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Civil Procedure

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Civil Procedure

Civil Procedure; burden of proof—disclosure of written evidence in suits involving state-granted land patents and boundary disputes

Code of Civil Procedure § 2031.5 (new); Evidence Code § 523 (new).
SB 1429 (Johnston); 1994 STAT. Ch. 128

Existing law provides that, except as otherwise provided by law, the burden of proof[1] as to each fact essential to a claim for relief or defense lies with the party asserting the claim or defense.[2] Chapter 128 provides that in actions involving

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1. *See* CAL. EVID. CODE § 115 (West 1966) (defining burden of proof as the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court); *see also id.* § 520 (West 1966) (providing that the party claiming that a person is guilty of a crime or wrongdoing has the burden of proof on that issue); CAL. PENAL CODE § 872 (West Supp. 1994) (stating that the burden of proof on the prosecution at a preliminary hearing is to establish sufficient cause to believe that the defendant is guilty of the offense charged); *id.* § 1096 (West 1985) (providing that a defendant in a criminal action is presumed innocent until the contrary is proved, and that the state has the burden of proving the accused guilty beyond a reasonable doubt); Rogers v. Superior Court, 46 Cal. 2d 3, 7-8, 291 P.2d 929, 932 (1955) (defining sufficient cause to mean a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused); Bruck v. Adams, 259 Cal. App. 2d 585, 588, 66 Cal. Rptr. 395, 397 (1968) (stating that the three standards commonly recognized for measuring a party's burden of proof are proof by a preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt, and an instruction in a medical malpractice case describing the plaintiff's burden of proof as proof by reasonable certainty was clearly erroneous); Carpenter Steel Company v. Pellegrin, 237 Cal. App. 2d 35, 42, 46 Cal. Rptr. 502, 507 (1965) (placing the burden of proof upon the party who is actually or presumptively in possession of information enabling him to more easily sustain the burden); BAJI § 2.60 (West 1986) (setting forth a form by which the burden to prove facts by a preponderance of the evidence may be allocated between the plaintiff and the defendant in a civil case); *id.* § 2.62 (West Supp. 1994) (setting forth a form upon which the burden to prove facts by clear and convincing evidence may be listed); CALJIC § 2.90 (West 1988) (placing upon the State the burden of proving a defendant guilty beyond a reasonable doubt in criminal cases); *id.* § 2.91 (West 1988) (stating that the burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he or she has been charged).

2. CAL. EVID CODE § 500 (West 1966); see CAL. CIV. PROC. CODE § 437c(o)(1)-(2) (West Supp. 1994) (stating that on a motion for summary judgment, a plaintiff or cross-complainant has met his burden of showing that there is no defense to a cause of action if that party has proven each element of the cause of action entitling the party to judgment). A defendant or cross-defendant has met his burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. *Id.*; *see* CAL. EVID. CODE § 405 (West 1966) (providing that when the existence of a preliminary fact is disputed, the court must indicate which party has the burden of producing evidence and the burden of proof on an issue as implied by the rule of law under which the question arises); *id.* § 550 (West 1966) (providing that the burden of producing evidence as to a particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence); *see also* Walling v. California Conserving Co., 74 F. Supp. 182, 183 (D. Cal. 1945) (providing that the burden of proof doctrine applies only to the weight of evidence of fact and not to the interpretation of a statute); Fisher v. City of Berkeley, 37 Cal. 3d 644, 698, 693 P.2d 261, 304, 209 Cal. Rptr. 682, 725 (1984) (providing that the Legislature deliberately excluded ordinances from those sources of law that may alter the traditional allocation of the burden of proof), *aff'd*, 475 U.S. 260 (1986); *see also, e.g.*, Anthony v. Hobbie, 25 Cal. 2d 814, 818, 155 P.2d 826, 829 (1945) (stating that defendants generally have the burden of proving contributory negligence); Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 543, 81 P.2d 533, 554 (1938) (providing that where a new matter is stated in the answer, this creates a new issue and the burden of proof shifts to the defendant); Finn v. Vallejo St. Wharf Co., 7 Cal. 254, 255 (1857) (providing that a party alleging an affirmative defense has the burden of proving it); Western Land Office, Inc. v. Cervantes, 175 Cal. App. 3d 724, 742, 220

boundary disputes between the State and a private party or involving the validity of any state patent or grant prior to 1950, the State will have the burden of proof on all issues relating to the historic locations of water bodies and to the State's authority to issue the land grant.[3]

Additionally, existing law governing disclosure in civil actions mandates that any party may obtain discovery of documents, things, and places that are in the possession, custody, or control of any other party to the action.[4] These disclosures

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Cal. Rptr. 784, 797 (1985) (holding that in an unlawful detainer action, where the defense of retaliatory eviction is asserted, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence); Polk v. Polk, 228 Cal. App. 2d 763, 787, 39 Cal. Rptr. 824, 838 (1964) (stating that the burden of proof is on the plaintiff as to those allegations in his complaint that are placed in issue); Gularte v. Martins, 65 Cal. App. 2d 817, 820, 151 P.2d 570, 571 (1944) (stating that the defendant has the burden of proving any new matter pleaded in avoidance of the cause of action); Axis Petroleum Co. v. Taylor, 42 Cal. App. 2d 389, 398, 108 P.2d 978, 983 (1941) (providing that defendants who file a cross-complaint have the burden of proving their affirmative allegations of a new matter); Sayles v. Peters, 11 Cal. App. 2d 401, 407, 54 P.2d 94, 98 (1936) (stating that in general, questions regarding admissibility or sufficiency of evidence, presumption, and burden of proof are questions of remedy to be governed by the law of the forum); Holwick v. Walker, 6 Cal. App. 2d 669, 672, 45 P.2d 374, 375 (1935) (stating that a party asserting the affirmative of an issue has the burden of proof); Fawcett v. Gregg, 26 Cal. App. 727, 731, 148 P. 524, 526 (1915) (placing the burden on a party pleading a fact to prove it). *See generally* Albert Brundage, *The Adaptation of Judicial Procedures to the Arbitral Process*, 5 SAN DIEGO L. REV. 1, 23 (1968) (stating that the burden of proof concept has little significance in arbitration proceedings, and that the order of presentation should be based on how the facts may best be developed to provide an expeditious and orderly hearing, rather than by analogy to an established judicial procedure).

3. CAL. EVID. CODE § 523 (enacted by Chapter 128).

4. CAL. CIV. PROC. CODE § 2031(a) (West Supp. 1994); *see* Shepherd v. Superior Court, 17 Cal. 3d 107, 118, 550 P.2d 161, 166, 130 Cal. Rptr. 257, 262 (1976) (stating that California discovery statutes are liberally construed in favor of disclosure unless statutory or public policy considerations clearly prohibit it); Valley Bank v. Superior Court, 15 Cal. 3d 652, 655-56, 542 P.2d 977, 978, 125 Cal. Rptr. 553, 554 (1975) (stating that information is discoverable if it is not privileged and is either relevant to the subject matter of an action or reasonably calculated to reveal admissible evidence); Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 394, 364 P.2d 266, 287, 15 Cal. Rptr. 90, 111 (1961) (providing that California Evidence Code § 2031 does not violate constitutional provisions against unreasonable searches and seizures); Elmore v. Superior Court, 255 Cal. App. 2d 635, 640, 63 Cal. Rptr. 307, 311 (1967) (stating that the main purpose of the Discovery Act is to ensure effective preparation, encourage settlements, and end litigation); Ryan v. Superior Court, 186 Cal. App. 2d 813, 819, 9 Cal. Rptr. 147, 151 (1961) (stating that the purpose of the Discovery Act is to allow a party to prepare himself for trial and to discover any relevant admissible evidence or matters reasonably calculated to lead to the discovery of admissible evidence); Rolf Homes, Inc. v. Superior Court, 186 Cal. App. 2d 876, 882, 9 Cal. Rptr. 142, 146 (1960) (stating that the provisions of the Discovery Act must be liberally construed); Crummer v. Beeler, 185 Cal. App. 2d 851, 858, 8 Cal. Rptr. 698, 702 (1960) (stating that the purpose of the discovery rules is not to provide a weapon for punishment, forfeiture, and avoidance of a trial on the merits, but to secure a just, speedy, and inexpensive determination of actions); Clark v. Superior Court, 177 Cal. App. 2d 577, 580, 2 Cal. Rptr. 375, 378 (1960) (stating that the primary purpose of the Discovery Act is to facilitate the expeditious disposition of litigation). *See generally* Edwin W. Green & Douglas S. Brown, *Back to the Future: Proposals for Restructuring Civil Discovery*, 26 U.S.F. L. REV. 225 (1992) (proposing dramatic changes in California's civil litigation system, focusing primarily on pre-trial procedures such as pleadings, depositions, and interrogatories); *Justice At What Price?—Quayle Takes Case for Legal Reform Before the ABA*, SEATTLE TIMES, Aug. 14, 1991, at A3 (reporting former Vice President Dan Quayle's introduction of the "Agenda for Civil Justice in America," a 50-point plan to cut the nation's legal bills including a proposal to change the pre-trial discovery process requiring both sides in a suit to disclose "core information" about witnesses and documents, and to meet with the judge to set ceilings on the amount of any further discovery allowed).

are further regulated by protective orders that may be issued by the court.[5] Chapter 128 mandates that in actions where the boundaries of state-granted land or the validity of a state grant or patent prior to 1950 is in dispute, both parties have the duty to disclose to the opposing party all relevant written evidence available, provided that the evidence is not privileged.[6]

INTERPRETIVE COMMENT

Traditionally and statutorily in California, the burden of proof regarding facts essential to a claim or defense is allocated to the party asserting the claim or defense.[7] This basic rule, however, may be altered if the opposing party has greater access to the evidence necessary to prove the claim, or on the basis of public policy considerations.[8] Chapter 128 was introduced to protect private

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5. CAL. CIV. PROC. CODE § 2031(e) (West Supp. 1994); *see id.* § 2025(i) (West Supp. 1994) (providing that any person before, during, or after a deposition may move for a protective order, and that the court may make any order that justice requires, for good cause shown, to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense); *see, e.g.*, CAL. EVID. CODE § 1061(b)(1) (West Supp. 1994) (providing that the owner of a trade secret may file a motion for a protective order to assert a trade secret privilege); CAL. PROB. CODE § 453 (West 1991) (providing that on petition of a person required to appear before a probate referee, the court may make a protective order to protect the person from annoyance, embarrassment, or oppression); *see also* Coalition Against Police Abuse v. Superior Court, 170 Cal. App. 3d 888, 905, 216 Cal. Rptr. 614, 625 (1985) (stating that the trial court did not err when it entered a decree directing the return of police documents to be produced in civil discovery which was subject to protective orders upon the settlement of litigation challenging police activities); Elmore v. Superior Court, 255 Cal. App. 2d 635, 639, 63 Cal. Rptr. 307, 310 (1967) (providing that upon inspection of a nonprofit corporation's audited accounting reports, that corporation's business interests were to be protected by a protective order specifically limiting individuals permitted to inspect such documents).

