RESOLUTION 01-01-2020

DIGEST
Judges: Removal of Challenged Judge's Authority to Strike Disqualification Request
Amends Code of Civil Procedure section 170.4 to eliminate a challenged judge's authority to strike disqualification requests that are untimely or state no "legal grounds."

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Identical to Resolution 08-02-2018, which was approved in principle, and similar to Resolution 02-10-2017, which was approved in principle as amended.

Reasons:
This resolution amends Code of Civil Procedure Section 170.4 to eliminate a challenged judge's authority to strike disqualification requests that are untimely or state no "legal grounds." This resolution should be disapproved because it does not further judicial fairness and delays the prompt disposition of untimely and facially meritless disqualification requests.

Code of Civil Procedure section 170.1 *et seq* creates the statutory framework for judicial disqualification and the process for rulings on requests for judicial disqualification. Parties may summarily disqualify a judge within a narrow time frame after being assigned to that judge by declaring that the party or the party's attorney believes that they cannot have a fair and impartial trial or hearing before the assigned judicial officer. (Code. Civ. Proc., § 170.6.) In all other instances, parties must move for disqualification supported by declarations and evidence establishing the facts constituting grounds for the disqualification of the judicial officer. (Code Civ. Proc., § 170.3, subd. (c)(1); and see *People v. Brown* (1993) 6 Cal.4th 322.) Once a disqualification challenge is filed, the power of the challenged judge to issue rulings in a case is severely restricted pending disposition of the disqualification request. (Code Civ. Proc., § 170.4.) That restriction on judicial power includes the general prohibition on judges ruling on their own disqualification challenge – the ruling must be made by another judge. (Code Civ. Proc., § 170.3, subd. (c)(5).) However, current law allows two exceptions to that prohibition, the challenged judge has the power to strike untimely challenges and challenges that disclose no legal grounds for disqualification on their face. (Code Civ. Proc., § 170.4, subd. (b).)

This resolution proposes eliminating the power of challenged judges to strike untimely challenges and challenges that disclose no legal grounds for disqualification on their face by striking out subdivision (b) of Code of Civil Procedure section 170.4. The resolution proposes that the limited exceptions permitting challenged judges to strike untimely and facially meritless judicial disqualification motions often result in the challenged judge declaring themselves to be "unbiased."

However, striking an untimely peremptory challenge under section 170.6, or a challenge that discloses no basis for disqualification on its face, does not require any decision on the merits of the challenge itself. The legislature has considered this framework on numerous occasions and

has seen no need to modify this statute as proposed in this resolution. Numerous cases have interpreted the framework for judicial disqualification and found there is no vagueness nor abuse of the process of striking untimely or facially meritless judicial disqualification motions. (See, e.g. *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, and *People v. Panah* (2005) 35 Cal.4th 395, and *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415.) Besides, parties are not without remedies in the event a challenged judge improperly strikes a judicial disqualification motion as untimely or facially meritless. "In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson." (Code Civ. Proc., § 170.3, subd. (c)(5); and see *Brown, supra*, at p. 722.)

In contrast, eliminating the ability of challenged judges to quickly dispose of untimely and facially meritless judicial disqualification motions would have profound implications for judicial economy, trial management and operation. It would encourage more gamesmanship with requests for disqualification because even untimely and facially meritless requests would bring a temporary halt to proceedings.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

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

§ 170.4

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

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

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

(3) Hear and determine purely default matters.

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

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

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

~~(c)~~(b)

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

(2) For the purposes of this subdivision, if (A) a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, and (B) the

proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time, the trial or hearing shall be deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time.

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

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

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: It is unreasonable to allow a judge that is challenged for the appearance of bias to declare themself unbiased which is what can and does occur when a judge strikes a petition for disqualification under Code of Civil Procedure section 170.4, subdivision (b). In other words, Code of Civil Procedure section 170.4, subdivision (b) permits challenged judges to declare themselves unbiased. Therefore, section (b) should be deleted. Another reason that section (b) should be deleted is because Code of Civil Procedure section 170.4, subdivision (b) permits a challenged judge to circumvent Code of Civil Procedure section 170.3, subdivision (c)(5), which specifically states that "A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party." In other words, Code of Civil Procedure section 170.4, subdivision (b), on its face, negates Code of Civil Procedure section 170.3, subdivision (c)(5).

The Solution: Delete Code of Civil Procedure section 170.4, subdivision (b).

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

CURRENT OR PRIOR RELATED LEGISLATION
None known. The California Conference of Bar Associations voted for this change in the law in in 2017 and 2018, but no assembly person has so far embraced this deletion.

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RESOLUTION 01-02-2020

DIGEST
Depositions: Oral Deposition Notices
Amends Code of Civil Procedure section 2025.220 to allow a party and deponent to stipulate to changes in a previously scheduled oral deposition without serving an amended notice.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 2025.220 to allow a party and deponent to stipulate to changes in a previously scheduled oral deposition without serving an amended notice. This resolution should be disapproved because the proposed change to section 2025.220 does not address problems related to issuing an amended notice of deposition and there is already well-established authority that permits parties to stipulate to waive the formalities of any deposition notice.

