

## RESOLUTION 01-01-2008

### DIGEST

#### CDCBA Rules: Review Process For Record Of Conference Actions

Adds to CDCBA Rules a procedure for tracking, reviewing, correcting and publishing a record of the actions taken during the Annual Meeting of the Conference of Delegates.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds to CDCBA Rules a procedure for tracking, reviewing, correcting and publishing a record of the actions taken during the Annual Meeting of the Conference of Delegates. This resolution should be disapproved because it will create a logistical and administrative burden on CDCBA staff to duplicate information that is already available as well as adversely affect CDCBA's efforts in promoting resolutions for legislation.

The resolution would create additional oversight of the Conference proceedings ostensibly to promote accuracy. However, the proponent's plan is unworkable because of the burdens it will place on the CDCBA's limited staff in preserving a record of those proceedings. Additionally, CDCBA employs several methods for capturing and checking the accuracy of the Conference proceedings, including: (1) The proceedings of the Conference are digitally recorded and available for review in case questions arise regarding actions taken by the Conference. Delegates are free to request access to the recordings. (2) A complete account of the final disposition of resolutions is available by reviewing the archives section of the CDCBA website where all of the resolutions are posted since the Conference of 2002. (3) On the conclusion of each Conference, proponents are required to submit lobbying forms for each resolution approved at the Conference. These forms constitute an important method for double-checking the accuracy of the Conference proceedings with regard to the specific actions taken on each resolution that comes before the Conference.

Moreover, the oversight requested by the proponent would add a 30-day delay between the end of the Conference and when the resolutions would be available to the CDCBA lobbyist, which delay would impose and potentially damage CDCBA's efforts to find legislative sponsors to move resolutions into legislative action.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of the California Bar Association recommends that the Board of Governors of the Conference of Delegates of the California Bar Association adopt the following resolution:

WHEREAS the Conference of Delegates meets for three days every years and its meeting schedule does not accommodate the preparation of minutes and their review, correction and approval at its next meeting;

WHEREAS the record of Conference actions simply appears on its web site with no provision for their review, correction and approval;

WHEREAS the web site has incorrectly reported the actions of the Conference, and no avenue for redress of such errors by delegates is available.

THEREFORE BE IT RESOLVED that the Conference of Delegates of the California Bar Association recommends that the Board of Governors of the Conference of Delegates of the California Bar Association establish a process whereby the record of Conference actions can be reviewed by the Board of Governors;

BE IT FURTHER RESOLVED that it is recommended that the process include (1) the retention of documents showing (a) call-ups, (b) withdrawal of call-ups and withdrawal of resolutions and (c) Reports of the Resolutions Committee until the record is approved by the Board of Governors; (2) that the record of the Conference be posted on the Conference web site within a reasonable period of time after the conclusion of the Conference; (3) that every delegate to the Conference be afforded the opportunity to review and offer corrections to that record; and (4) that at its next meeting after 30 days have elapsed from the posting of the record of the Conference on the web site, the Board of Governors shall consider corrections and vote on the approval of the record of the Conference.

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

**PROPONENT:** San Diego County Bar Association

**STATEMENT OF REASONS:**

Existing Law: Presently there is no process to ensure that the actions taken at the Conference of Delegates are accurately reflected in the record of the Conference.

This Resolution: Would correct an oversight in the CDCBA's procedures and provide an avenue to challenge clerical errors.

The Problem: Resolutions adopted by the Conference may be incorrectly shown as withdrawn or defeated. This is not just a possibility - it has happened. In 2006, the Resolutions Committee recommended Approval in Principle of Resolution 05-11-06. Most delegations agreed with the Resolutions Committee, but a few called up the resolution. The call-ups were withdrawn and, in the normal process, the action that should have been reported was the resolution was approved in principle. However, the web site of the Conference showed instead the Resolution - not the call-ups - had been withdrawn. The efforts of the proponent to remedy this error met a stone wall because there is no process in place to challenge such a clerical error and, as far as can be ascertained, no practice of preserving documents to show the resolution had not been withdrawn.