6. CAL. CIV. PROC. CODE § 2031.5 (enacted by Chapter 128).

7. CAL. EVID. CODE § 520 (West 1966); *see supra* notes 1-2 and accompanying text (discussing burden of proof).

8. *See* Sanchez v. Unemployment Ins. Appeals Bd., 20 Cal. 3d 55, 70-71, 569 P.2d 740, 751, 141 Cal. Rptr. 146, 157 (1977) (holding that once an unemployment insurance claimant has shown he is available for suitable work for which he has no good cause for refusing, the burden of proof on the issue of whether he is available to a substantial field of employment lies with the Department of Employment Development, since that issue calls for testimony regarding the size and character of the labor market which is peculiarly within the knowledge and competence of the Department); McGee v. Cessna Aircraft Co., 139 Cal. App. 3d 179, 190, 188 Cal. Rptr. 542, 550 (1983) (providing that the doctrines of both negligence *per se* and strict liability for defective products shift the burden of proof onto defendants for reasons grounded in sound economic and public policy); Worsley v. Municipal Court, 122 Cal. App. 3d 409, 420, 176 Cal. Rptr. 324, 330-31 (1981) (holding that whether the traditional allocation of the burden of proof should be altered is measured by the knowledge of the parties, the availability of the evidence to the parties regarding a particular issue, the most desirable result in terms of public policy considerations, and the probability of the existence or nonexistence of the particular fact at issue); Donald N. Bauhofer & Steven L. Ching, *The Burden of Proof In California Environmental Nuisance Cases*, 9 U.C. DAVIS L. REV. 679, 699 (1976) (proposing judicial reallocation of the burden of proof under California nuisance law when the plaintiff is seeking injunctive relief); *see, e.g.*, CAL. CIV. PROC. CODE § 1240.620 (West 1982) (providing that if the defendant objects to a taking for a more public use, he has the burden of proof that his property is appropriated to public use); CAL. HEALTH & SAFETY CODE § 7101 (West 1970) (stating that when funeral expenses incurred upon a decedent are rejected by the administrator of the estate, the burden of proving that the cost of the funeral service, interment plot, or memorial is disproportionate to the standard of living enjoyed by the decedent while living shall be upon the executor or administrator of the estate rejecting the claim); CAL. LAB. CODE § 1964(b)(2) (West 1989) (providing that in the removal of a volunteer firefighter, the burden of proving incompetency or misconduct

landowners who bring quiet title actions in reaction to the issuance of a claim to property by the State Lands Commission.[9] Because the private landowner is the plaintiff in the action, he or she carries the burden of proof with regard to his or her claim to the land while the facts related to this issue, such as the historic location of bodies of water and the State's authority to issue the initial land grant, may be only within the knowledge of the State.[10] Chapter 128 alleviates this conflict by leveling the playing field in litigation between the State Lands Commission and private landowners.[11] The provision relating to disclosure between parties is intended to further alleviate this conflict by providing extensive access to documents and other written evidence which may be damaging to the disclosing party, yet which may also establish or rebut a particular party's claim to the property.[12]

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to the governing board shall be on the person alleging such incompetency or misconduct); CAL. PROB. CODE § 8252 (West 1991) (providing that the proponents of a will have the burden of proof of due execution, and that the contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation); CAL. REV. & TAX. CODE § 6241 (West 1987) (providing that it will be assumed for the purposes of the use tax that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is proved). The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale. *Id.*

9. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1429, at 2 (May 10, 1994) (providing that the measure stems from a long-standing feud between the State Lands Commission and private landowners over the State's assertion of property rights under the Public Trust Doctrine); *see also* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 425, 658 P.2d 709, 712, 189 Cal. Rptr. 346, 349 (1983) (stating that the core of the Public Trust Doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters), *cert. denied sub nom.* Los Angeles Dep't of Water & Power v. Superior Court, 464 U.S. 977 (1983); Federico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364, 1364-65 (1986) (stating that the Public Trust Doctrine has roots in both civil and common law, and that under the doctrine in its traditional American form, tidelands and those lands that are submerged by navigable bodies of water are open for public uses such as fishing, commerce, and navigation, and are held by the state government in trust for the people of the state); Janice Lawrence, Note, *Land Use:* Lyon *and* Fogerty*: Unprecedented Extensions of the Public Trust*, 70 CAL. L. REV. 1138, 1138 (1982) (reporting that during the past decade, the California courts have greatly expanded the Public Trust Doctrine from including trust lands for navigation, commerce, and fisheries to lands used for public recreation and environmental preservation).

10. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1429, at 2-3 (May 10, 1994) (providing that the traditional/statutory allocation of the burden of proof is inequitable due to the fact that most of the relevant information is within the knowledge of the state).

11. *Id.* at 2.

12. CAL. CIV. PROC. CODE § 2031.5 (enacted by Chapter 128). *But see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1429, at 3 (May 10, 1994) (providing the State Lands Commission's position that all information sought to be discovered under this Act is available under the Public Records Act); *see also* CAL. GOV'T CODE § 6253 (West Supp. 1994) (enumerating public records which are open to inspection under the California Public Records Act).

Civil Procedure; childhood sexual abuse—commencement of actions

Code of Civil Procedure § 340.1 (amended).
AB 2846 (Speier); 1994 STAT. Ch. 288

Existing law requires that an action for damages suffered due to childhood sexual abuse[1] be commenced within eight years after the plaintiff attains majority[2] or within three years of the time that the plaintiff discovers that any psychological injury resulted from the sexual abuse, whichever occurs later.[3] The law prior to January 1, 1991, required that such actions be brought within three years.[4] Chapter 288 provides that causes of action that were barred under prior law are revived and will be subject to the extended commencement period.[5]

Existing law requires any plaintiff who is twenty-six years of age or older at the commencement of an action, filed pursuant to California Code of Civil Procedure section 340.4, to file certificates of merit[6] executed by both the plaintiff's attorney and a licensed mental health practitioner.[7] Chapter 288

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1. *See* CAL. CIV. PROC. CODE § 340.1(b) (amended by Chapter 288) (defining childhood sexual abuse).

2. *See* CAL. FAMILY CODE § 6502 (West 1994) (defining the age of majority as 18 years).

3. CAL. CIV. PROC. CODE § 340.1(a) (amended by Chapter 288); *see id.* § 340.1(o) (amended by Chapter 288) (providing that the law applies to all actions commenced on January 1, 1991, or after); *cf.* ILL. ANN. STAT. ch. 735, para. 5/13-202.2 (Smith-Hurd Supp. 1994) (providing a limitation of two years from the time the abused person discovers or should have discovered that sexual abuse occurred and that the injury was caused by the sexual abuse); MO. ANN. STAT. § 537.046 (Vernon Supp. 1994) (providing a limitations period of five years from the time the abused attains 18 years of age or within three years of the time the abused discovered or should have discovered the injury was the result of the sexual abuse, whichever occurs later); MONT. CODE ANN. § 27-2-216 (1993) (imposing a limitations period of three years from the time of the abuse or three years after the abused person discovers or reasonably should have discovered the injury was a result of the abuse); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1994) (providing for a three-year limitation from either the date of the abuse or the time when the abused person discovered the injury was caused by the abuse, whichever occurs later). *But see* Irene Wielawski, *Unlocking the Secrets of Memory*, L.A. TIMES, Oct. 3, 1991, at A1 (discussing the skepticism surrounding the phenomenon of repressed childhood memories). *See generally* Lisa Bickel, Note, *Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse*, 33 ARIZ. L. REV. 427 (1991) (discussing historical case treatment of statute of limitations for childhood sexual abuse); Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245 (1991) (discussing various states' treatments regarding statutes of limitations for adult survivors of childhood sexual abuse).

4. 1986 Cal. Stat. ch. 914, sec. 1, at 3165 (enacting CAL. CIV. PROC. CODE § 340.1(a)).

5. CAL. CIV. PROC. CODE § 340.1(o) (amended by Chapter 288); *see also* David A. v. Superior Court, 20 Cal. App. 4th 281, 286, 24 Cal. Rptr. 2d 537, 540 (1993) (holding that an intent to revive lapsed claims must be stated clearly by the Legislature in order to have such an effect); Liebig v. Superior Court, 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574, 578 (1989) (holding that the Legislature has the power to retroactively extend the limitations period on previously lapsed claims).

6. *See* CAL. CIV. PROC. CODE § 340.1(e)(1)-(3) (amended by Chapter 288) (outlining the facts which must be set forth in the certificates which support the claim).

