

## RESOLUTION 03-20-08

### DIGEST

#### Enforcement of Judgments: Examination of Judgment Debtors and Third Parties

Amends Code of Civil Procedure sections 708.110, 708.120 and 708.130, and adds section 708.040, to change the method for the conduct of post-judgment examinations of debtors and third parties.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure sections 708.110, 708.120 and 708.130, and adds section 708.040, to change the method for the conduct of post-judgment examinations of debtors and third parties. This resolution should be disapproved because the methods proposed are in conflict with existing statutes, which conflict outweighs the benefits of the proposed resolution.

The addition of subdivision (f) to Code of Civil Procedure section 708.110, which provides penalties for less than complete compliance with an order to testify, makes the statute inconsistent both internally (cf., subdivision (e) notice provides sanctions “may” be imposed while subdivision (f) provides that they “shall” be imposed) and with existing Code of Civil Procedure section 708.170. The sanctions within the statutory scheme should be consistent.

The proposed new sanctions include making mandatory a finding of contempt of court committed outside the presence of the court. As contempt of court is a quasi-criminal proceeding requiring admissible evidence, that sanction should be left to the judge’s discretion. Additionally, the sanctions proposed expand the attorneys’ fees and costs imposed on the debtor to include those “incurred in otherwise determining the information sought,” rather than simply the attorneys’ fees and costs “incurred in the examination proceeding,” as set forth in existing section 708.170(a)(2).

The amendment to section 708.120 expands the third parties who are subject to a court-ordered examination to include persons with information about the judgment debtor’s assets and liabilities or the whereabouts of the judgment debtor or spouse. This is a reasonable expansion of that statute. However, the Mandatory Judicial Council Form for Application and Order for Appearance and Examination (AT-128, EJ-125) should be, but has not been, also amended to reflect the proposed new topics on which third parties may be called to answer.

The deletion of section 708.130 subdivision (a), which currently provides that witnesses shall testify in the same manner as at trial, would eliminate both the debtor’s and third parties’ rights under the Evidence Code. This change is made without sufficient justification, as it would include a waiver of all privileges, including Fifth Amendment rights.

New section 708.040 provides that “an examinee,” an undefined term impliedly including both the debtor and third parties, may be compelled to produce documents pursuant to Code of Civil Procedure section 1985, et seq. Existing law requires a third party to produce documents pursuant to that section, however the judgment debtor is required to produce documents pursuant to Code of Civil Procedure section 708.030(a), which refers to section 2031.010, et seq. Section 708.030(a) has not been amended, resulting in an inconsistent statutory scheme for the production of documents by judgment debtors.

## TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 708.110, 708.120, and 708.130, and to add Code of Civil Procedure section 708.040, to read as follows:

1 §708.110

2 (a) The judgment creditor may apply to the proper court for an order requiring the  
3 judgment debtor to appear before the court, or before a referee appointed by the court, at a  
4 time and place specified in the order, to furnish information to aid in enforcement of the  
5 money judgment.

6 (b) If the judgment creditor has not caused the judgment debtor to be examined  
7 under this section during the preceding 120 days, the court shall make the order upon ex  
8 parte without notice application of the judgment creditor.

9 (c) If the judgment creditor has caused the judgment debtor to be examined under  
10 this section during the preceding 120 days, the court shall make the order if the judgment  
11 creditor by affidavit or otherwise shows good cause for the order. The application shall be  
12 made on noticed motion if the court so directs or a court rule so requires. Otherwise, it may  
13 be made ex parte.

14 (d) The judgment creditor shall personally serve a copy of the order on the  
15 judgment debtor not less than 10 days before the date set for the examination. Service shall  
16 be made in the manner specified in Section 415.10. Service of the order creates a lien on  
17 the personal property of the judgment debtor for a period of one year from the date of the  
18 order unless extended or sooner terminated by the court.

19 (e) The order shall contain the following statement in 14-point boldface type if  
20 printed or in capital letters if typed: "NOTICE TO JUDGMENT DEBTOR. If you fail to  
21 appear at the time and place specified in this order, you may be subject to arrest and  
22 punishment for contempt of court and the court may make an order requiring you to pay  
23 the reasonable attorney's fees incurred by the judgment creditor in this proceeding."

24 (f) Failure of a judgment debtor to testify, or false testimony by a judgment debtor  
25 shall subject the judgment debtor to liability, including, but not limited to:

26 (1) Costs and reasonable attorney's fees incurred by the judgment creditor in  
27 otherwise determining the information about which the judgment debtor has falsely  
28 testified ; and

29 (2) Punishment of the judgment debtor for contempt of court.

30

31 §708.120

32 (a) Upon ex parte application by a judgment creditor who has a money judgment  
33 and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the  
34 proper court that a third person has (1) possession or control of property in which the  
35 judgment debtor has an interest; or (2) is indebted to the judgment debtor in an amount  
36 exceeding two hundred fifty dollars (\$250); ; or (3) has knowledge or information about  
37 the judgment debtor's assets, liabilities, income or expenses or about the whereabouts of  
38 the judgment debtor or spouse, if any, the court shall make an order directing the third  
39 person to appear before the court, or before a referee appointed by the court, at a time and  
40 place specified in the order, to answer, under oath concerning such property or debt, or to  
41 provide such information as the third person may have about the judgment debtor's assets,  
42 liabilities, income, expenses or the whereabouts of the judgment debtor or the spouse of  
43 the judgment debtor or of someone who has information regarding the foregoing. The  
44 affidavit in support of the judgment creditor's application may be based on the affiant's  
45 information and belief.

