RESOLUTION 06-01-08

DIGEST

Small Claims Court: Attorney's Fees on Appeal

Amends Code of Civil Procedure section 116.780 to increase the maximum amount of attorney's fees which may be awarded by the Superior Court on an appeal from a Small Claims Court judgment from $150 to $1000.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 9-07-03, recommending an increase in the jurisdiction of Small Claims courts to $10,000, which was approved.

Reasons:

This resolution amends Code of Civil Procedure section 116.780 to increase the maximum amount of attorney's fees awarded on appeal from a Small Claims Court judgment. This resolution should be approved in principle because this code section has not been amended since 1991 and in order to serve the purpose for which it is intended, the allowable amount should be increased.

The amount of attorney's fees which the Superior Court may currently award on an appeal from a Small Claims Court judgment is $150. This resolution would increase that amount to $1,000. Since the cost of attorney services has risen a great deal in the last 17 years, and $1,000 might only pay for a few hours of attorney time, this is a reasonable increase.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 116.780 to read as follows:

1 §116.780
2 (a) The judgment of the superior court after a hearing on appeal is final and not
3 appealable.
4 (b) Article 6 (commencing with Section 116.610) on judgments of the small claims
5 court applies to judgments of the superior court after a hearing on appeal, except as
6 provided in subdivisions (c) and (d).
7 (c) For good cause and where necessary to achieve substantial justice between the
8 parties, the superior court may award a party to an appeal reimbursement of (1) attorney's
9 fees actually and reasonably incurred in connection with the appeal, not exceeding ~~one~~
10 ~~hundred fifty dollars ($150)~~ <u>one thousand dollars ($1000)</u>, and (2) actual loss of earnings
11 and expenses of transportation and lodging actually and reasonably incurred in connection
12 with the appeal, not exceeding one hundred fifty dollars ($150).

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS:

Existing Law: Code of Civil Procedure section 116.780, subdivision (c) provides that a prevailing party on a small claims appeal is eligible, upon a finding by the court of good cause and if necessary to achieve substantial justice, the sum of **one hundred fifty dollars ($150)** for attorney's fees actually and reasonably incurred in connection with the appeal. Wow! $150.

This Resolution: Would increase the maximum amount of attorney's fees available to a prevailing party in a small claims appeal to one thousand dollars.

The Problem: In 1991, some sixteen years ago, the Legislature increased the attorney's fees available to a prevailing party on a small claims appeal from fifteen dollars (yes, $15) to one hundred fifty dollars ($150). There has been no change since then. Proponent submits that regardless of jurisdiction, $150 is simply not a reasonable maximum for representation of a litigant in a small claims appeal, as it represents two thirds to one half of a plausible hourly rate for an attorney in general practice in California, and preparation for and appearance at a small claims hearing could easily consume two to four hours of attorney time. Recognizing that the general goal is to have litigants represent themselves, if the intention is to provide relief for the necessity of obtaining counsel on appeal, that relief should be meaningful.

IMPACT STATEMENT:

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

AUTHOR AND PERMANENT CONTACT: Deborah F. Bayus, 1901 Camino Vida Roble, Suite 110, Carlsbad, CA 92008 (760) 918-9283

RESPONSIBLE FLOOR DELEGATE: K. Martin White

RESOLUTION 06-02-08

DIGEST
Rules of Court: Service of Two-Sided Copies
Amends rule 2.102 of the California Rules of Court to permit service of two-sided copies of documents.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution recommends amendment of rule 2.102 of the California Rules of Court to permit service of two-sided copies of documents. This resolution should be approved in principle because it would save paper and allow for more environmentally conscious use of resources.

Rule 2.102 of the California Rules of Court presently requires that all papers served or filed in trial court proceedings must be printed or reproduced on one-sided pages. This resolution would continue to require that all documents filed with a court be printed only on one-sided pages, but would permit service copies of said documents to be printed on both sides of each page. In fact, at present, many Judicial Council form documents are preprinted on two-sides of each page.

This change will conserve substantial amounts of paper, storage and filing space, to say nothing of trees, and will be of great benefit to the environment.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council of California amend California Rules of Court, rule 2.102 to read as follows:

1 Rule 2.102
2 On papers filed with the court, only one side of each page may be used. On papers
3 served on other parties or their counsel of record, copies may be made so as to use both
4 sides of each page.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Requires all "papers" served or filed in trial court proceedings to be printed or reproduced on one-sided copies.

