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Civil Procedure

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Civil Procedure

Civil Procedure; disqualification of judges

Code of Civil Procedure §170 (amended).

AB 2035 (Elder); STATS. 1981, Ch 192

Support: California Judges Association; California Trial Lawyers Association; Judicial Council

AB 2154 (Imbrecht); STATS. 1981, Ch 255

Existing law permits the disqualification of judges on specified grounds.¹ Prior to the enactment of Chapter 255 judges who believed their disqualification was improper in an action or proceeding could not hear or pass upon the question of their own disqualification.² The courts, however, have held that a judge sought to be disqualified may rule on the legal question of the sufficiency of the statement of disqualification.³ Chapter 255 specifically precludes judges challenged on the ground of impartiality from hearing or passing upon any question of *law or fact* concerning their own disqualification or the statement of objection or disqualification filed against them.⁴ Chapter 255 specifies, however, that this provision is not intended to change the authority of any judge to stay proceedings pending the determination of any matter relating to a statement of disqualification that has been filed.⁵

Existing law also requires the disqualification of a judge of any superior, municipal, or justice court when prejudice against a party, an attorney, or an interest of either is established.⁶ This challenge must be made upon an oral or written motion supported by an affidavit or declaration under penalty of perjury or an oral statement under oath that the judge is prejudiced against a party or attorney involved in the action or proceeding leading the party or attorney to believe that a fair and impartial trial or hearing cannot be obtained before that judge.⁷ Chapter 192 designates the affidavit supporting the motion a “peremp-

1. See generally CAL. CIV. PROC. CODE §170.

2. See CAL. STATS. 1979, c. 730, §17, at 2472 (amending CAL. CIV. PROC. CODE §170).

3. See *Taliaferro v. Taliaferro*, 203 Cal. App. 2d 642, 646, 21 Cal. Rptr. 864, 866 (1962). See also *In re Morelli*, 11 Cal. App. 3d 819, 843, 91 Cal. Rptr. 72, 88 (1970).

4. CAL. CIV. PROC. CODE §170(e).

5. CAL. STATS. 1981, c. 235, §2, at —.

6. See CAL. CIV. PROC. CODE §170.6(1).

7. *Id.* §170.6(2).

tory challenge.”⁸

COMMENT

Although Chapter 192 has designated the affidavit filed in support of a motion for disqualification on the ground of prejudice a “peremptory challenge,” it is not a peremptory challenge in the sense of allowing the removal of a judge without reason or for any arbitrary and undisclosed reason.⁹ This distinction is important because prior statutory law¹⁰ providing for the peremptory challenge of a judge was found unconstitutional; the legislature has the authority to prescribe the grounds for the disqualification of a judge but cannot delegate to a private citizen or to an attorney the right to restrain or prohibit the functioning of a coordinate branch of the government.¹¹ In contrast, the specific statutory provisions designated a “peremptory challenge” by Chapter 192 have been upheld against constitutional attack as a reasonable method of regulating the jurisdiction of the courts because the affidavit procedure establishes as a fact the belief of a litigant that a fair trial or hearing cannot be obtained before the assigned judge.¹²

8. *Id.* §170.6(5).

9. *See* Austin v. Lambert, 11 Cal. 2d 73, 76, 77 P.2d 849, 851 (1938). *Compare* CAL. CIV. PROC. CODE §170.6 with CAL. STATS. 1937, c. 507, §1, at 1496 (enacting CAL. CIV. PROC. CODE §170.5).

10. *See* CAL. STATS. 1937, c. 507, §1, at 1496.

11. *See* Daigh v. Schaffer, 23 Cal. App. 2d 449, 452, 73 P.2d 927, 930 (1937).

12. *See* Solberg v. Superior Court, 19 Cal. 3d 182, 191-93, 561 P.2d 1148, 1154-55, 137 Cal. Rptr. 460, 466-67 (1970). *See also* Johnson v. Superior Court, 50 Cal. 2d 693, 329 P.2d 5 (1958).

Civil Procedure; attorney fees—sanctions for frivolous actions

Code of Civil Procedure §128.5 (new).

SB 947 (Davis); STATS. 1981, Ch 762

Support: County Supervisors Association of California

The California Supreme Court held in *Bauguess v. Paine*¹ that an award of fees to opposing counsel as a sanction² for an attorney's misconduct was not within the equitable power³ or supervisory role⁴ of the trial court and was not authorized by statute.⁵ In response to *Bauguess*

1. 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978).

2. *See* BLACK'S LAW DICTIONARY 1203 (5th ed. 1979) (definition of sanction).

3. *See* 22 Cal. 3d at 636-37, 586 P.2d at 947-48, 150 Cal. Rptr. at 466-67.

4. *See id.* at 637-38, 586 P.2d at 948, 150 Cal. Rptr. at 467.

5. *See id.* at 635, 586 P.2d at 946-47, 150 Cal. Rptr. at 465-66; CAL. CIV. PROC. CODE §§128,

v. *Paine*,⁶ Chapter 762 enacts statutory provisions allowing trial courts to order an attorney, the attorney's client, or both, to pay reasonable expenses, including attorney fees, to the other party for incurring additional expenses because the attorney employed tactics or actions not based on good faith that were either frivolous⁷ or caused unnecessary delay.⁸ Expenses can be imposed as a sanction only upon notice contained in moving or responding papers by one of the parties or by motion of the court.⁹ Chapter 762 also requires that the party accused of the misconduct be given notice and an opportunity to be heard on the motion and that any order imposing expenses as a sanction must state in detail the conduct or circumstance justifying the sanction.¹⁰

1021-1021.6. *See generally* 4 B. WITKIN, CALIFORNIA PROCEDURE *Trial* §147A (Supp. 1981); *see also* STATE BAR OF CALIFORNIA, 1980 CONFERENCE RESOLUTION 5-2.

6. *See* CAL. STATS. 1981, c. 762, §2, at —.

7. *See* CAL. CIV. PROC. CODE §128.5(a) (frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith).

8. *See id.*

9. *See id.* §128.5(b).

10. *See id.*

Civil Procedure; attorney fees—actions against peace officers

Code of Civil Procedure §1021.7 (new).

SB 229 (Doolittle); STATS. 1981, Ch 980

Opposition: American Civil Liberties Union; California Trial Lawyers Association

Unless attorney fees are specifically provided for by statute, existing law leaves the measure and mode of attorney fees to the agreement of the parties.¹ Chapter 980 provides that in any action for damages brought against a peace officer arising out of the performance of the officer's duties,² or against a public entity employing a peace officer, the court may, in its discretion, award reasonable attorney fees as part of the costs to the defendant upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause.³ In addition, Chapter 980 allows the court to award attorney fees to the defendant in an action for libel⁴ or slander⁵ upon a finding by the court that the action was not filed or maintained in good faith and with rea-

1. CAL. CIV. PROC. CODE §1021.

2. *See* CAL. PENAL CODE §§830-830.6 (definition of peace officers and their authority).

3. *See* CAL. CIV. PROC. CODE §1021.7.

4. *See* CAL. CIV. CODE §45 (definition of libel).

5. *See id.* §46 (definition of slander).

sonable cause.⁶ The apparent purpose of Chapter 980 is to reduce non-meritorious lawsuits against peace officers and to deter the filing of frivolous libel and slander suits.⁷

6. See CAL. CIV. PROC. CODE §1021.7.

7. See Senator John Doolittle, Press Release No. 16, June 4, 1981 (copy on file at the *Pacific Law Journal*) (This bill is necessary because of the increasing number of frivolous suits filed against peace officers each year. Currently, less than four percent of the suits filed against peace officers result in a plaintiff's verdict, but often non-meritorious claims are settled just to avoid the cost of a law suit.). See also *City of Long Beach v. Bozek*, 118 Cal. App. 3d 847, 173 Cal. Rptr. 611 (1981) (the court stated that the incidence of suits against municipalities for unlawful arrest or the use of excessive force by police officers has increased substantially in recent years and that while many suits are well founded, some are instituted without any real belief in their merit, with the hope of attracting publicity and creating pressure for the municipality); CAL. STATS. 1980, c. 1209, §1, at — (enacting CAL. CIV. PROC. CODE §1038); 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION, 306 (1981) (litigation costs in civil proceedings under the California Tort Claims Act or in a civil action for indemnity or contribution).

