

# **Beverly Hills Bar Association: Working to Make Changes in the Law**

By Elizabeth A. Moreno, Esq.  
*Co-chair of BHBA ResCom*

This year the BHBA Resolutions Committee did not dwell on the unsolvable economic downturn but turned their energies to achievable results and drafted eight resolutions. This year's resolutions have an impact on many professionals from mediators, dilatory judges, coroners, last minute litigants, employers and good Samaritans. The Resolutions Committee solicits and authors resolutions recommending proposed changes to state and federal substantive law and procedure. The resolutions will be presented to the Conference of Delegates of the California Bar Associations in San Diego this September. A detailed description of the resolutions is set forth below.

## **BHBA- 1**

### Settlement Agreements

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend 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 any party in writing to the court, the court may shall retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. The case will thereafter be exempt from all case disposition requirements and from mandatory or discretionary dismissal for failure to prosecute.

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

PROPONENT: Beverly Hills Bar Association.

#### STATEMENT OF REASONS

Existing Law: Existing law permits but does not require the court to retain jurisdiction over matters which have been settled but performance under the settlement agreement will not be completed within the 45 days. California Rules of Court Rule 3.1385(b) provides that any party seeking affirmative relief must file a dismissal within 45 days of filing notice of settlement or else the court must dismiss the action absent a showing of good cause.

This Resolution: This resolution would require the court to retain jurisdiction over cases where performance of the settlement agreement will not occur within 45 days. Such cases would be

exempt from mandatory case disposition and prosecution requirements so that they will not impact any statistical analysis of the case disposition history of a particular judge.

The Problem: More and more cases are being resolved by an agreement whereby one party will pay the other an amount in settlement over a lengthy period of time, often a period of years. Some judges in some counties retain jurisdiction to enforce the settlement pursuant to CCP section 664.6 until full performance is complete and the party seeking affirmative relief is in a position to file a dismissal. Other judges do not; therefore, in those cases, if payments are not made, an entire new action for breach must be filed and prosecuted consuming additional time and resources both for the aggrieved party and the court.

#### IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Elizabeth A. Moreno

### **BHBA- 2**

#### Written Commission Agreements

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend California Labor Code Section 2751 to read as follows:

#### § 2751

Whenever any employer ~~who has no permanent and fixed place of business in this State~~ enters into a contract of employment with an employee for services to be rendered within this State and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid.

The employer shall give a signed copy of each such contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee.

As used in this section, "commissions" does not include short term productivity bonuses such as are paid to retail clerks; and it does not include bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: The existing law is unconstitutional pursuant to decisional law.

This Resolution: This resolution amends California Labor Code section 2751 to eliminate provisions held unconstitutional by the United States District Court, Northern District of California, in *Lett v. Paymentech, Inc.*, (N.D. California 1999) 81 F.Supp.2d 992 on Commerce Clause and Equal Protection grounds.

The Problem: Although the statute remains on the books, it is practically unenforceable due to the holding in *Lett*. The statute purports to require “any employer who has no permanent and fixed place of business in this State [and who] enters into a contract of employment with an employee for services to be rendered within this State [,which contract]. . . contemplate[s]. . . payment of the employee involve[ing] commissions” to reduce that contract to writing setting forth “the method by which the commissions shall be computed and paid.”

The statute contains additional provisions requiring the employer to provide each affected employee with a signed copy of the contract and obtain from each such employee a signed receipt for the contract, and defining “commissions” as excluding “short term productivity bonuses such as are paid to retail clerks; and it does not include bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.” This amendment would have no effect on those provisions.

#### IMPACT STATEMENT

This resolution would also make effective Labor Code Section 2752, which provides that “[a]ny employer who does not employ an employee pursuant to a written contract as required by Section 2751 shall be liable to the employee in a civil action for triple damages.”

