

## RESOLUTION 11-08-05

### DIGEST

#### Attorney's Fees: Award In Frivolous Litigation

This resolution amends Code of Civil Procedure section 1038 to delete certain requirements for the award of defense costs in frivolous cases.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 1038 to delete certain requirements for the award of defense costs in frivolous cases. This resolution should be disapproved because it creates ambiguity as to when a judge is required to determine whether an action was brought with reasonable cause and in the good faith. Moreover, it would allow the court to grant defense costs before ruling on the substantive issues of the case, creating the potential for defense costs to be awarded in cases with substantive merit. A ruling that a proceeding was not filed with objective reasonable cause might conflict with the denial of a motion to dispose of the case under the law. Finally, it requires the court to determine the issue without a motion from the defendant and would no longer require proper notice to the plaintiff. The lack of any requirement for proper notice and an opportunity to be heard violates due process and has the potential to chill the legitimate exercise of rights. Moreover, because the amendment dispenses with the necessity of a motion, it creates ambiguity as to the procedural mechanism by which a court is required to make the analysis required by the statute.

Section 1038 already allows defendants in "any civil proceeding under the California Tort Claims Act or for express or implied indemnity or for contribution in any civil action" to recover defense costs. (Code Civ. Proc. § 1038, subd. (a).) The statute already provides protection from frivolous litigation. (See, e.g., *Gamble v. Los Angeles Dept. of Water and Power* (2002) 97 Cal.App.4<sup>th</sup> 253) (plain purpose of statute permitting public entities to recover defense costs in proceedings under Tort Claims Act is to discourage frivolous lawsuits against public entities by providing public entities with an alternate remedy to a constitutionally proscribed action for malicious prosecution.) Defendants also have the option of pursuing claims for malicious prosecution, which both provides additional recourse for defendants and discourages frivolous lawsuits.

### TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1038 to read as follows:

- 1 § 1038
- 2 (a) In any civil proceeding under the California Tort Claims Act or for express or implied indemnity or
- 3 for contribution in any civil action, the court, ~~upon motion of the defendant or cross-defendant, shall,~~
- 4 ~~at the time of the granting of any summary judgment, motion for directed verdict, motion for judgment~~
- 5 ~~under Section 631.8, or any nonsuit dismissing the moving party other than the plaintiff, petitioner,~~
- 6 ~~cross-complainant, or intervenor, or at a later time set forth by rule of the Judicial Council adopted~~
- 7 ~~under Section 1034~~ determine whether or not the plaintiff, petitioner, cross-complainant, or intervene
- 8 or brought the proceeding with reasonable cause and in the good faith belief that there was a
- 9 justifiable controversy under the facts and law which warranted the filing of the complaint, petition,
- 10 cross-complaint, or complaint in intervention. If the court should determine that the proceeding was
- 11 not brought in good faith and with reasonable cause, an additional issue shall be decided as to the
- 12 defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding,
- 13 and the court shall render judgment in favor of that party in the amount of all reasonable and

14 necessary defense costs, in addition to those costs normally awarded to the prevailing party. ~~An~~  
15 ~~award of defense costs under this section shall not be made except on notice contained in a party's~~  
16 ~~papers and an opportunity to be heard.~~  
17 (b) "Defense costs," as used in this section, shall include reasonable attorneys' fees, expert witness  
18 fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, and  
19 where reasonably and necessarily incurred in defending the proceeding.  
20 (c) ~~This section shall be applicable only on motion made prior to the discharge of the jury or entry of~~  
21 ~~judgment, and any~~ Any party requesting the relief pursuant to this section waives any right to seek  
22 damages for malicious prosecution. Failure to make the motion shall not be deemed a waiver of the  
23 right to pursue a malicious prosecution action.  
24 (d) This section shall only apply if the defendant or cross-defendant has made a motion for summary  
25 judgment, judgment under Section 631.8, directed verdict, or nonsuit and the motion is granted.

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

PROPONENT: Santa Barbara County Bar Association

#### STATEMENT OF REASONS

Existing Law: Existing law does not provide sufficient protection for frivolous litigation.

This Resolution: This Resolution would provide justifiable protection from frivolous litigation and provide ethical relief from costs incurred should a defendant face such frivolous litigation. This is not the same as a malicious prosecution action since "malice" is not required, but this code section change would force a would-be litigant to seriously consider whether this is a proper action to bring before a court. And, it would allow the court not to be burdened with actions which should not take up court time. Thus, it would create a "civil" equivalent of the protection afforded by Penal Code Sections 1447 and 1448.

The Problem: Currently, a defendant can be brought into court on the filing of a frivolous lawsuit without recourse. The defendant may lose simply due to lack of funds. Unless the action specifically falls under "malicious prosecution" under Government Code Section 821.6 for liability of public employees, Penal Code Sections 1447 and 1448 for criminal actions brought wherein the defendant is subsequently exonerated, or Penal Code Section 374.2 with respect to discharge or release by sewers or sewer systems, there is no protection.

Changing California Code of Civil Procedure Section 1038 will further public policy by affording all defendants protection from frivolous litigation, saving huge amounts of taxpayer funds by keeping frivolous litigants out of the courts by having a deterring effect upon those who would otherwise bring frivolous lawsuits, and would have a beneficial effect upon the process.

#### IMPACT STATEMENT

This proposed resolution will affect California Code of Civil Procedure Section 631.8 and 1034.

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#### COUNTERARGUMENTS

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution would have an unacceptable chilling effect on meritorious litigation. Section 1038 and other statutes and laws already provide ample protection against frivolous lawsuits. The award of

defense costs should only be done on motion and with an opportunity to be heard, as Section 1038 presently provides.

### **BAR ASSOCIATION OF SAN FRANCISCO**

Code of Civil Procedure Section 1038 permits a court to award sanctions for bad faith litigation in a limited category of cases after granting summary judgment (or similar dispositive motions) in favor of a defendant. It is primarily intended to permit governmental entities, which are prohibited from bringing malicious prosecution actions, to recover fees and costs in cases of unjustified, bad faith litigation. This resolution proposes to eliminate three requirements of the current law: 1) that defendant must prevail in a dispositive motion, 2) that the party against whom costs are awarded must receive notice and an opportunity to be heard and 3) that the motion must be brought before the jury is discharged or judgment is entered.

No good argument is advanced for these changes. In addition, the elimination of the notice and opportunity to be heard requirement is probably unconstitutional. Also, Section 1038 itself is something of a curiosity and appears to have pre-dated Sections 128.5 through 128.7. It may currently be redundant. Certainly, it does not need to be made more sweeping.

### **SACRAMENTO COUNTY BAR ASSOCIATION**

This resolution denies due process. It would require the court to sanction a plaintiff *sua sponte* if the court determines that the action, including a cross-complaint or complaint in intervention, was frivolous.

A court's *sua sponte* imposition of sanctions for frivolous litigation, without prior fair warning and opportunity to be heard, denies rudimentary due process. *O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 962; *Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1078; see also *Marriage of Flaherty* (1982) 31 Cal.3d 637, 652 (same where frivolous appeal sanctions imposed without prior notice and opportunity for hearing).

The resolution further denies due process in not providing that the court must state in detail its reasons for imposing sanctions. *Flaherty*, 51 Cal.3d at 654; *O'Brien*, 148 Cal.App.3d at 962. Requiring the court to specify why sanctions are imposed is also important to ensure that a court does not abuse its power to sanction, and to aid a reviewing court in determining whether the trial court abused its discretion in imposing sanctions. *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1029.