<u>This Resolution</u>: Would permit parties to save paper by serving double-sided copies on other parties and counsel.

<u>The Problem</u>: Litigation practice is consuming far too much paper. In most cases, the bulk of paper is used on service copies. In cases with multiple parties, the problem grows proportionately. Many actions, such as toxic tort litigation or class actions, have dozens of involved parties and law firms and require voluminous filings and discovery documents, leading in turn to even greater wastes of paper. Moreover, many law firms simply do not have sufficient space in their files to maintain all these documents.

The simple solution is to halve the amount of paper needed for service copies by allowing service copies to be double-sided. This is a sure-fire means of reducing paper consumption and preserving filing space. Virtually any copying machine can make two-sided copies. However, for those practices that do not have double-sided copying means available, the provision would be permissive rather than mandatory.

IMPACT STATEMENT:

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

AUTHOR AND/OR PERMANENT CONTACT: Jim Weixel, Weixel Law Office, 2370 Market Street • No. 133, San Francisco, CA 94114, telephone (415) 682-9785, fax (866) 640-3918, email appeals [at] jimweixel.com.

RESPONSIBLE FLOOR DELEGATE: Jim Weixel

RESOLUTION 06-03-08

DIGEST
Rules of Court: Courtesy Copy to Court of Documents to be Judicially Noticed
Amends rule 3.1306 of California Rules of Court to require courtesy copies of large documents of which judicial notice is sought to be provided to the court.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution recommends that the Judicial Council amend rule 3.1306 of California Rules of Court to require courtesy copies of large documents of which judicial notice is sought to be provided to the court. This resolution should be approved in principle because it will make the work of the state trial courts more efficient by providing the reviewing judge with hard copies of large documents of which it is being requested to take judicial notice.

California Rules of Court, rule 3.1306, presently requires that courtesy copies be furnished to the court only of those documents which are not part of a file in the court in which the matter is being heard. This resolution would require courtesy copies also be furnished the court of any document exceeding 25 pages or exhibits that exceed 50 pages.

This change is necessary in order to provide courts with sufficient hard copies of documents under consideration which are or may be impractical to understand or comprehend if available solely online as will occur upon the further implementation of the statewide California Case Management System ("CCMS").

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council amend Rule 3.1306 of the California Rules of Court, to read as follows:

1 § 3.1306
2 (a) Restrictions on oral testimony. Evidence received at a law and motion hearing
3 must be by declaration or request for judicial notice without testimony or cross-
4 examination, unless the court orders otherwise for good cause shown.
5 (b) Request to present oral testimony. A party seeking permission to introduce oral
6 evidence, except for oral evidence in rebuttal to oral evidence presented by the other party,
7 must file, no later than three court days before the hearing, a written statement stating the
8 nature and extent of the evidence proposed to be introduced and a reasonable time estimate
9 for the hearing. When the statement is filed less than five court days before the hearing, the
10 filing party must serve a copy on the other parties in a manner to assure delivery to the
11 other parties no later than two days before the hearing.

12 (c) Judicial notice. A party requesting judicial notice of material under Evidence
13 Code Sections 452 or 453 must provide the court and each party with a copy of the
14 material, if the material is not part of a file in the court in which the matter is being heard.
15 If the material is part of a file in the court in which the matter is being heard, and is a
16 document exceeding 25 pages, or exhibits that exceed 50 pages, the party must:
17 (1) Specify in writing the part of the court file sought to be judicially noticed; and
18 (2) ~~Make arrangements with the clerk to have the file in the courtroom at the time~~
19 ~~of the hearing~~. Provide a courtesy copy to the judge.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing law: A party requesting judicial notice of material under Evidence Code Sections 452 or 453 must provide each party with a copy of the material, unless if the material is part of a file in the court in which the matter is being heard. In that case, the party need not provide the court with a copy, but must specify in writing the part of the court file sought to be judicially noticed; and make arrangements with the clerk to have the file in the courtroom at the time of the hearing.

This Resolution: Would minimize the distinction between documents which are already part of a court file and other judicially noticeable documents, which are not part of the court file, by requiring the party requesting judicial notice to provide courtesy copies of large documents of which it requests judicial notice to the court.

