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Civil Procedure

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Civil Procedure

Civil Procedure; demurrer—contracts implied by conduct and certificates of consultation

Code of Civil Procedure §430.10 (amended).

AB 3174 (Greene); STATS 1980, Ch 500

Support: Office of the Governor, Legal Affairs Unit

Existing law allows a party to object to a complaint or cross-complaint by demurrer or answer in an action founded upon a contract if it is not evident from the pleadings whether the contract is written or oral.¹ Chapter 500 permits this objection when it cannot be ascertained from the pleadings whether the contract is written, oral, or *implied by conduct*.² As a result, a party in actions based on implied, as well as written or oral contracts, can determine whether he or she may assert the affirmative defense of the statute of frauds.³

Chapter 500 also amends the procedure for objecting to the pleadings by answer or demurrer in actions against architects, land surveyors, or professional engineers.⁴ Existing law requires the plaintiff's attorney in these actions to file a certificate relating to his or her consultation with an architect, a professional engineer, or a land surveyor regarding the merit of the complaint.⁵ Chapter 500 permits an objection by demurrer or answer for the failure to file a certificate of merit in an action for damages arising out of the professional negligence of an architect, a professional engineer, or a land surveyor.⁶

1. See CAL. CIV. PROC. CODE §§430.10(g), 430.30.

2. Compare *id.* with CAL. STATS. 1979, c. 988, §2, at —.

3. 3 B. WITKIN, CALIFORNIA PROCEDURE, *Pleadings* §830 (2d ed. 1971).

4. See CAL. CIV. PROC. CODE §430.10(h). See generally *id.* §411.35.

5. See *id.* §411.35.

6. See *id.* §430.10(h).

Civil Procedure; discovery

Code of Civil Procedure §§2031, 2034 (amended).

AB 1924 (Fenton); STATS 1980, Ch 23

Support: Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 23, a party seeking the production of documents for inspection was required to specifically identify those *items* requested.¹ However, if the requesting party lacked sufficient information concerning the existence, description, nature, custody, condition, and location of books, documents, and other tangible things,² he or she had to obtain that information by submitting a written interrogatory³ or by taking an oral or written deposition.⁴ Chapter 23 streamlines the discovery process by allowing a party to *simultaneously* request another party to identify, produce, and permit inspection of documents, books, accounts, letters, photographs, objects, or other tangible things of a category specified with reasonable particularity in the request.⁵ The court apparently has the power to determine whether the items sought to be identified are within a category described with sufficient particularity.⁶

Chapter 23 requires the party upon whom the request is served to provide a written response subscribed under oath within 20 days after service of the request.⁷ The response must identify the documents, papers, books, accounts, letters, photographs, objects, or other tangible things existing within the specified category that are in the possession, custody, or control of the responding party.⁸ As under existing law, the response must either state a proper objection to the request, and the reasons therefor, or specify that the inspection and related activities will be permitted as requested.⁹ Chapter 23 provides for the application of existing sanctions¹⁰ to the refusal or failure of a party to identify the items requested or to permit their inspection.¹¹ A party making the request, upon notice and a showing of good cause, may apply for an

1. See CAL. STATS. 1974, c. 592, §1, at 1413 (amending CAL. CIV. PROC. CODE §2031(b)). See also *Pacific Auto Ins. Co. v. Superior Court*, 273 Cal. App. 2d 61, 69-70, 77 Cal. Rptr. 836, 840 (1969); *Flora Crane Serv. Inc. v. Superior Court*, 234 Cal. App. 2d 767, 785-86, 45 Cal. Rptr. 79, 89 (1965).

2. See CAL. CIV. PROC. CODE §2016(b).

3. See *id.* §2030; *West Pico Furniture Co. v. Superior Court*, 56 Cal. 2d 407, 416, 364 P.2d 295, 299, 15 Cal. Rptr. 119, 123 (1961); 3 DE MEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE §10.01(22)(a) (1980).

4. See CAL. CIV. PROC. CODE §§2019, 2020; *McClatchy Newspapers v. Superior Court*, 26 Cal. 2d 386, 398, 159 P.2d 944, 950-51 (1945); *Union Oil Co. v. Superior Court*, 151 Cal. App. 2d 286, 293, 311 P.2d 640, 644 (1957); 3 DE MEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE §10.01(22)(b) (1980).

5. See CAL. CIV. PROC. CODE §2031(a).

6. See *Flora Crane Serv. Inc. v. Superior Court*, 234 Cal. App. 2d 767, 778, 45 Cal. Rptr. 79, 84 (1965); *Shell Oil Co. v. Superior Court*, 109 Cal. App. 75, 79, 292 P. 531, 532 (1930).

7. See CAL. CIV. PROC. CODE §2031(b).

8. See *id.*

9. See *id.*

10. See *id.* §2034(a), (b).

11. Compare *id.* §2034(a) with CAL. STATS. 1978, c. 265, §2, at 551.

order to enforce the request.¹²

12. See CAL. CIV. PROC. CODE §2034(a).

Civil Procedure; depositions and interrogatories

Code of Civil Procedure §§2019, 2030 (amended).

AB 2473 (Chappie); STATS 1980, Ch 970

Support: Office of the Governor, Legal Affairs Unit; State Bar of California

AB 3297 (Kapiloff); STATS 1980, Ch 677

Support: Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 970, the videotaping of depositions was prohibited unless the parties to the action otherwise agreed.¹ This restriction was stated in *Bailey v. Superior Court*,² which interpreted the Code of Civil Procedure as only providing for written depositions.³ Chapter 970 amends the Code of Civil Procedure to allow a party to videotape a deposition if the notice of the deposition states that it will be videotaped.⁴ The cost of the videotaped portion of the deposition, however, is not a recoverable court cost.⁵

Chapter 970 also amends the provision of the Code of Civil Procedure dealing with out-of-state depositions to provide that the officer before whom the deposition is taken, by accepting the commission or by undertaking to act pursuant to an agreement, will be deemed to have consented to be bound by all California provisions relating to the taking of depositions unless otherwise agreed by the parties on the record.⁶ If the officer is not a shorthand reporter who has a place of business in California where the deposition will be kept, he or she will be required to send the deposition to the court in which the action is pending for filing.⁷ A reasonable filing fee, as determined by the Judicial Council, may be charged by the clerk for filing the deposition.⁸

In addition, Chapter 970 provides for changes in the duties of a deposition reporter.⁹ Existing law requires an officer taking a deposition to

1. See *Bailey v. Superior Court*, 19 Cal. 3d 970, 974, 568 P.2d 394, 396, 140 Cal. Rptr. 669, 671 (1977); CAL. STATS. 1979, c. 19, §1, at — (amending CAL. CIV. PROC. CODE §2019); STATE BAR OF CALIFORNIA, 1979 CONFERENCE RESOLUTION 9-17.

2. 19 Cal. 3d 970, 568 P.2d 394, 140 Cal. Rptr. 669 (1977).

3. See *id.* at 974, 568 P.2d at 396, 140 Cal. Rptr. at 671; CAL. STATS. 1979, c. 19, §1, at —.

4. See CAL. CIV. PROC. CODE §2019(c).

5. See *id.*

6. See *id.* §2019(f)(3).

7. See *id.*

8. See *id.*

9. Compare *id.* §2019(f) with CAL. STATS. 1979, c. 19, §1, at —.

certify on the deposition that the witness was duly sworn and that the deposition is a true record of the witness' testimony.¹⁰ Also, unless the parties otherwise agree, the deposition reporter must notify the deponent and counsel in writing that the deposition will be available for reading, correcting, and signing for a period of 30 days following notification.¹¹ The officer is further required, under existing law, to seal the deposition and to give prompt notice of the availability of the deposition to all other parties.¹²

Chapter 970 amends this procedure to require the deposing officer to seal the deposition promptly upon the correction or approval of, or the refusal to approve, the deposition.¹³ Alternatively, the officer may seal the deposition 30 days after notifying the witness that the deposition is available for reading, correcting, and signing.¹⁴ Chapter 970 further requires the officer to give prompt notice to all parties of any changes made in the deposition by the witness,¹⁵ as well as notice of the availability of the deposition for reading, correction, and approval.¹⁶ The officer is required to provide a certified copy of the deposition to any party to the action or to the deponent upon request for a copy prior to delivery or mailing of the deposition and upon payment of reasonable charges therefor.¹⁷

Furthermore, Chapter 677 amends the Code of Civil Procedure to require the party serving interrogatories to retain the original document with the original proof of service attached.¹⁸ The original responses to these interrogatories, made under oath, must be returned to, and retained by, the party serving the interrogatories.¹⁹ Chapter 677 also provides that no party is required to retain the original interrogatories or the responses after the final judgment in the applicable action.²⁰

In summary, Chapter 970 allows the videotaping of depositions.²¹ Also, Chapter 970 confronts the problems associated with out-of-state depositions by requiring that out-of-state deposition reporters be bound by all California laws relating to the recording of depositions, as well as by providing specific procedures for the handling of out-of-state depo-

10. See CAL. CIV. PROC. CODE §2019(f)(1).

11. See *id.* §2019(e).

12. See *id.* §2019(f)(1), (2).

13. Compare *id.* §2019(f)(1) with CAL. STATS. 1979, c. 19, §1, at —.

14. See CAL. CIV. PROC. CODE §2019(f)(1).

15. See *id.* §2019(f)(2)(ii).

16. See *id.* §2019(f)(2)(i).

17. See *id.* §2019(f)(2).

18. See *id.* §2030(a).

19. See *id.*

20. See *id.*

21. See *id.* §2019(c).

sitions.²² Finally, Chapters 970 and 677 clarify the duties of deposition reporters, establishing greater uniformity in the handling of depositions and interrogatories.²³

22. See *id.* §2019(f)(3).

23. See *id.* §§2019(f), 2030(a); STATE BAR OF CALIFORNIA, 1979 CONFERENCE RESOLUTION 9-18.

Civil Procedure; administrative discovery

Business and Professions Code §490 (amended); Government Code §11507.7 (amended).