7. *Id.* § 340.1(d), (e) (amended by Chapter 288); *see id.* § 340.1(e)(2) (amended by Chapter 288) (stating that the chosen mental health practitioner may not be currently treating or have previously treated the plaintiff); *see also id.* § 340.1(f) (amended by Chapter 288) (stating that separate certificates must be filed regarding each defendant).

provides that such a practitioner may not be the practitioner providing treatment to the plaintiff.[8]

Prior law forbade a complaint filed by a plaintiff at least twenty-six years of age to name the defendant(s) until the court found reasonable and meritorious cause for the filing.[9] Chapter 288 requires that the plaintiff make an application, supported by a certificate of corroborative fact,[10] to the court for permission to amend the complaint so that the names of any defendants may be inserted.[11]

Chapter 288 further provides that a complaint filed by a plaintiff who is at least twenty-six years of age may not be served upon the defendant(s) until the court makes a finding based solely on the required certificates of merit that the action is reasonable and meritorious.[12]

INTERPRETIVE COMMENT

The Legislature enacted Chapter 288 in response to *David A. v. Superior Court*,[13] in which an appellate court held that the extended statute of limitations which took effect January 1, 1991 did not revive claims which had previously lapsed under the prior law.[14] The court also held that for such lapsed claims to be revived the Legislature must state clearly its intention to do so.[15] In Chapter 288, the Legislature answers the call of the court for such unmistakable language by explicitly providing for the revival of lapsed claims.[16]

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8. *Id.* § 340.1(e)(2) (amended by Chapter 288).

9. 1990 Cal. Legis. Serv. ch. 1578, sec. 1, at 6403-05 (amending CAL. CIV. PROC. CODE § 340.1(g)).

10. *See* CAL. CIV. PROC. CODE § 340.1(k)(1) (amended by Chapter 288) (defining a corroborative fact as one which supports or confirms the allegation and stating that an opinion of a mental health practitioner about the plaintiff is not such a corroborative fact).

11. *Id.* § 340.1(j), (k) (amended by Chapter 288); *see id.* § 340.1(k)(1)-(3) (amended by Chapter 288) (outlining the procedure by which the application and certificate of corroborative fact must be presented to the court and the defendant); *see also id.* § 340.1(*l*) (amended by Chapter 288) (requiring that the court view the materials in camera and decide whether the complaint should be amended); *id.* § 340.1(m) (amended by Chapter 288) (requiring that the court keep such materials confidential from all persons other than the plaintiff).

12. *Id.* § 340.1(g) (amended by Chapter 288); *see id.* (providing that a plaintiff's duty to serve process upon the defendant does not attach until the court makes such a finding).

13. 20 Cal. App. 4th 281, 24 Cal. Rptr. 2d 537 (1993).

14. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2846, at 2-3 (May 18, 1994); *see id.* (noting the need to add clear language that would display an intent to revive lapsed causes of actions in order to eliminate the injustice created by *David A.*); *David A.*, 20 Cal. App. 4th at 286-87, 24 Cal. Rptr. 2d at 540 (holding that an intent to revive lapsed claims must be stated clearly by the Legislature in order to have such an effect).

15. *David A.*, 20 Cal. App. 4th at 286, 24 Cal. Rptr. 2d at 540.

16. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2846, at 3 (June 27, 1994) (stating arguments in support of the bill and the author's intention to add specific language to alleviate the injustice created by the court); *see also* CAL. CIV. PROC. CODE § 340.1(o) (amended by Chapter 288) (adding explicit language stating that lapsed causes of action are to be revived).

Civil Procedure; mediation—land use disputes

Government Code §§ 66030, 66031, 66032, 66033, 66034, 66035, 66036, 66037 (new).
SB 517 (Bergeson); 1994 STAT. Ch. 300

Under existing law, the Office of Permit Assistance[1] is authorized to mediate disputes over the issuance of permits for development projects.[2] There is also a pilot project authorized by existing law which allows judges in Los Angeles County to order mediation in any case in which the amount in controversy is less than $50,000.[3]

Chapter 300 permits the court, where a suit that is related to land use[4] has been brought, to invite the parties to resolve the dispute by mediation.[5] The invitation

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1. *See* CAL. GOV'T CODE § 15399.50 (West Supp. 1994) (creating the Office of Permit Assistance in the Trade and Commerce Agency to provide technical assistance to counties and cities for the development permit process).

2. *Id.* § 15399.55 (West Supp. 1994).

3. CAL. CIV. CODE §§ 1775-1775.16 (West Supp. 1994).

4. *See* CAL. GOV'T CODE § 66031(a)(1) (enacted by Chapter 300) (making actions related to approval or denial by a public agency of any development project subject to a possible mediation proceeding pursuant to Chapter 300). The other types of land use disputes affected by Chapter 300 are those arising under California Government Code §§ 53080-53082, 56000-57550, 65100-65763, 65920-65963.1, 65995-65997, 66000-66009, 66410-66499.37, California Health and Safety Code §§ 33000-33855, and California Public Resources Code §§ 21000-21178.1. *Id.* § 66031(a)(2)-(8) (enacted by Chapter 300). *See id.* §§ 53080-53082 (West Supp. 1994) (authorizing school boards to impose fees on development projects for the purpose of constructing school facilities and to prevent the issuance of building permits until the fee has been paid); *id.* §§ 56000-57550 (West Supp. 1994) (providing for Local Agency Formation Commissions with authority to determine territorial scope of the power of local agencies); *id.* §§ 65100-65763 (West 1983 & Supp. 1994) (authorizing planning agencies to administer general plans and specific plans for development); *id.* §§ 65920-65963.1 (West 1983 & Supp. 1994) (establishing time limitations for approval of development projects to protect against unjustifiable delays); *id.* §§ 65995-65997 (West Supp. 1994) (limiting the amount of fees imposed by school boards on the basis of the square footage of the development); *id.* §§ 66000-66009 (West Supp. 1994) (authorizing local agencies to impose fees as a condition to issuance of a permit for a development project, such fees shall be limited by the need for public facilities attributable to the development project); *id.* §§ 66410-66499.37 (West 1983 & Supp. 1994) (providing for regulation by local agencies of the development of apartment and condominium buildings and subdivisions); CAL. HEALTH & SAFETY CODE §§ 33000-33855 (West 1973 & Supp. 1994) (providing for redevelopment of blighted areas); CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1994) (requiring an environmental impact report on any project that requires government permit and which may have a significant effect on the environment).

5. CAL. GOV'T CODE § 66031(a) (enacted by Chapter 300); *see id.* § 66030(b) (enacted by Chapter 300) (asserting that it is not the intent of the Legislature to interfere with the ability of litigants to pursue remedies through the courts); *id.* § 66031(a)(1) (enacted by Chapter 300) (subjecting actions relating to approval or denial by a public agency of any development project to a possible mediation proceeding pursuant to Chapter 300); *id.* § 66031(a)(2)-(8) (enacted by Chapter 300) (listing the other subjects of an action that may give rise to a mediation proceeding pursuant to Chapter 300); *id.* § 66031(b) (enacted by Chapter 300) (permitting the court to invite the parties to consider resolving their dispute by mediation); *id.* § 66031(d) (enacted by Chapter 300) (prohibiting the court from drawing any inference from the refusal of a party to consider mediation); *id.* (introducing a 30-day delay in the action while the parties are to consider whether to accept mediation which the judge may use to give the parties time to consider mediation); Barbara A. Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1234 (1983) (defining mediation as facilitated negotiation). *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1074 (1984) (suggesting that "invitations" to settle are actually coercive). *See generally* SAM KAGEL & KATHY

must be made within five days after the deadline for the filing of a reply.[6] The mediator may be anyone selected by mutual agreement of the parties.[7]

If mediation is accepted, it continues in 90-day periods, at the end of which the lawsuit is reactivated unless the parties settle or reaffirm their acceptance of mediation.[8] If mediation fails to resolve the dispute, the judge may schedule a settlement conference;[9] but, if the action is later heard on the merits, a different judge must preside.[10] Chapter 300 calls for the tolling of time limits, with respect to the action, while the mediation is in progress.[11]

Chapter 300 specifies that the communications made during mediation are inadmissible as evidence in any action and are protected from other disclosure.[12] The mediator is further restrained by Chapter 300 from filing with the court anything other than a statement of agreement or nonagreement, unless the parties agree otherwise.[13]

KELLY, THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK (1989) (providing a case study of mediation in the labor context, the keys to successful mediation, and an application of the keys in varied settings).

6. CAL. GOV'T CODE § 66031(b) (enacted by Chapter 300).

7. *Id.* § 66031(b) (enacted by Chapter 300); *see id.* § 66031(c)(1)-(4) (enacted by Chapter 300) (specifying that, in selecting a mediator, the parties are to consider the council of government having jurisdiction in the county where the dispute arose, any subregional or countywide council of governments in the county where the dispute arose, the Office of Permit Assistance, and any other person, organization or agency with background in mediation including those with experience in land use issues); *cf.* Phillips & Piazza, *supra* note 5, at 1235 (describing mediators as process experts who need not have expertise in the subject of the dispute).

8. CAL. GOV'T CODE § 66032(d) (enacted by Chapter 300).

9. *See* CAL. CT. R. 222 (describing mandatory settlement conferences that may be called at any time and that require personal attendance by trial counsel, parties, and persons with authority to settle the case).

10. CAL. GOV'T CODE § 66034 (enacted by Chapter 300).

11. *Id.* § 66032(a) (enacted by Chapter 300).