Code of Civil Procedure section 2025.220 provides that notice of the intent to take the oral deposition of a party be made by providing written notice of details, such as the date, time, and location of the deposition. Code of Civil Procedure section 2025.220 provides the requirements of the notices themselves but does not address amended notices.

Code of Civil Procedure section 2025.220 currently does not require full written formal notice of any calendar changes despite the parties' stipulation otherwise. Additionally, this section does not limit or extend the timing of the depositions. Code of Civil Procedure section 2025.270 only requires depositions to take place within a particular time frame after notice is provided.

This resolution seeks to add a provision to Code of Civil Procedure section 2025.220 to provide that formal written notice is not required when the deponent and the deposing party have stipulated to change the date, time or location of a deposition to another date, time or location. The proposed language allows for the use of an "amended notice" or "further amended notice," if it is reasonably calculated to give notice to all interested parties.

However, well-established authority already permits parties to stipulate to waive the formalities of any deposition notice. Courts have established that the written formal notice requirement of a deposition can be waived through stipulation "if the deposition was 'taken and returned' in the manner provided [and] the notice and affidavit were waived by the giving of the stipulation." (*Consol. Lumber Co. v. Fid. & Deposit Co. of Maryland* (1911) 161 Cal. 397, 402.) Where the defendants' counsel orally agreed to taking of deposition and both counsel entered into a formal stipulation that the deposition might be used by either party, then such action constitutes a waiver of more formal notice. (*Margolis v. Teplin* (1958) 163 Cal. App. 2d 526, 538.) Established case law and the general practice of practitioners to utilize email and other written communication to

confirm the stipulation of the parties to any changes in the deposition notice makes this proposed amendment unnecessary. An additional concern with this resolution is that, as drafted, the party who noticed the deposition of a third party could agree with that third-party deponent to a new deposition date without an agreement with other parties or counsel involved in the case, potentially creating a situation where other counsel cannot participate in the deposition.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2025.220, to read as follows:

§ 2025.220

(a) A party desiring to take the oral deposition of any person shall give notice in writing. The deposition notice shall state all of the following, in at least 12-point type:

(1) The address where the deposition will be taken.

(2) The date of the deposition, selected under Section 2025.270, and the time it will commence.

(3) The name of each deponent, and the address and telephone number, if known, of any deponent who is not a party to the action. If the name of the deponent is not known, the deposition notice shall set forth instead a general description sufficient to identify the person or particular class to which the person belongs.

(4) The specification with reasonable particularity of any materials or category of materials, including any electronically stored information, to be produced by the deponent.

(5) Any intention by the party noticing the deposition to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method as required by Section 2025.330 and any intention to record the testimony by stenographic method through the instant visual display of the testimony. If the deposition will be conducted using instant visual display, a copy of the deposition notice shall also be given to the deposition officer. Any offer to provide the instant visual display of the testimony or to provide rough draft transcripts to any party which is accepted prior to, or offered at, the deposition shall also be made by the deposition officer at the deposition to all parties in attendance. Any party or attorney requesting the provision of the instant visual display of the testimony, or rough draft transcripts, shall pay the reasonable cost of those services, which may be no greater than the costs charged to any other party or attorney.

(6) Any intention to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or of an expert witness under subdivision (d) of Section 2025.620. In this event, the operator of the video camera shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties.

(7) The form in which any electronically stored information is to be produced, if a particular form is desired.

(8) (A) A statement disclosing the existence of a contract, if any is known to the noticing party, between the noticing party or a third party who is financing all or part of the action and either of the following for any service beyond the noticed deposition:

(i) The deposition officer.

(ii) The entity providing the services of the deposition officer.

(B) A statement disclosing that the party noticing the deposition, or a third party financing all or part of the action, directed his or her attorney to use a particular officer or entity to provide services for the deposition, if applicable.

(b) Notwithstanding subdivision (a), where under Article 4 (commencing with Section 2020.410) only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena shall serve as the notice of deposition.

(c) When there is mutual agreement between the noticing party and the deponent to change the date, time or location of the deposition to another date, time or location, notice of such change does not require the issuance of an amended notice. Notice of changes to the date, time or location of the deposition be made in writing or other means reasonably calculated to give notice to all interested parties.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The unilateral noticing of depositions without consultation of the deponent is ubiquitous in California state court litigation. In the vast majority of situations, the deponent is unavailable and the deposition date, time or location must be changed. When this is done, practitioners in many counties feel obligated to issue an "Amended Notice of Deposition." These "amended" notices are commonly sent even though there is no requirement for this in the California code. Such an "amended" notice could run afoul of the timeline for scheduling depositions. Further, the use of "amended" and "further amended" deposition notices wastes time, energy and fills court pleading folders if motions are later needed. Some practitioners do currently simply send letters or emails to all parties notifying them of simple changes to date, time and location. However, the plain language of 2025.220 could be read as requiring a full formal notice with every single calendaring change.

