arbitration award may be filed. All parties to the arbitration (even defaulting ones) should receive notice of the arbitration award so each party has an opportunity to evaluate the award. In the case that triggered this resolution, a party did not appear at the hearing and the arbitration made a “default” award against that party and did not serve a copy of the award. The party only learned of the award upon being service with a petition to confirm the award. There was no time to comply with the award (hence the 10 day waiting period) and the client is now subject to costs in that proceeding pursuant to Code of Civil Procedure section 1293.2.

The Solution: This resolution requires service of the arbitration award on all parties to the arbitration before a petition to confirm or vacate can be filed. This is a fair way to ensure all parties receive notice of the award before being hurled into another judicial forum.

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:

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

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-09-2019

DIGEST

Standard on Bond Requirement for Out of State Plaintiffs

Amends Code of Civil Procedure section 1030 to require showing of no reasonable possibility an out-of-state plaintiff will prevail before a bond is required.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1030 to read as follows:

1 § 1030

2 (a) When the plaintiff in an action or special proceeding resides out of the state, or is a
3 foreign corporation, the defendant may at any time apply to the court by noticed motion for an
4 order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees
5 which may be awarded in the action or special proceeding. For the purposes of this section,
6 "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a
7 statute apart from this section or by contract.

8 (b) The motion shall be made on the grounds that the plaintiff resides out of the state or is
9 a foreign corporation and that there is a no reasonable possibility that the ~~moving defendant~~
10 plaintiff will obtain judgment in the action or special proceeding. The motion shall be
11 accompanied by an affidavit in support of the grounds for the motion and by a memorandum of
12 points and authorities. The affidavit shall set forth the nature and amount of the costs and
13 attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or
14 special proceeding.

15 (c) If the court, after hearing, determines that the grounds for the motion have been
16 established, the court shall order that the plaintiff file the undertaking in an amount specified in
17 the court's order as security for costs and attorney's fees.

18 (d) The plaintiff shall file the undertaking not later than 30 days after service of the
19 court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file
20 the undertaking within the time allowed, the plaintiff's action or special proceeding shall be
21 dismissed as to the defendant in whose favor the order requiring the undertaking was made.

22 (e) If the defendant's motion for an order requiring an undertaking is filed not later than
23 30 days after service of summons on the defendant, further proceedings may be stayed in the
24 discretion of the court upon application to the court by the defendant by noticed motion for the
25 stay until 10 days after the motion for the undertaking is denied or, if granted, until 10 days after
26 the required undertaking has been filed and the defendant has been served with a copy of the
27 undertaking. The hearing on the application for the stay shall be held not later than 60 days after
28 service of the summons. If the defendant files a motion for an order requiring an undertaking,
29 which is granted but the defendant objects to the undertaking, the court may in its discretion stay
30 the proceedings not longer than 10 days after a sufficient undertaking has been filed and the
31 defendant has been served with a copy of the undertaking.

32 (f) The determinations of the court under this section have no effect on the determination
33 of any issues on the merits of the action or special proceeding and may not be given in evidence
34 nor referred to in the trial of the action or proceeding.

35 (g) An order granting or denying a motion for an undertaking under this section is not
36 appealable.

(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 1030 provides a procedure under which a defendant can apply to have the court impose a requirement that a non-resident or foreign corporation post an undertaking to secure the award of costs and attorney fees that may be awarded in an action or proceeding. It provides for a hearing procedure where the burden on the moving defendant is nothing more than “that there is a reasonable **possibility** the moving defendant will obtain judgment . . .” This standard has already been held inapplicable to indigent plaintiffs in *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, where the court noted it “acts to prevent out-of-state residents from filing frivolous lawsuits against California residents.” (*Id.*, at 428.) Under current law, the likely potential of the granting of such motion is to throw the plaintiff out of court without trial on the merits, based on the inability to post such a bond. This procedure is an undue burden on interstate commerce, as it clearly discriminates against out-of-state residents, restricting their access to the court based on the mere reasonable possibility of loss, a standard that no California resident has to meet. Subdivision (g) provides the determination is not appealable.