The Problem: The Administrative Office of the Courts is implementing a new, uniform, statewide California Case Management System (“CCMS”). Among the changes being implemented are the elimination of hard copies of documents and court files. All civil case documents filed with a court are being scanned into the computer database and will be accessible to the court and the public only as electronic versions. The hard copies are discarded, after scanning.

Two trial courts have been selected as “guinea pigs” to be the first in the state to implement the CCMS system. The Sacramento Superior Court is one of the two courts first implementing CCMS.

There are occasions, for example a motion for reconsideration of an order on a motion for summary adjudication, when the documents in the court’s computer “file”, of which judicial notice is requested, are voluminous, as they include long briefs and bulky exhibits. Even a dual screen computer for the judge and court staff, lacks sufficient space to simultaneously refer to the earlier filed motion, opposition, reply, separate statements and supporting evidence. Scanned documents lack the required exhibit tabs, which simplify the court’s initial review of bulky exhibits.

This proposed amendment is based upon the local rule in the U.S.D.C. for the Eastern District of California, which is already paperless, which requires courtesy copies be provided for the judge of all documents which exceed 25 pages, or exhibits that exceed 50 pages.

This proposed amendment would make the work of the state trial courts more efficient, by requiring that a courtesy copy of voluminous court documents, of which judicial notice is requested, be submitted by counsel to the court with the request for judicial notice.

IMPACT STATEMENT:

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

AUTHOR AND PERMANENT CONTACT: Joan A. Jernegan, Sacramento Superior Court, 720 Ninth Street, Sacramento, California 95814 (916) 874-5619, jernegj@saccourt.com

RESPONSIBLE FLOOR DELEGATE: Joan A. Jernegan

RESOLUTION 06-04-2008

DIGEST

Small Claims Services: Prohibit from County District Attorneys' Offices
Amends Code of Civil Procedure section 116.940 to prohibit small claims advisory services from being located in or provided by District Attorneys' offices.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 116.940 to prohibit small claims advisory services from being located in or provided by District Attorneys' offices. This resolution should be approved in principle because it discourages the appearance of any conflicts of interest between a small claims litigant who was or is a criminal defendant prosecuted by the same District Attorney's office.

While this situation is rare, by locating a small claims advisory services office within a District Attorney's Office, it may pose a hardship or barrier for potential small claims litigants who may seek those services from the same District Attorney's office that was or is prosecuting that litigant in a criminal matter. Existing law specifies that the services be administered in a manner that avoids creating an actual or perceived conflict of interest (Code Civ. Proc. §116.940 (d)) but does not provide guidance in any situation that might give rise to such a real or perceived conflict. Most small claims advisory services are located in the county court or the county department of consumer affairs, practices that are more likely to avoid the appearance of any such conflict.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommend that legislation be sponsored to amend Code of Civil Procedure Section 116.940 as follows:

1 §116.940.
2 (a) Except as otherwise provided in this section or in rules adopted by the Judicial
3 Council, which are consistent with the requirements of this section, the characteristics of
4 the small claims advisory service required by Section 116.260 shall be determined by each
5 county in accordance with local needs and conditions.
6 (b) Each advisory service shall provide the following services:
7 (1) Individual personal advisory services, in person or by telephone, and by any
8 other means reasonably calculated to provide timely and appropriate assistance. The topics
9 covered by individual personal advisory services shall include, but not be limited to,
10 preparation of small claims court filings, procedures, including procedures related to the
11 conduct of the hearing, and information on the collection of small claims court judgments.