12. *Id.* § 66032(f) (enacted by Chapter 300); *see* CAL. EVID. CODE § 703.5 (West Supp. 1994) (declaring mediators incompetent to testify as to statements, conduct, decisions, or rulings occurring in mediations unless the statements or conduct could constitute a crime or be the subject of an investigation by the State Bar or Commission on Judicial Performance); *id.* § 1152.5(a)(1)-(2), (5) (West Supp. 1994) (prohibiting admission of evidence of statements made in, or any document prepared for, mediation and their production by discovery, except that a written settlement agreement may be offered to show fraud, duress, or illegality); *id.* § 1152.5(a)(3)-(4) (West Supp. 1994) (requiring all communications in mediation be kept confidential unless the parties agree otherwise).

13. CAL. GOV'T CODE § 66032(e) (enacted by Chapter 300).

Chapter 300 also contains provisions to assure that public agencies will conduct mediations only in accordance with existing law.[14] Judges will be encouraged to consider use of Chapter 300 through the Judicial Council.[15]

INTERPRETIVE COMMENT

Chapter 300 is intended to reduce the cost of real estate development in California by reducing the cost of litigation.[16] In order to determine whether Chapter 300 is actually reducing costs, it includes a provision that requires the mediator in each mediation conducted pursuant to Chapter 300 to file with the Office of Permit Assistance an estimate of the costs avoided by mediation.[17]

Owen W. Dukelow

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14. *See id.* § 66032(b) (enacted by Chapter 300) (permitting legislative and state bodies to keep mediation meetings closed to the public so long as less than a quorum of the legislative or state bodies are involved); *id.* § 66032(c) (enacted by Chapter 300) (requiring actions taken regarding mediation to be conducted pursuant to current law); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 517, at 3 (May 11, 1994) (explaining that subsequent adoption of an agreement reached in mediation would have to be done in an open meeting as required by state law); *see also* CAL. GOV'T CODE §§ 11120-11132 (West 1992 & Supp. 1994) (setting forth the provisions of the Bagley-Keene Open Meeting Act which requires, with certain exceptions, that meetings of state bodies be open); *id.* §§ 54950-54962 (West 1983 & Supp. 1994) (setting forth the provisions of the Ralph M. Brown Act, which requires, with certain exceptions, that meetings of legislative bodies be open); Spencer V. Beni, Review of Selected 1993 California Legislation, *Government; Open Meetings*, 25 PAC. L.J. 368, 793 (1994) (describing the changes to the Brown Act for 1993).

15. *See* Telephone Interview with Peter Detwiler, Consultant to California State Senate Local Government Committee, (Aug. 9, 1994) (notes on file with the *Pacific Law Journal*) (explaining that no particular type of party to these land use disputes would be more likely than others to opt for mediation but rather that the inclination of the judge would be the main impetus and that Chapter 300 would be publicized to the judges via the Judicial Council); *see also* CAL. GOV'T CODE § 66035 (enacted by Chapter 300) (permitting the Judicial Council to promulgate necessary rules, forms and standards).

16. *See* CAL. GOV'T CODE § 66030 (enacted by Chapter 300) (noting that the parties with standing to sue over land use disputes, which include public agencies, developers and affected residents, are a large group and the frequently resulting litigation adds to both the cost of housing and the burden on the judicial system); *cf.* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 517, at 4 (May 11, 1994) (paraphrasing the author of Chapter 300 as saying that judges considering land use disputes are making legal decisions on what are essentially political disputes); Phillips & Piazza, *supra* note 5, at 1233 n.14 (asserting that mediated negotiations allow public agencies to maintain their delegated role of administering policies set by the Legislature).

17. CAL. GOV'T CODE § 66033 (enacted by Chapter 300); *see also id.* § 66036 (enacted by Chapter 300) (requiring the Office of Permit Assistance to file a report with the Legislature regarding the implementation of Chapter 300); *cf.* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367-68 (1986) (asserting that systematic empirical testing should be used to evaluate alternative dispute resolution methods).

Civil Procedure; proceedings—collection of fines and forfeitures

Code of Civil Procedure § 695.221 (amended); Government Code § 69102 (amended); Labor Code § 4903 (amended); Penal Code § 1463.007 (amended).
AB 1702 (Frazee); 1994 STAT. Ch. 75
(Effective May 20, 1994)

Under existing law, money received in satisfaction of a money judgment[1] is credited according to a specified sequence of priorities, with special priorities in place for support generally.[2] Prior law maintained separate requirements for the crediting of money received from liens on workers' compensation awards.[3] Under Chapter 75, special priorities for crediting money received from that collected from a lien on a workers' compensation award would be deleted.[4]

Existing law requires that one of the three-member divisions of the seven divisions of the Second Appellate District must hold its regular session in Santa Barbara.[5] Under Chapter 75, one of the three-member divisions will convene its regular sessions in either Ventura, San Luis Obispo, or Santa Barbara County, at the discretion of the judges within that division; the other six divisions will continue holding regular sessions in Los Angeles County.[6]

Existing law which specifies how counties employing extraordinary programs to collect past due fines and forfeitures were to deduct expenses for such programs, including how collection expenses would be distributed, was to be repealed on June 30, 1994.[7] Chapter 75 extends the repeal date three years and

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1. *See* CAL. CIV. PROC. CODE § 680.270 (West 1987) (explaining that money judgment is the part of a judgment which requires the payment of money); *see also* 16 CAL. L. REVISION COMM'N REP. 1201 (1982) (discussing California Code of Civil Procedure § 680.270 and indicating that money judgments included child or spousal support judgments and orders which are payable by installment); BLACK'S LAW DICTIONARY 1006 (6th ed. 1990) (defining money judgment as a judgment which orders the payment of a sum of money).

2. CAL. CIV. PROC. CODE § 695.221 (amended by Chapter 75); *see id.* (providing the order for crediting a money judgment for support).

3. 1993 Cal. Legis. Serv. ch. 876, sec. 11, at 3804 (enacting CAL. CIV. PROC. CODE § 695.221(e)); *see id.* (stating that money judgments for support collected from a lien on a worker's compensation award shall be credited as directed by California Labor Code § 4903, which permits support as a sufficient basis for a lien, including priorities of disbursement of child support); *see also* CAL. LAB. CODE § 3207 (West 1989) (defining compensation within the Worker's Compensation Act to encompass every benefit or payment to an injured employee); Hawthorn v. City of Beverly Hills, 111 Cal. App. 2d 723, 728 (1952) (stating that the technical term of compensation includes any payments made as provided by the act to an injured employee, but does not have the same meaning in regard to wages or salary).

4. CAL. CIV. PROC. CODE § 695.221 (amended by Chapter 75).

5. CAL. GOV'T CODE § 69102 (amended by Chapter 75).

6. *Id.* § 69102 (amended by Chapter 75); *see id.* (providing that the Court of Appeals for the Second Appellate District is comprised of five four-judge divisions, and two three-judge divisions).

7. CAL. PENAL CODE § 1463.007 (amended by Chapter 75); *see id.* (delineating authority to counties to retain costs accrued from identifying and collecting certain overdue fines and forfeitures, and specifying a plan of distribution for these collections).

adds a provision which excludes capital expenditures from being deducted by a county as an expense of collection.[8]

INTERPRETIVE COMMENT

Chapter 75 addresses a provision regarding support which deletes enforcement requirements which were both expensive and impractical for district attorneys' computer collections system.[9] Chapter 75 reintroduces Penal Code provisions, inadvertently chaptered out by previous legislation,[10] which prohibit the retention of capital expenditures in regard to counties authorized to deduct the costs incurred for taking exceptional measures in their efforts to collect overdue fines and forfeitures.[11] The sunset on the authority for counties to retain such extraordinary costs has also been extended to June 30, 1997.[12] Furthermore, Chapter 75 permits judges from the designated division in the Second District Court of Appeal to determine the forum for their regular session.[13]

Chapter 75 was enacted as an urgency statute to accommodate the immediate needs of judges within the Second Appellate District and to extend the sunset on expiring laws relating to the retention of costs for collecting past due fines and forfeitures.[14] Additionally, the combination of seemingly unrelated legislation contained within Chapter 75 is due to the author's attempts to address the

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8. *Id.* § 1463.007 (amended by Chapter 75).

9. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1702, at 2-3 (May 4, 1994); *see id.* (discussing the difficulty that district attorneys encountered attempting to place liens on workers compensation awards through an outdated computer system which made collection and distribution of such funds impossible).

10. *See id.* at 2. (explaining that similar provisions had been within AB 392 (Isenberg), 1993 Cal. Legis. Serv. ch. 158, sec. 21, at 1205-06, but had been subsequently chaptered out by SB 744 (Leslie), 1993 Cal. Legis. Serv. ch. 295, sec. 7, at 1674-75).

11. CAL. PENAL CODE § 1463.007 (amended by Chapter 75); *see id.* (permitting counties or courts which implement detailed programs in order to collect overdue fines and forfeitures to deduct from the revenue collected for costs incurred, and defining the components which comprise an authorized comprehensive collection program).

12. *Id.*; *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS of AB 1702, at 2 (May 4, 1994) (noting the extension of county authorization to retain extraordinary costs).

13. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1702, at 3 (May 4, 1994); *see id.* (describing how judges assigned to Santa Barbara County through existing law had already been doing business in Ventura County due to personal convenience and lower real estate costs in that county).