AB 2753 (Nolan); STATS 1980, Ch 548

Support: Department of Finance; Office of Administrative Hearings; Office of the Governor, Legal Affairs Unit

Existing law allows limited discovery prior to an administrative hearing¹ and, if the request for discovery is not complied with, specifies that a verified petition to compel discovery may be filed in the superior court for the county in which the administrative hearing is to be held within 15 days of a refusal of a request, or within 30 days of an unanswered discovery request, whichever period is longer.² In an apparent attempt to reduce the potential delay of administrative discovery procedures, Chapter 548 requires that a petition to compel discovery may not be filed later than 15 days prior to the beginning of the hearing unless allowed by an order of the court after noticed motion and for good cause.³ In its determination of good cause, the court is required to consider the need and diligence of the moving party, potential delay, and possible prejudice to any party.⁴

Furthermore, under prior law, administrative hearings were automatically stayed pending an action to compel discovery.⁵ Chapter 548 allows the court the *discretion* to order a stay of the administrative proceeding pending such an action,⁶ and, if necessary, the court may extend the stay for a reasonable time after the discovery order to give the respondent party time to comply.⁷ Discovery orders issued by the superior court are final and not subject to appeal except by a petition for

1. See CAL. GOV'T CODE §11507.6. See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §§2.38-2.76 (1970), (Supp. 1979).

2. See CAL. GOV'T CODE §11507.7(a), (b).

3. Compare *id.* §11507.7(b) with CAL. STATS. 1971, c. 1303, §8, at 2556.

4. See CAL. GOV'T CODE §11507.7(b).

5. See CAL. STATS. 1971, c. 1303, §8, at 2556.

6. Compare CAL. GOV'T CODE §11507.7(d) with CAL. STATS. 1971, c. 1303, §8, at 2556.

7. See CAL. GOV'T CODE §11507.7(d).

a writ of mandamus,⁸ however, prior law did not specifically state in which appellate court the petition for mandamus was to be filed.⁹ Chapter 548 now specifies that the petition for a writ of mandamus is to be filed in the court of appeal for the district in which the superior court is located.¹⁰

8. See *id.* §11507.7(h). See generally CAL. CIV. PROC. CODE §§1084, 1085; 5 B. WITKIN CALIFORNIA PROCEDURE, *Extraordinary Writs* §4 (2d ed. 1971).

9. See CAL. STATS. 1971, c. 1303, §8, at 2556.

10. See CAL. GOV'T CODE §11507.7(h).

Civil Procedure; settlement of claims

Code of Civil Procedure §877.6 (new).

AB 3425 (Torres); STATS 1980, Ch 562

Support: California Trial Lawyers Association; Office of the Governor, Legal Affairs Unit

Existing law provides that, in a case involving alleged multiple tortfeasors, a tortfeasor who settles in good faith must be discharged from liability for partial or comparative indemnity sought by a concurrent tortfeasor.¹ Prior to Chapter 562, however, statutory law had not established *when* during the action the issue of good faith was to be determined.² Chapter 562 provides that a party to an action involving a settling tortfeasor is entitled to a hearing on the issue of whether or not the settlement was made in good faith if notice of the hearing is served at least 20 days prior to the hearing.³ The court, upon a showing of good cause, may shorten the 20-day period to permit the determination of the good faith issue either (1) prior to the commencement of the trial of the tort issues⁴ or (2) before the verdict or judgment if the settlement is arrived at after the commencement of the trial.⁵

Furthermore, under the provisions of Chapter 562, the party asserting the lack of a good faith settlement has the burden of proof on that issue.⁶ The court may determine the issue of good faith on the basis of affidavits served with the notice of the hearing and on any counter-

1. See CAL. CIV. PROC. CODE §§875-880. See generally Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiation*, 12 PAC. L.J. 121 (1980). See also *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 604, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978).

2. See *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 438, 163 Cal. Rptr. 47, 51 (1980).

3. See CAL. CIV. PROC. CODE §877.6(a).

4. See *id.* See also *id.* §§1010, 1011 (discussion of notice procedures).

5. See *id.* §§877.6(a), 1010, 1011.

6. See *id.* §877.6(d). See also *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 447, 163 Cal. Rptr. 47, 56 (1980).

affidavits filed in response to those affidavits.⁷ The court also has the discretion to receive other evidence at the hearing.⁸ A determination by the court that the settlement was made in good faith will bar a claim by any other joint tortfeasor for equitable comparative contributions, or partial or comparative indemnity, based on comparative negligence or comparative fault.⁹

7. See CAL. CIV. PROC. CODE §877.6(b).

8. See *id.*

9. See *id.* §877.6(c). See also *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591, 598, 578 P.2d 899, 907, 912, 146 Cal. Rptr. 182, 190, 195 (1978).

Civil Procedure; summary judgment

Code of Civil Procedure §437c (amended).

SB 1200 (Robbins); STATS 1980, Ch 57

Support: Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 57, a court was required to grant a motion for summary judgment if there was no triable issue as to any material fact and the moving party was entitled to judgment as a matter of law.¹ In ruling on the motion, the court was to consider all *admissible* evidence set forth in the papers supporting or opposing the motion.² While this rule was strictly applied to the moving party, the court generally allowed the opposing party to submit *any* evidence to show that a triable issue existed.³

Chapter 57 eliminates the requirement that all the evidence be of admissible quality and instead requires the court to consider *all* the evidence set forth in the papers except that evidence to which objections have been made and sustained.⁴ Moreover, Chapter 57 expressly states that evidentiary objections not raised in writing in the papers or orally at the hearing for summary judgment are deemed waived.⁵

Although existing law provides that there can be no reversal for erroneous admission of evidence absent a timely objection on specific grounds,⁶ there has been some question whether this rule would be ap-

1. See CAL. STATS. 1978, c. 949, §2, at 2930.

2. See *id.*

3. See *Eagle Oil & Refining Co. v. Prentice*, 19 Cal. 2d 553, 560, 122 P.2d 264, 267-68 (1942); *Black v. Sullivan*, 48 Cal. App. 3d 557, 567, 122 Cal. Rptr. 119, 126 (1975); *Jack v. Wood*, 258 Cal. App. 2d 639, 648, 65 Cal. Rptr. 856, 861-62 (1968). See generally 4 B. WITKIN, CALIFORNIA PROCEDURE, *Proceeding Without Trial* §191 (2d ed. 1971); Zack, *California Summary Judgment: The Need for Legislative Reform*, 59 CALIF. L. REV. 439, 466-67 (1971).

4. See CAL. CIV. PROC. CODE §437c.

5. See *id.*

6. See CAL. EVID. CODE §353.

pliable to an appeal from a summary judgment ruling.⁷ Chapter 57 clarifies this by providing that an evidentiary objection cannot be raised for the first time on appeal.⁸ The changes made by Chapter 57, however, will not apply to any appeal filed prior to January 1, 1981.⁹

7. See *Dugar v. Happy Tiger Records, Inc.*, 41 Cal. App. 3d 811, 817, 116 Cal. Rptr. 412, 416 (1974); *Rodes v. Shannon*, 194 Cal. App. 2d 743, 749, 15 Cal. Rptr. 349, 353 (1961).

8. See CAL. CIV. PROC. CODE §437c.

9. See CAL. STATS. 1980, c. 57, §2, at —.

Civil Procedure; partial nonsuit

Code of Civil Procedure §§581c, 631.8 (amended).

SB 1531 (Sieroty); STATS 1980, Ch 187

Support: Attorney General's Office; Office of the Governor, Legal Affairs Unit; State Bar of California

Existing law allows a defendant in a trial by jury to move for a judgment of nonsuit without waiving the right to offer evidence if the motion is denied.¹ The defendant may make the motion at the conclusion of the plaintiff's opening statement² or at the completion of the plaintiff's presentation of evidence in a trial by jury.³ In either case, if the motion is granted, it is considered to be an adjudication on the merits unless the court states otherwise in its order.⁴ As an adjudication on the merits, the judgment is appealable.⁵

Also under existing law, a party in a trial by the court may move for a judgment after the other party has completed the presentation of evidence.⁶ The moving party, however, does not waive the right to offer evidence in support of a defense, or to offer evidence in rebuttal if the motion is denied.⁷

Chapter 187, while continuing the substance of this law,⁸ permits the court to grant a motion for nonsuit on all or *part* of a plaintiff's cause of

1. See CAL. CIV. PROC. CODE §581c.

2. See *id.* See also *Willis v. Gordon*, 20 Cal. 3d 629, 633, 574 P.2d 794, 796, 143 Cal. Rptr. 723, 725 (1978).

3. See CAL. CIV. PROC. CODE §581c. See generally *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 395, 572 P.2d 1155, 1157, 143 Cal. Rptr. 13, 15 (1978); *Ayer v. Boyle*, 37 Cal. App. 3d 822, 828, 112 Cal. Rptr. 636, 639 (1974).