The Solution: This resolution would adjust the burden on the defendant who is bringing a motion under section 1030 to the demonstration that there is “no reasonable possibility” the plaintiff will prevail. Such a demonstration would be more consistent with the notion of discouraging truly frivolous cases. In the civil context, the standard of “reasonable possibility” is typically applied in the determination of such things as possibility of stating a cause of action when considering leave to amend after the sustaining of a demurrer, where the lack of a “reasonable possibility” of amending to state a cause of action is ground for denying leave to amend. However, it does not appear that the existence of a reasonable possibility of loss is used as a basis to deny a plaintiff relief in any other context. Cases should be resolved on their merits after full review, not based on a “reasonable possibility” that would only be required to be shown against a non-resident or foreign corporation, but would not be available against a resident or domestic corporation.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT:

K. Martin White, Post Office Box 1826, Carlsbad, CA 92018, marnew@sbcglobal.net, (760) 434-6787

RESPONSIBLE FLOOR DELEGATE:

K. Martin White

RESOLUTION 12-10-2019

DIGEST

Privilege: Eliminates Absolute Privilege for Falsely Reporting Alleged Criminal Activity
Amends Civil Code section 47 to make an intentionally false report of criminal activity a non-privileged communication.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code section 47 as follows.

§ 47.

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) This subdivision does not make privileged any communication between a person and a law enforcement agency in which a person intentionally falsely reports that another person has committed or is in the act of committing a criminal act or is engaged in an activity requiring law enforcement intervention, including when the purpose of the communication is to harass or annoy the other person.

~~(4)~~ (5) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is

34 requested by the person interested to give the information. This subdivision applies to and
35 includes a communication concerning the job performance or qualifications of an applicant for
36 employment, based upon credible evidence, made without malice, by a current or former
37 employer of the applicant to, and upon request of, one whom the employer reasonably believes is
38 a prospective employer of the applicant. This subdivision authorizes a current or former
39 employer, or the employer's agent, to answer whether or not the employer would rehire a current
40 or former employee. This subdivision shall not apply to a communication concerning the speech
41 or activities of an applicant for employment if the speech or activities are constitutionally
42 protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other
43 provision of law.

44 (d)(1) By a fair and true report in, or a communication to, a public journal, of (A) a
45 judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the
46 course thereof, or (E) of a verified charge or complaint made by any person to a public official,
47 upon which complaint a warrant has been issued.

48 (2) Nothing in paragraph (1) shall make privileged any communication to a public journal
49 that does any of the following:

50 (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

51 (B) Breaches a court order.

52 (C) Violates any requirement of confidentiality imposed by law.

53 (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was
54 lawfully convened for a lawful purpose and open to the public, or (2) the publication of the
55 matter complained of was for the public benefit.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: During 2018 the media was replete with stories (sometimes accompanied by video) regarding people calling 911 to report non-criminal activity of people of color, such as “Barbeque Betty” and “Permit Patty.” Calling 911 can be dangerous to innocent people’s health. Over the past year, several innocent people (mostly young, Black males) have been killed by the police after a citizen called 911 to report that the individuals involved were engaged in criminal activity, even though the deceased individuals were engaged in non-criminal, innocent activity. Lesser consequences can also result from false 911 calls. In California a deceased person’s family in such circumstances will not have a civil cause of action against the caller. According to the California Supreme Court’s interpretation of Civil Code § 47(b), “when a citizen contacts law enforcement personnel to report suspected criminal activity on the part of another person” that person has absolute immunity from liability, even if the report to the police was false and done maliciously or recklessly. *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355.