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RESPONSIBLE FLOOR DELEGATE: Michael R. Sohigian

### **BHBA- 3**

#### Unattended Deaths

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code Section 27941 to read as follows:

§27491

It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; unattended deaths; deaths where the deceased has not been attended by either a physician or a registered nurse, who is a member of a hospice care interdisciplinary team, as defined by subdivision (e) of Section 1746 of the Health and Safety Code in the ~~20~~ **30** days before death; deaths related to or following known or

suspected self-induced or criminal abortion; known or suspected homicide, suicide, or accidental poisoning; deaths known or suspected as resulting in whole or in part from or related to accident or injury either old or recent; deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or where the suspected cause of death is sudden infant death syndrome; death in whole or in part occasioned by criminal means; deaths associated with a known or alleged rape or crime against nature; deaths in prison or while under sentence; deaths known or suspected as due to contagious disease and constituting a public hazard; deaths from occupational diseases or occupational hazards; deaths of patients in state mental hospitals serving the mentally disabled and operated by the State Department of Mental Health; deaths of patients in state hospitals serving the developmentally disabled and operated by the State Department of Developmental Services; deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another; and any deaths reported by physicians or other persons having knowledge of death for inquiry by coroner. Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies.

In any case in which the coroner conducts an inquiry pursuant to this section, the coroner or a deputy shall personally sign the certificate of death. If the death occurred in a state hospital, the coroner shall forward a copy of his or her report to the state agency responsible for the state hospital. The coroner shall have discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances and falling within the provisions of this section, and if inquiry determines that the physician of record has sufficient knowledge to reasonably state the cause of a death occurring under natural circumstances, the coroner may authorize that physician to sign the certificate of death. For the purpose of inquiry, the coroner shall have the right to exhume the body of a deceased person when necessary to discharge the responsibilities set forth in this section.

Any funeral director, physician, or other person who has charge of a deceased person's body, when death occurred as a result of any of the causes or circumstances described in this section, shall immediately notify the coroner. Any person who does not notify the coroner as required by this section is guilty of a misdemeanor.

**PROPONENT:** Beverly Hills Bar Association

**STATEMENT OF REASONS:**

Existing law: Current law provides that the coroner must inquire into any death where the deceased had not been attended by a physician within 20 days before death even where the death is expected from a known cause and no other circumstances exist that would warrant such inquiry, such as a suspicious or unusual death.

This Resolution: The resolution would change the length to time that a person has been attended by a physician or registered nurse to 30 days instead of 20 days.

The Problem: Routine physician visits for stable patients in skilled nursing facilities (“SNF”) are required by law every 30 days; this is all that is compensated by Medicare/Medi-Cal, the theory being that SNF patients should be stable enough to only need a doctor once a month – if not, they should be transferred to an acute hospital. Some people in the SNF do not wish to be hospitalized and wish instead to die a natural death. If they have the misfortune to have their

monthly doctor visit on the 5<sup>th</sup> of the month and die on the 26<sup>th</sup>, there will have to be clearance from the coroner before burial can take place.

The majority of problems with the 20 day coroner statute arise in the context of terminally ill individuals who are residents of skilled nursing facilities. In the SNF there is 24 hour nursing care available so there is generally no reason for the physician to visit more frequently than every 30 days for a patient with a known terminal illness. If a non-terminally ill patient develops a life-threatening illness, he or she will be transferred to an acute facility where the patient will be seen on a daily basis.

In these types of cases, the coroner's "inquiry" is a ministerial function. The death is reported and burial cannot take place until a deputy coroner signs a document allowing the burial. Certainly if there are any concerns about foul play, the coroner is obligated to inquire into all "violent, sudden or unusual deaths" under current law and this would not change. This statute would affect only those deaths that are reported solely because of the timing of a doctor's visit.

## IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Elizabeth A. Moreno

## BHBA- 4

### Submitted Decision Pending More Than 90 Days

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council add California Rules of Court, rule 2.910 to read as follows:

#### Rule 2.910.

Duty of Counsel and Pro Se Litigants When Cause Remains Pending And Undetermined for More Than 90 Days After Submission for Decision.

(a) When any cause remains pending and undetermined for more than 90 days after it is deemed submitted to a judge or commissioner pursuant to Rule 2.900, then all counsel and all parties representing themselves shall, within ten (10) days after the end of the month in which the 90-day period has expired, file with the judge or commissioner a joint request that such determination be made without further delay. A copy of the request shall be delivered to the presiding judge of the trial court. If there is no presiding judge or if the presiding judge is the subject of the request, the request shall be delivered to the Commission on Judicial Performance.