12 (2) Recorded telephone messages may be used to supplement the individual
13 personal advisory services, but shall not be the sole means of providing advice available in
14 the county.
15 (3) Adjacent counties may provide advisory services jointly.
16 (c) In any county in which the number of small claims actions filed annually is
17 1,000 or less as averaged over the immediately preceding two fiscal years, the county may
18 elect to exempt itself from the requirements set forth in subdivision (b). This exemption
19 shall be formally noticed through the adoption of a resolution by the board of supervisors.
20 If a county so exempts itself, the county shall nevertheless provide the following minimum
21 advisory services in accordance with rules adopted by the Judicial Council:
22 (1) Recorded telephone messages providing general information relating to small
23 claims actions filed in the county shall be provided during regular business hours.
24 (2) Small claims information booklets shall be provided in the court clerk's office
25 of each superior court, the county administrator' s office, other appropriate county offices,
26 and in any other location that is convenient to prospective small claims litigants in the
27 county.
28 (d) The advisory service shall operate in conjunction and cooperation with the
29 small claims division, and shall be administered so as to avoid the existence or appearance
30 of a conflict of interest between the individuals providing the advisory services and any
31 party to a particular small claims action or any judicial officer deciding small claims
32 actions. The advisory service shall not be located in, or provided by, a District Attorney’s
33 office.
34 (e) Advisers may be volunteers, and shall be members of the State Bar, law
35 students, paralegals, or persons experienced in resolving minor disputes, and shall be
36 familiar with small claims court rules and procedures. Advisers may not appear in court as
37 an advocate for any party.
38 (f) Advisers, including independent contractors, other employees, and volunteers
39 have the immunity conferred by Section 818.9 of the Government Code with respect to
40 advice provided as a public service on behalf of a court or county to small claims litigants
41 and potential litigants under this chapter.

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

PROPONENT: National Lawyers Guild: Los Angeles Chapter

STATEMENT OF REASONS:

Existing Law: The existing law requires that counties provide small claims advisory services to the public, and further requires that the services be administered in a manner that avoids creating the existence or appearance of a conflict of interest. However, the existing law does not specify any situation that would create a real or apparent conflict of interest.

This Resolution: Would modify existing law by prohibiting District Attorneys' offices from providing or housing small claims advisory services.

The Problem: In most counties, the small claims advisor is part of the court or a county department of consumer affairs. However, in rare instances (e.g., Ventura County), the small claims advisor is located within the District Attorney’s office. This may occur, for example, when the District Attorney has significant political clout with the county board of supervisors, and seeks to have the funding allocated for the small claims advisor (a portion of all small claims court filing fees within the county) directed to the Office of the District Attorney.

Locating the small claims advisor in a District Attorney's office creates a particular problem when the small claims litigant is a current or former criminal defendant and does not feel comfortable seeking assistance in the office that is or was prosecuting him or her.

IMPACT STATEMENT:

This proposed resolution affects Code of Civil Procedure Section 116.260, Government Code Section 818.9 and Rule 3.2120 of the California Rules of Court.

AUTHORS AND/OR PERMANENT CONTACT: Author: Lisa Jaskol and Tina L. Rasnow, Ventura County Superior Court, Self-Help Legal Access Center, 800 South Victoria Avenue, Room 400, Ventura, CA 93009/(805)654-3879, tina.rasnow@ventura.courts.ca.gov

RESPONSIBLE FLOOR DELEGATE: Tina L. Rasnow

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution should be disapproved because it attempts to adopt a statewide rule to address a local issue, which is apparently unique to the proponent's county. In smaller counties, the location of the small claims advisory service in space provided by the District Attorney's office may produce significant cost savings. The resolution fails to provide sufficient justification that the mere location of the small claims advisory service in the District Attorney's office will produce such a substantial "chilling effect" on the delivery of those services that a ban should be imposed statewide.

RESOLUTION 06-05-2008

WITHDRAWN

RESOLUTION 06-06-08

DIGEST
Rules of Court: Timely Filing by Overnight Delivery of Documents in Writ Proceedings.
Amends California Rules of Court, rule 8.25 to provide that overnight delivery of documents in original appellate proceedings is timely, except as the court may otherwise direct.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends California Rules of Court, rule 8.25 to provide that overnight delivery of documents in original appellate proceedings is timely, except as the court may otherwise direct. This resolution should be approved in principle because it makes the rule permitting overnight delivery for the filing of documents in original appellate proceedings consistent with the rule governing other appellate filings.

California Rules of Court, rule 3.1306, presently allows as timely filed appellate briefs, rehearing petitions and answers to rehearing petitions which are sent by priority or express mail or delivered to an overnight delivery service before the time to file has expired. This resolution would expand that rule to include any document permitted or required to be filed in original proceedings in appellate courts, other than the initial filing. It also allows the court to direct otherwise on a case by case basis.

There is no reason to continue to treat filings of subsequent documents in writ proceedings in appellate courts differently from appellate proceedings.