In the 1980s, the Conference approved a resolution dealing with the transfer of capital cases from the Supreme Court to the Courts of Appeal. At a subsequent Conference, that resolution was shown as having been Disapproved.

Clerical errors are simply subverting our hard work. This is particularly important since we have a lobbyist in place to attempt to put our resolutions into law, but a mistake in reporting can frustrate the effort to introduce legislation. A process needs to be established to review the record of Conference actions to be sure that the record accurately reflects what took place at the Conference. This Resolution offers recommendations on how that process should work, but leaves the formulation of the process to the Board of Governors.

**IMPACT STATEMENT:**

This resolution does not affect other laws, statutes or rules of procedure.

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**RESPONSIBLE FLOOR DELEGATE:** Howard Wayne

## RESOLUTION 01-02-2008

### DIGEST

#### CDCBA Rules: Legislative Policy Resolutions

Encourages CDCBA to adopt a procedure allowing for Legislative Policy Resolutions in addition to resolutions seeking specific changes, additions and modifications to the California Code.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution encourages CDCBA to adopt a procedure allowing for Legislative Policy Resolutions in addition to resolutions seeking specific changes, additions and modifications to the California statutes. This resolution should be disapproved because it does not offer a procedure for determining when a Legislative Policy Resolution would be preferable to the traditional CDCBA resolution in which a specific code section and language are targeted for change.

The resolution offers a proposed option to CDCBA's standard approach to resolution preparation for those situations that do not readily lend themselves to changing specific words within particular code sections.

Though there may be identifiable circumstances in which a Legislative Policy Resolution would be appropriate, the proponent fails to suggest any standard how CDCBA and its participants might differentiate the circumstances in which one type of resolution is preferable to the other. There is an important policy served by requiring members of the Bar to offer specific changes to the words and sections of the laws of California; that policy is simply that lawyers are ostensibly more skilled in writing the laws they seek to change than others.

CDCBA has been effective in proposing legislative changes throughout its history in large part because, through the resolution process, it prepares language ready for and influential in the legislative process. Furthermore, the proponent fails to take into account the additional costs that would be incurred in the proposed process that would require paying a lobbyist or others to draft the language of implementing legislation. Anyone can say, "There ought to be a law." Lawyers are generally trained and experienced in crafting legislation that hopefully fulfills the object sought by a proponent.

### TEXT OF RESOLUTION

RESOLVED, that the Board of Directors of the Conference of Delegates of California Bar Associations implement an additional format and procedure for resolutions that will allow the Conference to vote on general matters of policy within the mission of the Conference, as

opposed to specific items of proposed legislation.

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS:**

Existing Policy: Under the current rules, a Resolution must be formatted to propose a specific amendment to a specific code section. The effect of this policy is to leave the Board of the Conference, when faced with a more generalized question of legislative policy to either decline to comment, or possibly, given the passage of Resolution 9-08-07, to implement the game plan outlined in that resolution, which amounts to an educated guess.

This Resolution: Would require the Board to implement a second procedure for the introduction of resolutions that have broader policy implications.

For example, Resolution 6-09-07 proposed enactment of new Elections Code sections 4500, et seq., contemplating an elaborate structure implementing voting by mail state wide. Obviously the proponent of that resolution gave a lot of thought to the mechanics of the resolution, because the detail involved is a requirement of the Conference's current resolution submission process. One wonders whether it might not have been better, both for the proponent, and for the Conference, for the proponent to have been required to do nothing more than ask the question "Should there be a procedure to allow voting by mail that is consistent state wide?" and then leave it to the Legislature to work out the details, in the event of an approval in principle. In that way, any policy argument made either way by a bar association, or the Resolutions Committee, or by anyone else, would be less amenable to being taken out of context, and when asked, the Board could disclose that the Conference is either in favor of, or against, the concept, as opposed to a mere detail of it, or an elaborate structure attempting to implement it.