(b) In the event one or more of the counsel or parties fails or refuses to join in the request referred to in paragraph (a) above for any reason, such request shall be sent by the remaining counsel or parties to the presiding judge of the trial court rather than to the judge or commissioner directly. If there is no presiding judge or if the presiding judge is the subject of the request, the request shall be delivered to the Commission on Judicial Performance.

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

PROPONENT: Beverly Hills Bar Association

#### STATEMENT OF REASONS

Existing Law: Government Code section 68210 provides: “No judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision.” However, there is no other legal assurance that a court or commissioner will actually decide the case within 90 days, and no remedy for the litigants in case a court or commissioner does not comply.

This Resolution: Provides a mechanism for parties to jointly present to the delinquent judge or commissioner, and simultaneously to the presiding judge of the trial court, notice that a matter has remained pending more than 90 days after submission for decision, in order to secure a prompt decision without prejudicing the interests of any party. Further it provides a mechanism for parties to proceed even if not all parties agree to join in the request for prompt disposition.

The Problem: Occasionally judges in courts of record and commissioners have failed to decide cases within 90 days of submission for decision. If judges repeatedly fail to decide cases within 90 days of submission, and execute requisite affidavits declaring that no cause remained pending and undetermined before him or her for 90 days after submission (in order to receive their salary), the California Supreme Court has ruled that this is a failure to perform one’s duties and is grounds for public censure or other sanction. *In re Jensen*, (1978) 24 Cal.3d 72. However, the failure to timely decide cases does not afford a basis to attack the decision that is ultimately reached. *Hassanally v. Firestone*, (1996) 51 Cal.App.4th 1241.

No remedy currently exists for the litigants to secure a timely decision when the matter remains undetermined. Any litigant who raises the issue unilaterally currently risks incurring the displeasure of the judge or commissioner who has not yet ruled on a matter. Time may, in fact, be of great consequence to the litigant, and the prospect that – someday – the delinquent judge or commissioner will be sanctioned provides scant comfort.

This Rule of Court would impose a duty on all counsel and pro se litigants to raise the issue, so that no single counsel or litigant risks incurring the displeasure of the delinquent judicial officer by raising the issue. It also provides the mechanism for counsel and parties to proceed even if all counsel and parties fail to join. It is based in part on the language of Rule 83-9.2 of the Local Rules of the U.S. District Court for the Central District of California.

#### IMPACT STATEMENT:

This resolution does not affect any other laws.

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**BHBA- 5**

Civil Trial Court Annexed Mediator Panels

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend California Code of Civil Procedure 1775, 1775.2, 1775.3 and 1775.8 and that the Judicial Council amend California Rules of Court, rule 3.870 and Rule 10.781 to read as follows:

§1775

The Legislature finds and declares that:

(a) The peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government under Article VI of the California Constitution.

(b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.

(c) Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.

(d) Mediation and similar alternative processes can have the greatest benefit for the parties in a **civil** action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a **civil** action.

(e) ~~As a pilot project in Los Angeles County and in other~~ In counties which elect to apply this title, courts should be able to refer cases to appropriate dispute resolution processes such as judicial arbitration and mediation as an alternative to trial, consistent with the parties' right to obtain a trial if a dispute is not resolved through an alternative process.

(f) The purpose of this title is to encourage the use of court-annexed alternative dispute resolution methods in general, and mediation in particular. It is estimated that the average cost to the court for processing a civil case of the kind described in Section 1775.3 through judgment is three thousand nine hundred forty-three dollars (\$3,943) for each judge day, and that a substantial portion of this cost can be saved if these cases are resolved before trial. The Judicial Council, through the Administrative Office of the Courts, shall conduct a survey to determine the number of cases resolved by alternative dispute resolution authorized by this title, and shall estimate the resulting savings realized by the courts and the parties. The results of the survey shall be included in the report submitted pursuant to Section 1775.14. The programs authorized

by this title shall be deemed successful if they result in estimated savings of at least two hundred fifty thousand dollars (\$250,000) to the courts and corresponding savings to the parties.