SECTION/COMMITTEE REPORTS

COMMITTEE ON APPELLATE COURTS
APPROVE IN PRINCIPLE

Under rule 8.25(b) of the California Rules of Court, an appellate brief, a petition for rehearing, an answer to a petition for rehearing, a petition for review, an answer to a petition for review, or a reply to an answer to a petition for review is timely if the time to file it has not expired on the date of a) its mailing by priority or express mail as shown on the postmark or the postal receipt; or b) its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Rule 8.25(b)(4) currently provides that these provisions do not apply to original proceedings. Under this resolution, the provisions would apply to any document permitted or required to be filed in an original proceeding, other than the initial filing, except as the court may otherwise direct. The State Bar of California’s Committee on Appellate Courts supports this resolution for the reasons articulated by the proponent.

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend California Rules of Court, rule 8.25 as follows:

1 Rule 8.25. Service and filing
2 (a) Service
3 (1) Before filing any document , a party must serve, by any method permitted by
4 the Code of Civil Procedure, one copy of the document on the attorney for each party
5 separately represented, on each unrepresented party, and on any other person or entity
6 when required by statute or rule.
7 (2) The party must attach to the document presented for filing a proof of service
8 showing service on each person or entity required to be served under (1). The proof must
9 name each party represented by each attorney served.
10 (b) Filing
11 (1) A document is deemed filed on the date the clerk receives it.
12 (2) Except as provided in (3) <u>and (4)</u>, a filing is not timely unless the clerk receives
13 the document before the time to file it expires.
14 (3) A brief, a petition for rehearing, an answer to a petition for rehearing, a petition
15 for review, an answer to a petition for review, or a reply to an answer to a petition for
16 review is timely if the time to file it has not expired on the date of:
17 (A) Its mailing by priority or express mail as shown on the postmark or the postal
18 receipt; or,
19 (B) Its delivery to a common carrier promising overnight delivery as shown on the
20 carrier's receipt.
21 <u>(4) Any document permitted or required to be filed in an original proceeding, other</u>
22 <u>than the initial filing, is timely as provided in subdivision (3) except as the court may</u>
23 <u>otherwise direct.</u>

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

<u>Existing law</u>: Under rule 8.25, California Rules of Court, an appellate brief is timely if it is sent by priority or express mail or delivered to an overnight delivery service before the time to file the brief has expired. The rule applies to rehearing petitions and answers to rehearing petitions,

petitions for review in the California Supreme Court, answers to petitions for review and replies to answers to petitions for review. Any of these documents is timely filed if sent by priority or express mail or delivered to an overnight carrier on the day it is due in the clerk's office.

This resolution: Would amend the rule to include filings in original appellate proceedings—for example, a preliminary opposition to a writ petition, return to an OSC or alternative writ or a reply to a return. The amendment would not apply to a writ petition or other initial filing in an original appellate proceeding, which would still have to be physically filed with the appellate court clerk within the allowed time. The amendment would permit the court to require physical delivery to the clerk by a specific date.

The problem: Under rule 8.25, briefs and similar documents are considered timely filed if sent by priority or express mail or delivered to an overnight service, such as UPS or Federal Express on or before the date when the document is due. The rule does not, however, apply to documents filed in original appellate proceedings, such as a petition for writ of mandate or prohibition. A preliminary opposition, return to an order to show cause or alternative writ, or a reply to a return, must still be physically delivered to the clerk's office on or before the due date.

There is good reason to require the initial document in original appellate proceeding, usually a petition for extraordinary writ, to be physically filed with the clerk within the time allowed. Filing a writ petition is akin to filing a notice of appeal. Just as a notice of appeal must be physically filed before expiration of the time to appeal, so should a writ petition be physically filed before expiration of any time provided by statute or rule.

But, if the court agrees to hear the petition, there is no apparent justification for not allowing parties to file subsequent documents the same way that briefs may be filed in an appeal, sending the document on the due date by priority or express mail or delivering it to an overnight service.

The proposed amendment cures this anomalous treatment of documents filed in appellate writ proceedings.

In cases where the appellate court must act very quickly, it may be appropriate to require actual physical delivery to the clerk by the due date. The proposed amendment, therefore, order actual delivery to the clerk, providing that a document may be filed by priority or express mail or delivery to an overnight service "except as the court may otherwise direct."