4. See CAL. CIV. PROC. CODE §581c.

5. See, e.g., *In re Jamison's Estate*, 41 Cal. 2d 1, 5-6, 256 P.2d 984, 985 (1953); *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 862, 129 Cal. Rptr. 603, 614 (1976).

6. See CAL. CIV. PROC. CODE §631.8.

7. See *id.*

8. Compare *id.* §§581c, 631.8 with CAL. STATS. 1978, c. 372, §1, at 1114 (amending CAL. CIV. PROC. CODE §631.8) and CAL. STATS. 1961, c. 692, §1, at 1927 (amending CAL. CIV. PROC. CODE §581c).

action⁹ or a motion for judgment on all or *part* of a moving party's complaint or cross-complaint.¹⁰ This allows the court to eliminate some issues and to proceed to trial with the remaining issues.¹¹ When ruling on either motion, the court must examine the evidence presented to see if it supports the granting of the motion as to fewer than all of the issues involved in the action.¹² Chapter 187 provides that when ruling on a motion for nonsuit, in addition to weighing the evidence already presented, the court must consider the evidence *to be* presented.¹³

When ruling on a motion for judgment in a trial by the court, all the evidence is to be considered so long as the party against whom judgment is to be granted has had an opportunity to present rebuttal evidence and has had a chance to rehabilitate the testimony of a witness whose credibility has been attacked.¹⁴ If judgment is rendered in favor of the moving party, the court must issue written findings of fact and conclusions of law if they have been requested by a party to the action.¹⁵ In the alternative, the court may decline to render a judgment until all the evidence has been heard.¹⁶

Chapter 187 increases the circumstances in which the judgment of nonsuit is available.¹⁷ Adopting a procedure similar to that used for partial summary judgment,¹⁸ Chapter 187 allows the court to grant a motion for nonsuit if the evidence supports the motion as to some, but not all, of the issues in the action.¹⁹ In *In re Jamison's Estate*²⁰ the California Supreme Court expressed doubts as to the propriety of the procedure because it would result in two final judgments in the same case, both of which could be appealed.²¹ Chapter 187 seems to resolve this difficulty by providing that, despite the granting of the motion, there is to be no final judgment until the action has terminated.²² The final judgment, however, will include the matters determined by the trial, and must award judgment as determined by the motion.²³

9. See CAL. CIV. PROC. CODE §581c(b).

10. See *id.* §631.8(b).

11. See *id.* §§581c(b), 631.8(b).

12. See *id.*

13. See *id.* §581c(b).

14. See *id.* §631.8(a).

15. See *id.* See generally *id.* §§632, 634 (issuing findings of fact and conclusions of law).

16. See *id.* §631.8(a).

17. See generally *id.* §§581c, 631.8.

18. Compare *id.* §437c with *id.* §§581c(b), 631.8(b).

19. See *id.* §§581c(b), 631.8(b).

20. 41 Cal. 2d 1, 256 P.2d 984 (1953).

21. See *id.* at 5-6, 256 P.2d at 985. See generally CONTINUING EDUCATION OF THE BAR, CIVIL PROCEDURE DURING TRIAL §§15.32-15.36 (1960).

22. See CAL. CIV. PROC. CODE §581c(b), 631.8(b).

23. See *id.*

Civil Procedure; consolidation of actions

Code of Civil Procedure §404.3 (amended).
AB 2425 (Fenton); STATS 1980, Ch 318
Support: California Judges Association

Existing law provides that when civil actions share a common question of fact or law and are pending in different courts, the judge or either party may move to have the actions coordinated in one court.¹ Chapter 318 adds an alternative to coordination by providing that when an action pending in the superior court is sought to be coordinated with an action pending in a municipal or justice court in the same county, the judge assigned by the Judicial Council to determine whether coordination is appropriate may order the municipal or justice court action transferred to the superior court, and *consolidate* the two actions.² As a result, Chapter 318 will apparently promote judicial economy by eliminating the need for formal coordination proceedings in this situation.³

1. See CAL. CIV. PROC. CODE §404. See generally *id.* §§404.1-404.8 (coordination of actions).

2. See *id.* §404.3(b). See generally *id.* §1048(a) (consolidation of actions).

3. Compare *id.* §404.3(b) with CAL. STATS. 1972, c. 1162, §2, at 2287 (enacting CAL. CIV. PROC. CODE §404.3).

Civil Procedure; notices

Code of Civil Procedure §§1005, 1013, 1013a (amended).
SB 1664 (Petris); STATS 1980, Ch 196
Support: Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 196, written notice of a motion was required to be given at least ten days before the time appointed for the hearing on the motion.¹ Chapter 196 provides that if the notice is served by mail, the required ten-day period of notice must be increased as follows: (1) by five days if the place of address is inside the state of California; (2) by ten days if the place of address is outside the state of California but within the United States; and (3) by 20 days if the place of address is outside the United States.²

In addition, Chapter 196 amends the provision governing the time

1. See CAL. STATS. 1963, c. 878, §3, at 2126 (amending CAL. CIV. PROC. CODE §1005).

2. See CAL. CIV. PROC. CODE §1005.

when service of process is complete.³ Prior law provided that in the case of service by mail, when a right could be exercised or an act was to be done by the adverse party *within* a given number of days, the time for exercising the right or performing the act could be extended.⁴ There was not, however, any provision for an extension of time when an act was required to be done or a right could be exercised *on a particular date*.⁵ Chapter 196 clarifies this omission by allowing for an extension of time for any prescribed period of notice, and for any right of duty to do an act or make a response within a prescribed period *or* on a certain date.⁶

Finally, under prior law proof of service by mail was established by attaching an affidavit or certificate containing specified information to the original or true copy of the document served.⁷ Chapter 196 deletes the requirement of attachment, but states that the affidavit or certificate now must contain a statement of the exact title of the document served as well as the information required under existing law.⁸

3. Compare *id.* §1013(a) with CAL. STATS. 1974, c. 282, §2, at 546.

4. See CAL. STATS. 1974, c. 282, §2, at 546.

5. See *id.*; STATE BAR OF CALIFORNIA, 1978 CONFERENCE RESOLUTION 9-19.

6. See CAL. CIV. PROC. CODE §1013; STATE BAR OF CALIFORNIA, 1978 CONFERENCE RESOLUTION 9-19. See generally CAL. CIV. PROC. CODE §§659, 663a, 901-914 (actions to which extension does not apply).

7. See CAL. STATS. 1974, c. 282, §3, at 546 (amending CAL. CIV. PROC. CODE §1013a).

8. Compare CAL. CIV. PROC. CODE §1013a with CAL. STATS. 1974, c. 282, §3, at 546.

Civil Procedure; trial juror selection

Code of Civil Procedure §§204, 204b, 204d, 208, 209, 210, 211, 215, 219, 220, 230-233, 250-251 (repealed); §§193.2, 197, 197.1, 204.5 (new); §§190, 193, 195, 196, 196.1, 203, 205, 206, 206a, 246 (amended); §§204a, 204c, 204e (amended and renumbered); Government Code §§72231, 74603 (repealed); Penal Code §§1072, 1075, 1143 (repealed).

AB 1454 (Chappie); STATS 1980, Ch 81

Support: American Civil Liberties Union; California Association of Superior Court Administrators; Department of Motor Vehicles; Office of the Governor, Legal Affairs Unit

Opposition: Department of Finance

Prior to the enactment of Chapter 81, the selection of trial jurors was carried out in the trial courts by procedures that varied depending upon whether the court was a superior,¹ municipal,² or justice court.³ In ad-

1. See CAL. STATS. 1978, c. 718, §3, at 2247-48 (amending CAL. CIV. PROC. CODE §204).

dition, this selection process was modified according to the population of the county where the court was located.⁴ Chapter 81 establishes a uniform procedure for the selection of trial jurors for all trial courts⁵ to insure the random selection of trial jurors from a fair cross section of the population served by the court.⁶

Chapter 81 further provides that the Judicial Council may adopt rules pertaining to trial juror selection.⁷ Each trial court, however, may supplement these rules with local rules governing the selection of persons who are to be listed as available for service as a juror.⁸ Chapter 81 also extends existing law to permit the judge of the superior court in *any* county where the court administrator does not perform the duties of the jury commissioner to appoint a jury commissioner, with the consent of the county board of supervisors, to assist the court in selecting persons for trial jury service.⁹ In addition, Chapter 81 supplements existing law pertaining to the duties of the jury commissioner by providing that the commissioner may summon a person who has failed to complete a juror questionnaire so that the person may complete the questionnaire in the presence of the commissioner.¹⁰ A jury commissioner also must maintain all records and papers in connection with juror service for three years after a jury list is compiled.¹¹

Moreover, Chapter 81 establishes specified lists from which the selection of persons for juror service may be made.¹² By July 1, 1981,¹³ every source list¹⁴ must be derived from at least two lists: (1) the county list of registered voters;¹⁵ and (2) as far as practicable, a list of persons residing in the county who are registered with the Department

See generally Adams v. Superior Court, 12 Cal. 3d 55, 59, 524 P.2d 375, 377, 115 Cal. Rptr. 247, 249 (1974).