The Solution: The proposed language clarifies the gap in the existing law demonstrating that the "amended notice" is a needless document. In today's electronic world, a simple one page letter or email is appropriate to make calendaring changes. The use of simple scheduling letters and emails for such simple and ubiquitous changes encourages efficiency, promotes simplicity and thereby promotes judicial economy and civility.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 01-03-2020

DIGEST
Compelling Arbitration: Statutory Writ as Exclusive Means of Review
Amends Code of Civil Procedure section 1294 to treat review of orders denying and granting petitions to compel arbitration the same way by providing for exclusive review by statutory writ.

RESOLUTION COMMITTTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1294 to treat review of orders denying and granting petitions to compel arbitration the same way by providing for exclusive review by statutory writ. This resolution should be approved in principle because it makes the means of appellate review consistent and allows the parties a speedy means of conclusively determining arbitrability before compelled arbitration commences.

Under current law, orders denying petitions to compel arbitration are immediately appealable. (Code Civ. Proc., § 1294, subd. (a).) By comparison, orders compelling arbitration are not appealable until after arbitration and entry of judgment on the arbitration award. (Code Civ. Proc., § 1094.2; *State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506 [appeal lies only from the ultimate judgment confirming the arbitration award].) A party that wants immediate review of an order compelling arbitration may file a petition for writ of prohibition. (*International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 704; *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1004, fn. 8.) These existing rules of appealability reflect a long-standing policy preference in favor of the right to arbitrate disputes. (See *Report to Law Revision Commission for Changes to California Arbitration Law* (Feb. 2004) Pepperdine Dispute Resolution Law Journal, Vol 4.:1, 2003.) This also reflects the view that arbitration agreements are an indication that the parties expect their dispute will be resolved without the necessity of contact with the courts. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 502.) Under "state law as under federal law, when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration." (*Sandquist v. Lebo Automotive Inc.* (2016) 1 Cal.5th 233, 247.) Finally, the current approach is consistent with the Federal Arbitration Act's (FAA) strong preference for arbitration and federal law that orders compelling arbitration are not immediately appealable. (See 9 U.S.C. § 16(b)(3).)

This resolution would change current law by making the means of reviewing orders granting and denying petitions to compel arbitration consistent. It would provide that the exclusive means of appellate review is by way of immediate statutory writ. In doing so, it would provide the parties with equal means for immediate appellate review of all orders on petitions to compel arbitration. It would similarly provide the parties with prompt certainty that the cost and expense of proceeding forward with arbitration will not be wasted by a later appellate determination, after

full arbitration, holding that an order compelling arbitration was in error and should not have been granted.

This resolution will also likely result in a net savings in judicial economy and resources for our appellate courts. By providing expedited and discretionary writ review of all orders on petitions to compel arbitration, it will reduce the number of appeals that appellate courts are required by law to hear after full briefing and argument. Appellate courts will be able to promptly review and dispose of the majority cases where the orders on petitions to compel arbitration are clearly correct by means of summary denial, as compared to full written opinions required in appeals. Likewise, appellate courts will have writs with a narrow issue and streamlined record under consideration, rather than appellate review of orders compelling arbitration as part of an appeal from a final judgment, which may involve multiple issues and a much larger record that includes both the arbitration and court proceedings leading to the entry of a final judgment.

While there is a potential that this proposed solution might face preemption challenges under the FAA, such challenges will likely fail. When "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally…should apply ordinary state-law principles that govern the formation of contracts." (*Sandquist v. Lebo Automotive Inc., supra,* 1 Cal.5th at p. 244.) This resolution would result in a statute that treats the review of orders compelling arbitration and denying petitions to compel arbitration equally. Accordingly, it is likely that any such challenge to the proposed statutory change based on preemption would fail. This resolution is also consistent with current legislative trends recognizing the inequities in how arbitration clauses create inequities and often give more powerful parties an upper hand, particularly in the context of employees and consumers. (See, e.g., Stats. 2019, ch. 711, §§ 1-3.) This resolution preserves the right to have matters decided by arbitration, while ensuring that parties have equal rights to challenge orders on petitions to compel arbitration, as well as the means for fast and prompt appellate determination before the parties incur the substantial costs of arbitration.

There are no similar pending bills, nor any known similar legislation in the last three years.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1294, to read as follows:

§ 1294

(1) An aggrieved party may appeal from:

~~(a) An order dismissing or denying a petition to compel arbitration~~

(a ~~b~~) An order dismissing a petition to confirm, correct or vacate an award.

(b ~~c~~) An order vacating an award unless a rehearing in arbitration is ordered.

(c ~~d~~) A judgment entered pursuant to this title.

(d ~~e~~) A special order after final judgment.