The Problem: Resolution 09-08-07 demonstrated the problem that in the context of the legislative process in Sacramento, the influence Conference is dramatically limited in that it is not in a position to be generally consulted about the consensus of the Conference on issues other than those that are specific to resolutions that have made their way into the Conference's legislative program. Instead, as the procedure outlined in Resolution 9-08-07 demonstrates, absent a more generalized resolution taking a broader policy position, all the Conference can do is say "Well, in 2005 we had a resolution that was approved in principle that appears to be supportive of your position" or try to contrive some sort of prognostication of how the Conference would vote if confronted with the particular question. Given the fact that the delegates on floor of the conference are selected by their respective bar associations, whereas under the organizational structure of the Conference the Board members need not be elected, it would seem that a policy resolution voted on by delegates would carry more weight as being representative, than an educated guess from the Board.

**IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** David Moore

## RESOLUTION 01-03-2008

### DIGEST

#### State Bar Records: Option Not to Publish Retired Judges' Addresses

Amends State Bar of California Rule 2.2 for retired inactive judges to withhold their addresses, and all members to withhold their e-mail addresses, from the State Bar website.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends State Bar of California Rule 2.2 to allow retired inactive judges to withhold their addresses, and all members to withhold their e-mail addresses, from the State Bar website. This resolution should be approved in principle because it gives members the option to withhold from the State Bar website certain sensitive information.

The State Bar currently publishes all member addresses on its website. For members who use their office address as their address of record, this rarely presents a problem. However, if a member does not have a business address, and does not wish to have his or her home address published, the only option is to purchase a post office box. Although this may make sense for active members of the State Bar, no apparent need exists for the public to have access to addresses of inactive members, including retired judges who may have legitimate security concerns about having their addresses made posted on a website.

This resolution would additionally allow all members to elect not to have their e-mail addresses made public. The Bar currently allows members to leave blank the space provided for e-mail addresses. This resolution would clarify that providing an e-mail address is optional. So long as other contact information of the active member is published (such as a mailing address), then the member should not feel compelled to have his/her email address also published.

This resolution deals only with what is published on the State Bar website. It does not limit the information which must be provided to the State Bar, and does not contradict the provisions of Business and Professions Code section 6002.1.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the State Bar Board of Governors amend Rules of the State Bar of California, Rule 2.2 to read as follows:

- 1 Rule 2.2
- 2 A member record contains public information, including the following:
- 3 (A) last name, first name, and any middle names;

- 4 (B) State Bar member number;
- 5 (C) address and telephone number, except that, such information relating to a retired judge
- 6 on inactive status shall be withheld from disclosure on the State Bar website upon written
- 7 request of such member;
- 8 (D) e-mail address, except that disclosure of such shall not be made on the State Bar
- 9 website with respect to a member who objects to the State Bar, in writing, as to such
- 10 inclusion;
- 11 (E) date of admission in California;
- 12 (F) places and dates of admission in other jurisdictions before admission in California;
- 13 (G) membership status;
- 14 (H) date of any transfer from one membership status to another;
- 15 (I) date and period of any discipline; and
- 16 (J) any other information as directed by the Supreme Court or otherwise required by law.

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

**PROPONENT:** Los Angeles County Bar Association

**STATEMENT OF REASONS**

Existing Law: Provides, under Business & Professions Code §6002.1, that the State Bar’s “official membership records” include addresses and telephone numbers of members. Such information is posted on the State Bar’s website. Addresses and telephone numbers of sitting judges are not included because they are not “members” while serving on courts of record. Art. VI, Sec. 9 of the state Constitution provides: “Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record.” However, once a judge leaves office, he or she becomes a “member,” absent a resignation from the State Bar, and an address must be reported. E-mail addresses which members provide to the State Bar are not explicitly exempted from public disclosure on the website although, as a matter of present policy, requests to withhold the information are honored.