The Solution. *Hagberg* was a four to three decision, and the dissent pointed out that California is in the minority in its interpretation of § 47(b) or its equivalent in other states. The majority rested its decision primarily on prior decisions of the Courts of Appeal based on an asserted

policy of encouraging communications between citizens and police but failed to explain why that policy should extend to protecting malicious or reckless false reports.

The dissenting opinion makes the better case for not making such reports subject to an absolute privilege in civil actions. The dissenting opinion ended as follows:

“The ramifications of an intentionally false report of suspected criminal activity to police are enormous. Citizens arrested pursuant to such a report will be stigmatized, and forever thereafter have to note the arrest on job, credit, and housing applications. Assertions that the charges were dropped, and of one’s actual innocence, will likely fall on deaf ears. Under the majority’s conclusion today, such falsely accused individuals will have no opportunity to clear their name, seek compensation for economic loss in defending the charges or loss of their reputation. In the absence of clear support from either the language or the history of section 47(b), this court should not approve absolute civil protection for such destructive and criminal communications conduct.”

This resolution is a companion to **Resolution ----2019** that makes it clear that it is a crime to use the 911 system for purposes of harassing a person on account of race, national origin, sexual identification or religion. This resolution addresses civil liability.

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:

John T. Hansen, 582 Market Street, Suite 1015, San Francisco, California 94105; 415-444-6684 (o); 510-910-1392 (m); jhansenlaw101@gmail.com.

RESPONSIBLE FLOOR DELEGATE: John T. Hansen

RESOLUTION 12-11-2019

DIGEST

Civil Rights: Homeless Person’s Bill of Rights.

Adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85 to protects people experiencing homelessness’s civil and due process rights.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85, to read as follows:

1 § 52.80

2 There is created a Homeless Person’s Bill of Rights to guarantee that the rights, privacy
3 and property of persons experiencing homeless are adequately safeguarded and protected under
4 the laws of this state. The rights afforded persons experiencing homelessness to ensure that their
5 person, privacy and property are safeguarded and protected, as set forth in subsection Sections
6 52.82 and 52.83 below, are available only insofar as they are implemented in accordance with
7 other parts of the general statutes, state rules and regulations, federal law, the state Constitution
8 and the United States Constitution.

9
10 § 52. 81

11 For purposes of this part, the following definitions shall apply:

12 (a) “Adequate and accessible housing” means, at a minimum, living space:

13 (1) Where a person has both the right to reside and keep belongings on an ongoing, long
14 term basis at any time of day or night;

15 (2) That meets living standards commonly acceptable to society, and includes safety from
16 other individuals, the elements, and exposure to disease or filth, room to move about, storage
17 space for belongings, the ability to maintain current household composition, accommodation for
18 physical or mental limitations, and access to hygiene facilities; and

19 (3) That is accessible to the individual who is or will be living in that space, including
20 that the individual must not be barred due to criminal background, treatment status, ability to
21 show identification, household composition, physical or mental limitations, substance use
22 disorder, or otherwise.

23 (b) “Hazardous condition” means a condition that creates an imminent public health or
24 safety harm. The public health or safety harm must be created by the presence of a specific
25 condition and not a generalized harm common to all who are unsheltered.

26 (c) “Homeless person(s)” and “person(s) experiencing homelessness” mean those
27 individuals or members of families who lack a fixed, regular, and adequate nighttime residence,
28 including people defined as homeless using the criteria established in the Homeless Emergency
29 Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.

30 (d) “Impoundment” means any action by the municipality to remove or tow a vehicle
31 used as a residence without the express approval of the vehicle’s owner.

32 (e) “Municipality” means any local jurisdiction and any of its contractors, agents,
33 employees or partners.

34 (f) “Outdoor living space” means any outdoor public space that homeless individual(s)
35 use to live or sleep in, as evidenced by the presence of a sleeping bag, shelter, tarp, tent, bed,
36 cardboard, metal sheeting, furniture, or other objects demonstrating an intent to live in the
37 location for one or more days, whether or not continuously.