Civil Procedure; attorney fees—prevailing party in contract actions

Civil Code §1717 (amended).

SB 1028 (Rains); STATS. 1981, Ch 888

Under existing law, the prevailing party in any action on a contract that provides for an award of attorney fees and costs incurred in enforcing the contract is entitled to reasonable attorney fees, costs, and necessary disbursements even though the prevailing party is not the party named in the contract.¹ Prior statutory law specified that the prevailing party was the party in whose favor final judgment was rendered.² Chapter 888 eliminates this definition and requires the court to determine who is the prevailing party, upon notice and motion by a party, regardless of whether the suit proceeds to final judgment.³ In addition, Chapter 888 specifies that a defendant is deemed the prevailing party if (1) he or she tenders to the plaintiff the full amount to which the defendant alleges the plaintiff is entitled, (2) the defendant deposits that amount in court, and (3) then establishes the allegation as true.⁴ Where, however, an action has been voluntarily dismissed or the

1. See CAL. CIV. CODE §1717; Comment, *Attorney's Fees and Civil Code 1717*, 13 PAC. L.J. 231, 231 (1981) [hereinafter cited as *Attorney's Fees*]. See generally 4 B. WITKIN, CALIFORNIA PROCEDURE *Judgment* §§117-128 (2d ed. 1971), 124, 127 (Supp. 1975). See also *T.E.D. Bearing Co. v. Walter E. Heller & Co.*, 38 Cal. App. 3d 59, 63, 112 Cal. Rptr. 910, 913 (1974) (the primary purpose of California Civil Code Section 1717 is to transfer a unilateral contractual right to attorney's fees into a reciprocal provision giving the right to recover to either party).

2. See CAL. STATS. 1968, c. 266, §1, at 578 (enacting CAL. CIV. CODE §1717).

3. See CAL. CIV. CODE §1717(b)(1).

4. See *id.* §1717(b)(2).

case settled, no prevailing party exists for purposes of this statute.⁵

When attorney fees were recoverable on a contract, the traditional rule in California was that they were recoverable only as special damages and not as costs.⁶ They were required to be pled in the complaint and proved at trial.⁷ Case law, however, has established that the party required to pay attorney fees by a contract could recover them as costs.⁸ In an attempt to codify existing case law, Chapter 888 provides that reasonable attorney fees recoverable on a contract are to be fixed by the court, upon notice and motion by a party, and are an element of the costs of suit.⁹

5. *See id.*

6. *See Attorney's Fees, supra* note 1, at 235.

7. *Attorney's Fees, supra* note 1, at 235.

8. *See System Inv. Corp. v. Union Bank*, 21 Cal. App. 3d 137, 161-63, 98 Cal. Rptr. 735, 752-53 (1971).

9. *See* CAL. CIV. CODE §1717.

Civil Procedure; motions—notice and response

Code of Civil Procedure §1005 (amended).

AB 1784 (McCarthy); STATS. 1981, Ch 197

Prior to the enactment of Chapter 197, when written notice of a motion¹ was required, it had to be given at least ten days prior to the scheduled hearing date of the motion absent a shorter time prescribed by the court.² Chapter 197 increases the time period to fifteen days³ and requires that all supporting points and authorities, declarations, and other supporting materials accompany the notice.⁴ In an attempt to create uniformity among conflicting local requirements,⁵ Chapter 197 requires all papers that oppose a motion properly noticed must be filed with the court and served on each party not later than five days prior to the appointed hearing date.⁶

1. *See* CAL. CIV. PROC. CODE §1003 (definition of order and motion).

2. *Compare id.* §1005 with CAL. STATS. 1980, c. 196, §1 at —.

3. CAL. CIV. PROC. CODE §1005.

4. *Id.*

5. *See* STATE BAR OF CALIFORNIA, 1980 CONFERENCE RESOLUTION 5-24 (The time requirement for filing of responsive papers varies among the counties. Attorneys familiar with filing two days prior to the hearing may be prejudiced when in a county that requires filing four days prior to the hearing.).

6. CAL. CIV. PROC. CODE §1005. The judge or court may prescribe a shorter time for all papers considered by the court to be filed, including responsive papers against a motion.

Civil Procedure; motions and applications

Code of Civil Procedure, §§396.6, 473 (amended).
SB 357 (Sieroty); STATS. 1981, Ch 122

Under existing law, when a civil action is filed in a court having subject matter jurisdiction, but in a county not designated as a proper county for venue purposes,¹ the defendant may move to transfer the action to another court deemed more appropriate for trial.² Prior law required the defendant to serve and file with the notice of motion an affidavit of merits.³ The purpose of the affidavit of merits was to show the validity of the defense, apparently to discourage frivolous motions interposed for delay.⁴ It was not necessary, however, that the affidavit disclose facts constituting the defense.⁵ The affidavit was intended instead as a declaration that, in the opinion of the defense attorney, the defense was valid.⁶ Chapter 122 eliminates the requirement of an affidavit of merits.⁷ A motion for change of venue to a proper county now may be made by filing with the court a notice of motion with proof of service upon the adverse party.⁸

Existing law also provides that a party may move for equitable relief from a judgment or order entered by a court against that party as a result of mistake, inadvertence, surprise, or excusable neglect on the part of the party or the party's attorney.⁹ Under the Code of Civil Procedure, the moving party is only required to include a copy of his or her proposed pleading with the application for relief.¹⁰ Case law, however, has held that the proposed pleading must be verified or accompanied by an affidavit of merits.¹¹ Chapter 122 specifies that when a motion for relief from an order or judgment is made, *no* affidavit or declaration of merits is required of the moving party.¹²

1. See CAL. CIV. PROC. CODE §§392-395 (designating counties wherein venue is properly laid for specified actions).

2. See *id.* §396b.

3. See CAL. STATS. 1974, c. 1369, §2, at 2964 (amending CAL. CIV. CODE §396b).

4. See *Anderson v. No-Doz*, 134 Cal. App. 2d 11, 13, 284 P.2d 883, 884 (1955); 2 B. WITKIN, CALIFORNIA PROCEDURE *Actions* §537 (2d ed. 1970) (affidavit of merits).

5. See *Carter v. Broder*, 50 Cal. App. 63, 69-70, 194 P. 527, 530 (1920).

6. See *id.*

7. Compare CAL. CIV. CODE §396b with CAL. STATS. 1974, c. 1369, §2, at 2964.

8. See CAL. CIV. CODE §396b.

9. See *id.* §473. See also 9 M. BENDER, CALIFORNIA FORMS OF PLEADING AND PRACTICE *Judgments* 239, 246 (1981) (application for relief may be brought by an independent complaint in equity as well as by motion).

10. See CAL. CIV. PROC. CODE §473.

11. See *First Small Business Inv. Co. v. Sistim, Inc.*, 12 Cal. App. 3d 645, 649, 90 Cal. Rptr. 798, 800 (1970).

12. See CAL. CIV. PROC. CODE §473.

Civil Procedure; small claims court

Code of Civil Procedure §§116.1, 117.6, 117.20 (new); 116.2, 116.7, 117, 117.1, 117.5, 117.9, 117.14, 117.18 (amended); Government Code §818.9 (new).

AB 119 (Ryan); STATS. 1981, Ch 86

AB 2079 (Nolan); STATS. 1981, Ch 313

Support: Transamerica Financial Service

Opposition: Western Center on Law and Poverty

SB 180 (Mark); STATS. 1981, Ch 958

Support: Small Claims Court Advisory Committee; Department of Consumer Affairs; Judicial Council; Attorney General; Legal Services Section, State Bar; Construction Industry Legislative Council; California Public Interest Research Group; California Credit Union League; Pharmacists Planning Service, Inc.; Advisory Board to the Senate Select Committee on Small Business Enterprises; Consumer Federation of California; California Consumer Affairs Association; Consumer Advisory Council; Consumer Action, San Francisco

Opposition: California Banker's Association; Committee on the Administration of Justice, State Bar

Chapter 958 states the legislative finding that individual minor civil disputes are important to the parties involved and of significant social and economic consequences.¹ To resolve these disputes in an expeditious, inexpensive, and fair manner, the small claims division of the municipal and justice courts have been established.² The Legislature has enacted several procedural and administrative changes³ in the small claims court system based upon the recommendations of the three-year Small Claims Court Experimental Project.⁴ Greater accessibility and efficiency⁵ will be achieved through an increased jurisdic-

1. CAL. CIV. PROC. CODE §116.1.

2. *Id.*

3. *See generally id.* §§116.1, 116.2, 116.7, 117, 117.1, 117.5, 117.6, 117.9, 117.14, 117.18, 117.20; CAL. GOV'T CODE §818.9.