This Resolution: Would spare retired judges who are on inactive status from the expense of renting a Post Office box just to avoid having their home addresses disclosed by the State Bar on the Internet. The same security considerations that preclude the listing of judges’ home addresses on voters’ rolls are here applicable. The fact that a judge has left office does not remove dangers of retribution, especially by sentenced criminals, who indeed might not be at liberty until after the judge has left office. Precluding the public posting of e-mail addresses supplied to the State Bar, where a member so requested, would result in State Bar continued access to the members via e-mail while avoiding a public presentation of the address, to be plucked by spammers.

The Problem: Some retired judges go to the trouble and expense of getting post office boxes to avoid their home addresses being listed on the State Bar website though their need for security

remains the same as when they were on the bench owing to continued resentment from persons they have sentenced or litigants against whom they have ruled. All State Bar members face the prospect of being spammed and should have the option not to have their e-mail addresses exposed on the State Bar website.

### **IMPACT STATEMENT**

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

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**RESPONSIBLE FLOOR DELEGATE:** Jo-Ann W. Grace

### **COUNTERARGUMENT**

#### **THE STATE BAR BOARD OF GOVERNORS**

This resolution proposes to make two changes to the State Bar's rules.

Under the first proposed change, the address (including a Post Office box) and phone number of an inactive retired judge would be withheld from disclosure on the State Bar website upon request. This would not be permissible under Business and Professions Code section 6002.1. The State Bar, in consultation with the Administrative Office of the Courts, is currently working on an administrative strategy that would safeguard the home address of an inactive retired judge, obviate the need to obtain a Post Office box, and be permissible under Business and Professions Code section 6002.1.

Under the second proposed change, the e-mail address of any member would not be disclosed on the State Bar website if the member objects. This change is not needed. As the resolution notes, requests to withhold that information are currently honored (although the resolution seeks to make the rule explicit).

## RESOLUTION 01-04-2008

### DIGEST

#### CDCBA Rules: Response to Requests for Position on Legislation

Amends 09-08-2007, which granted the CDCBA Legislative Committee authority to respond to requests for support or opposition on legislation.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Resolution 09-08-2007 was approved.

#### Reasons:

This resolution amends 09-08-2007, which granted the CDCBA Legislative Committee authority to respond to requests for support or opposition on legislation. This resolution should be approved in principle because it adds clarity to the parameters under which CDCBA may respond to requests for support of or opposition to legislation.

The resolution removes the option for the Committee to support a request for support or opposition “if determined that the proposed legislation is consistent with the CDCBA’s stated mission and goals.” With approval in principle of this resolution, the Legislative Committee of CDCBA will continue to be able to recommend three, rather than four, courses of action when CDCBA’s voice is requested to support or oppose legislation. The Committee can recommend that CDCBA (1) sponsor the request for support/opposition based on a resolution that the Conference has passed and that is in line with the proposed support/opposition; (2) oppose the request because it is in conflict with a position taken at the Conference; or (3) recommend that no position be adopted because the issue is not germane or is not in the interests of CDCBA to voice an opinion.

Because the basic foundation of CDCBA is that delegates with different backgrounds, perspectives and professional expertise debate possible changes to the law and then, by democratic process vote on the courses of action appropriate for those changes. It is a reasonable corollary that legislation supported or opposed by CDCBA likewise be rooted in the debate and democratic processes employed at the Conference. Otherwise, the Legislative Committee would have the authority to recommend a course of action on which the Delegates have not opined. This resolution would allow the CDCBA to support or oppose legislation *only* where the CDCBA determines that the issue has been debated and decided by the Conference and *only* where such position was consistent with that taken by the Conference. It may continue to take positions in opposition to such requests where the request is in conflict with Conference objectives.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations amend its policy implemented by Resolution 09-08-2007 (hereinafter, the “Policy”) as follows:

1 09-08-2007 (or subsequent numbered Policy resulting from Resolution 09-08-2007):  
2 All requests for support of, or opposition to, pending or proposed legislation shall be given  
3 to the Chair of the Legislative Committee, Chair of the Board, and Executive Director  
4 within 3 days of receipt.  
5 The Chair of the Legislative Committee shall first determine if the Conference has debated  
6 resolution(s) on the topic during the preceding 3 years. S/he shall communicate the request  
7 in writing to members of the committee, examine said request in detail, and after due  
8 consideration, obtain a recommendation of the majority of said committee on the position  
9 the Board should take with respect to said proposed legislation. The Legislative  
10 Committee shall recommend one of the following three (3) ~~four (4)~~ positions on the  
11 proposed legislation:  
12 A) Sponsor: upon determination that the Conference has passed a resolution on  
13 all fours with the proposed legislation;  
14 ~~B) Support: if determined that the proposed legislation is consistent with the~~  
15 ~~CDCBA's stated mission and goals;~~  
16 B) Oppose: if determined the Conference affirmatively passed a resolution  
17 contrary to the proposed legislation or the proposed legislation is inconsistent with the  
18 Conference's stated mission and goals; or  
19 ~~D) C) No position: if determined the proposed legislation is not germane or it is~~  
20 ~~not in the best interest of the CDCBA to take a position.~~  
21 This recommendation shall be made in writing to the Chair of the Board and the  
22 Executive Director within 10 days of receipt of the original request.  
23 The Chair of the Board and Executive Director shall promptly communicate in  
24 writing the Legislative Committee's recommendation to the Board and request the Board's  
25 responses as to whether it accepts or rejects the recommendation of the Legislative  
26 Committee. Any position on legislation requires a super-majority 2/3rds vote of the Board  
27 if adopted at a duly noticed meeting. If the vote of the Board is sought by electronic  
28 resolution rather than noticed meeting, then voting shall be via e-mail or other electronic  
29 written communication sent to the Executive Director or other designee and the vote of the  
30 Board must be unanimous.  
31 Upon receipt of the decision of the Board, the Executive Director shall  
32 communicate the Board's decision to the requesting party.  
33 The Legislative Committee shall report back to the Conference at the annual  
34 meeting regarding any action taken under this policy, as part of its legislative report.

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

**PROPONENT:** Orange County Bar Association

**STATEMENT OF REASONS:**

Existing Law/Policy: Last year, the CDCBA Board allowed a late-filed resolution (09-08-2007) in connection with the CDCBA procedure for incoming requests for positions on legislation (the

“Policy”), which would allow the CDCBA to sponsor or oppose legislation upon request, even where the Conference had never decided the issue.

This Resolution: Would allow the CDCBA to sponsor or oppose legislation without a vote of the Conference only where the CDCBA determines that the issue has been debated and decided by the Conference, and only where such position was consistent with that taken by the Conference.

The Problem: The authority of the CDCBA arises out of the deliberative process that it engages in at the Conference and throughout the year. Because the CDCBA is comprised of delegations of bar associations throughout the State, it is important that those associations have an opportunity to speak through their delegations on proposed legislation. As an example, the OCBA does not take positions through its delegation until after they have been debated within the delegation and approved by both the delegation and our bar association. This ensures that the OCBA delegation is taking positions that are consistent with the position of the OCBA on legislation.

The proposed resolution and counterargument process, along with debate during the Conference is the appropriate mechanism by which the CDCBA should take positions on legislation. While it is reasonable that the CDCBA Board be authorized to take positions on legislation throughout the year that are consistent with the determination of the Conference, the Board should not act on behalf of the Conference without the issue being vetted through the Conference. The OCBA urges that the CDCBA adopt this Resolution to avoid the CDCBA Board taking positions on behalf of the CDCBA which have not been debated by the Conference and may, in fact, be contrary to what the overall conference would recommend.

#### **IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** Cathrine M. Castaldi

#### **COUNTERARGUMENTS**

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

The proponent correctly recognizes that the policy which it wishes to change was adopted at the 2007 Conference. The proponent offers no reason why the decision of the Conference was misguided and should be reversed. In essence this is simply re-argument. The Bar Association of San Francisco has full confidence that Board of Directors of the CDCBA will not abuse the authority given to it by Resolution 09-08-2007 to support legislation consistent with the CDCBA’s stated mission even though the Conference has not acted on the particular issue.