(2) An order dismissing, denying or granting a petition to compel arbitration is not an

appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal. An aggrieved party may file a petition for writ of mandate within 20 days after service of written notice of entry of the court's order. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Section 1294 provides that an order dismissing a petition to compel arbitration is immediately appealable while an order granting such a petition is appealable only from the final judgment. This means that a party who contends that the trial court wrongly denied the petition can file an immediate appeal and stay all trial court proceedings pending resolution of the appeal – a process that often takes 1-2 years. In contrast, a party who contends that the trial court wrongly granted a petition must first expend significant time and money to arbitrate the case to conclusion and then appeal from the final judgment. While a party disputing arbitration may file a petition for writ of mandate from the order, writ review is extraordinary and rarely granted. The disparity in section 1294 has created an uneven playing field and disadvantaged parties who oppose the applicability or enforceability of arbitration agreements. This inequity is particularly troubling because mandatory arbitration agreements are now commonplace and impact an increasing number of employees and consumers who are in far weaker positions than their opponents to withstand the higher burden placed on them by section 1294.

The Solution: The Legislature should treat orders denying and granting petitions to compel arbitration the same by providing for their *exclusive* review by way of a *statutory* writ. While statutory writs, like common law writs, are discretionary, reviewing courts are more inclined to grant statutory writs on the ground that the Legislature has recognized that writ relief is warranted in these circumstances.

A statutory writ is warranted here because arbitrability is a critical question which should be and can be conclusively resolved soon after a lawsuit is filed. The question regarding which forum -- the court or arbitration -- is appropriate for resolving a dispute should be conclusively resolved before the parties devote substantial resources and time to a forum which may end up being deemed inappropriate. Furthermore, there is no reason to delay the court of appeal's determination because the briefs and evidence filed in support and opposition to the motion to compel arbitration provide the court with all the information necessary for its ruling.

The Legislature has provided for statutory writs in other circumstances where there is uncertainty regarding the correct forum, for example: an order granting or denying a motion to change venue (C.C.P. § 400); an order denying a motion to stay or dismiss for inconvenient forum or a motion to quash service of summons (C.C.P. § 418.10(c)); and any order granting or denying a motion to disqualify a judge. (C.C.P. § 170.3). Some of these writs are made expressly exclusive (e.g., C.C.P. § 170.3(d)) and some are treated as an exclusive remedy by the courts. (See e.g., *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 257 [C.C.P. §

418.10(c)]; *Chango Coffee v. Applied Underwriters* (2017) 11 Cal.App.5th 1247, 1249 [C.C.P. § 400].)

This resolution is not against mandatory arbitration but rather in favor of resolving any dispute regarding the application of arbitration agreements evenhandedly and efficiently.

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

CURRENT OR PRIOR RELATED LEGISLATION
Assembly Bill No. 1062 (2011-2012 Reg. Sess.); Senate Bill No. 1065 (2015-2016 Reg. Sess.)

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

The thrust of this Resolution is that arbitrability is a critical question which should be and can be conclusively resolved soon after a lawsuit is filed, rather than the end of the case after the parties have spent substantial money in litigation. This resolution is in favor of resolving any dispute regarding the application of arbitration agreements evenhandedly and efficiently, soon after a lawsuit is filed. This is all reasonable and practical. However, the Resolution only provides for 20 days to file a Writ of Mandate in the Court of Appeal after the trial court makes a decision on arbitrability. Twenty days is insufficient time for a lawyer to file a Writ of Mandate and competently represent *all* of their clients. Even if filing a Writ of Mandate was a streamlined process, and it is not, 20 days is not enough time. Yes, other statutes only permit 20 days to file a Writ. However, because other statutes do not permit enough time to file a Writ is not a sufficient reason to perpetuate this problem. Therefore, this Resolution should change the number of days to file a Writ from 20 to *at least* 30 days after a trial court's decision on arbitrability.

OCBA

The Orange County Bar Association opposes this Resolution based on the information known to the OCBA at this time.

The proposal focuses on taking the right of appeal away from an order dismissing a petition to compel arbitration. The proponent states writ review should be the exclusive remedy for an order dismissing a petition to compel arbitration. The proponent states statutory writs are discretionary, extraordinary and rarely granted.

There is likely a reason the legislature treats an order dismissing a petition to compel arbitration differently from an order granting such a petition. An order dismissing a petition to compel arbitration potentially denies a contractual right and triggers the potential for a greater due process violation. An order granting such a petition may not trigger the same due process concerns. We do not judge whether a contractual right outweighs a potentially constitutional right. There are arguments both ways. However, the basis for the proponent's requested changes are not compelling.

For example, our Appellate Courts have held when there is an order compelling arbitration, a writ is appropriate "if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement" or if the arbitration "would appear to be unduly time consuming or expensive." See *Zembsch v. Superior Court* (2006) 146 CalApp.4th 153, at 1600; *Young v RemX, Inc*. (2016) 2 Cal.App.5th 630, at 636.

The latter comment regarding an arbitration that is unduly time consuming or expensive alleviates the proponent's concern about this issue. This appears to be the thrust of the proponent's claims of unevenness in the handling of petitions. Our Appellate Courts held writ relief is available in such an instance.

In addition, our Appellate Courts carved out exceptions where the right to appeal may exist after an order to compel arbitration. *Miranda v Anderson Enters., Inc.* (2015) 241 CalApp.4th 196 addresses this issue when the order compelling arbitration "rings the death knell" for class action claims.