4. *See generally* DEP'T OF CONSUMER AFFAIRS, SUMMARY, THE SMALL CLAIMS COURT EXPERIMENTAL PROJECT, A REPORT TO THE LEGISLATURE ON THE COURT ASSISTANCE EXPERIMENT (Aug. 1979); DEP'T OF CONSUMER AFFAIRS, THE SMALL CLAIMS COURT EXPERIMENTAL PROJECT, A REPORT TO THE LEGISLATURE ON THE MONETARY JURISDICTION EXPERIMENT—FINAL (Oct. 1980).

5. *See* CAL. CIV. PROC. CODE §116.1; Senator Ralph C. Dills, Press Release, April 10, 1981; Senator Milton Marks, Press Release, Jan. 28, 1981 [hereinafter cited as Marks] (copies on file at the *Pacific Law Journal*).

tional monetary limit,⁶ required Saturday and evening court sessions,⁷ provision of legal advisors for litigants,⁸ and judicial law clerks for small claims court judges.⁹ In addition, judgment debtors have been provided with a new method of proving satisfaction of judgment when the judgment creditor has refused to file an acknowledgement of payment or cannot be located.¹⁰ Finally, the inconsistent interpretations given by small claims courts to the term "conditional sales contract"¹¹ in prohibiting assignees from filing or prosecuting in small claims court has been remedied.¹²

Access and Efficiency

Chapter 958 creates new procedures designed to effect greater access to and efficiency in the small claims court system.¹³ The most significant change is the increased monetary jurisdictional limit of the courts from \$750 to \$1500.¹⁴ In addition, while existing law allows scheduling of court sessions at any time on any day, including Saturdays, but excluding holidays,¹⁵ Chapter 958 *requires* the use of at least one night or Saturday session per month in each small claims division of a municipal court having four or more judicial officers.¹⁶ Furthermore, prior law authorized each small claims court to promulgate local rules so that legal advisors could be furnished to litigants.¹⁷ Chapter 958 requires

6. CAL. CIV. PROC. CODE §116.2; *Hearings on Increasing the Monetary Jurisdiction of Small Claims Court Before the California Assembly Committee on the Judiciary* 1 (Nov. 20, 1980) (statement of Richard B. Spohn, Director of the California Department of Consumer Affairs). See CAL. STATS. 1976, c. 964, §1, at 3309.

7. CAL. CIV. PROC. CODE §116.7.

8. See *id.* §117.18; Marks, *supra*, note 3; *Hearings on Increasing the Monetary Jurisdiction of Small Claims Court Before the California Assembly Committee on the Judiciary* 3 (Nov. 20, 1980) (statement of Richard B. Spohn).

9. See CAL. CIV. PROC. CODE §117.20.

10. See *id.* §117.9. According to Assemblywoman Marilyn Ryan, these amendments were necessary to aid judgment debtors in two cases. The first occurs when a judgment creditor refuses to file the requisite acknowledgment of satisfaction. Since credit reporting agencies are notified of all unsatisfied judgments, the judgment debtor could incur a bad credit rating under prior law even though the judgment had been satisfied, because there was no alternative method for proving satisfaction. The second problem occurs when a judgment creditor either moved out of state or could not be located. Prior law provided no remedy in this situation. Letter from Marilyn Ryan to *Pacific Law Journal*, Aug. 28, 1981 (copy on file at the *Pacific Law Journal*).

11. See note 24 *infra*.

12. See CAL. CIV. PROC. CODE §117.5.

13. See generally *id.* §§116.2, 116.7, 117.1, 117.18, 117.20; CAL. GOV'T CODE 818.9; Marks, *supra* note 3; Senator Ralph C. Dills, Press Release, April 10, 1981.

14. See note 6 *supra*. Compare CAL. CIV. PROC. CODE §116.2 with CAL. STATS. 1976, c. 964, §1, at 3309. Because of inflation, it is not economically feasible to obtain the services of an attorney in disputes involving less than \$1500. State Senator Ralph C. Dills, Press Release, Sept. 17, 1981.

15. Compare CAL. CIV. PROC. CODE §116.7 with CAL. STATS. 1976, c. 1289, §2, at 5766.

16. CAL. CIV. PROC. CODE §116.7. For purposes of this section, a "session" includes proceedings conducted by members of the State Bar acting as mediators or referees.

17. See CAL. STATS. 1978, c. 723, §4, at 2272 (enacting CAL. CIV. PROC. CODE §117.18).

legal advisors to be made available at no charge to litigants and potential litigants.¹⁸ These advisors, however, may not appear in court as an advocate for any party¹⁹ nor may a public entity or its employees or volunteers be liable because of any advice provided a litigant.²⁰ The pool of advisors may be drawn from members of the State Bar, law students, paralegals, or other persons familiar with small claims procedure and may work on a paid or volunteer basis.²¹ Finally, small claims judges now may use law clerks for legal research.²²

Assignees

Prior law prohibited an assignee of a claim from filing or prosecuting in small claims court.²³ Chapter 313 deletes the exception applicable to holders of conditional sales contracts²⁴ and instead permits prosecution in small claims court by holders of security agreements, retail installment contracts, or lien contracts who claim by assignment,²⁵ having purchased the contracts for an investment portfolio rather than for purposes of collection.²⁶ In a related change, Chapter 958 provides that when an action is filed against principals and their guaranty or surety pursuant to a guarantor or suretyship agreement, a reasonable attempt must be made to complete service on the principal.²⁷ If service is not

18. CAL. CIV. PROC. CODE §117.18. Each county may tailor the legal advisory program to meet local needs. Adjacent counties may pool resources.

19. *Id.* This provision reinforces existing provisions that prohibit the use of legal counsel by small claims court litigants during court sessions. *Id.* §117g.

20. CAL. GOV'T CODE §818.9.

21. CAL. CIV. PROC. CODE §117.18. To effect the litigant assistance program, Chapter 958 directs the Judicial Council and the Department of Consumer Affairs to adopt rules to insure that litigants receive adequate notice of the availability of legal assistance.

22. *Id.* §117.20. Use of law clerks shall be undertaken according to rules to be adopted by the Judicial Council.

23. CAL. STATS. 1976, c. 1289, §2, at 5766 (enacting CAL. CIV. PROC. CODE §117.5) (except trustees in bankruptcy acting in the exercise of trusteeship duties or holders of conditional sales contracts who purchased the contract as part of an investment portfolio and not for collection purposes).

24. See Memorandum from Judge Malcolm H. Mackey to Hon. Armand M. Jewell, Presiding Judge, Municipal Court of Los Angeles, Oct. 11, 1979 (copy on file at the *Pacific Law Journal*); letter from John A. Hendry to Hon. Xenophon F. Lang, Jan. 11, 1980 (copy on file at the *Pacific Law Journal*); letter from James P. Drummy to Hon. Malcolm Mackey, Aug. 10, 1979 (copy on file at the *Pacific Law Journal*); letter from Phillip H. Myers to Hon. Earl Warren Jr., July 26, 1978 (copy on file at the *Pacific Law Journal*). Compare CAL. CIV. PROC. CODE §117.5 with CAL. STATS. 1976, c. 1289, §2, at 5766.

25. CAL. CIV. PROC. CODE §117.5. These contracts must have been written pursuant to either the Unruh Act which defines the requirements of retail installment sales contracts for purchase of personal, family, or household goods and services, see CAL. CIV. CODE §§1801-1812.20, or the Automobile Sales Finance Act which provides requirements for conditional sales contracts for the purchase of motor vehicles, see *id.* §§2981-2984.1.