## **SAN DIEGO COUNTY BAR ASSOCIATION**

The Board, as head of the CDCBA, is most knowledgeable about the goals and positions of the Conference. If this resolution is passed, it may prohibit the Conference from supporting issues that would be beneficial to the members. The Board needs the discretion to take positions that benefit the organization as a whole during the time the Conference is not in session.

## RESOLUTION 01-05-2008

### DIGEST

#### CDCBA Rules: Childcare at Meeting of Conference of Delegates

Recommends CDCBA adopt a plan that will provide childcare at the 2009 Annual Meeting of the Conference of Delegates.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution recommends CDCBA adopt a plan that will provide childcare at the 2009 Annual Meeting of the Conference of Delegates. This resolution should be disapproved because it is an unnecessary and burdensome role for the staff of the Conference.

While it would be convenient to have someone make childcare arrangements so that parents may participate in the Annual Meeting of the Conference of Delegates of California Bar Associations (CDCBA), parents are best suited to make the arrangements that suit their needs, their finances, the safety and particular needs of their children. CDCBA staff neither has the time to make childcare arrangements, nor should staff be responsible for attempting to make such arrangements and risk the liability assumed and associated with providing childcare. In addition to this being a burden on a small staff that already (and appropriately) is responsible for the logistics of hundreds of delegates and often more than 100 resolutions as well as the management of many committees that make up the CDCBA, the placement of the financial burden associated with developing childcare options is unclear.

Many hotels provide childcare or offer a list of local childcare services. Alternatively, the proponent could work directly with the State Bar of California and the annual meeting staff to select conference locations where appropriate childcare options exist. Childcare cannot and should not be the responsibility of the CDCBA staff and Board, because CDCBA does not have the person power or the financial resources to implement such a program.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Board of Directors of the Conference of Delegates adopt a plan which will provide child care at the 2009 Conference of Delegates.

**PROPONENT:** National Lawyers Guild, Los Angeles Chapter

### STATEMENT OF REASONS:

Existing Law: At the present time no child care is provided at the Conference of Delegates.

This Resolution: The purpose of this Resolution is to have the Board of Directors of the Conference of Delegates adopt a plan which will provide child care at the meeting of the Conference of Delegates .

The Problem: A substantial number of delegates to the Conference are parents of young children. In order for a parent to attend the Conference the parent must have child care.

The Board of Directors of the Conference of Delegates should be able to construct a plan which will provide child care at the meeting of the Conference of Delegates . This plan could be financed by a users fee or a combination of a users fee and voluntary contribution from non users who register for the Conference of Delegates .

#### **IMPACT STATEMENT;**

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

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**RESPONSIBLE FLOOR DELEGATE:** Tina Rasnow

#### **COUNTERARGUMENT**

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

The SDCBA supports the concept of child care at the Conference as one more way to make the Conference more inclusive. However, this Resolution moves too far, too fast. We do not know what a child care program would cost, who would pay for it, whether volunteers could become involved, what liability insurance issues might arise, etc. It is also recognized that any program adopted would need to be flexible given that child care facilities, and probably costs, would change as the venue for the Conference changes.

Accordingly, SDCBA proposes a substitute resolution, as follows:

"Resolved, that the Conference of Delegates recommends that the Board of Directors of the CDCBA study, and report to the Conference at the 2009 meeting, the feasibility of adopting a child care program for the annual Conference of Delegates."

The SDCBA envisions that, if this substitute resolution is approved in principle, the Board would welcome the assistance of the proponent of 01-05-08 and other volunteers from the Conference.

## RESOLUTION 01-06-2008

### DIGEST

#### Attorney Disqualification: Effect on Firm or Associate

Adds Rule 3-310(G) to the California Rules of Professional Conduct to clarify the effect of the disqualification of an attorney on an associated firm or individual.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Rule 3-310(G) to the California Rules of Professional Conduct to clarify the effect of the disqualification of an attorney on an associated firm or individual. This resolution should be disapproved because a bright-line rule of automatic disqualification is unnecessary and would limit the rights of clients to be represented by attorneys of their choice. In addition, the use of the phrase “clients whose interests are affected by the representation” is too vague.