IMPACT STATEMENT

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

AUTHOR AND/OR PERMANENT CONTACT: Jay-Allen Eisen, Jay-Allen Eisen Law Corporation, 980 Ninth Street, Suite 1900, Sacramento CA 95814. (916) 444-6171 voice, (916) 441-5810 fax. jae@eisenlegal.com

RESPONSIBLE FLOOR DELEGATE: Jay-Allen Eisen

RESOLUTION 06-07-2008

DIGEST

Judicial Nominees: Mandatory Disclosure of Not Qualified Rating

Amends Government Code section 12011.5 to require the State Bar, when the Governor has appointed a judge who has been found not qualified, to make that fact public.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Government Code section 12011.5 to require the State Bar, when the Governor has appointed a judge who has been found not qualified, to make that fact public. This resolution should be disapproved because it could unfairly harm a candidate for judicial office by not allowing him or her to bow out of an appointment based on a "not qualified" finding.

The resolution appears to assume that potential appointees know their ratings before they are appointed, but the language of the statute does not bear this assumption out. The current statute requires a "designated agency" of the State Bar to review potential judicial appointees, and to provide the Governor with a confidential rating of a candidate as "exceptionally well qualified," "well qualified," "qualified" or "not qualified." But the statute requires that the rating be kept confidential, and disclosed only to the Governor. While the statute allows the designated agency to disclose to the potential appointee "the subject matter of substantial and credible adverse allegations received regarding the candidate's health, physical or mental condition, or moral turpitude" (subdivision (e)), it does not make any provision for disclosure of the rating to the potential appointee. Rather, the only notice occurs in subdivision (f), which allows (but does not require) the State Bar to make public the "not qualified" rating of a person "the Governor has appointed" (i.e., someone no longer merely a "potential appointee"). Subdivision (f) allows this disclosure, however, only after the State Bar has provided "due notice" to the appointee of its intention to do so. In effect, this allows an appointee to bow out and avoid potential public humiliation.

This resolution would make such disclosures mandatory, and would eliminate the notice provision. Because the statute does not provide a potential appointee with any other notice of his or her rating, this means the potential appointee would find out about his or her "not qualified" rating only once it was made public. If there is a real concern that the State Bar may choose not to make public the fact that an appointee has been rated "not qualified" for political or professional reasons, the statute should be amended so that the designated agency of the State Bar can disclose to any "potential appointees" the fact that they have been rated "not qualified." If the potential appointee then chooses to remain in the running despite this notice and is appointed by the Governor, mandatory disclosure of the "not qualified" rating would be justified.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12011.5 to read as follows:

1 §12011.5
2 (a) In the event of a vacancy in a judicial office to be filled by appointment of the
3 Governor, or in the event that a declaration of candidacy is not filed by a judge and the
4 Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution
5 to nominate a candidate, the Governor shall first submit to a designated agency of the
6 State Bar of California the names of all potential appointees or nominees for the judicial
7 office for evaluation of their judicial qualifications.
8 (b) The membership of the designated agency of the State Bar responsible for
9 evaluation of judicial candidates shall consist of attorney members and public members
10 with the ratio of public members to attorney members determined, to the extent practical,
11 by the ratio established in Sections 6013.4 and 6013.5 of the Business and Professions
12 Code. It is the intent of this subdivision that the designated agency of the State Bar
13 responsible for evaluation of judicial candidates shall be broadly representative of the
14 ethnic, gender, and racial diversity of the population of California and composed in
15 accordance with Sections 11140 and 11141 of the Government Code. The further intent
16 of this subdivision is to establish a selection process for membership on the designated
17 agency of the State Bar responsible for evaluation of judicial candidates under which no
18 member of that agency shall provide inappropriate, multiple representation for purposes
19 of this subdivision.
20 (c) Upon receipt from the Governor of the names of candidates for judicial office
21 and their completed personal data questionnaires, the State Bar shall employ appropriate
22 confidential procedures to evaluate and determine the qualifications of each candidate
23 with regard to his or her ability to discharge the judicial duties of the office to which the
24 appointment or nomination shall be made. Within 90 days of submission by the Governor
25 of the name of a potential appointee for judicial office, the State Bar shall report in
26 confidence to the Governor its recommendation whether the candidate is exceptionally
27 well qualified, well qualified, qualified, or not qualified and the reasons therefor, and
28 may report, in confidence, other information as the State Bar deems pertinent to the
29 qualifications of the candidate.
30 (d) In determining the qualifications of a candidate for judicial office, the State
31 Bar shall consider, among other appropriate factors, his or her industry, judicial
32 temperament, honesty, objectivity, community respect, integrity, health, ability, and legal
33 experience. The State Bar shall consider legal experience broadly, including, but not
34 limited to, litigation and nonlitigation experience, legal work for a business or nonprofit
35 entity, experience as a law professor or other academic position, legal work in any of the
36 three branches of government, and legal work in dispute resolution.
37 (e) The State Bar shall establish and promulgate rules and procedures regarding
38 the investigation of the qualifications of candidates for judicial office by the designated
39 agency. These rules and procedures shall establish appropriate, confidential methods for
40 disclosing to the candidate the subject matter of substantial and credible adverse
41 allegations received regarding the candidate's health, physical or mental condition, or
42 moral turpitude which, unless rebutted, would be determinative of the candidate's
43 unsuitability for judicial office. No provision of this section shall be construed as