14. 1994 Cal. Legis. Serv. ch. 75, sec. 6, at 420 (amending CAL. CIV. PROC. CODE § 695.221, CAL. GOV'T CODE § 69102, CAL. LAB. CODE § 4903, and CAL. PENAL CODE § 1463.007); *see id.* (stating that Chapter 75 was an urgency statute as defined by Article IV of the California Constitution); *see also* Telephone Interview with Carol MacDonnell, Legislative Consultant for Assemblymember Frazee on AB 1702 (July 11, 1994) (notes on file with the *Pacific Law Journal*) (confirming the need for an urgency clause as stated within § 6 of Chapter 75).

chaptering out problems created by prior legislation while remedying specific problems experienced by district attorneys and the Second Appellate District.[15]

Sean P. Lafferty

Civil Procedure; proceedings—privileged communication of medical information

Civil Code §§ 47, 56.10 (amended).
SB 1457 (Kopp); 1994 STAT. Ch. 700

Under existing law, with some exceptions,[1] any publication made in a judicial proceeding is absolutely privileged.[2] Chapter 700 exempts from this absolute privilege any communication which knowingly[3] conceals[4] the existence of an insurance policy.[5]

Existing law prohibits health care providers[6] from disclosing medical information[7] regarding their patients[8] without authorization,[9] except under certain circumstances.[10] Under Chapter 700, health care providers are authorized to relate

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15. Telephone Interview with Carol MacDonnell, Legislative Consultant for Assemblymember Frazee on AB 1702 (July 11, 1994) (notes on file with the *Pacific Law Journal*).

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1. *See* CAL. CIV. CODE § 47(b)(1)-(2), (4) (amended by Chapter 700) (providing exceptions for certain allegations or averments contained in pleadings or affidavits filed in a legal separation or dissolution of marriage, for communications or publications made in furtherance of the alteration of certain physical evidence, and for recorded lis pendens which do not identify previously filed actions affecting the right of possession or title to real property).

2. *Id.*; *see* Kupiec v. American Int'l Adjustment Co., 235 Cal. App. 3d 1326, 1331, 1 Cal. Rptr. 2d 371, 373 (1991) (determining that the absolute privilege exists for publications or broadcasts made: (1) in judicial or quasi-judicial proceedings; (2) by litigants or other authorized participants; (3) to achieve some objective of litigation; and (4) with a logical relation to the action); *see also* Royer v. Steinberg, 90 Cal. App. 3d 490, 499, 153 Cal. Rptr. 499, 504 (1979) (stating that the privilege conferred by California Civil Code § 47 is absolute).

3. *See* CAL. PENAL CODE § 7(5) (West 1988) (defining knowingly); People v. Lonergan, 219 Cal. App. 3d 82, 95, 267 Cal. Rptr. 887, 895 (1990) (stating that knowledge of the illegality of an act or omission is not required to knowingly commit or omit an act).

4. *See* People v. Eddington, 201 Cal. App. 2d 574, 577-78, 20 Cal. Rptr. 122, 124-25 (1962) (defining conceal as an affirmative action likely to prevent or intended to prevent knowledge of a fact).

5. CAL. CIV. CODE § 47(b)(3) (amended by Chapter 700).

6. *See id.* § 56.05(d) (West Supp. 1994) (defining health care provider).

7. *See id.* § 56.05(b) (West Supp. 1994) (defining medical information as any identifiable information regarding a patient's medical history, mental or physical condition, or treatment in the possession of or derived from a provider of health care).

8. *See id.* § 56.05(c) (West Supp. 1994) (defining patient).

9. *See id.* § 56.05(a) (West Supp. 1994) (defining authorization).

10. *Id.* § 56.10 (amended by Chapter 700); *see id.* § 56.10(b)-(c) (amended by Chapter 700) (providing exceptions to the prohibition against the release of medical information by health care providers); *see also id.* § 56.30 (West Supp. 1994) (creating additional exceptions).

to a state or federally recognized disaster relief organization a patient's name, city of residence, age, sex, and general health status.[11]

INTERPRETIVE COMMENT

The intent of Chapter 700's provision rendering inapplicable the absolute privilege for communications which knowingly conceal the existence of an insurance policy is to overturn the decision reached in *California Dredging v. Insurance Company of North America.*[12] In that case, the California Court of Appeal determined that the knowing concealment of additional insurance coverage was within the absolute privilege conferred by California Civil Code section 47 and, thus, could not form the basis of a later lawsuit.[13] Although the court recognized this as unfair, it concluded that the purpose behind the absolute privilege outweighed any potential or actual unfairness to individual litigants.[14]

The principle purpose of the litigation privilege is to afford witnesses and litigants access to the courts without having to fear they will be held liable in tort for their statements.[15] The privilege also promotes open communications between the litigants and their counsel, thus promoting the administration of justice by allowing attorneys to zealously protect their clients' interests.[16] The change enacted by Chapter 700 should not frustrate those purposes and, in fact, will enhance them.[17]

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11. *Id.* § 56.10(15) (amended by Chapter 700).

12. 1994 Cal. Legis. Serv. ch. 700, sec. 1, at 2842; *see* California Dredging Co. v. Ins. Co. of N. Am., 23 Cal. App. 4th 591, 599, 22 Cal. Rptr. 2d 461, 469 (1993) (declaring that the knowing concealment of an insurance policy during the course of litigation was absolutely privileged).

13. *California Dredging*, 23 Cal. App. 4th at 599, 22 Cal. Rptr. at 462; *see* Koenig v. Foote, 16 Cal. App. 4th 1007, 1014, 21 Cal. Rptr. 2d 820, 824 (1993) (relating that publications are protected by the absolute privilege even if they are made with malice or with intent to do harm); *see also* Silberg v. Anderson, 50 Cal. 3d 205, 216, 786 P.2d 365, 372, 266 Cal. Rptr. 638, 645 (1990) (providing that the Legislature intended the absolute privilege to apply irrespective of the maliciousness of the communication); Washer v. Bank of Am., 21 Cal. 2d 822, 831-32, 136 P.2d 297, 303 (1943) (determining that absolutely privileged statements are not actionable, even if they were made maliciously and with knowledge of their falsity).

14. *California Dredging*, 23 Cal. App. 4th at 602-03, 22 Cal. Rptr. at 468-69; *see also Silberg*, 50 Cal. 3d at 213, 786 P.2d at 369, 266 Cal. Rptr. at 646 (holding that derivative tort actions based upon communications in previous judicial actions would be far more destructive of the administration of justice than the occasional unfair result).

15. *Silberg*, 50 Cal. 3d at 213, 786 P.2d at 369, 266 Cal. Rptr. at 642; *see Koenig*, 17 Cal. App. 4th at 1014-15, 21 Cal. Rptr. 2d at 824 (stating that fear of tort actions stemming from communications made in judicial proceedings would hinder efforts to remedy wrongdoing).

16. California Physicians' Serv. v. Superior Court, 9 Cal. App. 4th 1321, 1325-26, 12 Cal. Rptr. 2d 95, 97 (1992).

17. *See Silberg*, 23 Cal. App. 4th at 605-06, 22 Cal. Rptr. 2d at 470 (King J., dissenting) (arguing that full disclosure of insurance policy limits is critical to the operation of the civil justice system); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 3 (Aug. 16, 1994) (stating that the court in *California Dredging* went beyond the intended purpose of the absolute litigation privilege); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 3 (June 29, 1994) (stating that full disclosure of the existence of insurance policies will promote the settlement of lawsuits).

The intentional destruction or alteration of physical evidence already exists as an exception to the absolute litigation privilege.[18] Chapter 700's additional exemption is very similar, and because of its narrow focus, Chapter 700 should not substantially change the nature of the litigation privilege.[19]

The second provision of Chapter 700, allowing health care providers to release basic patient information to disaster relief organizations, adds an additional exception to the existing prohibition against the release of medical information.[20] The need for this bill was realized when family members and friends of persons involved in recent natural disasters were unable to learn of the conditions of their loved ones.[21] Although existing law allows the release of limited information regarding a specific patient upon written request,[22] this procedure is considered unworkable during disaster situations.[23] Through Chapter 700, recognized disaster relief organizations will act as a clearinghouse of information for those individuals most likely to be concerned about the status of disaster victims.[24]

T. Scott Belden

Civil Procedure; special statute of limitations—actions by Dalkon Shield victims

Code of Civil Procedure § 340.7 (new).
AB 2855 (Archie-Hudson); 1994 STAT. Ch. 107

Under existing law, the statute of limitations for an action for injury or death from a wrongful act or neglect is one year.[1] Chapter 107 extends the statute of

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18. CAL. CIV. CODE § 47(b)(2) (amended by Chapter 700).

19. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 5 (June 29, 1994).

20. CAL. CIV. CODE § 56.10 (amended by Chapter 700); *see id.* § 56.10(b)-(c) (amended by Chapter 700) (providing exemptions to the prohibition against the release of medical information).

21. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 2 (Aug. 16, 1994) (relating that friends and relatives of victims of the Loma Prieta earthquake and Oakland Hills fire were unable to learn the conditions of victims due to a reluctance by medical personnel to release patient information); *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 4 (June 29, 1994) (explaining that hospitals were reluctant to release medical information during disasters due to the prohibition contained in California Civil Code § 56.10).

22. *See* CAL. CIV. CODE § 56.16 (West 1982) (providing for the release of the patient's identifying information and general condition unless the patient has specifically requested such information not be released).

23. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 3 (Aug. 16, 1994).

24. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1457, at 4 (June 29, 1994).