#### §1775.2

~~(a) This title shall apply to the courts of the County of Los Angeles. (b)~~

(a) A court of any county, at the option of the presiding judge, may elect whether or not to apply this title to eligible actions filed in that court, and this title shall not apply in any court which has not so elected. An election under this subdivision may be revoked by the court at any time.

(b) A court of any county, at the option of the presiding judge, may elect whether or not to apply this title to eligible actions filed in that court, and this title shall not apply in any court which has not so elected. An election under this subdivision may be revoked by the court at any time.

(c) Courts are authorized to apply this title to all civil actions pending or commenced on or after January 1, 1994.

#### §1775.3

~~(a) In the courts of the County of Los Angeles and in other courts that elect to apply this title, all at-issue civil actions in which arbitration is otherwise required pursuant to Section 1141.11, whether or not the action includes a prayer for equitable relief, may be submitted to mediation by the presiding judge or the judge designated under this title as an alternative to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3.~~

(b) Any civil action otherwise within the scope of this title in which a party to the action is a public agency or public entity may be submitted to mediation pursuant to subdivision (a).

#### §1775.8.

(a) The compensation of court-appointed mediators for cases where the civil action is submitted to mediation pursuant to section 1775.3, shall be the same as the compensation of arbitrators pursuant to Section 1141.18, except that no compensation shall be paid prior to the filing of a statement of nonagreement by the mediator pursuant to Section 1775.9 or prior to settlement of the action by the parties.

(b) All administrative costs of mediation, ordered pursuant to Section 1775.3 including compensation of mediators, shall be paid in the same manner as for arbitration pursuant to Section 1141.28. Funds allocated for the payment of arbitrators under the judicial arbitration program shall be equally available for the payment of mediators under this title.

(c) In any proceeding where mediation is not ordered pursuant to section 1775.3 and the parties stipulate to mediation, the parties bear the cost of mediation. The parties will determine how the costs of mediation are shared. The court will maintain a list of mediators who provide pro bono services for a party who stipulates to mediation and in good faith files a declaration with the court requesting pro bono mediation on the grounds of limited means.

The rules in this chapter implement the Civil Action Mediation Act, Code of Civil Procedure section 1775 et seq. Under section 1775.2, they apply in ~~the Superior Court of California, County of Los Angeles and in other~~ courts that elect to apply the act.

Rule 10.781.

(a) Lists of neutrals

If a court makes available to litigants a list of ADR neutrals, the list must contain, at a minimum, the following information concerning each neutral listed:

- (1) The types of ADR services available from the neutral;
- (2) The neutral's résumé, including ADR training and experience; ~~and~~
- (3) The fees charged by the neutral for each type of service;. and
- (4) The number of cases the neutral will serve as a pro bono mediator.

(b) Requirements to be on lists.

In order to be included on a court list of ADR neutrals, an ADR neutral must sign a statement or certificate agreeing to:

- (1) Comply with all applicable ethics requirements and rules of court and;
- (2) Serve as an ADR neutral on a pro bono ~~or modest means~~ basis in at least one case per year, not to exceed eight hours, if requested by the court. ~~The court must establish the eligibility requirements for litigants to receive, and the application process for them to request, ADR services on a pro bono or modest means basis. Nothing in this rule shall prevent a mediator from choosing to serve pro bono for more than one case per year or longer than eight hours. The court will randomly assign the mediator who will serve as a mediator on a pro bono basis.~~

- (3) Serve as an ADR neutral when one or more parties are self-represented.

(4) A mediator who serves pro bono on any case shall not charge a fee for any portion of the pro bono case.

(c) Privilege to serve as a court-program neutral.

Inclusion on a court list of ADR Neutrals and eligibility to be recommended, appointed, or compensation by the court to serve as a neutral are privileges that are revocable and confer no vested right on the neutral.

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

PROPONENT: Beverly Hills Bar Association.

#### STATEMENT OF REASONS

Existing Law: The existing law makes mediation a pilot project, does not encourage pro bono mediation or encourage mediators to mediate cases involving self represented parties.