44 requiring that any rule or procedure be adopted that permits the disclosure to the
45 candidate of information from which the candidate may infer the source, and no
46 information shall either be disclosed to the candidate nor be obtainable by any process
47 that would jeopardize the confidentiality of communications from persons whose opinion
48 has been sought on the candidate's qualifications.
49 (f) All communications, written, verbal, or otherwise, of and to the Governor, the
50 Governor's authorized agents or employees, including, but not limited to, the Governor's
51 Legal Affairs Secretary and Appointments Secretary, or of and to the State Bar in
52 furtherance of the purposes of this section are absolutely privileged from disclosure and
53 confidential, and any communication made in the discretion of the Governor or the State
54 Bar with a candidate or person providing information in furtherance of the purposes of
55 this section shall not constitute a waiver of the privilege or a breach of confidentiality.
56 (g) If the Governor has appointed a person to a trial court who has been found not
57 qualified by the designated agency, the State Bar ~~may~~ <u>shall promptly</u> make public this
58 fact ~~after due notice to the appointee of its intention to do so~~, but that notice or disclosure
59 shall not constitute a waiver of privilege or breach of confidentiality with respect to
60 communications of or to the State Bar concerning the qualifications of the appointee.
61 (h) If the Governor has nominated or appointed a person to the Supreme Court or
62 court of appeal in accordance with subdivision (d) of Section 16 of Article VI of the
63 California Constitution, the Commission on Judicial Appointments may invite, or the
64 State Bar's governing board or its designated agency may submit to the commission its
65 recommendation, and the reasons therefor, but that disclosure shall not constitute a
66 waiver of privilege or breach of confidentiality with respect to communications of or to
67 the State Bar concerning the qualifications of the nominee or appointee.
68 (i) No person or entity shall be liable for any injury caused by any act or failure to
69 act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the
70 purposes of this section, including, but not limited to, providing or receiving any
71 information, making any recommendations, and giving any reasons therefor. As used in
72 this section, the term "State Bar" means its governing board and members thereof, the
73 designated agency of the State Bar and members thereof, and employees and agents of
74 the State Bar.
75 (j) At any time prior to the receipt of the report from the State Bar specified in
76 subdivision (c) the Governor may withdraw the name of any person submitted to the
77 State Bar for evaluation pursuant to this section.
78 (k) No candidate for judicial office may be appointed until the State Bar has
79 reported to the Governor pursuant to this section, or until 90 days have elapsed after
80 submission of the candidate's name to the State Bar, whichever occurs earlier. The
81 requirement of this subdivision shall not apply to any vacancy in judicial office occurring
82 within the 90 days preceding the expiration of the Governor' s term of office, provided,
83 however, that with respect to those vacancies and with respect to nominations pursuant to
84 subdivision (d) of Section 16 of Article VI of the California Constitution, the Governor
85 shall be required to submit any candidate's name to the State Bar in order to provide an
86 opportunity, if time permits, to make an evaluation.
87 (l) Nothing in this section shall be construed as imposing an additional
88 requirement for an appointment or nomination to judicial office, nor shall anything in this
89 section be construed as adding any additional qualifications for the office of a judge.