38 (g) “Personal property” means any item which an individual owns and which might have
39 value or use to that individual, regardless of whether the item is left unattended for temporary
40 periods of time or whether it has monetary value. This does not include weapons other than
41 knives, contraband, items which pose an obvious health or safety risk, or are clearly
42 contaminated in a way which a reasonable person would conclude the items should not be stored
43 with other property. Personal property includes non-rigid materials used for shelter, such as tents
44 and tarps, but does not include building materials, such as wood products, metal, or rigid plastics

45 (h) “Public space” means any property that is owned by a government entity or any
46 property upon which there is an easement for public use and that is held open to the public,
47 including, but not limited to, plazas, courtyards, parking lots, sidewalks, public transportation
48 facilities and services, public buildings, shopping centers, and parks.

49 (i) “Qualified outreach program” means a social service program with adequate
50 oversight, training, and clinical supervision to conduct sufficient individualized outreach, and
51 that the municipality contracts with or provides. Such programs shall have an established record
52 of providing sustained, equitable, person-centered care, and staff providing services shall have
53 training in the following areas: working with people with behavioral health issues including
54 substance use disorder, mental disorders, or both; trauma-informed care, including people who
55 have experienced or are experiencing gender- and gender-identity-based violence and violence
56 based on sexuality; outreach, assessment, and engagement; harm reduction practices (including
57 but not limited to safe needle exchange, use, and disposal, carrying and dispensing Narcan,
58 informing individuals of rights (Good Samaritan Law) and treatment options (Buprenorphine and
59 Methadone); cultural competence; confidentiality and grievance procedures; and may include
60 peer coaches that include adequate oversight and clinical supervision.

61 (j) “Removal” means action to remove people, camps, structures, or personal property
62 located at outdoor living spaces.

63 (k) “Rest” means the state of not moving, holding certain postures that include, but are
64 not limited to, sitting, standing, leaning, kneeling, squatting, sleeping, or lying.

65 (l) “Sufficient individualized outreach” means individualized, person-centered outreach
66 that responds to the unique needs of each person. Sufficient outreach involves:

67 (m) Making an individual assessment of each affected individual, which includes, but is
68 not limited to, considerations of household composition; disability; mental illness or other mental
69 or emotional capacity limitations; substance use or treatment status; geographic needs, such as
70 proximity to personal support, healthcare, employment and other geographic considerations; and
71 ongoing support needs;

72 (1) Identifying and offering adequate and accessible housing, if available, based on this
73 individual assessment; and

74 (2) If an offer is accepted, providing assistance with both the administrative and logistical
75 aspects of moving into the identified adequate and accessible housing.

76 (n) “Unsafe location” means a public space that poses imminent danger of harm to
77 individuals residing in that location or to the general public. The danger of harm must be created
78 by the existence of the specific outdoor living space at that particular location and not
79 generalized danger of harm common to all who are unsheltered. Unsafe locations include, but are

80 not limited to, rights-of-way in industrial areas actively used for transporting people or goods
81 and for providing ingress and egress to real property.

82 (o) "Unsuitable location" means a public space that has a specific public use that is
83 substantially impeded as a result of an outdoor living space in that location. Improved areas of
84 Municipality parks, including restored natural areas or natural areas actively undergoing
85 restoration, and public sidewalks in front of houses and dwelling units are per se unsuitable.

86
87 § 52.82

88 (a) Each homeless person in this state has the right to:

89 (1) Free movement without restraint;

90 (2) Have equal opportunities for employment;

91 (3) Receive emergency medical care;

92 (4) Register to vote and to vote;

93 (5) Have personal information protected;

94 (6) Have a reasonable expectation of privacy in his or her personal property; and

95 (7) Receive equal treatment by state and municipal agencies.

96 (b) Each municipality shall conspicuously post in the usual location for municipal notices
97 a notice entitled "HOMELESS PERSON'S BILL OF RIGHTS" that contains the text set forth in
98 subsection (a) of this section. Each municipality shall make copies of such notice available to
99 members of the public upon request.