2. *See* CAL. STATS. 1951, c. 1495, §1, at 3475 (amending CAL. CIV. PROC. CODE §203).

3. *See* CAL. STATS. 1967, c. 82, §2, at 984 (amending CAL. CIV. PROC. CODE §231).

4. *See* CAL. STATS. 1978, c. 718, §3, at 2247-48 (amending CAL. CIV. PROC. CODE §204); CAL. STATS. 1951, c. 1495, §1, at 3475 (amending CAL. CIV. PROC. CODE §203). *See generally* 41 CAL. JUR. 3d, *Jury* §47 (1978).

5. *See* CAL. CIV. PROC. CODE §203.

6. *See id.* §§197, 197.1, 203. *See generally* Comment, *The Streamlined Jury*, 36 S. CAL. L. REV. 89 (1962).

7. *See* CAL. CIV. PROC. CODE §203. *See generally* 16 CAL. JUR. 3d, *Courts* §§118-120 (1978).

8. *See* CAL. CIV. PROC. CODE §203.

9. *See id.* §204.1; CAL. STATS. 1963, c. 195, §2, at 934 (amending CAL. CIV. PROC. CODE §204a).

10. *See* CAL. CIV. PROC. CODE §204.3(b).

11. *See id.* §204.3(c).

12. *See id.* §§204.5 (master jury lists), 204.7 (source lists), 205 (qualified jury lists).

13. *See* CAL. STATS. 1980, c. 81, §35, at —.

14. *See* CAL. CIV. PROC. CODE §193.2(i) ("source list" means a list used as the source of names of potential jurors).

15. *See id.* §204.7(a).

of Motor Vehicles.¹⁶ If a jury commissioner compiles one or more *master* jury lists,¹⁷ apparently an intermediate step in the production of a qualified jury list,¹⁸ the plan for the random selection of persons for the list must be set forth in writing and be designed to insure a random selection from a fair cross-section of the population served by the court.¹⁹ The names of persons listed on the master jury list must be randomly selected from the source lists.²⁰ Furthermore, when a master jury list is used, the jury commissioner must prepare a new list every year.²¹ Apparently, the final step created by Chapter 81 concerning the production of jury lists is the compilation of the *qualified* jury list,²² which may be drawn from the source *or* master jury lists.²³ This list may include *only* the names of persons who meet the current qualifications for juror competency.²⁴ When compiling the qualified jury list, the selection of names is to be made from the judicial districts of the county in proportion to the number of inhabitants of the districts.²⁵ Chapter 81, by creating the qualified jury list, does not affect existing law relating to the qualifications for juror competency;²⁶ however, the law now emphasizes that no person is to be excluded from jury service on account of race, color, religion, sex, national origin, or economic status.²⁷ To further streamline the juror selection process, Chapter 81 repeals the use of the “trial jury box” method of selection.²⁸

Finally, Chapter 81 creates a uniform system of fees for all trial jurors.²⁹ Unless otherwise provided by ordinance or statute, jurors in civil or criminal trials will receive five dollars a day and 15¢ a mile, one

16. See *id.* §204.7. See generally Kairys, Kadane, & Lehoczyk, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776 (1977).

17. See CAL. CIV. PROC. CODE §204.5. See generally *id.* §193.2(e) (“master jury list” means a jury list on which are placed names of jurors drawn at random from source lists).

18. Compare *id.* §193.2(e) with *id.* §193.2(g), (i).

19. See *id.* §204.5.

20. See *id.* §204.5(b).

21. See *id.* §204.5(a).

22. See generally *id.* §193.2(g) (“qualified jury list” means a jury list taken from a master jury list or source list).

23. See *id.* §205.

24. See *id.* §205(a).

25. See *id.* §206.

26. See *id.* §§198-200. See generally 7 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 315 (1973).

27. See CAL. CIV. PROC. CODE §197.1.

28. See CAL. STATS. 1980, c. 81, §§21-25, 29, at —. See generally CAL. STATS. 1961, c. 728, §2, at 1970 (amending CAL. CIV. PROC. CODE §209) (definition of “trial jury box”); *id.* §§3-5, at 1970 (amending CAL. CIV. PROC. CODE §§215, 219, 220); CAL. STATS. 1951, c. 1495, §10, at 3479 (amending CAL. CIV. PROC. CODE §250); CODE AM. 1880, c. 35, §1, at 51 (reenacting CAL. CIV. PROC. CODE §251).

29. Compare CAL. CIV. PROC. CODE §196 with CAL. STATS. 1959, c. 501, §5, at 1283 (amending CAL. CIV. PROC. CODE §196) and CAL. STATS. 1959, c. 594, §4, at 2567 (amending CAL. CIV. PROC. CODE §196.1) and CAL. STATS. 1957, c. 1406, §1, at 2740 (amending CAL. PENAL CODE §1143).

way, for service as a juror.³⁰ Chapter 81 also provides that juror fees will be paid by the litigants in civil actions and that in criminal cases the costs will be charged to the county.³¹

30. See CAL. CIV. PROC. CODE §196.

31. See *id.* §196.1.

Civil Procedure; deaf jurors

Code of Civil Procedure §610 (new); §§198, 205, 602 (amended).
AB 3285 (Goggin); STATS 1980, Ch 1227

Support: Department of Finance; Department of Rehabilitation; Office of the Governor, Legal Affairs Unit

Opposition: California Judges Association; California Association of Superior Court Administrators

Under existing law, a person is competent to act as a trial juror if he or she is (1) a citizen of the United States of the age of 18 years who meets the residency requirements of electors in California, (2) possessed of sufficient knowledge of the English language, and (3) in possession of his or her natural faculties and of ordinary intelligence.¹ Moreover, existing law provides that loss of sight or a disability involving mobility may not be the sole consideration in determining incompetency.² Chapter 1227 now provides that loss of hearing also may not be the only factor prompting dismissal from jury service,³ and accordingly, Chapter 1227 further provides that a person cannot be excluded from a qualified jury list used for the selection of trial jurors solely because that person is deaf.⁴

In addition, Chapter 1227 adds to the existing grounds for challenges for cause *any* incapacity, including loss of hearing, that in the opinion of the court renders the challenged person incapable of acting as a juror without adversely affecting the substantial rights of the challenging party.⁵ If a party does not cause the removal of an individual juror who is handicapped by a loss of hearing and who requires the services of a sign language interpreter, that party must (1) stipulate to the pres-

1. See CAL. CIV. PROC. CODE §198.

2. See *id.*

3. Compare *id.* with CAL. STATS. 1978, c. 301, §1, at 626 (amending CAL. CIV. PROC. CODE §198).

4. Compare CAL. CIV. PROC. CODE §205(b) with CAL. STATS. 1980, c. 81, §17, at — (amending CAL. CIV. PROC. CODE §205). See generally 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 295 (1981).

5. Compare CAL. CIV. PROC. CODE §602 with CAL. STATS. 1979, c. 730, § 21, at — (operative January 1, 1981) (amending CAL. CIV. PROC. CODE §602).

ence of the interpreter in the jury room during deliberations,⁶ and (2) prepare and deliver to the court proposed instructions that apparently are to be given to the interpreter regarding his or her conduct during deliberations.⁷ If the interpreter is needed in the jury room during the deliberations, the court must instruct the interpreter *and* the jury that the interpreter's activities are to be limited to facilitating communication between the deaf juror and the other jurors.⁸

COMMENT

Recent case law continues to follow the traditional view that permitting a deaf person to serve on a trial jury may impair a litigant's right to a fair trial by a competent jury.⁹ Moreover, it has been held that statutes which exclude deaf persons from jury service do not constitute a violation of the deaf person's right to equal protection.¹⁰ Notwithstanding the case law, it has been suggested that if adequate safeguards insuring competency are provided, a litigant's right to a fair trial will not necessarily be impaired by the presence of an *otherwise competent* deaf person.¹¹ Adequate safeguards arguably would include statutory provisions permitting a party to challenge an *incompetent* deaf person for cause,¹² as well as provisions requiring instructions from the bench admonishing the jury and the interpreter that the interpreter is in the jury room *only* for the purpose of interpreting and that no interference with the fact finding process will be permitted.¹³ Since Chapter 1227 enacts procedures encompassing these safeguards intended to insure fairness to litigants,¹⁴ Chapter 1227 may be able to withstand any challenges brought on the ground that a litigant has been denied a fair trial by the use of an improper jury selection process,¹⁵ thereby affording competent deaf persons the opportunity to serve as trial jurors.¹⁶

6. See CAL. CIV. PROC. CODE §610(a).

7. See *id.* §610. See generally Comment, *Jury Selection: The Courts, The Constitution, and the Deaf*, 11 PAC. L.J. 967, 980 (1980) [hereinafter cited as *Jury Selection*].

8. See CAL. CIV. PROC. CODE §610(b).

9. See generally *Eckstein v. Kirby*, 452 F. Supp. 1235, 1242 (E.D. Ark. 1978); *Jury Selection*, *supra* note 7, at 968, 975.