90 (m) The Board of Governors of the State Bar shall not conduct or participate in, or
91 authorize any committee, agency, employee, or commission of the State Bar to conduct
92 or participate in, any evaluation, review, or report on the qualifications, integrity,
93 diligence, or judicial ability of any specific justice of a court provided for in Section 2 or
94 3 of Article VI of the California Constitution without prior review and statutory
95 authorization by the Legislature, except an evaluation, review, or report on potential
96 judicial appointees or nominees as authorized by this section.
97 The provisions of this subdivision shall not be construed to prohibit a member of
98 the State Bar from conducting or participating in an evaluation, review, or report in his or
99 her individual capacity.
100 (n) (1) Notwithstanding any other provision of this section, on or before March 1,
101 2007, and on or before March 1 of each year thereafter, all of the following shall occur:
102 (A) The Governor shall collect and release, on an aggregate statewide basis, all of
103 the following:
104 (i) Demographic data provided by all judicial applicants relative to ethnicity, race,
105 and gender.
106 (ii) Demographic data relative to ethnicity, race, and gender as provided by all
107 judicial applicants, both as to those judicial applicants who have been and those who
108 have not been submitted to the State Bar for evaluation.
109 (iii) Demographic data relative to ethnicity, race, and gender of all judicial
110 appointments or nominations as provided by the judicial appointee or nominee.
111 (B) The designated agency of the State Bar responsible for evaluation of judicial
112 candidates shall collect and release both of the following on an aggregate statewide basis:
113 (i) Statewide demographic data provided by all judicial applicants reviewed
114 relative to ethnicity, race, gender, and areas of legal practice and employment.
115 (ii) The statewide summary of the recommendations of the designated agency of
116 the State Bar by ethnicity, race, gender, and areas of legal practice and employment.
117 (C) The Administrative Office of the Courts shall collect and release the
118 demographic data provided by justices and judges described in Article VI of the
119 California Constitution relative to ethnicity, race, and gender, by specific jurisdiction.
120 (2) Any demographic data disclosed or released pursuant to this subdivision shall
121 disclose only aggregated statistical data and shall not identify any individual applicant,
122 justice, or judge.
123 (o) If any provision of this section other than a provision relating to or providing
124 for confidentiality or privilege from disclosure of any communication or matter, or the
125 application of the provision to any person or circumstances, is held invalid, the remainder
126 of this section to the extent it can be given effect, or the application of the provision to
127 persons or circumstances other than those as to which it is held invalid, shall not be
128 affected thereby, and to this extent the provisions of this section are severable. If any
129 other act of the Legislature conflicts with the provisions of this section, this section shall
130 prevail.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS:

Existing Law: Makes a disclosure of the "not qualified" rating of a person appointed to a trial court discretionary with the State Bar Board of Governors. This creates the possibility of non-disclosure based on political considerations or personal regard for the appointee.

This Resolution: Would require disclosure in all instances, in the public interest. Inasmuch as the discretion would be removed from the Board of Governors, a forewarning to the appointee would serve no purpose inasmuch as dissuasion would no longer be a possibility. Such a change would foreseeably deter the offering of such appointments by the Governor's Office or the acceptance of such appointments by candidates. It would remove the prospect of political bargaining with the State Bar for conferring of benefits in exchange for non-disclosure.

The Problem: Whether the State Bar reveals that a person who has been appointed by the governor to a Superior Court judgeship was rated "not qualified" by the Commission on Judicial Nominees Evaluation is left to chance, whim, or varying attitudes of Board of Governors' members from year to year. The board might also be subject to pressures in some instances not to make a public disclosure which, in all instances, would be detrimental to the governor. At a time when the Legislature has passed a dues bill and it is before the governor for signature or veto, displeasing the governor might seem politically unwise. Disclosure would, however, deter the making of bad appointments, and maintaining a judiciary of a high caliber should not be influenced by political considerations. The public interest would in *all* instances be served by disclosure, while the current law creates discretion which could in some instances be exercised to keep secret from the public that which it should know.

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

SAN DIEGO COUNTY BAR ASSOCIATION

The mandatory disclosure rule of a "not qualified" rating could be extremely detrimental to a judicial nominee. As presently structured, the nomination process allows a nominee to appeal a determination of "not qualified," and allows the State Bar the flexibility to reconsider a determination as to the nominee's qualifications based upon evidence received in the appeal. This resolution should be disapproved because it fails to provide adequate protection to judicial nominees in the event of an error in the initial decision of the individual's qualifications.