100
101 § 52.83

102 (a) It is the intent of the Legislature that this section be interpreted broadly so as to
103 prohibit policies or practices that are discriminatory in either their purpose or effect.

104 (b) Persons experiencing homelessness shall be permitted to use public space in the ways
105 described in this section at any time that the public space is open to the public without
106 discrimination based upon their housing status, and without being subject to criminal, civil, or
107 administrative penalties. Permitted use of the public space include, but are not limited to, all of
108 the following:

109 (1) Free movement without restraint.

110 (2) Sleeping or resting, and protecting oneself from the elements while sleeping or
111 resting in a non-obstructive manner.

112 (3) Eating, sharing, accepting, or giving food in a space in which having food is not
113 otherwise generally prohibited.

114 (4) Praying, meditating, worshiping, or practicing religion.

115 (c) Nothing in this section shall prevent law enforcement from enforcing laws to protect
116 the right of people to use the sidewalk pursuant to the Americans with Disabilities Act of 1990
117 (42 U.S.C. Sec. 12101 et seq.).

118 (d) Nothing in this section shall prevent law enforcement from enforcing the Penal Code,
119 except subdivision (e) of Section 647 of the Penal Code, so far as it prohibits rest.

120
121 § 52.84

122 (a) A municipality may respond appropriately to emergency situations such as fires,
123 crimes, or medical crises as it normally would outside outdoor living spaces. However, except as
124 specified in (b) the municipality may undertake a removal or impoundment action only when the
125 municipality has satisfied the following conditions:

126 (1) Adequate and accessible housing is available beginning at least 30 days before the
127 time of removal or impoundment, to all individuals whose persons, personal possessions and/or
128 vehicles are being removed or impounded.

129 (2) The affected individuals have been engaged with sufficient outreach over a period of
130 not less than 30 days, to allow those interested to move voluntarily to adequate and accessible
131 housing. Sufficient outreach involves, at a minimum: (1) making an individual assessment of
132 each affected individual, which includes, but is not limited to, considerations of household
133 composition; disability; mental illness or other mental or emotional capacity limitations;
134 substance use or treatment status; geographic needs, such as proximity to personal support,
135 healthcare, employment and other geographic considerations; and ongoing support needs; (2)
136 identifying and offering adequate and accessible housing based on this individual assessment;
137 and (3) if an offer is accepted, providing assistance with both the administrative and logistical
138 aspects of moving into the identified adequate and accessible housing.

139 (3) The Municipality has provided written notice meeting the following requirements:

140 (A) The specific date and time the removal or impound will take place, which must not
141 be fewer than thirty (30) days from notice date;

142 (B) Explanation of the actions that will be taken during the removal or impoundment and
143 how loss of personal property can be avoided;

144 (C) Information about where personal property will be safeguarded if seized during the
145 removal or impoundment and how it can be retrieved after removal or impoundment;

146 (D) Contact information for the outreach organizations that will work with that site as
147 specified in subsection (2) above; and

148 (E) A statement that adequate and accessible housing is available for all affected
149 individuals.

150 (F) Notice must be provided in languages likely to be spoken by impacted individuals,
151 and through methods capable of being understood by persons with physical and mental
152 disabilities.

153 (G) Notice must be posted in a conspicuous location at the relevant outdoor living space
154 or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that
155 location.

156 (b) If an outdoor living space or a vehicle used as a residence is in an unsafe or unsuitable
157 location, or creates or contains a hazardous condition, the municipality may undertake a removal
158 or impoundment action if conducted in accordance with the procedures set forth in this Section.

159 (1) Prior to conducting removal or impoundment actions based on unsafe or unsuitable
160 locations, the municipality must do the following:

161 (A) The municipality must inform all individuals staying at such location the reasons that
162 it is unsafe or unsuitable at least 48 hours prior to any removal or impoundment.