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1. CAL. CIV. PROC. CODE § 340(3) (West Supp. 1994); *see* Ward v. Westinghouse Can., Inc., 807 F. Supp. 91, 93-94 (N.D. Cal. 1992) (applying the appreciable and actual harm test, where a statute of limitations begins to run upon the plaintiff's awareness he suffered significant as opposed to nominal harm; and holding the plaintiff to the discovery test, which attributes to the plaintiff any information he could have discovered

limitations to fifteen years from the date of injury for actions brought by, or on behalf of, Dalkon Shield victims.[2]

Under Chapter 107, only victims who, prior to January 1, 1990, filed a civil action, timely claim, or a claim deemed timely according to the bankruptcy disclosure statement filed by A. H. Robins may apply the extended statute of limitations.[3] The statute is tolled from August 21, 1985, the date on which the A. H. Robins Company filed for bankruptcy.[4] Chapter 107 applies regardless of whether such actions or claims may have lapsed or are otherwise time barred under California law.[5]

INTERPRETIVE COMMENT

A.H. Robins, a large, multi-national pharmaceutical company, purchased the Dalkon Shield intrauterine birth control device from Dalkon Corporation in 1970.[6] Robins modified the design of the Shield but failed to test the new design before it began marketing the product in 1971; instead, Robins promoted the device on the basis of the unmodified Shield's test results.[7] Robins distributed almost five million Dalkon Shields throughout the world.[8] The company took the product off the United States market in 1974 and discontinued all foreign sales in early 1975.[9] Under the weight of lawsuits brought by those who suffered injuries inflicted by the Dalkon Shield, A.H. Robins filed for bankruptcy in 1985.[10] By 1987, Robins was seeking for a way to settle more than 300,000 claims.[11] A trust was set up in the amount of $2.475 billion to pay the personal

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through reasonable investigation as well as his actual knowledge of the injury and its cause). *See generally* Burnett v. New York Cent. R.R., 380 U.S. 424, 428-29 (1965) (commenting that a statute of limitations is designed to protect a defendant from stale claims where a plaintiff has slept on his rights, but other considerations of justice often weigh in favor of tolling a statute of limitations); 3 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions*, §§ 306-413 (3d ed. 1985 & Supp. 1994) (summarizing statutes of limitations in general).

2. CAL. CIV. PROC. CODE § 340.7 (enacted by Chapter 107).

3. *Id.*; *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2855, at 2 (May 17, 1994) (discussing the history of Dalkon Shield litigation); *see also In re* A.H. Robins Co., 88 B.R. 742, 745, 752-55 (Bankr. E.D. Va. 1988) (confirming the reorganization plan, which established a bar date of April 30, 1986, and set up a massive notification campaign to inform potential claimants of their rights under the plan), *aff'd*, 880 F.2d 694 (4th Cir. 1988), *cert. denied*, 493 U.S. 959 (1989), *modified*, 1991 U.S. Dist. LEXIS 17027 (E.D. Va. July 25, 1991), *rev'd*, 972 F.2d 77 (4th Cir. 1992).

4. CAL. CIV. PROC. CODE § 340.7 (enacted by Chapter 107).

5. *Id.*

6. *See In re* A.H. Robins Co., 88 B.R. at 743 (reviewing the circumstances leading to Robins' Chapter 11 plan).

7. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2855, at 1 (Mar. 23, 1994).

8. *In re* A.H. Robins Co., 88 B.R. at 743.

9. *Id.*

10. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2855, at 2 (May 17, 1994).

11. Michael Abramowitz, *Parties Set Guidelines for Robins Claims*, WASH. POST, May 12, 1987, at C1 (reporting a general agreement on guidelines for Robins' bankruptcy plan settling the Dalkon Shield personal injury claims through the formation of a trust).

injury claims as well as to meet the expenses involved in administering those claims.[12]

Chapter 107 was enacted to achieve the rapid and fair resolution of outstanding claims against the Dalkon Shield Trust.[13] Chapter 107 specifically states that the legislation was enacted under unique circumstances[14] and that the Legislature does not intend for the section to be considered precedent for other, similar legislation.[15] Other states have enacted similar legislation.[16]

Molly K. Mosley

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12. *In re* A.H. Robins Co., 88 B.R. at 747; *see id.* (reconfirming Robins' Chapter 11 plan and the amount in the Trust as sufficient to pay all claims).

13. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2855, at 4 (Mar. 23, 1994); *see id.* (stating that the provision will affect approximately 1,000 women and will allow them to concentrate on litigating the substance of their claims rather than procedural matters such as the statute of limitations); *see also In re* A.H. Robins Co., 996 F.2d 716, 719-20 (4th Cir. 1993) (upholding the operation of a federal act, the Soldiers' and Sailors' Civil Relief Act of 1940, to toll the running of the bar date set in Chapter 11 reorganizations, and in particular, the bar date set by the Dalkon Shield Trust). The court found that although any such tolling provision will necessarily impair the parties' interests in finality and certainty, the provision reflects Congress' judgment that the costs are outweighed by the benefits. *Id.* at 719.

14. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2855, at 4 (May 17, 1994) (quoting the sponsor's assertion that A.H. Robins is responsible for the delays in claim litigation because it "actively and fraudulently concealed evidence" of the Dalkon Shield's dangerous nature, sought bankruptcy protection, and continues to further delay or bar legitimate claims by raising the statute of limitations as a preliminary defense at trial); *see also* Braxton-Secret v. A.H. Robins Co., 769 F.2d 528, 532 (9th Cir. 1985) (finding that plaintiff's cause of action was time barred by the statute of limitations despite alleged fraudulent concealment by the defendant, where plaintiff did not learn of the dangers inherent in the use of the Dalkon Shield until seven years after her miscarriage, which had occurred while using the device); *cf.* CAL. CIV. PROC. CODE § 340.2 (West 1982) (providing for a special statute of limitations regarding exposure to asbestos); Puckett v. Johns-Manville Corp., 169 Cal. App. 3d 1010, 1015-16, 215 Cal. Rptr. 726, 730 (1985) (stating that the Legislature attempted to redress the problem created by the gradual, progressive nature of asbestosis, which may not be detected until sometime after exposure, by enacting a special statute of limitations, Civil Code § 340.2).

15. 1994 Cal. Legis. Serv. ch 107, sec. 2, at 507.

16. *See* 1994 Kan. Sess. Laws 278 (specifying that the statute of limitations for Dalkon Shield victims bringing a civil action for relief on the ground of fraud does not accrue until the fraud was discovered); 1993 N.Y. Laws 419 (reviving the statute of limitations for Dalkon Shield victims for one year from the date of enactment, July 21, 1993); *see also* Gary Spencer, *Revival Statute Passed for Silicone Implants; One-Year Window Opened for Damage Suits*, N.Y. L.J., June 30, 1993, at 1 (discussing New York's revival statute permitting New York women to challenge compensation awards from the national Dalkon Shield Claimants Trust and giving them access to the fund by eliminating the obstacle created by the state's statute of limitations, which, according to the article, the Trust has used as a defense against claimants seeking higher awards); *Kansas Bill Would Extend Time for Dalkon Suits*, J. OF COM., Mar. 9, 1994, at A-9 (discussing a bill to extend the statute of limitations in Kansas for lawsuits brought by Dalkon Shields victims).

Civil Procedure; time for filing amended complaint following appellate review or remand

Code of Civil Procedure § 472b (amended).
AB 911 (Horcher); 1994 STAT. Ch. 41

Existing law provides that when a demurrer to any pleading is sustained or overruled, and permission to amend is granted by the court, the period for filing the amendment begins to run from the service of notice of the court's decision.[1] This notice requirement may be waived in open court and the court record will reflect such a waiver if applicable.[2] Chapter 41 mandates that when an order sustaining a demurrer without leave to amend is reversed or remanded by a reviewing court, any amended complaint must be filed within thirty days after the clerk of the reviewing court mails notice of the reversal.[3]

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1. CAL. CIV. PROC. CODE § 472b (amended by Chapter 41); *see id.* § 1010 (West 1980) (providing that notices must be in writing); *see also* People v. $20,000 United States Currency, 235 Cal. App. 3d 682, 691, 286 Cal. Rptr. 746, 750 (1991) (holding that the time to amend a complaint following a demurrer runs from the notice of the ruling, not the ruling itself, even if counsel is present); Parris v. Cave, 174 Cal. App. 3d 292, 294, 219 Cal. Rptr. 871, 873 (1985) (holding that there can be no better notice of what an order says than that provided by a file-stamped copy of the order itself); Harris v. Minnesota Inv. Co., 89 Cal. App. 396, 404, 265 P. 306, 310 (1928) (holding that a card mailed to the defendant's attorney by the clerk of the court which was not signed by the opposing attorney was not sufficient notice that the demurrer to the complaint had been overruled). *But see* Wall v. Heald, 95 Cal. 364, 368, 30 P. 551, 552 (1892) (holding that if the attorney to a party demurring to a pleading is present in court when a ruling on the demurrer is announced, knows of the order, and acts on it, written notice of the decision will be deemed waived); Jones v. Baxter, 51 Cal. App. 589, 594, 197 P. 361, 363 (1921) (holding that service of a written notice is not necessary for the actual party if that party is represented by counsel present in court when the order is made).

2. CAL. CIV. PROC. CODE § 472b (amended by Chapter 41); *see* Robbins v. Los Angeles Unified Sch. Dist., 3 Cal. App. 4th 313, 318, 4 Cal. Rptr. 2d 649, 652 (1992) (holding that unless notice is waived in open court, and the waiver is entered into the court minutes or docket, notice can be provided by a party or at the direction of the court by the clerk of the court); Timmons v. Coonley, 39 Cal. App. 35, 37-38, 179 P. 429, 430 (1919) (holding that where a demurrer is overruled, and time is given to answer, a stipulation allowing further time operates as a waiver of notice of a decision overruling the demurrer).

3. CAL. CIV. PROC. CODE § 472b (amended by Chapter 41); *see also id.* § 472c (West Supp. 1994) (providing that when any court makes an order sustaining a demurrer without leave to amend, the question as to whether such court abused its discretion is open on appeal even though no request to amend such pleading was made); Sirott v. Latts, 6 Cal. App. 4th 923, 930, 8 Cal. Rptr. 2d 206, 210 (1992) (holding that an order sustaining a demurrer without leave to amend is an abuse of discretion, if there is any reasonable possibility that the defect may be cured by an amendment); CAMSI IV v. Hunter Tech. Corp., 230 Cal. App. 3d 1525, 1538, 282 Cal. Rptr. 80, 87 (1991) (holding that when leave to amend a complaint has not been granted, the question on appeal, whether or not the party asked to amend the complaint, is the trial court's possible abuse of discretion), *review denied*, 1991 Cal. LEXIS 4365 (1991); Call v. Kezirian, 135 Cal. App. 3d 189, 195, 185 Cal. Rptr. 103, 106 (1982) (holding that a demurrer should not be sustained without leave to amend if there is a reasonable possibility that a defect in the complaint may be cured by amendment); McGee v. McNally, 119 Cal. App. 3d 891, 896, 174 Cal. Rptr. 253, 256 (1981) (holding that a demurrer should not be sustained without leave to amend where a defect may possibly be cured by supplying omitted and essential allegations and plaintiff has not had fair opportunity to do so).