This Resolution: This resolution recognizes that mediation is no longer a 'pilot project', makes compliance with the mediation statute an elective for Los Angeles County, as it is for every other county, that limited means parties can self declare they should be afforded unlimited pro bono mediation services, and the parties who stipulate to mediation, will be responsible for the cost of mediation.

The Problem: Mediation is no longer a pilot project, should not target just one county and those references should be deleted in CCP section 1775. Mediation has taken hold in all the California Courts and the statute needs to be updated.

Parties who voluntarily stipulate to mediation will bear the cost of the mediation. However, those parties of limited means will be provided a pro bono mediation services if they in good faith file a declaration with the court requesting pro bono mediation services. This assures that pro bono mediation services, with no limitation on the length, will be available to those of limited means. Presently, many courts only give a few hours of pro bono mediation per case, then a mediator can charge his/her market rate. This is a burden on those of limited means. Pro bono is further encouraged because California Rule of court 10.781 gives the mediator right to determine the number of pro bono mediations she or he can hear, instead of the court mandatory one at 8 hours. Many parties resort to self-representation out of economic necessity, not just for indigent individuals, but for large numbers of lower economic and middle class litigants who find the cost of legal representation prohibitive. There is a need to increase court services for self-represented individuals and to promote access to justice. Many court mediators, decline to mediate an action where a party is self-represented because of the self-represented party's lack of knowledge of the law and legal procedures. Under amended CRC 10.781(b, ) a mediator on a court list is required to mediate actions involving self represented individuals and not be given the option to turn down the mediation because the party is self-represented

In any action where a mediator is providing pro bono service, the mediator shall be randomly selected, instead of self-selected. The court's mediators list on a website usually contains biographical information about the mediator. A self-selection of the mediator by the party or the party's attorney does not promote inclusiveness and a fair and representative system. A party's self-selection of a mediator is not based upon a procedure where the person who makes the selection is blind to ethnicity, culture, or gender. The court's random selection of a pro bono mediator will not result in a party choosing based upon ethnicity, culture, or gender. This assures that all mediators despite their ethnicity, culture or gender will be chosen to provide pro bono mediation services.

#### IMPACT STATEMENT

This Resolution does not affect any other law, statute or rule. This resolution was not presented in 2008. This resolution addresses pro bono mediation services for the limited means and self-represented parties unlike resolution 3-03-2008.

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RESPONSIBLE FLOOR DELEGATE: Elizabeth A. Moreno

#### **BHBA- 6**

#### Exercising Recusal of a Judge

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend California Code of Civil Procedure 170.6 to read as follows:

§170.6.

(a)(1) No judge, court commissioner, or referee of any superior court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. Where the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall any judge, court commissioner, or referee entertain the motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion shall be made not later than the commencement of the hearing. A motion made after trial by one who was not a party to that trial but is sought to be added as a judgment debtor shall not be denied because it is made after trial. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (3), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has



Section 392) of Part 2, and this section shall be construed as cumulative thereto.

(c) If any provision of this section or the application to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

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

PROPONENT: Beverly Hills Bar Association

#### STATEMENT OF REASONS

Existing Law: The law is currently silent as to whether one not party to trial may move for peremptory disqualification of judicial officer in a proceeding that is subsequent to trial, rather than continuation of it.

This Resolution: This resolution amends California Code of Civil Procedure section 170.6 to provide guidance in cases where a third party is sought to be brought into the case after trial, such as by motion under Code of Civil Procedure section 187 to add a party as judgment debtor under alter ego principles.

The Problem: Case law provides, “[i]f a new cause or contested proceeding not involving substantially the same issues as an earlier finalized proceeding is later commenced, a party who first appears in the new proceeding, and who may have had no interest to protect in the earlier proceeding, should not be barred from exercising a peremptory challenge under [Code of Civ. Proc.] section 170.6 by a trial or judicial determination of contested fact issues in the earlier proceeding.” *Stephens v. Superior Court* (2002) 96 Cal.App.4<sup>th</sup> 54, 61. Appellate courts have applied the *Stephens* rule in writ proceedings challenging trial court orders striking peremptory challenges to judicial officers filed by new parties to a subsequent proceeding. *See, e.g., Auto Auction v. Ritz Leasing, etc., et al.*, Los Angeles Superior Court Case No. BC 324 712, Second District Appeal No. B211339. But there is no published authority to that effect. The resolution would provide notice and guidance to future litigants.