Finally, the appeal is available to preserve a defendant’s rights since a plaintiff gets to choose the initial forum. Regarding those instances where the legislature provided for a writ as the remedy, those all involve changing a venue, rather than the underlying court. Going from one court to another, or from one judge to another, is distinguishable from going from a court to an arbitrator.

RESOLUTION 01-04-2020

DIGEST
Anti-SLAPP Motions: Exception for Enforcement of No-Contest Clauses in Wills and Trusts
Amends Code of Civil Procedure section 425.17 to provide that petitions brought to enforce a no-contest clause in a will or trust shall not be subject to a special motion to strike.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasoning:
This resolution amends Code of Civil Procedure section 425.17 to provide that petitions brought to enforce a no-contest clause in a will or trust shall not be subject to a special motion to strike. This resolution should be approved in principle because petitions to enforce a no-contest clause against a beneficiary who contests a will or trust do not fall within the purpose and intent of the Anti-SLAPP Law, and the Anti-SLAPP Law is contrary to the purpose of the no-contest clause.

The Anti-SLAPP Law was created because the Legislature found that there had been an increase in lawsuits that were "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff asserts claims against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., §425.16, subd. (b)(1).)

The courts have recently found that a petition to enforce a no-contest clause against a beneficiary who contested the validity of a will or trust is subject to an anti-SLAPP motion. In *Urick v. Urick* (2017) 15 Cal.App.5th 1182 (*Urick*), a beneficiary filed a petition for instructions as to whether the no-contest clause of the decedent's trust had been violated after his sister had filed a petition to reform the trust. The sister filed a special motion to strike the petition under Code of Civil Procedure section 425.16, which was granted by the probate court. The beneficiary appealed the probate court's ruling. The *Urick* the court stated: "A cause of action arises from a protected activity under the anti-SLAPP statute if it arises from 'any written or oral statement or writing made before a . . . judicial proceedings.' (Code Civ. Proc., § 425.16, subd. (e)(1).) A 'contest' is 'a pleading filed with the court by a beneficiary that would result in a penalty under a no-contest clause, if the no-contest clause is enforced.' (Prob. Code, § 21310, subd. (a).)" (*Urick*, at p. 1194.) The court found that because a petition alleging a violation of the no-contest clause arises from a pleading filed with the probate court, such petitions were subject to the anti-SLAPP statute. The court concluded that "although policies underlying the no contest provisions have been carefully balanced by the Legislature and the anti-SLAPP procedures may impede some of those goals . . . [t]he language of the anti-SLAPP statute is clear and unambiguous, and it has been applied to other probate court petitions . . . There may be valid reasons to exempt enforcement of no contest clauses from the anti-SLAPP statute, but if so, it is for the Legislature to create an exception." (*Id.* at p.

1195.)

Urick was followed in *Key v. Tyler* (2019) 34 Cal.App.5th 505 (*Key*), which also concluded that petitions to enforce a no-contest clause are subject to an anti-SLAPP motion since "the anti-SLAPP statutory scheme does not create any exception to the anti-SLAPP procedure for actions to enforce no-contest clauses . . . While Key presents reasonable arguments for why the anti-SLAPP statute should not apply to actions to enforce no-contest provisions, those arguments are for the Legislature to consider." (*Key,* at p. 518.)

If successful, the beneficiary's anti-SLAPP motion to a petition to enforce a no-contest clause would result in an early dismissal of the petition, which is contrary to the purpose of the no-contest clause. The purpose of the no-contest clause is to promote public policies for honoring the intent of the transferor's estate plan by discouraging litigation from a beneficiary whose expectations are frustrated. Because of the holdings in *Urick* and *Key*, an exception should be added to Code of Civil Procedure, section 425.17, so that petitions to enforce no-contest clauses in estate planning documents are not subject to the Anti-SLAPP Law. This resolution would provide that exception.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.17 to read as follows:

§ 425.17

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) Section 425.16 does not apply to proceedings to enforce no contest clauses in estate plans.

(~~e~~f) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Presently, pursuant to statute and case law, if a beneficiary files a petition to enforce a no contest clause in valid estate plan, such petition is subject to the anti-SLAPP statute. For example, if someone files a petition to invalidate an estate plan based on capacity, undue influence, etc., and loses, the no contest clause would apply to disallow inheritance by the beneficiary who brought the action to invalidate. To enforce the no contest clause, a petition to determine that the no contest clause applies would be filed. This petition is subject to the California anti-SLAPP statute.

Pursuant to the anti-SLAPP statute, Code of Civil Procedure (C.C.P) section 425.16, a moving party must establish that the claim at issue arises from free speech or petitioning activity

protected by C.C.P. section 425.16. An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."

A "no contest clause" is a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court. (Probate Code § 21310(c).) In essence, any beneficiary trying to enforce a no contest clause and fulfill the Trustor's intent, will be subject to an anti-SLAPP proceeding since no exception has been made to C.C.P. section 425.16.

C.C.P. section 425.17 was enacted to except certain proceedings after it became apparent that there was an abuse of C.C.P. § 425.16.