Gone are the days when attorneys work for one firm their entire career. The reality of practice today is that lawyers and clients are free to change associations at will. A rule of automatic disqualification is subject to abuse where parties use it for strategic rather than proper reasons. In this environment, the court must have the flexibility not only to use its equitable powers to protect clients, but also to ensure the efficient administration of justice.

In California, the vicarious disqualification rules are derived from decisional law. Courts must retain the ability to examine each motion for disqualification to ensure that a client’s right to choose counsel and an attorney’s interest in representing clients are not unnecessarily compromised. In its evaluation, the court must be free to assess whether steps taken by attorneys to protect confidences and fulfill their duty of loyalty are effective. The Ninth Circuit noted in *In re County of Los Angeles* [9<sup>th</sup> Cir. (2000) 23 F.3d 990], that when implemented in a timely and effective way, an ethical wall can rebut the presumption that a lawyer has contaminated the entire firm. (Id. at 996.)

This resolution would unnecessarily limit the court’s power to ensure equity in court proceedings and the flexibility needed to practice in today’s legal environment.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Board of Governors of the State Bar of California and the California Supreme Court add a new Rule, Rule 3-310(G), to the California Rules of Professional Conduct, to read as follows:

- 1 Rule 3-310(G)

2           A law firm, employing or otherwise associating with a member who is disqualified  
3 under this Rule 3-310 or by order of any court or tribunal from representing a client, shall  
4 also be disqualified from representation of the client. The law firm shall not avoid  
5 disqualification under this rule by the use of an ethical screen where a member employed  
6 by or associated with that law firm is disqualified from such representation, unless  
7 informed written consent is obtained from all present and former clients of the member or  
8 law firm whose interests are affected by the representation.

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

**PROPONENT:** Orange County Bar Association

**STATEMENT OF REASONS:**

Existing Law: California Rules of Professional Conduct are silent on whether ethical screens can be erected to shield the conflicts of interest of one member of a law firm from another. The Ninth Circuit and the California Supreme Court appear to be developing conflicting views. Because of these conflicting rulings, attorneys and clients cannot predict how to avoid conflicts of interest and whether law firms will be disqualified from representations.

Resolution: Proposed Rule of Professional Conduct 3-310(G) adds an affirmative statement that ethical screens are not effective to shield the conflicts of interest of one member of a law firm from another.

The Problem: Rule of Professional Conduct 3-310(E) governs conflicts of interest as to former clients:

A member shall not, without the informed consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

The purpose of Rule 3-310(E) is to protect confidences shared between the client and attorney, both during the active attorney-client relationship and after the termination of the attorney's representation. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4<sup>th</sup> 839(2006); *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal.4<sup>th</sup> 1135, 1146 (1999).

If an attorney violates Rule 3-310(E), the former client may disqualify the attorney. Moreover, "when a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm." *Lucent Tech., Inc. v. Gateway, Inc.*, 2007 U.S. Dist. LEXIS 35502 at \*21 (S.D.Cal. May 15, 2007); see also *Pound v. DeMara DeMara Cameron*, 135 Cal.App.4<sup>th</sup> 70, 78 (2005); *Henriksen v. Great America Savings & Loan et al.*, 11 Cal.App.4<sup>th</sup> 109, 114 (1992) ("As a general rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well.").

The established rule in California is that once an attorney is disqualified, "that attorney's entire firm must be disqualified as well, regardless of efforts to erect an ethical wall." *Hitachi*,

Ltd. v. Tatung Co., 419 F.Supp.2d 1158, 1161 (N.D.Cal. 2006) (emphasis added). “California courts generally have not allowed a law firm to avoid vicarious disqualification by implementing a screening procedure.” Lucent, 2007 U.S. Dist. LEXIS at \* 22; Hitachi, 419 F.Supp.2d at 1161.