26. CAL. CIV. PROC. CODE §117.5.

27. *Id.* §117.6. The term "conditional sales contract" was not defined for purposes of California Code of Civil Procedure Section 117.5. OP. CAL. LEGIS. COUNSEL, *Small Claims Ct.*, No. 16021, at 2 (Nov. 20, 1978). The question arose whether this term applies only where the seller retained title as security for payment of the purchase price or also applied when title was trans-

completed, however, the action may be transferred to the court of appropriate jurisdiction.²⁸

Proof of Satisfaction of Judgment

Existing law provides that a judgment creditor must file an acknowledgment of satisfaction of judgment immediately upon receipt of payment from the judgment debtor.²⁹ Failure to timely file the acknowledgment on proper demand and without just cause results in liability of the judgment creditor in the amount of \$50 plus all damages.³⁰ Prior to the passage of Chapter 86, however, these judgment debtors had no other remedy if the creditor refused to file the notice of satisfaction of judgment and could not be located for suit.³¹ Chapter 86 permits judgment debtors to file with the clerk of the small claims court a cancelled check, money order, or cash receipt as proof of satisfaction.³² Submission of these items establishes a rebuttable presumption of satisfaction if accompanied by a statement made under penalty of perjury that (1) the judgment creditor has been paid in full, (2) the judgment creditor has been requested to file an acknowledgment of satisfaction but has refused to do so or the creditor's present address is unknown, and (3) the attached documents constitute evidence of receipt of payment by the creditor.³³ While Chapter 86 terms the effect of the filing of these items a "rebuttable presumption," the apparent *effect* is conclusive, because the court *must* enter satisfaction of judgment when the required items have been filed with the court.³⁴

Increase in Filing Fees

Chapter 958 increases the cost for filing a small claims court action

ferred to the buyer and the seller retained only a security interest. OP. CAL. LEGIS. COUNSEL, *supra*, at 1. The issue was further confused by the fact that special statutory provisions defined the latter type of contract as a conditional sales contract. Compare CAL. CIV. CODE §§1801-1812.20 (Unruh Act) with *id.* §§2981-2984.1 (Rees-Levering Act). This confusion led to inconsistent application of California Civil Code Section 117.5.

28. CAL. CIV. PROC. CODE §117.6. The section does not indicate whether the original action was filed in small claims court, does not define "court of appropriate jurisdiction," and does not specify whether the transferred action is to be brought against the principle or the guarantor or surety.

29. *Id.* §117.9.

30. *Id.*

31. See CAL. STATS. 1980, c. 1018, §1, at — (amending CAL. CIV. PROC. CODE §117.9). See note 10 *supra*.

32. CAL. CIV. PROC. CODE §117.9. The cancelled check or money order must be written by the judgment debtor subsequent to the judgment for its full amount and must be payable to and endorsed by the judgment creditor. The cash receipt must be written subsequent to the judgment for the full amount thereof and must be signed by the creditor.

33. *Id.*

34. *Id.*

from two to six dollars³⁵ to meet the increased costs of an expanded small claims court system.³⁶ Furthermore, if the plaintiff has filed more than twelve claims during the preceeding twelve months, the fee for subsequent filings increases to twelve dollars.³⁷ In determining the number of claims previously filed, a declaration made by the plaintiff under penalty of perjury stating the number of claims filed is required.³⁸ Finally, Chapter 958 provides that the filing fee and the fee for service of claims may be waived if the claimant cannot afford to pay the fees and chooses to proceed *in forma pauperis*.³⁹

35. Compare CAL. CIV. PROC. CODE §117.14 with CAL. STATS. 1980, c. 1372, §1, at —.

36. CAL. STATS. 1981, c. 958, §11, at —.

37. CAL. CIV. PROC. CODE §117.14(a); DEP'T OF CONSUMER AFFAIRS, SUMMARY, THE SMALL CLAIMS COURT EXPERIMENTAL PROJECT: A REPORT TO THE LEGISLATURE ON THE COURT ASSISTANCE EXPERIMENT 2 (Aug. 1979) (statement by Robert Beresford, Chairperson, Small Claims Court Experimental Project Advisory Committee).

38. CAL. CIV. PROC. CODE §117.14(b).

39. *Id.* §117.1.

Civil Procedure; small claims actions—public entities

Code of Civil Procedure §116.5 (new).

AB 497 (McAlister); STATS. 1981, Ch 65

Under existing law, an action in small claims court must be heard no later than forty days from the date of the order for hearing if the defendant or defendants resides in the county having jurisdiction, and seventy days if one or more of the defendants resides outside the county.¹ Chapter 65 extends the hearing deadline dates for public entity plaintiffs² that are filing more than ten claims at one time.³ Upon request by the public entity, the hearing date may now be extended to seventy days from the date of the order in cases when all defendants reside in the county and to ninety days when one or more of the defendants reside outside of the county.⁴

1. See CAL. CIV. PROC. CODE §§116.4(b)(1), (2), 117.3, 415.2 (The order must be by a clerk or judge and must be made at either the commencement of the plaintiff's action or when proof of service of process has been received. Service of process must be complete at least five days prior to the hearing date for county residents, otherwise, the court must extend the hearing date at least ten days.). See generally *id.* §§116-117.20; THE ASSOCIATION OF MUNICIPAL COURT CLERKS OF CALIFORNIA, INC., SMALL CLAIMS MANUAL COMMITTEE, MANUAL OF PROCEDURE IN SMALL CLAIMS CASES (1978).

2. See CAL. GOV'T CODE §811.2 (definition of public entity).

3. See CAL. CIV. PROC. CODE §116.5.

4. See *id.*

Civil Procedure; subpoena duces tecum

Code of Civil Procedure §1987.5 (amended).
AB 2106 (Stirling); STATS. 1981, Ch 189

Existing law allows for the service of a subpoena duces tecum¹ to compel a person to appear and produce documents or materials at a trial or deposition.² For a subpoena duces tecum to be valid, a copy of the affidavit³ on which the subpoena is based must be served on the person receiving the subpoena.⁴ In the case of a subpoena duces tecum requesting appearance and production of matters and things at the taking of a deposition, Chapter 189 requires that, in order for the subpoena to be valid, a copy of the affidavit and a list of the items requested be attached to the notice of the taking of the deposition that is served on all the parties or their attorneys.⁵ If subpoenaed matters and things are produced pursuant to a subpoena in violation of the provisions of this Chapter, any other party may file a motion and the court may grant an order for appropriate relief.⁶ This relief may include, but is not limited to, filing a motion for the exclusion of the evidence, retaking the deposition, or seeking a continuance.⁷

1. *See* B. WITKIN, CALIFORNIA EVIDENCE §1011 (2d ed. 1966) (definition of subpoena duces tecum).

2. *See* CAL. CIV. PROC. CODE §1985.

3. *See id.* §2003 (definition of affidavit).

4. *See id.* §1987.5. *See generally* B. WITKIN, CALIFORNIA EVIDENCE §1012 (2d ed. 1966).

5. *See* CAL. CIV. PROC. CODE §§1987.5, 2002-2004 (definitions of affidavit and deposition).

6. *See id.* §1987.5.

7. *See id.*

Civil Procedure; condemnation proceedings

Code of Civil Procedure §§1268.010, 1513, 1513.5, 1522 (amended).
SB 1141 (Keene); STATS. 1981, Ch 831
Support: Department of Savings and Loan; State Banking Department

The power of a government to condemn private property for public use is found in the United States¹ and California Constitutions² and is governed by eminent domain statutes.³ Existing law requires that once

1. *See* U.S. CONST. amend. V.

2. *See* CAL CONST. art. 1, §19.

3. *See generally* CAL. CIV. PROC. CODE §§1245.310-1268.720.

a final judgment⁴ has been rendered in any condemnation proceeding the plaintiff⁵ must compensate the owner within thirty days.⁶ Chapter 831 provides, however, that if the defendant⁷ challenges the judgment or the condemnation proceedings the plaintiff is not required to pay the judgment until thirty days after the conclusion of the additional court proceedings.⁸ Chapter 831 applies to all actions that have not reached final judgment by January 1, 1982, even if the action was commenced before that date.⁹

4. *Id.* §1235.120 (definition of final judgment); see CONTINUING EDUCATION OF THE BAR, CONDEMNATION PRACTICE IN CALIFORNIA §§10.17, 10.20 (Supp. June 1981).

5. CAL. CIV. PROC. CODE §1250.210 (the plaintiff is the person seeking to take the property).

6. See *id.* §1268.010(a); CONTINUING EDUCATION OF THE BAR, CONDEMNATION PRACTICE IN CALIFORNIA §10.21 (Supp. June 1981).

7. CAL. CIV. PROC. CODE §1250.220 (the defendants are the persons of record or those known to have interest in the property).