10. See 452 F. Supp. at 1241. See generally *Jury Selection*, *supra* note 7, at 984.

11. See *Jury Selection*, *supra* note 7, at 988.

12. See *Jury Selection*, *supra* note 7, at 981.

13. See *Jury Selection*, *supra* note 7, at 981. But see 452 F. Supp. at 1244.

14. See CAL. CIV. PROC. CODE §§602(2), 610. See generally *Jury Selection*, *supra* note 7, at 989.

15. See 452 F. Supp. at 1238. See generally *Rawlins v. Georgia*, 201 U.S. 638 (1906).

16. Compare *Jury Selection*, *supra* note 7, at 989 with 452 F. Supp. at 1245.

Civil Procedure; subpoena duces tecum

Code of Civil Procedure §1985.3 (new); §1987.1 (amended).

AB 2948 (Moore); STATS 1980, Ch 976

(Operative July 1, 1981).

Support: Department of Consumer Affairs; Office of the Governor,
Legal Affairs Unit

Existing law provides for the issuance of a subpoena to compel witnesses who are required to appear to testify to also produce any books, documents, or other evidence under their control.¹ These subpoenas duces tecum may be issued by a clerk or a judge and filled in by the party requesting the subpoena, and must be accompanied by a copy of an affidavit showing good cause for the production and the materiality of the evidence sought.² The court may make any other necessary order, including an order to quash or modify the subpoena, to protect witnesses from unreasonable or oppressive demands.³

Chapter 976 now requires that parties who subpoena the personal records⁴ of consumers⁵ maintained by physicians, hospitals, state or national banks, state or federally chartered savings and loan associations, state or federal credit unions, trust or insurance companies, attorneys, or accountants,⁶ give constructive notice to the consumer that these records are being sought at least 15 days prior to the date set for the production of the records by the subpoena.⁷ This constructive notice is to be effected by delivering to the consumer a copy of the subpoena, the affidavit supporting it, and a notice stating that records concerning the consumer are being sought, detailing action that should be taken if the consumer objects to the production of these records.⁸ The delivery of this information establishing constructive notice may be made: (1) personally to the consumer; (2) at the consumer's last known address; (3) by certified mail, return receipt requested, to the consumer's last known address; or (4) if the consumer is a party, to his or her attorney of record.⁹ A certificate attesting to compliance with these notice require-

1. See CAL. CIV. PROC. CODE §1985. See generally B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence*, §§1011-1015 (2d ed. 1966).

2. See CAL. CIV. PROC. CODE §1985.

3. See *id.* §1987.1. See generally 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 237 (1977) (civil procedure; subpoenas-motions to quash).

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

5. See *id.* §1985.3(a)(2) (definition of consumer).

6. See *id.* §1985.3(a)(1).

7. See *id.* §1985.3(b)(1).

8. See *id.* §1985.3(b)(1), (c).

9. See *id.* §1985.3(b)(1). See generally *id.* §§1010-1012 (notice and service of papers).

ments, signed by the subpoenaing party¹⁰ or his or her attorney, must also be served on the witness simultaneously with service of the subpoena.¹¹ The consumer may bring a motion to quash or modify the subpoena,¹² and a witness may not be required to produce personal records after the receipt of such a motion except upon order of the court in which the action is pending, or by agreement of the parties, witnesses, and consumers affected.¹³ Chapter 976, however, permits a subpoenaing party, upon a showing of good cause and provided the rights of the parties are preserved, to obtain an order either shortening the time for the service of the subpoena or waiving the constructive notice requirements provided due diligence has been shown by the subpoenaing party.¹⁴ Chapter 976 also permits the court to make an order protecting the parties, the witnesses, or the consumer from unreasonable violations of their right to privacy.¹⁵

10. *See id.* §1985.3(a)(3) (definition of subpoenaing party).

11. *See id.* §1985.3(b)(2).

12. *See id.* §1985.3(d). *See generally* B. WITKIN, CALIFORNIA EVIDENCE, *Motion to Quash or Vacate* §1040 (2d ed. 1966).

13. *See* CAL. CIV. PROC. CODE §1985.3(d).

14. *See id.* §1985.3(e).

15. *See id.* §1987.1. *See generally* Richards v. Superior Court, 86 Cal. App. 3d 265, 150 Cal. Rptr. 77 (1978); CAL. CONST. art. I, §1 (right to privacy).

Civil Procedure; judges as witnesses, employment of special counsel and special investigators by a grand jury

Evidence Code §703.5 (amended); Penal Code §936.5 (new).

AB 1630 (Knox); STATS 1980, Ch 290

Support: Office of the Governor, Legal Affairs Unit

Currently, the Attorney General may employ special counsel and special investigators to inquire into matters for, and to present evidence to, the grand jury if the grand jury so requests.¹ Chapter 290 now provides that the presiding judge of the superior court, at the request of the grand jury, also may employ special counsel and investigators.² Prior to any appointment of a special counsel and special investigators by the presiding judge, an evidentiary hearing must be held to discover if a conflict exists that would prevent the local district attorney, the county counsel, or the Attorney General from performing the investigation.³ Notice of the hearing must be given to the district attorney, the county counsel, and the Attorney General, except that notice need not be given

1. *See* CAL. PENAL CODE §936.

2. *See id.* §936.5(a).

3. *See id.* §936.5(b).

to any office that is a subject of the investigation.⁴ Any of these persons may appeal the finding of the presiding judge and the judge's order will be stayed pending their appeal.⁵

Under existing law, the services of the special counsel and special investigators appointed by the Attorney General are to be charged to the county in which the grand jury sits.⁶ Chapter 290 makes appointment of the special counsel and investigators by the presiding judge contingent upon certification by the county auditor-comptroller that the grand jury has sufficient funds appropriated to compensate those persons for services rendered.⁷ However, if the county board of supervisors or any member thereof is the subject of the investigation, the county has an obligation to appropriate the necessary funds.⁸

Finally, existing law provides that a person who presides over a judicial or quasi-judicial proceeding is not competent to testify in any subsequent civil proceeding regarding any statement or conduct at the previous proceeding unless his or her testimony relates to a statement or to conduct that could give rise to civil or criminal contempt or constitute a crime.⁹ Chapter 290 now permits the use of such testimony if the matter relates to conduct that could be the subject of an investigation by the State Bar or the Commission on Judicial Performance¹⁰ or that could give rise to judicial disqualification due to bias or prejudice.¹¹

4. *See id.*

5. *See id.*

6. *See id.* §936.

7. *See id.* §936.5(c).

8. *See id.*

9. *See* CAL. STATS. 1979, c. 205, §1, at — (enacting CAL. EVID. CODE §703.5). *See generally* 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 378 (1980).

10. *See* CAL. EVID. CODE §703.5.

11. *See* CAL. CIV. PROC. CODE §170; CAL. EVID. CODE §703.5.

Civil Procedure; security for costs

Code of Civil Procedure §§830-836 (repealed); §1037 (new); §§1029.5, 1029.6, 1030 (amended); Education Code §92650 (repealed); Government Code §§947, 951 (repealed); Military & Veterans Code §393 (amended).

SB 1538 (Rains); STATS 1980, Ch 114

Support: Office of the Governor, Legal Affairs Unit

To deter frivolous litigation, as well as to secure the defendant's

awardable costs,¹ a plaintiff is required by law in certain actions to furnish a cost bond, or an undertaking,² with the court.³ The California Supreme Court held in *Beaudreau v. Superior Court*,⁴ however, that while cost bond statutes serve a valid purpose,⁵ an order to furnish a cost bond must be preceded by notice and a hearing.⁶ At this hearing, the determination of the amount of the undertaking must be based on an inquiry into the merits of the plaintiff's action and the reasonableness of the amount of the undertaking in light of the defendant's probable costs.⁷ The *Beaudreau* court held that any statute that fails to provide these procedures, or that sets a specific amount of security, is unconstitutional because the plaintiff would be deprived of property without due process of law.⁸

Chapter 114 apparently was enacted to bring existing cost bond statutes into conformity with the due process requirements set forth in *Beaudreau*,⁹ while at the same time promoting the statutory purposes of deterring frivolous litigation and securing the defendant's costs.¹⁰ Consequently, Chapter 114 repeals those constitutionally deficient cost bond statutes¹¹ that are of questionable value in meeting these statutory purposes¹² and whose revision would not justify the administrative burden that procedural conformity to due process requirements would impose.¹³ Those cost bond statutes that are apparently useful as a deterrent¹⁴ or as security,¹⁵ and whose utility outweighs any resultant

1. See *Recommendation Relating to Security for Costs*, 14 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 323 (1978) [hereinafter cited as RECOMMENDATIONS].

2. See generally 2 B. WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§2, 4 (2d ed. 1970), (Supp. 1979); CONTINUING EDUCATION OF THE BAR, CALIFORNIA SURETY AND FIDELITY BOND PRACTICE §21.2 (1969).

3. See CAL. CIV. PROC. CODE §§1029.5, 1029.6, 1030; RECOMMENDATIONS, *supra* note 1, at 323 n.1.

4. 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

5. See *id.* at 452, 535 P.2d at 715, 121 Cal. Rptr. at 587.

6. See *id.* at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592.

7. See *id.* at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592. See generally RECOMMENDATIONS, *supra* note 1, at 324 n.8.