In *Urick v. Urick* (2017) 15 Cal.App.5th 1182, the court applied the anti-SLAPP statute in connection with a will contest petition filed by a beneficiary alleging fraud. The court stated, "there may be valid reasons to exempt enforcement of no contest clauses from the anti-SLAPP statute, but if so, it is for the Legislature to create an exception."

The Solution: This resolution will permit beneficiaries to enforce valid trust provisions and the intent of Trustors relating to no contest clauses without there being subject to an anti-SLAPP proceeding each and every time such petition for enforcement is filed.

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

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

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

This Resolution proposes to make Anti-SLAPP motions inapplicable to proceedings to enforce no-contest clauses.

TEXCOM approves this Resolution in principle. TEXCOM agrees that making Anti-SLAPP motions inapplicable to proceedings to enforce no-contest clauses is appropriate.

RESOLUTION 01-05-2020

DIGEST
Notices to Consumer: Service of Notice on Personal Representative or Trustee
Amends Code of Civil Procedure section 1985.3 to provide that a notice to consumer may be served on a deceased consumer's personal representative or trustee.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 05-05-2014 and 03-12-2008, which were disapproved, and Resolutions 11-09-2005 and 03-05-2008, which were withdrawn.

Reasons:
This resolution amends Code of Civil Procedure section 1985.3 to provide that a notice to consumer may be served on a deceased consumer's personal representative or trustee. This resolution should be disapproved because a personal representative or trustee may not exist, may not be readily ascertainable, and a death certificate may not be obtainable by the subpoenaing party, and as such the proposed requirement would create an undue burden on the subpoenaing party without solving challenges with serving consumer notice.

Under current law, when a party seeks the production of a consumer's personal records, a Notice to Consumer must be served on that consumer that they are made aware of the production request and have an opportunity to object to the production of private records. (Code Civ. Proc., § 1985.3.) Service of the subpoenas must be timed properly so that a witness is given sufficient time to gather the records for production (Code Civ. Proc., § 2020.220, subd. (a)), and with sufficient time for service of the Notice to Consumer so that the consumer has the required notice and opportunity to object before the witness produces the records (Code Civ. Proc., §§ 1985.3, subd. (b), and 2025.270, subd. (c)). This timing also allows the subpoenaed witness an opportunity to contact the consumer directly to determine whether there are any objections to the requested production. However, current law is silent as to how service of the Notice to Consumer is to be accomplished when the consumer is deceased.

The resolution's suggested solution is to specify that "if the consumer is deceased and a copy of the consumer's death certificate is provided to the witness," then the Notice to Consumer (and the related required documents) are to be served on the deceased consumer's personal representative or trustee.

However, there are several problems with the proposed solution. First, the subpoenaing party may not be among those persons entitled to obtain a death certificate for the deceased consumer and therefore could not comply with the first proposed requirement. Second, there may not be a personal representative appointed, since a probate case may not have been opened. Third, in instances where the consumer established a trust, unless the trust was recorded (and even if recorded, the trust may have been amended and a substitute trustee appointed), it would be difficult, if not impossible, for the subpoenaing party to identify the trustee. Fourth, this solution

would not give the subpoenaing party the option to serve the Notice to Consumer on a deceased consumer's successor(s) in interest who can more easily be ascertained and who would have a vested interest in raising privacy objections on behalf of the deceased consumer. Accordingly, this proposed solution creates an extra burden on the subpoenaing party without an easy means of identifying who should be served with the Notice to Consumer.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1985.3 to read as follows:

§ 1985.3

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

(1) "Personal records" means the original, any copy of books, documents, other writings, or electronically stored information pertaining to a consumer and which are maintained by any "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code , attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code , or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code , or psychotherapist, as defined in Section 1010 of the Evidence Code , or a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code .

(2) "Consumer" means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.

(3) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the Government Code , or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(4) "Deposition officer" means a person who meets the qualifications specified in Section 2020.420 .

(b) Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum, of the affidavit supporting the issuance of

the subpoena, if any, and of the notice described in subdivision (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service shall be made as follows:

(1) To the consumer personally, or at his or her last known address, or in accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his or her attorney of record. If the consumer is a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is at least 12 years of age.

(2) Not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail.

(3) At least five days prior to service upon the custodian of the records, plus the additional time provided by Section 1013 if service is by mail.

(c) Prior to the production of the records, the subpoenaing party shall do either of the following:

(1) Serve or cause to be served upon the witness a proof of personal service or of service by mail attesting to compliance with subdivision (b).

(2) Furnish the witness a written authorization to release the records signed by the consumer or by his or her attorney of record. The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer acted with the consent of the consumer, and that any objection to release of records is waived.

(d) A subpoena duces tecum for the production of personal records shall be served in sufficient time to allow the witness a reasonable time, as provided in Section 2020.410 , to locate and produce the records or copies thereof.

(e) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection as provided in subdivision (g) prior to the date specified for production on the subpoena; ?and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision.

(f) A subpoena duces tecum for personal records maintained by a telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code , shall not be valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as required by Section 2891 of the Public Utilities Code .

(g) Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given to the witness and deposition officer at least five days prior to production. The failure to provide notice to the deposition officer shall not invalidate the motion to quash or modify the subpoena duces tecum but may be raised by the

deposition officer as an affirmative defense in any action for liability for improper release of records.