8. See *id.* §1268.010(a) (including federal court proceedings).

9. See CAL. STATS. 1981, c. 831, §4, at —.

Civil Procedure; accrual of indemnity claims against public entities

Government Code §901 (amended).

AB 601 (McAlister); STATS. 1981, Ch 856

Support: State Board of Control

The California Tort Claims Act¹ requires timely filing of claims against public entities.² Actions based on personal property, growing crops, or injury or death to a person must be filed within 100 days after the cause of action accrues,³ defined as the date on which the death or injury occurred.⁴ Chapter 856 provides that for purposes of timely filing of an equitable indemnity or partial equitable indemnity action against a public entity, the cause of action accrues on the date the original defendant is served with the complaint giving rise to the equitable indemnity action.⁵

1. CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE §§5.31, 5.35 (1980).

2. See *id.* §§5.32(1), (2). See also CAL. GOV'T CODE §911.2.

3. CAL. GOV'T CODE §911.2.

4. CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE §535(2) (1980) (accrual of claims). See also CAL. GOV'T CODE §901.

5. CAL. GOV'T CODE §901.

COMMENT

Chapter 856 is an apparent response to the recent California Supreme Court case *The People ex rel. Dept. of Transportation v. Superior Court, Frost RPI*,⁶ interpreting accrual of indemnity actions against a public entity to arise only when the party seeking indemnification has suffered loss through payment of a settlement or judgment.⁷

In *People v. Frost*, a cause of action for implied equitable indemnity against the State was filed after the requisite 100 day period by the original defendant.⁸ The State demurred on the ground that the claim was barred due to untimely filing.⁹ The Supreme Court held that a cause of action for implied equitable indemnity is separate and distinct from the plaintiff's claim.¹⁰ Thus, for claim filing purposes, equitable indemnity actions including "partial" or "comparative" claims, do not accrue when the original accident occurs.¹¹

The dissent in *People v. Frost* indicated that the decision frustrated policy considerations inherent in the statutory filing provisions¹² such as early investigation of the facts, informed fiscal planning in light of prospective liabilities, settlement of claims before initiation of costly litigation, and avoidance of similarly caused future injuries and liabilities.¹³ Chapter 856 abrogates the *People v. Frost* holding, specifying the date of accrual for an equitable indemnity action against a public entity is the date the defendant is served with the original complaint giving rise to indemnification.¹⁴

6. 26 Cal. 3d 744, 163 Cal. Rptr. 585.

7. *See id.* at 752, 163 Cal. Rptr. at 590.

8. *See id.* at 747, 163 Cal. Rptr. at 587.

9. *See id.*

10. *See id.* at 752, 163 Cal. Rptr. at 590.

11. *See id.*

12. *See id.* at 768, 163 Cal. Rptr. at 600 (Clark, J., dissenting).

13. *See id.* at 766, 163 Cal. Rptr. at 599.

14. CAL. GOV'T CODE §901.

Civil Procedure; references

Code of Civil Procedure §645.1 (new); §639 (amended).

SB 877 (Sieroty); STATS. 1981, Ch 299

A reference is the sending of a pending action or proceeding, or certain issues involved in the pending action or proceeding, to a referee¹

1. Department of Motor Vehicles v. Superior Court, 271 Cal. App. 2d 770, 774, 76 Cal. Rptr. 804, 806 (1969) (definition of referee).

for hearing and determination.² Under existing law, a reference may be voluntary, upon agreement of the parties,³ or involuntary, if directed by a court.⁴ Prior law limited the use of an involuntary reference to four specific situations.⁵ Chapter 299 now allows an involuntary reference to be directed when the court determines in its discretion that it is necessary to appoint a referee to hear and determine any and all motions and disputes relating to discovery in the pending action.⁶ Accordingly, the referee must report his or her findings to the court and make a recommendation as to the proper disposition of the directed matter.⁷ In addition, Chapter 299 provides statutory authority for the court to order the parties to pay the fees of referees who are not employees or officers of the court at the time of their appointment.⁸ The court will determine the fees and a fair and reasonable method of payment, including apportionment of the fees among the parties.⁹

2. See 1 CAL. JUR. *Accounts and Accounting* §74 (3d ed. 1972); 66 AM. JUR. *References* §1 (2d ed. 1973) (definition of reference).

3. CAL. CIV. PROC. CODE §638.

4. See *id.* §639.

5. Compare *id.* §639(a), (b), (c), (d) with CAL. STATS. 1977, c. 1257, §23, at 4764 (an involuntary reference may be directed when the trial of an issue of fact requires the examination of a long account; when the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect; when a question of fact arises outside of the pleadings; or when it is necessary for the information of the court in a special proceeding). See generally BLACK'S LAW DICTIONARY 849 (5th ed. 1979) (definition of long account).

6. CAL. CIV. PROC. CODE §639(e).

7. See *id.*

8. *Id.* §645.1. See generally 55 CAL. JUR. *Referees* §13 (3d ed. 1980).

9. See CAL. CIV. PROC. CODE §§645.1, 1023.

Civil Procedure; limitation of actions—latent deficiencies

Code of Civil Procedure §337.15 (amended).

AB 605 (Stirling); STATS. 1981, Ch 88

An action¹ to recover damages for injury to real or personal property arising out of a latent deficiency² in a development³ or an improvement⁴ from the developer⁵ or a person contributing to an improve-

1. See CAL. CIV. PROC. CODE §337.15(2)(c) (includes action for indemnity against developer or person contributing to an improvement).

2. See *id.* §337.15(2)(b) (deficiency which is not apparent by reasonable inspection).

3. See *Liptak v. Diane Apartments, Inc.*, 109 Cal. App. 3d 762, 771, 167 Cal. Rptr. 440, 444 (1980) (defining development as a developed tract of land).

4. See BLACK'S LAW DICTIONARY 682 (5th ed. 1979) (a valuable addition made to property).

5. See 109 Cal. App. 3d at 772, 167 Cal. Rptr. at 444 (person with overall control over the development and improvements which eventually complete the development).

ment⁶ is barred after ten years have elapsed from the time of substantial completion of the particular development or improvement.⁷ Prior to the enactment of Chapter 88, "substantial completion" was not statutorily defined, causing uncertainty whether the limitations period with respect to improvements commenced upon substantial completion of the *improvement*, or upon substantial completion of the *development*, when the times of completion did not coincide.⁸ Chapter 88 specifies that the statute of limitations for each improvement commences running upon substantial completion of the particular improvement.⁹ Chapter 88 additionally provides that the limitations period may not commence later than the date of final inspection by an appropriate public agency,¹⁰ the date of recordation of a valid notice of completion,¹¹ the date of use or occupation of the improvement,¹² or one year after termination or cessation of work in the improvement,¹³ whichever occurs first.¹⁴

6. See CAL. CIV. PROC. CODE §337.15(a) (person who performs or furnishes design, specifications, surveying, planning, supervision, testing, observation of construction, or construction of improvement).

7. See *id.* §337.15(a)(1), (2).

8. See *generally* 109 Cal. App. 3d 762, 167 Cal. Rptr. 440 (1980).

9. See CAL. CIV. PROC. CODE §337.15(g).

10. See *id.* §337.15(g)(1).

11. See *id.* §337.15(g)(2).

12. See *id.* §337.15(g)(3).

13. See *id.* §337.15(g)(4).

14. See *id.* §337.15(g).

Civil Procedure; staying enforcement of a judgment pending an appeal

Code of Civil Procedure §917.1 (amended).
AB 1798 (Robinson); STATS. 1981, Ch 196

Prior to the enactment of Chapter 196, perfection of an appeal did not stay the enforcement¹ of any order or judgment for money issued by a trial court² unless an undertaking³ was given for double the amount of the order or judgment.⁴ Chapter 196 states that this require-

1. See *generally* 6 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* §147 (2d ed. 1970) (definition of stay of enforcement).

2. See CAL. CIV. PROC. CODE §917.1.

3. See *generally* CONTINUING EDUCATION OF THE BAR, CALIFORNIA SURETY AND FIDELITY BOND PRACTICE §21.2 (1969) (definition of undertaking).

4. See CAL. CIV. PROC. CODE §917.1 (if the undertaking is given by a corporate surety it need be only one and one-half times the amount of the judgment).

ment of an undertaking does not apply to cases when the money is in the custody of the court.⁵ In these cases the order or judgment may be stayed by giving an undertaking in a sum fixed and under conditions specified by the trial court.⁶

5. *See id.*

6. *See id.* §917.2.