8. See 14 Cal. 3d at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592.

9. See RECOMMENDATIONS, *supra* note 1, at 326.

10. See RECOMMENDATIONS, *supra* note 1, at 323.

11. See CAL. STATS. 1980, c. 114, §§1, 6, 7, 8, 9, at —. See generally CAL. STATS. 1976, c. 1010, §2, at 4534 (enacting CAL. EDUC. CODE §92650) (required cost bond in actions against the Regents of the University of California); CAL. STATS. 1969, c. 1390, §1, at 2834 (amending CAL. MIL. & VET. CODE §393) (required cost bond in actions against members of the state militia); CAL. STATS. 1968, c. 384, §§1, 2, at 811 (amending CAL. GOV'T CODE §§947, 951) (requiring cost bond in actions against public entities and employees); CAL. STATS. 1953, c. 52, §6.5, at 703 (enacting CAL. CIV. PROC. CODE §§830-836) (cost bond required before issuance of summons in libel and slander actions); RECOMMENDATIONS, *supra* note 1, at 326.

12. See RECOMMENDATIONS, *supra* note 1, at 328.

13. See RECOMMENDATIONS, *supra* note 1, at 326-29.

14. See RECOMMENDATIONS, *supra* note 1, at 328.

15. See RECOMMENDATIONS, *supra* note 1, at 329.

administrative burden,¹⁶ however, are revised to insure conformity with due process requirements.¹⁷ This group specifically includes those statutes relating to architectural malpractice,¹⁸ malpractice involving state-licensed health professionals,¹⁹ and actions brought by nonresident plaintiffs.²⁰

Prior to the enactment of Chapter 114, plaintiffs in architectural malpractice actions were required, upon noticed hearing, to furnish an undertaking *in the amount of \$500* per defendant up to a maximum of \$3000.²¹ Since due process requires a hearing to determine the *reasonable* amount of the undertaking,²² Chapter 114 replaces this fixed amount with a variable sum *not to exceed \$500* per defendant.²³ In addition, Chapter 114 deletes the statutory provision that allowed a defendant in an action against a state-licensed health professional to obtain an *ex parte* order requiring a cost bond when a plaintiff sought punitive damages.²⁴ This procedure violated due process because it failed to provide a hearing prior to the order for an undertaking.²⁵

Furthermore, Chapter 114 extensively revises the law relating to cost bonds in actions brought by nonresident plaintiffs.²⁶ The purpose of the revision is to insure due process in the cost bond procedure while securing an award of costs that might otherwise be difficult to recover against a nonresident plaintiff.²⁷ Chapter 114 permits the defendant in these actions to apply to the court, at any time, by noticed motion, for an order that requires the plaintiff to furnish a written undertaking with the court to secure an award of the costs and attorney fees.²⁸ The motion must be made on the grounds that the plaintiff resides out of the state or is a foreign corporation, and that a reasonable possibility exists that the moving defendant will prevail in the action.²⁹ In addition, the motion must be accompanied by an affidavit supporting the grounds

16. See RECOMMENDATIONS, *supra* note 1, at 328.

17. Compare *Beaudreau v. Superior Court*, 14 Cal. 3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975) with CAL. CIV. PROC. CODE §§1029.5, 1029.6, 1030.

18. See CAL. CIV. PROC. CODE §1029.5.

19. See *id.* §1029.6.

20. See *id.* §1030.

21. See CAL. STATS. 1969, c. 1610, §6, at 3371 (amending CAL. CIV. PROC. CODE §1029.5).

22. See 14 Cal. 3d at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592.

23. See CAL. CIV. PROC. CODE §1029.5(a), (c), (d).

24. Compare *id.* §1029.6 with CAL. STATS. 1972, c. 653, §1, at 1211.

25. See *Nork v. Superior Court*, 33 Cal. App. 3d 997, 1009, 109 Cal. Rptr. 428, 430 (1973); RECOMMENDATIONS, *supra* note 1, at 329.

26. Compare CAL. CIV. PROC. CODE §1030 with CAL. STATS. 1951, c. 1737, §137, at 4134

27. See RECOMMENDATIONS, *supra* note 1, at 339, 340. See generally *Gonzalez v. Fox*, 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312 (1977).

28. See CAL. CIV. PROC. CODE §1030(a).

29. See *id.* §1030(b).

for the motion and a memorandum of points and authorities.³⁰ The affidavit must set forth the costs that the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.³¹

If after hearing the motion the court determines that the requisite grounds have been established, the court must order the nonresident plaintiff to furnish an undertaking in an amount specified by the court.³² In addition, if the probable costs are likely to change, the court may increase or decrease the amount of the undertaking provided that another hearing, held upon noticed motion, precedes any change in the amount.³³ The undertaking furnished by the plaintiff must have at least two court-appointed sureties.³⁴ When an undertaking is given by individual sureties, however, the defendant may except to a surety by noticed motion, thereby requiring the surety to appear before the court and to submit to an examination under oath concerning the sufficiency of the surety.³⁵ If the surety fails to appear, or if the surety is insufficient, the court will order that a new undertaking be given.³⁶

If the defendant's motion for an order requiring an undertaking is filed within 30 days after service of the summons on the defendant, no pleading need be filed by the defendant and all proceedings are to be stayed until ten days after the motion is denied;³⁷ but if the motion is *granted*, the proceedings are stayed until ten days after the nonresident plaintiff has filed the required undertaking and the defendant has received written notice of the filing.³⁸ The court may use its discretion to stay the proceedings for no longer than ten days after a sufficient undertaking has been filed and the defendant has been given written notice of the filing if (1) the defendant's motion is filed later than 30 days after service of summons on the defendant, (2) the defendant excepts to the surety, or (3) the court orders the amount of the undertaking increased.³⁹ If the ordered undertaking is not furnished within the time set by the court, however, the plaintiff's action must be dismissed.⁴⁰ A ruling on the defendant's motion for an undertaking is to have no effect

30. *See id.*

31. *See id.*

32. *See id.* §1030(b), (c). *But see* Conover v. Hall, 11 Cal. 3d 842, 851, 523 P.2d 682, 687, 114 Cal. Rptr. 642, 647 (1974); RECOMMENDATIONS, *supra* note 1, at 340 (court may dispense with an undertaking if the plaintiff is indigent).

33. *See* CAL. CIV. PROC. CODE §1030(d).

34. *See id.* §1030(f). *But see id.* §1056 (one corporate surety sufficient).

35. *See id.* §1030(f).

36. *See id.*

37. *See id.* §1030(g).

38. *See id.*

39. *See id.*

40. *Compare id.* §1030(e) with CAL. STATS. 1951, c. 1737, §137, at 4134 (providing for discretionary dismissal).

on the determination of the merits of the main action and may not be given in evidence or referred to at trial.⁴¹ Finally, an order granting or denying a motion for an undertaking is not appealable.⁴²

In summary, Chapter 114 apparently codifies judicially mandated due process requirements in specified provisional remedy statutes.⁴³ In dealing with any particular cost bond statute, however, Chapter 114 has balanced the due process considerations with the possible administrative impact of the statute as well as its particular value in achieving the statutory purpose behind cost bond statutes.⁴⁴

41. See CAL. CIV. PROC. CODE §1030(h).

42. See *id.* §1030(i). But see *Beaudreau v. Superior Court*, 14 Cal. 3d 448, 452, 535 P.2d 713, 714-15, 121 Cal. Rptr. 585, 586-87 (1975) (use of extraordinary writ to review order for an undertaking).

43. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Beaudreau v. Superior Court*, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). See generally RECOMMENDATIONS, *supra* note 1, at 324 n.8; Comment, *Due Process and Security for Expenses Statutes: An Analysis of California Statutes in Light of Recent Trends*, 7 PAC. L.J. 176 (1976).

44. See RECOMMENDATIONS, *supra* note 1, at 326 n.20, 327.

Civil Procedure; litigation costs

Code of Civil Procedure §1038 (new).

AB 3214 (Nolan); STATS 1980, Ch 1209

Support: Department of Finance; Office of the Governor, Legal Affairs Unit

Existing law provides that the prevailing party in a civil action is generally entitled to court costs but, in most cases, is not entitled to attorney's fees.¹ Under Chapter 1209, a defendant or cross-defendant in a civil proceeding under the California Tort Claims Act² or in a civil action for indemnity or contribution³ is entitled to defense costs,⁴ *including attorney's fees*, upon a determination by the fact finder that the proceeding was brought without reasonable cause and without a good faith belief that there was a justiciable controversy.⁵

To recover defense costs, the defendant or cross-defendant must make a motion requesting this relief prior to the discharge of the jury or the entry of judgment.⁶ If the fact finder determines that the pro-

1. See CAL. CIV. PROC. CODE §§1021, 1031, 1032. See generally 4 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* §§80-138 (2d ed. 1971), (Supp. 1979).

2. See CAL. CIV. PROC. CODE §1038(a). See generally CAL. GOV'T CODE §§810-996.6 (California Tort Claims Act).

3. See generally CAL. CIV. PROC. CODE §§875-880 (indemnity and contribution).

4. See *id.* §1038(b) (definition of defense costs).

5. See *id.* §1038(a).

6. See *id.* §1038(c).

ceeding was not brought in good faith and with reasonable cause, the fact finder must then determine the reasonable and necessary defense costs and render judgment in favor of the moving party in that amount.⁷ Alternatively, the court may direct a separate trial at the conclusion of the proceeding to determine the amount of reasonable and necessary defense costs.⁸ A defendant or cross-defendant, however, will only be entitled to recover defense costs under this section if he or she has made a motion for summary judgment or nonsuit and the motion has been granted.⁹ Moreover, any party requesting this relief is deemed to waive the right to seek damages for malicious prosecution.¹⁰

7. *See id.* §1038(a).