#### IMPACT STATEMENT

This does not impact any other California laws.

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RESPONSIBLE FLOOR DELEGATE: Michael R. Sohigian

## Special Interrogatories

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend the Code of Civil Procedure Sections 2030.030 and 2030.040 and to repeal Section 2030.050 to read as follows:

### §2030.030

(a) A party may propound to another party either or both of the following:

(1) ~~Thirty five~~ Fifty specially prepared interrogatories that are relevant to the subject matter of the pending action.

(2) Any additional number of official form interrogatories, as described in Chapter 17 (commencing with Section 2033.710), that are relevant to the subject matter of the pending action.

(b) Except as provided in Section 2030.070 and in family law cases, unless stipulated or ordered by the court, no party shall, as a matter of right, propound to any other party more than ~~35~~ 50 specially prepared interrogatories including subparts, without first obtaining leave of court to do so by way of a noticed motion. If the initial set of interrogatories does not exhaust this limit, the balance may be propounded in subsequent sets.

(c) ~~Unless a declaration as described in Section 2030.050 has been made, leave of court to propound more than 50 interrogatories including subparts, has first been obtained by way of a noticed motion or the parties have stipulated to a greater number,~~ a party need only respond to the first ~~35~~ 50 specially prepared interrogatories served, if that party states an objection to the balance, under Section 2030.240, on the ground that the limit has been exceeded.

### §2030.040

~~(a) Subject to the right of the responding party to seek a protective order under Section 2030.090, any party who attaches a supporting declaration as described in Section 2030.050 may propound a greater number of specially prepared interrogatories to another party if this greater number is warranted because of any of the following:~~

(a) In ruling on a motion for leave to propound more than 50 specially prepared interrogatories including subparts pursuant to Section 2030.030, the court shall grant the motion if it finds that any of the following factors warrant relief:

(1) The complexity or the quantity of the existing and potential issues in the particular case.

(2) The financial burden on a party entailed in conducting the discovery by oral deposition.

(3) The expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.

~~(b) If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party shall have the burden of justifying the number of these interrogatories~~

(b) The court shall impose a monetary sanction on any party who makes or opposes a motion made under Section 2030.030 unless the court finds that the motion was made or opposed with substantial justification or that other facts would make the imposition of sanction unjust.

**§2030.050.**

~~Any party who is propounding or has propounded more than 35 specially prepared interrogatories to any other party shall attach to each set of those interrogatories a declaration containing substantially the following:~~

~~—DECLARATION FOR ADDITIONAL DISCOVERY~~

~~I, \_\_\_\_\_, declare: 1. I am (a party to this action or proceeding appearing in propria persona) (presently the attorney for \_\_\_\_\_, a party to this action or proceeding). 2. I am propounding to \_\_\_\_\_ the attached set of interrogatories. 3. This set of interrogatories will cause the total number of specially prepared interrogatories propounded to the party to whom they are directed to exceed the number of specially prepared interrogatories permitted by Section 2030.030 of the Code of **Civil Procedure**. 4. I have previously propounded a total of \_\_\_\_\_ interrogatories to this party, of which \_\_\_\_\_ interrogatories were not official form interrogatories. 5. This set of interrogatories contains a total of \_\_\_\_\_ specially prepared interrogatories. 6. I am familiar with the issues and the previous discovery conducted by all of the parties in the case. 7. I have personally examined each of the questions in this set of interrogatories. 8. This number of questions is warranted under Section 2030.040 of the Code of **Civil Procedure** because \_\_\_\_\_. (Here state each factor described in Section 2030.040 that is relied on, as well as the reasons why any factor relied on is applicable to the instant lawsuit.) 9. None of the questions in this set of interrogatories is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation. I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on \_\_\_\_\_.~~

~~\_\_\_\_\_ (Signature)  
—Attorney for \_\_\_\_\_~~

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: A party can only propound 35 specially prepared interrogatories. If a party wants to propound additional interrogatories they must execute a declaration of necessity.