Civil Procedure; statements of decision

Code of Civil Procedure §§632, 634, 635, 662, 663, 670, 909 (amended).

AB 1684 (Harris); STATS. 1981, Ch 900

Prior to the enactment of Chapter 900, a party to a controversy could request written findings of fact¹ and conclusions of law² when a justice, municipal, or superior court tried a question of fact.³ If no request was made, no written findings or conclusions were required.⁴ Chapter 900 eliminates written findings of facts and conclusions of law in superior, municipal, and justice courts.⁵ These courts must now issue a *statement of decision* explaining the factual and legal basis for the decision on each of the principal controverted issues only if requested by any party appearing at trial.⁶ This request must be made within ten days after the court announces a tentative decision. If the trial lasts for less than one day, however, the request must be made prior to the submission of the matter for decision.⁷ The request must specify which controverted issues are to be covered by the statement of decision⁸ and any party may make proposals regarding the content of the statement after a request has been made.⁹ The statement of decision must be in writing unless the parties appearing at trial otherwise agree. If the trial has been completed within one day the statement may be made orally on the record in the presence of the parties.¹⁰

1. *See* BLACK'S LAW DICTIONARY 569 (5th ed. 1979) (definition of finding of fact).

2. *See id.* 262-63 (definition of conclusion of law).

3. *See* CAL. STATS. 1977, c. 1257, §22, at 4763 (amending CAL. CIV. PROC. CODE §632).

4. *See id.*

5. *Compare* CAL. CIV. PROC. CODE §632 *with* CAL. STATS. 1977, c. 1257, §22, at 4763. *See also* CAL. CIV. PROC. CODE §§634, 662, 663, 670, 909 (eliminating references to findings of fact and conclusions of law).

6. CAL. CIV. PROC. CODE §632.

7. *Id.*

8. *Id.*

9. *Compare id. with* CAL. R. CT. 232(c), 520.

10. *See* CAL. CIV. PROC. CODE §632.

Under prior law, the presiding judge of the court was allowed to enter formal judgment in cases when the decision of the court had been entered in the minutes and the judge who had heard the case was unavailable, only if findings of fact and conclusions of law had been waived or had not been requested.¹¹ Chapter 900 eliminates this limitation.¹²

11. *See* CAL. STATS. 1965, c. 1942, §1, at 4470 (enacting CAL. CIV. PROC. CODE §635).

12. *Compare* CAL. CIV. PROC. CODE §635 with CAL. STATS. 1965, c. 1942, §1, at 4470.

Civil Procedure; injunctions, undertakings and costs

Code of Civil Procedure §529.2 (new); Government Code §65914 (new).

AB 1914 (Agos); STATS. 1981, Ch 970

Support: League of California Cities; Legal Aid Foundation of Los Angeles; National Retired Teachers Association; Western Center on Law and Poverty

Opposition: Environmental Defense Fund; Office of Planning and Research; Planning and Conservation League

AB 1915 (Agos); STATS. 1981, Ch 969

Support: Housing and Community Development

Opposition: Office of Planning and Research; Resources Agency

Existing law recognizes that incentives offered by cities or counties contribute significantly to the economic feasibility of low and moderate income housing in proposed housing developments¹ and to the elimination of the severe shortage of affordable housing for persons in these income brackets.² Thus, certain bonuses³ are provided to developers who agree to construct at least 25% of the total units of a housing development for persons and families of low or moderate income.⁴ Chapter 969 provides further incentive for public entities to encourage the development of low and moderate income housing by allowing the public entity to collect costs and attorney's fees if the public entity prevails in the action brought against it for an injunction to stop the development.⁵

1. *See* CAL. GOV'T CODE §65917.

2. *See id.* §65913.

3. *See id.* §65915 (bonus includes "density bonus" to allow 25% over allowable residential density).

4. *Id.* *See also* CAL. HEALTH & SAFETY CODE §50093 (definition of persons and families of low or moderate income).

5. *See* CAL. GOV'T CODE §65914.

Chapter 969 applies to any civil action brought against a public entity that has issued planning, subdivision, or other approvals for a housing development.⁶ If the action is brought to enjoin the carrying out or the approval of a housing development, or to secure a writ of mandate concerning the approval of, or decision to carry out the housing development, the court may award all reasonably incurred costs of suit, including attorney's fees, to the prevailing public entity if the court finds that (1) the housing development has met or exceeded the requirements of low or moderate income housing,⁷ (2) the action by the plaintiff has been frivolous and for the primary purpose of delaying or thwarting the low or moderate income nature of the development,⁸ (3) the public entity applying for costs has prevailed on all issues presented in the pleadings and took part on a continuing basis in the defense of the lawsuit if the public entity is an intervenor,⁹ and (4) either the plaintiff made a demand for a preliminary injunction that was denied and the denial was not reversed, or the defendant's motion for summary judgment was granted and not reversed.¹⁰

The award of the court may occur only after entry of final judgment, after the time to appeal has elapsed, and after notice has been given to the plaintiff.¹¹ In any appeal of an action under Chapter 969 the reviewing court may also award all reasonably incurred costs of suit including attorney's fees to the prevailing public entity if the reviewing court upholds the trial court's findings that the four conditions to making the award exist.¹²

When an injunction has been granted to enjoin a construction project¹³ which has received all legally required licenses and permits, existing law allows the defendant against whom the injunction was granted to apply for an order to require the plaintiff to furnish a written undertaking¹⁴ as security for the defendant's potential costs and damages resulting from delay of the project.¹⁵ Existing law excludes a state, county, municipal corporation, or other public agency from the class of

6. *See id.* §65914(a).

7. *Id.* §65914(a)(1).

8. *Id.* §65914(a)(2).

9. *Id.* §65914(a)(3).

10. *Id.* §65914(a)(4).

11. *Id.* §65914.

12. *Id.* §65914(b).

13. *See* CAL. CIV. PROC. CODE §529.1 (definition of construction project).

14. *See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA SURETY AND FIDELITY BOND PRACTICE §21.2 (1969) (definition of undertaking). *See also id.* §22.6 (required undertaking is intended to provide a successful defendant some security for the recovery of damages resulting from an improperly granted restraint).

15. *See* CAL. CIV. PROC. CODE §529.1.

plaintiffs who may be required to file an undertaking.¹⁶

Chapter 970 permits motions by defendants for an undertaking for costs in all civil actions, specifically including civil actions brought pursuant to the California Environmental Quality Act¹⁷ to stop the building of a housing development.¹⁸ The action brought must be a challenge to a housing development project¹⁹ that meets or exceeds the requirements for low or moderate income housing.²⁰ The plaintiff²¹ must be requesting an injunction that will prevent or delay the project from being carried out.²² Chapter 970 authorizes the defendant in the action to apply by noticed motion²³ to the court requiring the plaintiff to furnish a written undertaking as security for costs and damages incurred as a result of delay in carrying out the development project.²⁴

Specifically, the motion by the defendant asking that the plaintiff file an undertaking must allege that: (1) the action was brought either in bad faith, vexatiously, for the purpose of delay, or to thwart the low or moderate income nature of the housing development project,²⁵ and (2) the plaintiff will not suffer undue economic hardship by filing the undertaking.²⁶ If the court, after a hearing, determines that these grounds have been established, it must order the plaintiff to file the undertaking in an amount specified in the court's order as security for the costs and damages of the defendant.²⁷ The amount of plaintiff's liability, however, may not exceed \$500,000, and the plaintiff may be reimbursed for the cost of obtaining the undertaking if, after the undertaking has been filed, the housing development plan is changed by the developer in bad faith so that it fails to meet or exceed the requirements for low or moderate income housing.²⁸ Finally, Chapter 970

16. *See id.*

17. *See generally* CAL. PUB. RES. CODE §§21000-21176, 21050 (short title), 21167 (explaining the procedures to be followed when commencing an action pursuant to California Environmental Quality Act).

18. *See* CAL. CIV. PROC. CODE §529.2.

19. *See* CAL. GOV'T CODE §65928 (definition of development project).

20. *See* CAL. CIV. PROC. CODE §529.2; CAL. HEALTH & SAFETY CODE §50073 (housing development includes housing financed for the primary purpose of providing decent, safe, and sanitary housing for persons and families of low or moderate income).