INTERPRETIVE COMMENT

Chapter 41 was enacted in order to provide a specific time period in which a party may file an amended complaint following appellate review or remand of an order sustaining a demurrer without leave to amend which is overturned upon review.[4] Although the provision is purely procedural, a similar proposal, AB 910, failed to pass in the preceding year.[5] The bill's previous failure is attributed to the fact that additional, somewhat controversial, provisions were attached to AB 910 regarding the court's authority to order parties to pay referee fees.[6] As enacted, Chapter 41 omits such a provision.[7]

Sean Arther

Civil Procedure; violation of contempt orders—attorney's fees

Code of Civil Procedure § 1218 (amended).
AB 2911 (Goldsmith); 1994 STAT. Ch. 368

Existing law mandates a fine not exceeding $1000, a term of imprisonment not to exceed five days, or both, when a person is found in contempt.[1] Existing law

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4. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 911, at 1 (Apr. 4, 1994); *see id.* (stating that existing law does not provide a time period for filing an amended complaint following the reversal of an order sustaining a demurrer without leave to amend).

5. *Id.*; *see* AB 910, 1993-1994 Calif. Leg. Reg. Sess. § 1 (Sept. 8, 1993) (recommending a 30-day time limit by which an amended complaint must be filed following a demurrer being overruled or sustained).

6. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 911, at 1-2 (Apr. 4, 1994); *see id.* (stating that the Governor's veto appeared to be based upon the provision relating to referee's fees).

7. CAL. CIV. PROC. CODE § 472b (amended by Chapter 41).

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1. CAL. CIV. PROC. CODE § 1218(a) (amended by Chapter 368); *see id.* § 1219(b) (West Supp. 1994) (prohibiting confinement where the victim of a sexual assault commits contempt by refusing to testify concerning the assault); *In re* McKinney, 70 Cal. 2d 8, 12, 447 P.2d 972, 975, 73 Cal. Rptr. 580, 583 (1968) (holding that the court's power to summarily imprison a contemnor for five days and impose a fine of $500 for each offense is adequate for the court to vindicate its authority, and hence the limitation of California Code of Civil Procedure § 1218 on the court's contempt power to that extent is valid); H.J. Heinz Co. v. Superior Court, 42 Cal. 2d 164, 174, 266 P.2d 5, 11 (1954) (stating that statutes authorizing fines or imprisonment as penalties for contempt establish limits within which courts may punish contempt); Donovan v. Superior Court, 39 Cal. 2d 848, 855, 250 P.2d 246, 250 (1952) (holding that the provision of California Code of Civil Procedure § 1218 requiring the court to determine upon answer and evidence whether a person proceeded against in a contempt proceeding is guilty of the contempt charged and authorizing the imposition of a fine not exceeding $500 if such person is found guilty, is constitutional); *In re* Application of Garner, 179 Cal. 409, 415, 177 P. 162, 165 (1918) (holding that imprisonment as a punishment for contempt of court is neither cruel nor unusual); *In re* Liu, 273 Cal. App. 2d 135, 142, 78 Cal. Rptr. 85, 91 (1969) (stating that because the alleged contemnor faces drastic punishment under California Code of Civil Procedure § 1219 that authorizes imprisonment and the possibility of life imprisonment for failure to obey a court order, contempt proceedings must be strictly construed and any uncertainties must be resolved in favor of the defendant); Powers v. Superior

further provides that any party judged in contempt of court for failure to comply with a court order issued pursuant to the California Family Code[2] or specified

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Court, 253 Cal. App. 2d 617, 619, 61 Cal. Rptr. 433, 435 (1967) (holding that if the contempt order imposes punishment in excess of the five-day limit imposed by California Code of Civil Procedure § 1218 on the theory that there were separate punishable acts of contempt, the order must specify the particular acts); Lindsley v. Superior Court, 76 Cal. App. 419, 433-34, 245 P. 212, 217-18 (1926) (stating that the court of appeal is not authorized to hold the aggregate amount of fines to be excessive where the fines imposed were for separate contempts and were not in excess of the amount authorized by California Code of Civil Procedure § 1218); *In re* Application of Selowsky, 44 Cal. App. 421, 425, 186 P. 608, 610 (1919) (stating that when one is sentenced to imprisonment for contempt, the imprisonment begins to run at once, but where a fine is imposed, it simply becomes a judgment for a certain amount of money owed to the people, and like any other judgment against a party owing money to the state, it may be enforced either by execution or by imprisonment provided the enforcement is not barred by the statute of limitations); Bradford v. Barbiere, 33 Cal. App. 770, 779-80, 166 P. 812, 816 (1917) (holding that a statutory provision fixing a penalty for contempts of orders abating nuisances in excess of penalties generally fixed by California Code of Civil Procedure § 1218 is not invalid because it is within the power of the Legislature to establish punishments for contempts). *But see Ex parte* Karlson, 160 Cal. 378, 382-83, 117 P. 447, 449 (1911) (holding that where a fine is imposed as a punishment for a contempt, the court has the power to enforce its payment by imprisonment until paid, and such term of imprisonment may exceed five days). *See generally* Timothy J. Carter, Book Review, 78 J. CRIM. L. & CRIMINOLOGY 447, 447-48 (1987) (reviewing Douglas Corry McDonald, *Punishment Without Walls: Community Service Sentences in New York City* (1986)) (doubting the effectiveness of community service in lieu of imprisonment, stating that most of those sentenced to community service would not have ultimately been confined anyway).

2. *See, e.g.*, CAL. FAM. CODE § 290 (West 1994) (providing that an order made pursuant to the Family Code may be enforced by contempt proceedings); *id.* § 291 (West 1994) (mandating that a lack of diligence in seeking the enforcement of an order be considered by the court in determining whether to permit enforcement by contempt proceedings and other methods authorized in California Family Code § 290); *id.* § 2026 (West 1994) (stating that the reconciliation of the parties is an ameliorating circumstance to be considered by the court in considering a contempt of an existing court order); *id.* § 3768 (West 1994) (providing that the willful failure of a spouse's employer to comply with a health insurance coverage assignment ordered by the court is punishable as a contempt of court under California Code of Civil Procedure § 1218); *id.* § 4571 (West 1994) (providing that a child support obligor is subject to a contempt of court for failure to comply with an order to disburse and replenish funds when a child support payment is 10 or more days late and the payment has been disbursed from the deposit account established pursuant to California Family Code § 4560); *id.* § 4822 (West 1994) (stating that all duties of support, including the duty to pay arrearages, are enforceable by a proceeding for civil contempt); *id.* § 4836 (West 1994) (setting forth terms and conditions to assure an obligor's compliance with court orders, including punishment by contempt proceedings); *id.* § 5241 (West 1994) (providing that willful failure by an employer to comply with a wage assignment order is punishable as a contempt pursuant to California Code of Civil Procedure § 1218); *id.* § 5252 (West 1994) (providing that the filing of an application for earnings assignment to enforce a support order issued or modified prior to July 1, 1990 with knowledge of the falsity of the declaration is punishable as a contempt under California Code of Civil Procedure § 1209); *id.* § 7641 (West 1994) (providing that if the existence of a father and child relationship is declared or adjudicated, the court may order support payments to be made and enforced by civil contempt proceedings); *id.* § 7883 (West 1994) (providing that a failure to appear when personally served, or a failure to bring a child before the court if required by the citation, is a contempt of court); *see also In re* Marriage of Damico, 7 Cal. 4th 673, 679-80, 872 P.2d 126, 129-30 (1994) (holding that a custodial parent who actively conceals himself or herself and the child from the noncustodial parent until the child reaches the age of majority, despite reasonably diligent efforts by the noncustodial parent to locate them, is estopped from later collecting child support arrearages for the time of the concealment); Moffat v. Moffat, 27 Cal. 3d 645, 651, 612 P.2d 967, 970, 165 Cal. Rptr. 877, 880 (1980) (holding that a parent under a court order to pay support for a minor child must pay that support even if the parent with custody interferes with the paying parent's right to visitation); Solberg v. Wenker, 163 Cal. App. 3d 475, 480, 209 Cal. Rptr. 545, 548 (1985) (stating that when a custodial parent acts with intent to frustrate or destroy visitation rights, appropriate sanctions include holding the parent in contempt of court, terminating or reducing spousal support, and requiring a bond to assure compliance with a visitation order); *In re* Liu, 273 Cal. App. 2d 135, 145, 78 Cal. Rptr. 85, 93 (1969) (stating that where the contempt order sets forth no facts that would support a determination that the father had notice

sections of the California Welfare and Institutions Code[3] will be directed to complete community service instead of, or in addition to, a fine or imprisonment.[4] Existing law also provides that if the person is found in contempt three or more times, the court is required to order: (1) Imprisonment and either a fine or community service; and (2) the contemnor to pay an administrative fee for the