163 (B) The municipality must identify and make available a nearby, alternative location to
164 camp or park that is not unsafe or unsuitable to all affected individuals.

165 (C) The municipality must conduct sufficient individualized outreach.

166 (2) Prior to conducting removal or impoundment actions based on hazardous conditions,
167 the municipality must do the following:

168 (A) Provide access to basic garbage, sanitation, and harm
169 reduction services as dictated by the nature of the hazardous condition, for at least 72 hours.

170 (B) Make reasonable efforts to identify the likely source of the hazardous condition and
171 take action against only those responsible for creating the hazardous condition.

172 (C) Provide a meaningful opportunity to cure the hazardous condition, including:
173 (i) An effective cure notice of the specific conditions that create the hazardous condition
174 and information on how that condition can be remedied; and
175 (ii) Provision of necessary items, such as garbage bags and bins, rodent traps, intravenous
176 needle receptacles, and/or portable toilets, among others, that would allow the individuals to cure
177 the hazardous condition. The municipality must allow individuals at least 72 hours to cure the
178 hazardous condition before posting notice of removal or impoundment, and shall not conduct
179 removal or impoundment if the hazardous conditions have been cured.
180 (D) The municipality must conduct direct outreach through site visits to: (a) inform all
181 affected individuals prior to or during the cure period that the location has a hazardous condition
182 and the actions needed to cure that condition; and (b) inform all affected individuals whether the
183 hazardous condition has been remedied after the cure period, and if not, why not.
184 (3) Prior to removal or impoundment, the municipality must provide written notice
185 meeting the following requirements:
186 (A) The specific date and time the removal or impound will take place;
187 (i) The removal or impound may not take place fewer than 48 hours from the date of
188 notice in the case of unsafe or unsuitable location;
189 (ii) The removal or impound may not take place fewer than five (5) days from the date of
190 notice in the case of a hazardous condition
191 (B) Explanation of how the location of the outdoor living space or vehicle is unsafe
192 and/or unsuitable, or the hazardous condition has not been remedied;
193 (C) Explanation of the actions that will be taken during the removal or impoundment and
194 how loss of personal property can be avoided;
195 (D) Information about where personal property will be safeguarded if seized during the
196 removal or impoundment and how it can be retrieved after removal or impoundment;
197 (E) Clear directions to the alternative location;
198 (F) Contact information for the outreach organizations that will work with that site as
199 described in subsection (4) below; and
200 (G) If available, a statement that adequate and accessible housing is available for all
201 affected individual;
202 (H) Notice must be provided in languages likely to be spoken by impacted individuals,
203 and through methods capable of being understood by persons with physical and mental
204 disabilities.
205 (I) Notice must be posted in a conspicuous location at the relevant outdoor living space or
206 on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that
207 location.
208 (4) Sufficient individualized outreach must involve, at a minimum, the following actions:
209 (A) Informing all affected individuals of the availability of the alternative location for the
210 outdoor living space or vehicle, or offering adequate and accessible housing; and
211 (B) Offering assistance with both the administrative and logistical aspects of moving into
212 the identified alternative location or adequate and accessible housing.
213 (c) During a removal or impoundment, the Municipality will safeguard all personal
214 property free of charge according to the following requirements:
215 (1) For individuals present at the time of the removal or impoundment who have accepted
216 the offer of an adequate and accessible housing but do not have the ability to transport their

217 personal property, the Municipality shall transport all personal property to the location of the
218 accepted housing the day of the removal or impoundment.

219 (2) For individuals absent at the time of the removal or impoundment, the Municipality
220 must document that those individuals had actual notice of the removal or impoundment.
221 document that those individuals had actual notice of the removal or impoundment.

222 (3) For individuals absent at the time of removal or impoundment, or present but who did
223 not accept the offer of adequate and accessible housing and do not have the ability to transport
224 their personal property, the Municipality will safeguard all personal property as follows:

225 (A) Personal property must be photographed and catalogued by location and with
226 identifying details of the personal property prior to being put into storage. Such information must
227 be searchable by computer and by calling a Municipality agent.