Any other consumer or nonparty whose personal records are sought by a subpoena duces tecum may, prior to the date of production, serve on the subpoenaing party, the witness, and the deposition officer, a written objection that cites the specific grounds on which production of the personal records should be prohibited.

No witness or deposition officer shall be required to produce personal records after receipt of notice that the motion has been brought by a consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.

The party requesting a consumer's personal records may bring a motion under Section 1987.1 to enforce the subpoena within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.

(h) Upon good cause shown and provided that the rights of witnesses and consumers are preserved, a subpoenaing party shall be entitled to obtain an order shortening the time for service of a subpoena duces tecum or waiving the requirements of subdivision (b) where due diligence by the subpoenaing party has been shown.

(i) Nothing contained in this section shall be construed to apply to any subpoena duces tecum which does not request the records of any particular consumer or consumers and which requires a custodian of records to delete all information which would in any way identify any consumer whose records are to be produced.

(j) This section shall not apply to proceedings conducted under Division 1 (commencing with Section 50), Division 4 (commencing with Section 3200), Division 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200), of the Labor Code.

(k) Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the personal records sought by a subpoena duces tecum.

(l) If the subpoenaing party is the consumer, and the consumer is the only subject of the subpoenaed records, notice to the consumer, and delivery of the other documents specified in subdivision (b) to the consumer, is not required under this section.

(m) If the consumer is deceased and a copy of the consumer's death certificate is provided to the witness, notice to the consumer, and delivery of the other documents specified in subdivision (b) to the consumer, shall be provided to the deceased consumer's personal representative or to the trustee of the deceased consumer's trust.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Generally the right of privacy dies with a person. (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59; *James v. Screen Gems, Inc.* (1959) 174 Cal.App.2d 650.) But as to a decedent's medical records, California law also provides that the physician-patient and psychotherapist-patient privileges survive after patient's death in same fashion as

attorney-client privilege as long as there is a personal representative in place (Evid Code §§993-994; 1013-1014)

It is thus unclear whether (or to whom) a subpoenaing party needs to provide a notice to consumer when the consumer is deceased. Adding to the confusion, Code of Civil Procedure §1985.3 is silent on whether a notice to consumer is required (and if so, who it should be sent to) where a consumer is deceased. Moreover, in practice, some witnesses accept a notice to consumer sent to a trustee—while others insist on a notice to consumer being sent to a personal representative (even though in the majority of post-death cases, there is no need for a probate proceeding and thus there is never any personal representative in place). This causes confusion and creates an unnecessary layer of cost and delay—which the proposed amendment will resolve.

The Solution: The proposed amendment will eliminate the confusion during discovery regarding service of a Notice to Consumer when the consumer is deceased by providing that if a consumer is deceased and a copy of the consumer's death certificate is provided to the witness, then notice to the consumer, and delivery of the other documents specified in subdivision (b) of Section 1985.3 to the consumer, shall be provided to the deceased consumer's personal representative or to the trustee of the deceased consumer's trust. In addition to eliminating the confusion that currently exists, this Resolution will remove the unnecessary layer of cost and delay associated with opening a probate proceeding for the appointment of a personal representative for the sole and limited purpose of having someone in place to receive notices to consumer during litigation when the consumer whose records are being sought is deceased.

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

CURRENT OR PRIOR RELATED LEGISLATION
None

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RESPONSIBLE FLOOR DELEGATE: Gina D. Stein

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

While this resolution does attempt to solve the difficult problem of who is to receive a Notice to Consumer when the "consumer" is deceased, it is too limited in scope. Not all decedents have either a personal representative or a trustee, and indeed many do not, and finding such person and their address continues to be problematic. If there is no personal representative or trustee, the added language requires the very thing the amendment is designed to avoid, and will require someone to open a probate to appoint a personal representative to receive the Notice so

documents can be obtained. This issue could be cured by an amendment adding the term "successor in interest" as that phrase is defined in Code of Civil Procedure § 377.11.

RESOLUTION 01-06-2020

DIGEST
Settlements: Retention of Jurisdiction for Enforcement of Settlement
Amends Code of Civil Procedure section 664.6 to allow the court, upon written request of counsel, to retain jurisdiction over enforcement of a settlement after a dismissal has been entered.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
The resolution is similar to 13-10-2009, which was approved in principle.

Reasons:
This resolution amends Code of Civil Procedure section 664.6 to allow the court, upon written request of counsel, to retain jurisdiction over enforcement of a settlement after a dismissal has been entered. This resolution should be disapproved because jurisdictional matters, especially where a judgment may be entered, is weighty enough to require a party's signature supporting the request, rather than merely establishing it based upon the request of a lawyer.