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of a temporary restraining order prohibiting him from removing a child from southern California, the father could not be found in contempt for violation of such order); *cf.* CAL. CIV. PROC. CODE § 1209.5 (West Supp. 1994) (providing that noncompliance with a court order for care or support of a child is *prima facie* evidence of contempt of court); *id.* § 1219.5 (West Supp. 1994) (providing a procedure by which sanctions may be imposed upon a minor for refusing to take an oath or to testify after the matter has been referred to a probation officer in charge of matters coming before the juvenile court); CAL. PENAL CODE § 166 (West Supp. 1994) (specifying misdemeanor criminal contempts); *id.* § 657 (West 1988) (stating that a criminal act is not less punishable as a crime because it is also declared to be punishable as a contempt); Morelli v. Superior Court, 1 Cal. 3d 328, 333, 461 P.2d 655, 658, 82 Cal. Rptr. 375, 378 (1969) (stating that where the primary object of contempt proceedings is to protect the rights of the litigants, the proceedings are regarded as civil in character, but where the object of the proceedings is to vindicate the dignity or authority of the court, the proceedings are regarded as criminal in character even though the contempt proceedings arose from a civil action). *See generally* Annotation, *Power of Divorce Court, After Child Attained Majority, to Enforce by Contempt Proceedings Payment of Arrears of Child Support*, 32 A.L.R. 3d 888 (1970) (discussing cases concerning the power of a divorce court to enforce, via contempt proceedings, payment of arrears of child support after the child has attained majority); Marian C. Abram, *The Parental Kidnapping Prevention Act: constitutionality and effectiveness*, 33 CASE W. RES. L. REV. 89, 89-90 (1982) (arguing that the legal system may encourage interstate child abduction because state courts do not give full faith and credit to the custody orders of other states); Barbara Sheryl Silverman, Note, *The Search For a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1075-76 (1983) (proposing that child-snatching is a judicially created problem due to the fact that the Supreme Court has not extended the principle of full faith and credit to child custody decrees, a child custody order is not considered *res judicata*, but rather, it may be modified; and that a uniform system for the exercise of a court's jurisdiction in child custody matters was lacking among the state courts deciding custody disputes); Susan E. Spangler, Comment, *Snatching Legislative Power: The Justice Department's Refusal to Enforce the Parental Kidnapping Prevention Act*, 73 J. CRIM. L. 1176, 1177 (1982) (stating that judicial willingness to modify the custodial orders of other states has encouraged child snatching by providing the noncustodial parent with an incentive to take the child to a jurisdiction where a more favorable order might be granted); *As Dad Sits in Jail, Saga of Vanished Child Goes On*, SAN DIEGO UNION-TRIB., Jan. 31, 1992, at A30 (detailing the story of Odell Sheppard, a man imprisoned on a coercive contempt order due to the fact that he would not reveal the whereabouts of his daughter whom he took from her mother seven years earlier); Bill Grady et al., *Court Agency Audit Bout Lacks Punch*, CHI. TRIB., June 27, 1989, at C3 (discussing the *Odell Sheppard* case and an Illinois Appellate Court's decision to keep him in jail); Charles Mount, *Father Won't Tell Where Girl Is*, CHI. TRIB., May 18, 1989, at C4 (discussing the *Odell Sheppard* case and his open-ended civil contempt sentence for failing to reveal the location of his daughter to the custodial mother); Lou Ortiz, *Jailed Dad Won't Lead Cops to Girl Abducted in '84*, CHI. SUN-TIMES, Jan. 17, 1992, at 5 (discussing the *Odell Sheppard* case and the search for Deborah Sanders going on since 1984).

3. *See* CAL. CIV. PROC. CODE § 1218(c) (amended by Chapter 368) (delineating statutes in the Welfare and Institutions Code under which contempt proceedings will apply if orders pursuant to those statutes are violated); *see, e.g.*, CAL. WELF. & INST. CODE § 11350 (West Supp. 1994) (providing for support obligations to the family or child in the case of separation or desertion of a parent); *id.* § 11350.1 (West Supp. 1994) (providing for an action for support which may be prosecuted in the name of the county on behalf of the child, children, or caretaker parent by the district attorney); *id.* § 11350.5 (West Supp. 1994) (providing for the enforcement of support obligations); *id.* § 11350.6 (West Supp. 1994) (providing for the enforcement of child support obligations).

4. CAL. CIV. PROC. CODE § 1218(c) (amended by Chapter 368). *Cf.* IND. CODE ANN. § 31-6-6.1-16(h) (West Supp. 1994) (providing that if a party is found to be delinquent in the payment of child support, the party may be ordered to perform community service); UTAH CODE ANN. § 78-32-12.1(1)(a) (Michie Supp. 1993) (mandating a minimum of the performance of 10 hours of community service for failure to follow an order in a divorce decree regarding visitation, or for refusing to pay child support as ordered by the court).

community service.[5] Chapter 368 modifies existing law by providing that for all cases, in addition to previously imposed disciplinary action, the contemnor may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by the party in connection with the contempt proceeding.[6]

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5. CAL. CIV. PROC. CODE § 1218(c)(3)(A)-(B) (amended by Chapter 368); *see* Hume v. Superior Court, 17 Cal. 2d 506, 515-16, 110 P.2d 669, 675 (1941) (adjudging an attorney guilty of separate contempts for filing an original contemptuous complaint, an amended complaint containing additional matter, and an affidavit of a third person); *In re* Application of Shuler, 210 Cal. 377, 406, 292 P. 481, 493-94 (1930) (holding that the trial court properly deemed as separate contemptuous offenses several broadcasted addresses which occurred on different dates and were delivered to different audiences); *Ex parte* Stice, 70 Cal. 51, 58, 11 P. 459, 462 (1886) (holding that where the petitioner was called as a witness on the trial of a criminal prosecution and refused to be sworn on two separate occasions regarding the same case, the court properly deemed the contempts as separate and had the jurisdiction to impose two separate punishments); Conn v. Superior Court, 196 Cal. App. 3d 774, 787, 242 Cal. Rptr. 148, 156 (1987) (stating that the crucial question in determining whether separate adjudications of contempt are proper is whether the separate adjudications are based upon separate insults to the authority of the court); *In re* Keller, 49 Cal. App. 3d 663, 667-68, 123 Cal. Rptr. 223, 225 (1975) (holding that the trial court erred in finding a witness in a criminal action guilty of more than one contempt by refusing to answer questions after he specified that he would answer no questions concerning the incident at issue).

6. CAL. CIV. PROC. CODE § 1218(a) (amended by Chapter 368); *see id.* § 1032 (West Supp. 1994) (providing that unless expressly provided by statute to the contrary, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding); *id.* § 1033.5 (West Supp. 1994) (specifying items allowable as costs under California Code of Civil Procedure § 1032); *see also* CAL. FAM. CODE § 3027 (West 1994) (providing that if a court determines that an accusation of child abuse or neglect made during child custody proceedings was false, and the person making the accusation knew it to be false, the court may impose a reasonable monetary sanction and reasonable attorney's fees incurred in recovering the sanction); *id.* § 3028 (West 1994) (providing that the court may order financial compensation including attorney's fees for periods when a parent fails to assume the caretaker responsibility or when a parent has been thwarted by the other parent when attempting to exercise custody or visitation rights mandated by a custody or visitation order); *id.* § 3153 (West 1994) (providing that if the court appoints counsel to represent a child, counsel will receive reasonable attorney's fees to be paid by the parties in the proportions the court deems just); *id.* § 3557 (West 1994) (providing that upon determining the parties' ability to pay and in consideration of the respective incomes of the parties, the court must award attorney's fees to a custodial parent or any other person to whom payment should be made to enforce an existing order for child support or an existing order for spousal support); *id.* § 7640 (West 1994) (providing that the court may order reasonable attorney's fees and other costs, including the costs of blood tests, to be paid by the parties in proportions determined by the court in an action to determine the existence of a parent and child relationship); Smith v. Superior Court, 68 Cal. App. 3d 457, 465-66, 137 Cal. Rptr. 348, 353 (1977) (holding that an order requiring the mother of a minor child to pay her former husband's attorney's fees and costs, following an adjudication of contempt against the mother for violating orders pertaining to the former husband's visitation rights, was an abuse of discretion). *See generally National Real Estate Franchisor, Century 21, Held in Contempt of Court*, Business Wire, July 25, 1994, *available in* LEXIS, News library, Curnws file (reporting a case in which Century 21 was ordered to pay the attorney's fees of RE/MAX International which sought and obtained a contempt order against Century 21 for violating an injunction to stop its "sells a home every minute" advertising campaign); *NLRB Files Contempt Petition Against Radisson Plaza*, STAR TRIB., June 30, 1994, at 3D (reporting a case in which the National Labor Relations Board filed a contempt petition against the Radisson Plaza Hotel of Minneapolis for violating an appeals court judgment and seeking, among other damages, attorney's fees incurred in prosecuting the contempt action); David Rossmiller, *Judge Fines Prisons Chief for Sex Magazine Ban*, PHOENIX GAZETTE, June 4, 1994, at A1 (reporting a case in which the Department of Corrections Director, Sam Lewis, was ordered by a federal judge to personally pay $10,000 in attorney's fees to a group of prisoners who sued him due to Lewis' violation of a 1973 federal court order when he attempted to ban pornographic magazines from state prisons).

INTERPRETIVE COMMENT

Chapter 368 provides that in all cases, a court may order a contemnor to pay the reasonable attorney's fees and costs of the party who was forced to bring an action to enforce a court order.[7] According to the sponsor of this new provision, the currently enforced $1000 fine is a mere slap on the hand that usually bears no relationship to the contemptuous conduct.[8] Furthermore, with some contractual exceptions, a private party prosecuting contempt conduct is not able to recover his or her costs for bringing the action.[9] Chapter 368 allows a court to use its discretion in awarding attorney's fees in contempt proceedings, thus making the aggrieved party whole while possibly encouraging compliance with court orders.[10]

Sean Arther

7. CAL. CIV. PROC. CODE § 1218(a) (amended by Chapter 368).
8. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2911, at 2 (Mar. 23, 1994).
9. *Id.*
10. *Id.*