46 (b) Not less than 10 days prior to the date set for the examination, a copy of the  
47 order shall be:

48 (1) Served personally on the third person. Service shall be made in the manner  
49 specified in section 415.10 Code of Civil Procedure.

50 (2) Served personally or by mail on the judgment debtor.

51 (c) If the property in the third person's possession or control in which the judgment  
52 debtor has an interest or the debt owed by the third person to the judgment debtor is  
53 described in the affidavit or application for an order under subdivision (a) in a manner  
54 reasonably adequate to permit it to be identified, service of the order on the third person  
55 creates a lien on the judgment debtor's interest in the property or on the debt for a period of  
56 one year from the date of the order unless extended or sooner terminated by the court.

57 (d) The judgment debtor may claim that all or any portion of the property or debt is  
58 exempt from enforcement of a money judgment by application to the court on noticed  
59 motion, filed with the court and personally served on the judgment creditor not later than  
60 three days before the date set for the examination. The judgment debtor shall execute an  
61 affidavit in support of the application that includes all of the matters set forth in  
62 subdivision (b) of Section 703.520. If a claim of exemption is made pursuant to this  
63 section, a notice of opposition to the claim of exemption is not required. The court shall  
64 determine any claim of exemption made pursuant to this section. Failure of the judgment  
65 debtor to make a claim of exemption does not preclude the judgment debtor from later  
66 claiming the exemption unless the property or debt is described in the order in a manner  
67 reasonably adequate to permit it to be identified and the judgment debtor receives notice of  
68 the examination proceeding at least 10 days before the date set for the examination.

69 (e) An order made pursuant to subdivision (a) shall contain the following  
70 statements in 14-point boldface type if printed or in capital letters if typed:

71 (1) "NOTICE TO PERSON SERVED. If you fail to appear at the time and place  
72 specified in this order, you may be subject to arrest and punishment for contempt of court  
73 and the court may make an order requiring you to pay the reasonable attorney's fees  
74 incurred by the judgment creditor in this proceeding."

75 (2) "NOTICE TO JUDGMENT DEBTOR. The person in whose favor the  
76 judgment was entered in this action claims that the person to be examined pursuant to this  
77 order has possession or control of property which is yours or owes you a debt. This

78 property or debt is as follows: (Description of property or debt). If you claim that all or any  
79 portion of this property or debt is exempt from enforcement of the money judgment, you  
80 must file your exemption claim in writing with the court and personally serve a copy on  
81 the judgment creditor not later than three days before the date set for the examination. You  
82 must appear at the time and place set for this examination to establish your claim of  
83 exemption or your exemption may be waived."

84 (f) An order made pursuant to subdivision (a) is not effective unless, at the time it is  
85 served on the third person, the person serving the order tenders to the third person fees for  
86 the mileage necessary to be traveled from the third person's residence to the place of  
87 examination. The mileage fees shall be in the same amount generally provided for  
88 witnesses when legally required to attend civil proceedings in the court where the  
89 examination proceeding is to be conducted.

90

91 §708.130

92 ~~(a) Witnesses may be required to appear and testify before the court or referee in an~~  
93 ~~examination proceeding under this article in the same manner as upon the trial of an issue.~~

94 ~~(b) The privilege prescribed by Article 4 (commencing with Section 970) of~~  
95 Chapter 4 of Division 8 of the Evidence Code does not apply in an examination proceeding  
96 under this article.

97

98 §708.040

99 For any proceeding pursuant to §708.110 or §708.120 an examinee may be  
100 compelled to provide documents pursuant to Code of Civil Procedure Part Four, Title 3,  
101 Chapter 2, commencing with §1985, and Code of Civil Procedure, Part Four, Title 4,  
102 commencing with §2016.010.

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

**PROPONENT:** Los Angeles County Bar Association

**STATEMENT OF REASONS:**

Existing Law: Allows examinations of witnesses by a subpoena process but the circumstances under which they may be brought before the court are unclear.

This Resolution: The purpose of these amendments to sections 708.110, 708.120 and 708.130 is to clean up these procedures. The purpose of the new section 708.040 is to clear up the use of subpoenas in examination proceedings.

The Problem: Existing law requires clarification of the circumstances under which subpoenaed witnesses may be brought before the court. Additionally current law does not clearly spell out any liability for a judgment debtor or a third party who refuses to testify or who testifies falsely.

**IMPACT STATEMENT:**

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

**AUTHOR AND/OR PERMANENT CONTACT:** Jerome J. Blum, Herzlich & Blum LLP,  
15760 Ventura Boulevard, Suite 2024, Encino, CA 91436-3002, (818) 783-8891, fax (818) 783-  
6682, jerry@herzlich-blum.com; and Richard L. Enkelis: (Deceased)

**RESPONSIBLE FLOOR DELEGATE:** Phyllis Kupferstein