21. *See* CAL. CIV. PROC. CODE §529.2 (the provisions of Chapter 970 will not apply to the following plaintiffs: a state, a county, a municipal corporation, or a public agency).

22. *See id.* *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE *Public Interest* §72 (2d ed. 1970) (interest of the public may be a reason for denying an injunction against an undertaking of vital importance to the community).

23. *See* CAL. CIV. PROC. CODE §1005 (notice must be within 15 days).

24. *See id.* §529.2. *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE *Dissolution of Injunction* §109 (2d ed. 1970) (proper remedy of defendant is noticed motion attacking either the lack of notice to the person or insufficient ground for injunction).

25. CAL. CIV. PROC. CODE §529.2.

26. *Id.*

27. *Id.*

28. *Id.*

limits its application to those actions for injunctions against development projects filed on or after January 1, 1982.²⁹

29. CAL. STATS. 1981, c. 970, §3, at —.

Civil Procedure; discovery

Code of Civil Procedure §2033 (amended).

AB 1865 (Cramer); STATS. 1981, Ch 225

Under existing law, parties to a civil action may serve a written request upon the opposing party to obtain an admission of genuineness of a document or the truth of any relevant matter of fact.¹ Prior to the enactment of Chapter 225, either party could *lodge* the original or a copy of a request for admissions and the response with the court.² The request could not be *filed* with the court unless judicially ordered.³ Chapter 225 eliminates the filing and lodging procedures and requires the party serving the request for admissions to retain the original responses to the request,⁴ and proof of service for at least six months after the judgment has become final.⁵

1. CAL. CIV. PROC. CODE §2033(a).

2. See CAL. STATS. 1978, c. 265, §1, at 550 (amending CAL. CIV. PROC. CODE §2033).

3. *Id.* (not to be filed unless the court determines that contents are relevant to an issue at trial or other proceeding).

4. See CAL. CIV. PROC. CODE §2033(a) (the party responding to the request for admissions must serve the original responses made under oath upon the party serving the request for admissions).

5. *Id.*

Civil Procedure; witness fees

Business and Professions Code §6052 (amended); Code of Civil Procedure §§1987, 1989 (amended); Government Code §68093 (amended); Penal Code §§1329, 1332 (amended).

AB 633 (Papan); STATS. 1981, Ch 918

AB 1884 (Stirling); STATS. 1981, Ch 184

Support: City of Los Angeles

Opposition: Department of Finance

In an attempt to provide more efficiency within the judicial system,¹ Chapter 184 revises the intrastate distance limitation a witness may be compelled to travel in a civil proceeding,² and provides for payment of higher fees and greater reimbursement of travel expenses.³ Existing law requires the issuance of a subpoena,⁴ or, in certain cases, written notice, prior to the production of a witness to a legal proceeding.⁵ Prior law placed a 150 mile limit on the distance witnesses appearing in a civil action pursuant to written notice could be compelled to travel from their residence.⁶ Furthermore, prior law specified that a subpoenaed witness could not be requested to attend a hearing before any judge, justice, court, or any other officer unless the distance from the witness' residence to the location of the hearing was less than 500 miles.⁷ Chapter 184 abolishes these restraints⁸ and now *requires* witnesses to attend the proceedings as requested if they are *residents*⁹ within the state at the time of service.¹⁰

Additionally, prior law allowed payment of a \$12 per day witness fee in a civil action¹¹ as well as a twenty cent per mile payment for travel expenses, one way only.¹² Chapter 184 increases the witness fee to \$35 per day,¹³ and enables a witness to claim the twenty cent per mile reimbursement for travel to and from the proceeding.¹⁴

Existing law permits a magistrate to require a written statement by a material witness for the prosecutor¹⁵ to ensure that the witness will appear and testify in court,¹⁶ and subjects the witness to a \$500 forfeiture if he or she fails to appear.¹⁷ Chapter 918 specifies that a material wit-

1. See Assemblyman Larry Stirling, Press Release, July 14, 1981 (copy on file at the *Pacific Law Journal*).

2. Compare CAL. CIV. PROC. CODE §1987(b) with CAL. STATS. 1969, c. 1034, §1.5, at 2013; compare CAL. CIV. PROC. CODE §1989 with CAL. STATS. 1980, c. 591, §1, at —; compare CAL. BUS. & PROF. CODE §6052 with CAL. STATS. 1965, c. 290, at 1289.

3. Compare CAL. GOV'T CODE §68093 with CAL. STATS. 1977, c. 1257, §54, at 4772.

4. CAL. CIV. PROC. CODE §1987(a), (b).

5. See *id.* §1987(b), (c).

6. See CAL. STATS. 1969, c. 1034, §1.5, at 2013 (amending CAL. CIV. PROC. CODE §1987(b)).

7. See CAL. STATS. 1980, c. 591, §1, at — (amending CAL. CIV. PROC. CODE §1989).

8. Compare CAL. CIV. PROC. CODE §1989 with CAL. STATS. 1980, c. 591, §1, at — and CAL. STATS. 1969, c. 1034, §1.5, at 2013.

9. CAL. CIV. PROC. CODE §1989. See also Application of Jess, 11 Cal. App. 3d 819, 91 Cal. Rptr. 72 (1970) (holding that for purposes of restraints on travel, residence is equated with a "residence in fact and not domicile, and envisages nothing more than an abode").

10. See CAL. CIV. PROC. CODE §1989.

11. See CAL. STATS. 1977, c. 1257, §54, at 4772 (amending CAL. GOV'T CODE §68093).

12. See *id.*

13. CAL. GOV'T CODE §68093.

14. See *id.*

15. CAL. PENAL CODE §878.

16. See *id.*

17. See *id.*

ness for either prosecutor or defendant may be ordered by the court,¹⁸ if there is good cause by proof on oath to believe a witness may not appear to testify without security,¹⁹ to certify in writing their intent to appear and testify when ordered or forfeit an amount the court deems proper.²⁰ If the witness refuses to comply, the court may commit an adult witness into sheriff's custody, and a minor witness to the custody of a probation officer or other agency.²¹ Custody may continue until the witness complies or is legally discharged.²² An automatic review, held no later than two days from the original order of commitment, is required,²³ and must be conducted by a judge or magistrate having jurisdiction over the offense other than the one issuing the order.²⁴ If the witness must remain in custody, a second review is required after ten days.²⁵

18. *See id.* §1332(a) (notwithstanding provisions of California Penal Code Sections 878-883).

19. *See id.*

20. *See id.* *See also id.* §1332(e) (upon failure to appear, forfeiture is pursued under provisions of California Penal Code Section 1269(d) or in the manner of fail forfeiture).

21. *See id.* §1332(b).

22. *See id.*

23. *See id.* §1332(c).

24. *See id.*

25. *See id.* §1332(d).

Civil Procedure; bankruptcy exemptions

Code of Civil Procedure §690 (amended).

AB 1857 (Lancaster); STATS. 1981, Ch 455

Support: Department of Alcoholic Beverage Control

Existing law provides that when the property of a judgment debtor¹ is levied upon under writ of execution,² the debtor may claim certain property as exempt³ from execution of the judgment.⁴ Chapter 455 includes direct deposits of federal payments⁵ and the debtor's dwelling house⁶ as property that may be exempted.⁷

In the specific case of bankruptcy proceedings, state and federal law

1. *See* CAL. CIV. PROC. CODE §690(c) (definition of debtor).

2. *See generally id.* §§682 (writ of execution), 684 (enforcement of judgment).

3. *See id.* §§690-690.29.

4. *See id.* §§690, 690.50.

5. *See id.* §690.30.

6. *See id.* §690.31.

7. *Compare id.* §690(a) with CAL. STATS. 1977, c. 305, §2, at 1211 (amending CAL. CIV. PROC. CODE §690).

provides for the exemption of certain property from a debtor's estate.⁸ Two recent Bankruptcy Court decisions, *In Re Collins*⁹ and *In Re Ancira*¹⁰ have held that in the absence of state law to the contrary, married couples in California are not precluded by the Bankruptcy Act¹¹ from exempting property under *both* state and federal provisions.¹² *Collins* approved the situation in which one spouse exempted certain property under the state provisions and the other spouse exempted *different* property under the federal provisions.¹³ *Ancira* approved the situation in which one spouse claimed a state exemption and the other spouse claimed a federal exemption in the *same* property.¹⁴ Chapter 455 eliminates the possibility of double exemptions by providing that a husband and wife may choose *either* the state *or* the federal exemption provisions, but may not choose exemptions from both.¹⁵ When filing a joint bankruptcy petition under federal law, Chapter 455 requires that the couple jointly elect either the state or federal provisions.¹⁶ When filing petitions individually and one spouse has already claimed exemptions under either the state or federal law, the other spouse is precluded by Chapter 455 from claiming any exemptions under the alternative provisions.¹⁷

8. See 11 U.S.C. §522 (1976); CAL. CIV. PROC. CODE §§690-690.31.

9. *In re Collins*, 6 Bankr. Ct. Decisions 834 (1980).