228 (B) The location of the storage facility must be accessible by public transportation and
229 accessible to those with disabilities.

230 (C) Its operating hours must extend beyond normal business hours to accommodate those
231 who work or have other obligations during midweek during normal business hours.

232 (D) Photo identification shall not be required as a condition of retrieval;

233 (E) The Municipality must post notice for 90 days at the location of the removal or
234 impoundment with the location of the seized personal property and instructions for reclaiming
235 such personal property.

236 (F) After 90 days, the Municipality may dispose of any unclaimed personal items
237 provided all the above requirements have been met.

238
239 § 53.85

240 (a) Any person whose rights have been violated pursuant to this part may enforce those
241 rights in a civil action.

242 (b) The court may award appropriate injunctive and declaratory relief, restitution for loss
243 of property or personal effects and belongings, actual damages, compensatory damages,
244 exemplary damages, statutory damages of one thousand dollars (\$1,000) per violation, and
245 reasonable attorney's fees and costs to a prevailing party.

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

PROPONENT: Bay Area Lawyers for Individual Freedom (BALIF)

STATEMENT OF REASONS

The Problem: Existing laws do not provide basic civil and human rights for people experiencing homelessness. Several municipalities in California have offensive and anachronistic laws targeting homeless people. In September 2018, the Ninth Circuit in *Martin et al v City of Boise*, 902 F.3d 1031(9th Cir. 2018) held that these laws are “cruel and unusual” and constitute a violation of the Eighth Amendment. Judge Marsha Berzon wrote, “As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter,” *Id.* at 1048. By the virtue of their existence, homeless individuals are subject to civil and criminal sanctions, and have restrictions on their right to use, move freely, rest, protect themselves from the elements, eat, or perform religious observances in public spaces.

The Solution: The forced dispersal of people from encampment settings is not an appropriate strategy. It accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide lasting solutions to people who have been sleeping and living in an encampment. Homeless encampments across the country are increasingly subject to sudden evictions or “sweeps”. Often conducted with little or no notice, sweeps displace homeless people from public space, and often result in the loss or destruction of people’s possessions.

The loss of warm clothing, protective tents, medication, identification, and important documents can become a matter of life and death. Homeless persons are made to leave their encampment communities without being offered any alternative places to live. Because this merely disperses, rather than reduces homelessness, new encampments inevitably reappear. Without sanitation services, so will the public health and safety concerns that led to the sweeps. Indeed, California’s state transportation agency eliminated 217 homeless encampments between July 2014 and February 2015, only to have some of them reopen the very same day. The cost to taxpayers for this ineffective exercise of governmental power is significant.

This resolution affords persons experiencing homelessness the right to use public spaces without discrimination based on their housing status. It also enumerates basic human rights that may be exercised without being subject to criminal or civil sanctions. These include the right to protect themselves from the elements, eat, perform religious observances, move freely, and rest in public spaces. It ensures the protection of due process rights of homeless persons personal property. It requires municipalities to provide alternative space or adequate housing as well as appropriately tailored services to people experiencing homelessness. This resolution provides aggrieved individuals injunctive and declaratory relief, restitution, damages, statutory damages of \$1,000 per violation, fees and costs.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

This resolution uses language from Connecticut Homeless Bill of Rights, California Senate Bill 876: Homelessness introduced by Liu in February 2016, and a proposed ordinance in Seattle, WA addressing assessment and access to housing, as well as due process rights of homeless persons.

AUTHOR AND/OR PERMANENT CONTACT:

Michael Wolchansky 2370 Market Street, Suite 180, San Francisco, CA 94114, P: 415-640-0633, E: Michael@WolchanskyLaw.com.

RESPONSIBLE FLOOR DELEGATE: Michael Wolchansky