Nonetheless, the Ninth Circuit noted in *In re County of Los Angeles*, 223 F.3d 990, 995-996 (9<sup>th</sup> Cir. 2000) that the California Supreme Court has signaled it “may well adopt a more flexible approach to vicarious disqualification.” The Ninth Circuit permitted an ethical wall to prevent disqualification in that case.

No California state court has adopted the Ninth Circuit’s approach, leaving unclear whether ethical screens are effective in California. This resolution would clarify the California Rules of Professional Conduct, in a manner consistent with existing case law, so that unnecessary litigation over the propriety of ethical walls in private law firms can be avoided.

#### **IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** Joel S. Miliband

#### **COUNTERARGUMENTS**

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

In principle, Resolution 01-06 seeks to achieve a useful purpose, which is to clarify the law regarding conflicts of interest arising when one member of a law firm has a potential conflict with an existing or former client of the law firm, and whether that conflict can be resolved by creating an ethical wall. As the size of law firms increases, the use of ethical walls is a virtual necessity to prevent many firms from being perpetually conflicted out of engagements. The solution of permitting ethical walls with the consent of the clients and former clients affected by the conflict is appropriate, and certainly the trend in the case law. However, this proposal is flawed by the use of the term clients “whose interests are affected” by the representation. This introduces an entirely new concept into the Rule of Professional Conduct and will lead to even more confusion. The Bar Association of San Francisco would be inclined to support this proposal if it were amended to state that the law firm must obtain the consent of any clients or former clients “whose interests are in conflict with the current representation.” This language is consistent with the rest of Rule 3-310.

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

The San Diego County Bar Association opposes Resolution 1-6-2008 because disqualification of an entire law firm based on its employment of a single attorney would work harsh and unjust results. The consequences of the proposed policy would be harmful to attorneys, law firms and clients.

In today's legal world, attorneys change associations frequently. If law firms are required to disqualify themselves in every case when a mid-career attorney represented an adverse party prior to joining that firm, they will be less likely to associate experienced attorneys. Clients would find their options to retain law firms much more limited simply because an attorney in another practice group of a firm they wish to utilize once represented their opponent in an unrelated case prior to working for this firm.

The restriction on the clients' right to retain their counsel of choice could become an out and out prohibition of the right to counsel in specialized areas of law. It would likely become a litigation tactic to prevent parties from being represented by highly-qualified law firms. The current Rules does not compel such vicarious exclusion of law firms. Judicial interpretations which apply a case-by-case determination have worked well. The proponent is seeking to obtain absolute purity in a messy world without consideration of what this ideal will cost the public, attorneys and the administration of justice.

## **THE BOARD OF GOVERNORS**

This resolution seeks an amendment to the Rules of Professional Conduct, specifically rule 3-310 [re avoiding the representation of adverse interests]. The desired amendment would add a new paragraph (G) addressing the issue of imputed conflicts and ethical screens.

At this time, the State Bar is considering amendments to the Rules of Professional Conduct through the work of its Special Commission for the Revision of the Rules of Professional Conduct (Commission). The Commission is charged with conducting a cover-to-cover review of the California rules and proposing comprehensive amendments for consideration by the Board of Governors. This comprehensive review includes consideration of amendments to rule 3-310. In addition, the Commission's charge also instructs the Commission to consider the American Bar Association's Model Rules of Professional Conduct, including Model Rule 1.10 [re imputation of conflicts of interest].

Accordingly, the general subject matter of the proponent's desired initiative is being considered by the State Bar through its Commission and any action to approve Resolution 01-06-2008 would prejudice controversial substantive and policy issues that are already in process. Rather than pursuing Conference action, the resolution proponents should participate in the Commission's work by sending representatives to the open session meetings of the Commission and by providing input on draft rules that are distributed for public comment. Other stakeholders have participated in this manner, greatly enhancing the Commission's deliberative process and clarifying complex issues that will be ultimately decided by the Board of Governors and the Supreme Court.