Current law requires a two-step process for the court to retain jurisdiction over a concluded case. First, the parties, themselves, in their signed settlement agreement, or on the record, must request that the court retain jurisdiction. Second, the court must issue an order reserving jurisdiction. In the past, counsel simply added a reservation of jurisdiction on the Judicial Council's Request for Dismissal form. But, in *Mesa RHF Partners, LLP v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 918, the court rejected this procedure. It ruled that jurisdiction for purposes of enforcing a settlement is only met by either filing (a) a stipulation requesting the court retain jurisdiction with a copy of the signed settlement, or (b) a stipulation signed by the parties, themselves requesting the court retain jurisdiction for purposes of enforcing the settlement.

The resolution removes the requirement that the request to retain jurisdiction be signed by the parties. It would instead allow the court to retain jurisdiction for enforcing the settlement if prior to the entry of dismissal any party, or attorney, makes the request on behalf of all parties to the settlement.

This modification does not resolve the concerns set out in the *Mesa RHF Partners, LLP* case. First, the resolution refers to a "prescribed form." The *Mesa* court found that the "prescribed form" should be the very Stipulation and Order that the resolution seeks to avoid. (*Id.* at p. 918.) Second, and more worrisome, is that the resolution permits one side to make this request without the consent of the other side. The settlement agreement, which is the agreement of the parties and must be signed by the parties, may be silent on the issue of retaining jurisdiction, whether by intention or inadvertence. The resolution would permit the attorney for one side or the other to unilaterally request that the court retain jurisdiction. This is contrary to the requirement that the *parties* make the request to retain jurisdiction, and that that request be made *before* dismissal. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440.)

Notably, this resolution is similar to Assembly Bill 2723 (Chiu) (2019-2020 Reg. Sess.), a bill now pending in the state Assembly, and Senate Bill 1105 (Umberg) (2019-2020 Reg. Sess.), a bill now pending in the state Senate. However, while AB 2723 would allow attorneys to stipulate to enforcing settlement by entry of judgment, the parties would still be required to agree to the settlement and any retention of jurisdiction by the court. Similarly, while SB 1105 has different provisions, but still requires the stipulation by the parties themselves.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Code of Civil Procedure Section 664.6, to read as follows:

§ 664.6

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. <u>If a request of the parties for retention of jurisdiction is made by any party or any party's attorney of record, who makes the request on behalf of all settling parties and so represents to the court via a prescribed form or other signed statement filed with the court, then the court shall retain jurisdiction over the settling parties to enforce the settlement until performance in full of the terms of the settlement. A request by a party or its counsel for retention of jurisdiction under this section must be made at or before the time the request for dismissal is filed with the court.</u>

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

PROPONENT: Roger Rosen, Marian Fraigun, Leslie Shear, Erin Joyce, Caroline Vincent, Alice Graham, Zein Obagi, Alice Graham, Matthew Norris, Howard Gould, Nancy Gray, Mohamad Ahmad, Carolin K. Shining

STATEMENT OF REASONS

<u>The Problem</u>: Recent case law (*Satya v. Chu* (2017) 17 Cal.App.5th 960) and strictly interprets CCP Section 664.6 such that a court's entry of the standard Request for Dismissal form does neither creates nor constitutes retention of jurisdiction over matters for post-dismissal settlement enforcement. (See also *Mesa RHF Partners, LLP v. City of Los Angeles* (2019) 33 Cal.App.5th 913 (2019). It is generally impractical for settling parties to appear in court to orally request the retention of jurisdiction. As a result, counsel by settling parties have been forced to create a separate stipulation that is appended to the standard Request for Dismissal Judicial Council form. This creates an extra step for litigants and extra paperwork for the courts. Such extra work runs counter to both the policy of encouraging early settlement of litigation, and to access to justice through simplicity.

The Solution: The proposed language returns the law to the custom and practice as to how the court retains jurisdiction by simple request rather than a formal stipulation. This avoids the burdens implemented by the strict interpretation of CCP 664.6 in the Satya and Mesa cases. Indeed, these requests could be very simply effectuated by a modification of the CIV-100 Judicial Council form to attest that all parties request such retention. A simple "check box" with appropriate language could be used – something that the Judicial Council does not have the authority to do in light of the recent opinions. This simple revision of the law will simplify and encourage settlements, a primary public policy goal of the California judicial process.

IMPACT STATEMENT
This resolution will overturn those portions of *Satya v. Chu* (2017) 17 Cal.App.5th 960 (2017) and *Mesa RHF Partners, LLP v. City of Los Angeles* (2019) 33 Cal.App.5th 913 which overly strictly interpret CCP Section 664.6. The amendments will return the law to the manner in which litigants have practiced since at far back as 1995 when CCP Section 664.6 was adopted.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Carolin K. Shining (and if not present, then Erin Joyce).

COUNTERARGUMENTS AND COMMENTS
BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

This resolution does not solve the problem of requiring two documents – a written settlement agreement and a separate Stipulation and Order retaining jurisdiction by the Court—in order for the Court to retain jurisdiction to enforce a settlement. Moreover, the resolution as written permits only one attorney to make a request—and the resolution is unclear whether that request may be orally made to the Court. The current procedure as articulated in *Mesa RHF Partners, LLP v. City of Los Angeles* (2019) 33 Cal.App.5th 913, is relatively simple and sets a clear procedure for reserving jurisdiction. This resolution should be disapproved.