This Resolution: This resolution would change the number of specially prepared interrogatories to 50 and require a party to seek leave of court or stipulate with the opposing party for more than 50 specially prepared interrogatories.

The Problem: The purpose of the proposed revisions is to deter abusive discovery and “paper wars”. *Day v. Rosenthal* (1985) 170 Cal. App.3d 1125, 1172, 217 Cal.Rptr. 89 (time necessary to answer nine sets of interrogatories estimated to be 1,600 hours) *Deyo v. Kilbourne* (1979) 84 Cal.App.3d 771, 780-781 (n. 5) 149 Cal. Rptr.499 (and cases cited therein) The proposed revisions are intended to bring the statute in line with FRCP 33(a), which requires a party who

wants to serve no more than 25 interrogatories to obtain a stipulation or leave of court to do so.

Under present law, a party who wants to propound more than 35 specially prepared interrogatories may do so by way of a declaration of necessity. This unfairly forces the responding party to incur the time and expense of challenging the declaration of necessity by a motion for a protective order pursuant to CCP section 2030.040. In 2001, a law review article which surveyed the discovery rules of the state and federal courts said, "At the time of its enactment, section 2030(c) of the California Code of Civil Procedure [the predecessor to CCP sections 2030.030, 2030.040 and 2030.050] was on the leading edge of attempts to rein in abusive interrogatory practice. Nearly fifteen years later, however, the provision is easily the weakest of the efforts to end interrogatory abuse." Weber, "Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts," 32 McGeorge L. Rev. 1051, 1090-1091 (2001) (emphasis added)

The proposed revisions would not increase the cost of litigation because the cost to the propounding party of moving for leave to serve additional interrogatories should be roughly equal to the cost to responding party of moving for a protective order under the current scheme. The proposed revisions take into account the cost of litigation and increase the number of specially prepared interrogatories to 50.

The proposed revisions to CCP section 2030.040(a) require the court to grant leave to propound additional interrogatories if any of the conditions in section 2030.040(a) (1-3) dictate relief. This will protect a party from a denial of necessary discovery while preventing discovery abuse. Subsection (b) authorizes the court to impose monetary sanctions against a party who makes or opposes a motion made under Section 2030.030 unless the court find that the motion was made or opposed with substantial justification or that other factors make the imposition of sanctions unjust. The proposed revision will be limited to civil actions and is not applicable to family law cases.

## IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Elizabeth A. Moreno

## **BHBA- 8**

### No Liability For Good Samaritans

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code §1799.102 to read as follows:

§1799.102.

No person who in good faith, and not for compensation, renders emergency care or assistance, medical or nonmedical, at the scene of an emergency shall be liable for any civil damages resulting from any act or omission in the course of rendering emergency care or assistance. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered.

PROPONENT: Beverly Hills Bar Association

#### STATEMENT OF REASONS

Existing Law: The California Supreme Court recently held that Health and Safety Code Section 1799.102 (the Good Samaritan law) applies only to medical care. (*Van Horn vs. Watson* (2008) 2008 DJDAR 18512).

This Resolution: This would include non medical emergency care in a non medical emergency, such as a rescue attempt, provided by a person who is acting as a Good Samaritan.

The Problem: The recent Supreme Court case of *Van Horn vs. Watson* (2008) 2008 DJDAR 18512 held for the first time that the Good Samaritan law does not apply to non medical assistance, including taking a person out of a vehicle after an accident. The decision from the California Supreme Court not only stated that the statute only applied to medical care, but also that it only applied to the scene of a medical emergency. Therefore, the “medical and non-medical” revision is necessary with regard to both the terms “emergency care” and “scene of an emergency.” Research of other state laws specifically includes rescue attempts as protected acts, not just medical emergencies. As Justice Baxter’s dissent in *Van Horn vs. Watson* expresses, this is contrary to the plain reading of the code and the public’s understanding of the law. As a result, this amendment is needed to make clear that the “Good Samaritan” law applies to non medical emergencies and to avoid the argument whether the services are medical or non medical or mixed.

#### IMPACT STATEMENT

This does not affect any other law, statute or rule. Presently, before the Legislature is a similar resolution which were introduced in 2009 as Senate Bill 39 and Assembly Bill 83.

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