8. *See id.* §1038(b).

9. *See id.* §1038(d). *See generally id.* §§437c (definition of summary judgment), 581c (definition of nonsuit).

10. *See id.* §1038(c).

Civil Procedure; offsets—amounts owed to and owed by the state

Government Code §12419.5 (amended).

SB 1773 (Holmdahl); STATS 1980, Ch 572

Support: Department of Finance; Department of Social Services; Franchise Tax Board

Under existing law, when a claim is made by a person or entity against the state or a state agency for an amount owed to the claimant, the state controller has discretion to offset the claim by any amount that the claimant may owe to the state.¹ The balance of the claim after all offsets will be the amount owed to the claimant.² Prior to the enactment of Chapter 572, some confusion existed as to whether a tax refund was to be treated as a debt owed by the state, or as property held in trust by the state.³ As a debt, the refund would be within the scope of the offset statute, whereas property held in trust would not.⁴ Chapter 572 clarifies existing law by specifically providing that tax refunds *are* to be considered as debts owed by the state, thus placing them within the provisions of the offset statute.⁵

1. *See* CAL. GOV'T CODE §12419.5.

2. *See id.*

3. *See* *Bonelli v. State*, 71 Cal. App. 3d 459, 469, 139 Cal. Rptr. 486, 492 (1977) (holding that tax refunds were property held in trust); CAL. STATS. 1980, c. 572, §2, at —.

4. *See* 71 Cal. App. 3d at 469, 139 Cal. Rptr. at 492.

5. *See* CAL. STATS. 1980, c. 572, §2, at —. *Compare* CAL. GOV'T CODE §12419.5 *with* CAL. STATS. 1951, c. 350, §1, at 800.

Civil Procedure; powers of court commissioners

Code of Civil Procedure §259a (repealed); §259 (amended).
SB 1619 (Garamendi); STATS 1980, Ch 229
Support: Office of the Governor, Legal Affairs Unit

Under the California Constitution, court commissioners and other court officials appointed by trial courts of record are empowered to perform certain subordinate judicial functions.¹ Prior statutory law specifically enumerated these functions,² granting greater authority to those court commissioners who served in counties having over 900,000 inhabitants.³ Chapter 229 eliminates this distinction, allotting to all court commissioners those powers previously reserved to commissioners serving in the more populous counties.⁴

Chapter 229 provides that *all* court commissioners are authorized to hear and determine *ex parte* motions for orders and alternative writs and writs of habeas corpus in the superior courts to which they are appointed.⁵ In addition, all commissioners may take proof and report findings on any matter of fact as required by the court.⁶ The report, and any subsequent court order pursuant thereto, may be excepted to by any party to the proceedings within five days after written notice of the court's action.⁷ A copy of the exceptions must be filed and served upon the opposing party or upon his or her counsel within the five-day period.⁸ The party may argue the exceptions upon giving notice of a motion for that purpose within ten days from the time of the submission of the exceptions to the court.⁹ Chapter 229 further provides that all court commissioners are empowered to take affidavits and depositions, as well as acknowledgements and proof of deeds, mortgages, and other instruments requiring acknowledgment or proof under the laws of any state or country.¹⁰ Moreover, the commissioners may (1) act as

1. See CAL. CONST. art. VI, §22. See generally CAL. GOV'T CODE §§70141-70148; 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§223, 225, 233 (2d ed. 1970), (Supp. 1979); 21 U.C.L.A.L. REV. 1081, 1130-34 (1974).

2. See CAL. STATS. 1949, c. 469, §1, at 816 (amending CAL. CIV. PROC. CODE §259a); CODE AM. 1880, c. 35, §1, at 51 (amending CAL. CIV. PROC. CODE §259).

3. See CAL. STATS. 1949, c. 469, §1, at 816. See generally 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§226-227 (2d ed. 1970), (Supp. 1979).

4. Compare CAL. CIV. PROC. CODE §259 with CAL. STATS. 1949, c. 469, §1, at 816 and CODE AM. 1880, c. 35, §1, at 51.

5. See CAL. CIV. PROC. CODE §259(1).

6. See *id.* §259(2).

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.* §259(3).

temporary judges when otherwise qualified and when appointed for that purpose,¹¹ (2) hear and report findings and conclusions to the court on all preliminary matters including motions regarding child custody and temporary alimony, and issues of fact in contempt proceedings in divorce, maintenance, and annulment of marriage cases,¹² and (3) hear, report on, and determine all uncontested actions and proceedings other than actions for divorce, maintenance, or annulment of marriage.¹³ Finally, the same fees allowed by law to notaries public for the performance of official acts are to be collected by court commissioners for like services and conveyed to the county treasurer for deposit in the general fund of the county.¹⁴

11. *See id.* §259(4) (no compensation may be received in this capacity other than compensation as commissioner).

12. *See id.* §259(5).

13. *See id.* §259(6).

14. *See id.* §259(7) (not applicable to any services as commissioner, the compensation for which is expressly fixed by law).

Civil Procedure; family conciliation court law

Civil Code §4607 (new); Code of Civil Procedure §§1740-1749, 1760-1772 (repealed); §§1740-1749, 1760-1772 (new); §1731 (amended); Government Code §26862 (new); §26840.3 (amended).

SB 961 (Sieroty); STATS 1980, Ch 48

(Effective March 27, 1980)

Support: Department of Finance; Office of the Governor, Legal Affairs Unit

Existing law permits each superior court to act as a court of conciliation¹ to resolve conflicts between spouses that, if left unresolved, might affect the welfare of minor children.² Chapter 48 extends the jurisdiction of these courts, renamed "family conciliation courts,"³ to controversies between spouses or parents, *regardless of marital status*, when the conflict pertains to child custody or visitation.⁴ In addition, a family conciliation court may exercise jurisdiction over conflicts involving domestic violence, regardless of the existence of minor children.⁵ Chapter 48, however, does not foreclose alternative civil or criminal remedies in cases involving domestic violence.⁶

1. *See* CAL. CIV. PROC. CODE §1740.

2. *See generally id.* §1760.

3. *Compare id.* §1740 with CAL. STATS. 1955, c. 1230, §5, at 2243.

4. *Compare* CAL. CIV. PROC. CODE §1760 with CAL. STATS. 1955, c. 1230, §11, at 2245.

5. *See* CAL. CIV. PROC. CODE §§1760, 1763(f).

6. *See id.* §1764.

Under existing law, the superior court can appoint counselors to assist the family conciliation court.⁷ Prior to the enactment of Chapter 48, the number of counselors that the court could appoint was based on the population of the county where the court was located.⁸ Under Chapter 48, every superior court is permitted to appoint *one* supervising counselor and *one* secretary to assist the family conciliation court in carrying out its functions.⁹ In addition, if the court's workload so requires, the superior court, with the consent of the county board of supervisors, may appoint associate counselors and other office workers, *without* regard to the population of the county.¹⁰ Chapter 48 also establishes minimum qualifications that all counselors must meet for employment by the family conciliation court.¹¹ Prior to the enactment of Chapter 48, the duties of the counselors of the conciliation court varied with the population of the county where the court was located.¹² Chapter 48 permits *all* counselors to perform the same duties.¹³ Under prior law, a counselor was permitted to destroy, upon court order, certain documents that were more than two years old.¹⁴ Chapter 48 provides that *only* the supervising counselor may destroy these documents, except for those records of child custody or visitation mediation proceedings, which may be destroyed only when the minor children involved reach 18 years of age.¹⁵

The central focus of Chapter 48¹⁶ is the establishment of a mediation procedure in actions relating to any contested child custody or visitation order,¹⁷ that will become effective January 1, 1981.¹⁸ The express purpose of this new procedure is to reduce conflict between parents and to insure the child's continuing contact with both parents after a dissolution.¹⁹ These mediation proceedings are to be held in private, infor-

7. See *id.* §1744.

8. See CAL. STATS. 1979, c. 134, §1, at — (amending CAL. CIV. PROC. CODE §1744.3); CAL. STATS. 1972, c. 727, §1, at 1318 (amending CAL. CIV. PROC. CODE §1744.2); CAL. STATS. 1966, c. 87, §1, at 526 (amending CAL. CIV. PROC. CODE §1744.1); CAL. STATS. 1963, c. 829, §1, at 2028 (amending CAL. CIV. PROC. CODE §1744).

9. See CAL. CIV. PROC. CODE §§1744, 1745.

10. See *id.* §1744.

11. See *id.* §1745.

12. See CAL. STATS. 1979, c. 134, §1, at — (amending CAL. CIV. PROC. CODE §1744.3); *id.* §2, at — (enacting CAL. CIV. PROC. CODE §1744.4); CAL. STATS. 1972, c. 727, §1, at 1318 (amending CAL. CIV. PROC. CODE §1744.2); CAL. STATS. 1966, c. 87, §1, at 526 (amending CAL. CIV. PROC. CODE §1744.1); CAL. STATS. 1963, c. 829, §1, at 2028 (amending CAL. CIV. PROC. CODE §1744).