10. *In re Ancira*, 6 Bankr. Ct. Decisions 864 (1980).

11. See generally 11 U.S.C. §§1-1103 (1976).

12. See generally 6 Bankr. Ct. Decisions 834, 6 Bankr. Ct. Decisions 864.

13. See generally 6 Bankr. Ct. Decisions 834.

14. See generally 6 Bankr. Ct. Decisions 864.

15. See CAL. CIV. PROC. CODE §690(b)(1).

16. See *id.*

17. See *id.* §690(b)(2).

Civil Procedure; subpoenas of business records

Code of Civil Procedure §1987.4 (repealed), §1985.3 (amended); Evidence Code §1563 (amended).

AB 812 (Moore); STATS. 1981, Ch 227 (*Effective July 1, 1981 to January 1, 1982*)

SB 57 (Rains); STATS. 1981, Ch 1014

Support: California Credit Union League and other contractors associations; California State Bar; California Trial Lawyer's Association

Prior to the enactment of Chapter 1014, all reasonable costs incurred by a custodian or witness of a non-party business other than a health care institution¹ in the production of business records pursuant to a subpoena duces tecum² could be charged against the requesting party.³ Upon the custodian's demand, the requesting party was required to pay the reasonable costs of production before the records had to be delivered.⁴ Reasonable costs included the actual copying costs and clerical costs computed by the time spent locating and making the records available multiplied by the employee's hourly wage.⁵

Chapter 1014 allows all reasonable costs incurred in the production of business records in compliance with a subpoena duces tecum by *any* non-party witness to be charged against the requesting party.⁶ Reasonable costs may include the actual costs for the reproduction of oversize or specially processed documents, ten cents per page for standard reproduction, and clerical costs incurred in locating and making the records available.⁷ Clerical costs are computed at the rate of ten dollars per hour and include any actual costs paid to a third party by the non-party witness for the retrieval and return of records held by the third party.⁸ Chapter 1014 does not require payment by the requesting party before the business records are delivered, although the non-party witness may demand payment upon the actual delivery of the business records and, until paid, is not required to deliver.⁹

Chapter 1014 requires the non-party witness to submit an itemized statement of any reproduction or clerical costs to the requesting party.¹⁰ If the costs are excessive, the requesting party may petition the court to recover or reduce the costs.¹¹ At the hearing on an order to show cause issued after the petition is filed, the court may order the non-party wit-

1. See CAL. STATS. 1972, c. 396, §1, at 719 (amending CAL. EVID. CODE §1563) (The sole fee for complying with a subpoena for patient records of a public or licensed hospital or of a physician, surgeon, osteopath, or dentist licensed to practice in the state when the custodian of the records or a qualified witness was not required to attend was \$12.00).

2. CAL. CIV. PROC. CODE §1985, BLACK'S LAW DICTIONARY 1279 (5th ed. 1979) (definition of subpoena duces tecum).

3. See CAL. STATS. 1980, c. 830, §1 at — (enacting Cal. Civ. Proc. Code §1987.4).

4. *Id.*

5. *Id.*

6. CAL. EVID. CODE §1563(b).

7. *Id.* §1563(b)(1).

8. *Id.*

9. *Id.* §1563(b)(2). In addition to these costs, existing law entitles the custodian of the records to 20¢ a mile one way in addition to \$12.00 per day when personal attendance is required. Chapter 1014 permits the custodian to be reimbursed for any additional reasonable costs. Reasonable costs recoverable by the custodian of records will be determined using the same standard employed for the determination of reasonable costs of a non-party witness.

10. *Id.* §1563(b)(3).

11. See *id.* §1563(b)(4).

ness to repay or reduce the costs charged to the requesting party.¹² If the court determines that the costs are excessive and charged in bad faith by the witness, the requesting party may be excused from any payment or the non-party witness ordered to remit the full payment and pay the requesting party's attorney's fees and reasonable expenses for the petition.¹³ If the court determines at the hearing that the costs are not excessive, the requesting party must pay the non-party witness's reasonable expenses in defending the petition including attorney's fees.¹⁴

Furthermore, Chapter 1014 authorizes payment to the non-party witness for any costs incurred in compliance with the subpoena duces tecum up to the point of notification when the subpoena has been quashed, withdrawn, modified, or limited on a motion made by a party other than the non-party witness.¹⁵ If the subpoena has been withdrawn or quashed and payment is not made by the requesting party within thirty days of demand for payment, a motion may be filed for a court order requiring payment.¹⁶

Under existing law, when the personal records¹⁷ of a consumer¹⁸ maintained by a physician, hospital, bank, savings and loan, credit union, trust or insurance company, accountant, or attorney are subpoenaed, the subpoenaing party¹⁹ is required to give constructive notice²⁰ to the consumer that the records are being sought.²¹ In an attempt to clarify that the State Bar is exempt from this provision when acting in an adjudicative capacity pursuant to the Business and Professions Code,²² Chapters 227 and 1014 narrow the definition of "subpoenaing party".²³ Under Chapters 227 and 1014, all entities of the Judicial Department, including the State Bar,²⁴ and all parties not bringing an action under the Code of Civil Procedure will not be considered a

12. *See id.*

13. *Id.*

14. *Id.*

15. *Id.* §1563(b)(5).

16. *Id.*

17. CAL. CIV. PROC. CODE §1985.3(a)(1) (definition of personal records).

18. *Id.* §1985.3(a)(2) (definition of consumer).

19. *Id.* §1985.3(a)(3) (definition of subpoenaing party).

20. *See id.* §1985.3(b)(1) (to give constructive notice the subpoenaing party must deliver copies of the subpoena, the affidavit, and the notice indicating what records are being sought to the consumer personally, to the consumer's last known address, or to the consumer's attorney).

21. *See id.* §1985.3(b)(1). *See generally* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 300 (1981).

22. *See* CAL. STATS. 1981, c. 227, §2, at —; letter from Terrance Flanigan, Legislative Representative for the State Bar of California, to Governor Edmund G. Brown, Jr., July 3, 1981 (copy on file at the *Pacific Law Journal*). *See generally* CAL. BUS. & PROF. CODE §§6000-6301.5.

23. *Compare* CAL. CIV. PROC. CODE §1985.3(a)(3) with CAL. STATS. 1980, c. 976, §1 at — (adding CAL. CIV. PROC. CODE §1985.3(a)(3)).

24. *See* CAL. CONST. art. VI, §9.

“subpoenaing party” for constructive notice purposes.²⁵

In addition, Chapters 227 and 1014 modify the time period for bringing a motion to quash or modify a subpoena duces tecum dealing with production of personal records.²⁶ Under prior law, any consumer whose personal records were subpoenaed could bring a motion to quash or modify the subpoena at *any time* prior to the date for production.²⁷ Chapters 227 and 1014 allow the consumer ten days from the receipt of the subpoena to bring a motion to quash or modify the subpoena.²⁸ Finally, Chapter 1014 exempts any proceedings dealing with the Department of Industrial Relations,²⁹ Workers’ Compensation and Insurance,³⁰ and retraining and rehabilitation of full time public employees³¹ from these provisions.³²

25. See CAL. CIV. PROC. CODE §§1985.3(a)(3), (b)(1).

26. Compare *id.* §1985.3(d) with CAL. STATS. 1980, c. 976, §1, at — (adding CAL. CIV. PROC. CODE §1985.3(d)).

27. CAL. STATS. 1980, c. 976, §1, at —. See also CAL. CIV. PROC. CODE §1987.1.

28. CAL. CIV. PROC. CODE §1985.3(d).

29. See generally CAL. LAB. CODE §§50-150.

30. See generally *id.* §§3200-5300, 6100-6149.

31. See generally *id.* §§6200-6208.

32. CAL. CIV. PROC. CODE §1985.3(g).