13. See CAL. CIV. PROC. CODE §1744.

14. See CAL. STATS. 1978, c. 274, §1, at 562 (amending CAL. CIV. PROC. CODE §1748).

15. See CAL. CIV. PROC. CODE §1748.

16. See generally Senator Alan Sieroty, Press Release, March 27, 1980.

17. See CAL. CIV. PROC. CODE §4607(a).

18. See *id.* §4607(f).

19. See *id.* §4607(a).

mal sessions from which counsel may be excluded.²⁰ The objective of this mediation proceeding is to reach an agreement between the parties relating to contested custody or visitation.²¹ Any agreement reached as a result of the mediation is then reported to the court, and the court may rely on the agreement when issuing its order relating to custody or visitation.²² While the court is not required to institute a family conciliation court in order to provide the mediation services, every superior court *must* have a mediator available who satisfies the qualifications required of a conciliation counselor.²³

The system of domestic conciliation created by Chapter 48 is intended to be self-financing.²⁴ To achieve this objective, the superior court may, with the approval of the county board of supervisors, increase the required fees for the filing of various motions or petitions relating to marriages and dissolutions,²⁵ as well as for obtaining a marriage license.²⁶

In summary, the procedures established by Chapter 48 pertaining to orders and hearings are essentially similar to those contained in prior law.²⁷ Their continued viability seems to indicate an ongoing recognition of the value to be gained from the use of flexible and informal proceedings in the area of domestic conciliation.²⁸

20. *See id.* §4607(c), (d).

21. *See id.* §4607(a).

22. *See id.* §4607(e).

23. *See id.* §4607(b). *See also* CAL. CIV. PROC. CODE §1745.

24. *See* CAL. STATS. 1980, c. 48, §8, at —.

25. *See* CAL. GOV'T. CODE §§26840.3(a)(1), 26862.

26. *See id.* §26840.3(a)(2), (3).

27. *Compare* CAL. CIV. PROC. CODE §§1747, 1764-1769 *with* CAL. STATS. 1972, c. 1118, §5, at 2136 (amending CAL. CIV. PROC. CODE §1769) *and* CAL. STATS. 1965, c. 299, §22, at 1358 (amending CAL. CIV. PROC. CODE §1747) *and* CAL. STATS. 1939, c. 737, §1, at 2265 (enacting CAL. CIV. PROC. CODE §§1764-1768). *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* §§92-96 (8th ed. 1974).

28. *Compare* CAL. CIV. PROC. CODE §1768 *with* CAL. STATS. 1939, c. 737, §7, at 2265. *See generally* Senator Alan Sieroty, Press Release, March 27, 1980.

Civil Procedure; actions to recover wages

Labor Code §98.2 (amended).

SB 1397 (Dills); STATS 1980, Ch 453

Support: Department of Industrial Relations

Under existing law, within ten days after service of notice of an order or a decision of the Labor Commissioner on an action to recover wages, penalties, or other demands for compensation, the parties may seek re-

view by filing an appeal to the municipal court or to the superior court¹ in accordance with the appropriate rules of jurisdiction.² With the enactment of Chapter 453, a decision may also be appealed to the justice court.³ In addition, if the party seeking the appeal is unsuccessful, Chapter 453 requires the court to determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and to assess this amount as a cost upon the moving party.⁴

1. See CAL. LAB. CODE §98.2(a). See generally 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 368 (1980).

2. See CAL. CIV. PROC. CODE §§83, 86; CAL. CONST. art. VI, §11. See generally 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 311 (1979).

3. Compare CAL. LAB. CODE §98.2(a) with CAL. STATS. 1979, c. 107, §2, at —.

4. Compare CAL. LAB. CODE §98.2(b) with CAL. STATS. 1979, c. 107, §2, at —.

Civil Procedure; assignments—creditors

Business and Professions Code §§7113.5, 8657 (amended); Civil Code §§3448-3473 (repealed); Code of Civil Procedure §§690.60, 1204.5, 1800 (amended); Financial Code §12100 (amended); Government Code §27292 (repealed).

AB 1539 (Rains); STATS 1980, Ch 135

Support: Office of the Governor, Legal Affairs Unit

Assignments for the benefit of creditors are often used to avoid the delays and complications of bankruptcy proceedings.¹ The debtor assigns his or her assets to a trustee who holds the assets for four months, liquidates them, and then pays the creditors from the assets.² Prior law permitted an assignment for the benefit of creditors to be made pursuant to statutory provisions³ or according to the common law.⁴ The statutory provisions were rarely used, however, because the common law provisions were less cumbersome and more economical.⁵ Therefore, Chapter 135 generally deletes these obsolete references,⁶ as well as the

1. See *Recommendation Relating to Assignments for the Benefit of Creditors*, 15 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 1117, 1121-22 (1979); Greenfield, *Alternatives to Bankruptcy for the Business Debtor*, 51 L.A.B.J. 135, 135 (1975).

2. See Greenfield, *Alternatives for Bankruptcy for the Business Debtor*, 51 L.A.B.J. 135, 136 (1975). See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA REMEDIES FOR THE UNSECURED CREDITOR 429 (1957).

3. See CAL. STATS. 1872, §§3449-3473, at 455-74.

4. See *Bumb v. Bennett*, 51 Cal. 2d 294, 299, 333 P.2d 23, 26 (1935); CAL. STATS. 1959, c. 1284, §1, at 3435 (enacting CAL. CIV. CODE §3448).

5. See *Mechanics Bank v. Rosenberg*, 201 Cal. App. 2d 419, 423-24, 20 Cal. Rptr. 202, 205 (1962). See generally 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §729 (8th ed. 1973), (Supp. 1980); Keatinge, *Assignments for Benefit of Creditors; Legal and Practical Aspects*, 25 L.A.B.A. BULL. 99, 110 (1949); Comment, *Assignors for Benefit of Creditors in California: A Proposed Revision of Ineffectual Statutory Provisions*, 6 U.C.L.A.L. REV. 573, 578 (1959).

6. See CAL. STATS. 1980, c. 135, §3, at —.

references to the distinction between statutory and common law assignments.⁷ Although Chapter 135 repeals the requirement that assignments for the benefit of creditors must be recorded,⁸ this does not affect the requirement that transfers of real property must be recorded.⁹

7. See *Recommendation Relating to Assignments for the Benefit of Creditors*, 15 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 1121-22 (1980). Compare CAL. BUS. & PROF. CODE §7113.5(d) with CAL. STATS. 1975, c. 818, §2, at 1871; compare CAL. BUS. & PROF. CODE §8657 with CAL. STATS. 1978, c. 1161, §437, at 3726; compare CAL. CIV. PROC. CODE §690.60 with CAL. STATS. 1979, c. 394, §1, at —; compare CAL. CIV. PROC. CODE §1204.5 with CAL. STATS. 1979, c. 394, §4, at —; compare CAL. CIV. PROC. CODE §1800(b) with CAL. STATS. 1979, c. 394, §5, at —; compare CAL. FIN. CODE §12100(h) with CAL. STATS. 1978, c. 1347, §§5, 6, 6.5, at 4431-36.

8. See CAL. STATS. 1980, c. 135, §8, at —.

9. See CAL. CIV. PROC. CODE §1169; CAL. GOV'T CODE §27280.

Civil Procedure; small claims court—transfer of actions

Code of Civil Procedure §116.8 (amended).

AB 2142 (Bane); STATS 1980, Ch 536

Support: Department of Consumer Affairs; Judicial Council; Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 536, a defendant in a small claims action could have the action transferred to a higher court merely by filing a cross-complaint in an amount over the jurisdictional limit of the small claims court and by paying a transmittal fee.¹ This method of transfer permitted abuse of the small claims court system by defendants who filed frivolous cross-complaints in order to effectuate a transfer of the action.² The burden of obtaining counsel to proceed in the higher court caused some plaintiffs to drop their small claims action.³

Chapter 536 amends the Code of Civil Procedure to provide that an action pending in small claims court may not be transferred to a higher court until a judgment is rendered in the small claims action, unless the ends of justice would be served by a prejudgment transfer.⁴ The discretionary power granted to the court to determine whether the transfer would serve the ends of justice apparently will allow the court to protect those cross-complaints filed in good faith, while simultaneously guarding against intimidation of the small claims plaintiff.⁵

1. See CAL. STATS. 1978, c. 723, §3, at 2271.

2. See generally Comment, *How to Defeat the Jurisdiction (and Purpose) of Small Claims Court for only Fifteen Dollars*, 44 BROOKLYN L. REV. 431, 440-44 (1978); KNXT Editorial: *Court Tricks Cancel Renters' Rights* (Sept. 21, 24, 1979) (copy on file at the *Pacific Law Journal*).

3. See note 2 *supra*.

4. Compare CAL. CIV. PROC. CODE §116.8(b) with CAL. STATS. 1978, c. 723, §3, at 2271.

5. See CAL. CIV. PROC. CODE §116.8(b). See also Comment, *How to Defeat the Jurisdiction*

Chapter 536 further provides that the plaintiff in the small claims court action may be entitled, as the *defendant* in the *transferred* action, to recover the costs incurred as a consequence of the transfer, including attorney fees and filing fees.⁶ Moreover, if the small claims action is transferred prior to judgment, both actions will be tried together in the higher court.⁷

(and Purpose) of Small Claims Court for only Fifteen Dollars, 44 BROOKLYN L. REV. 431, 440-44 (1978).

6. See CAL. CIV. PROC. CODE §116.8(b).

7. See *id.*

Civil Procedure; small claims court judgments—fictitious business names and duties of the clerk

Code of Civil Procedure §§117.19, 117.20 (new and repealed); §117.9 (amended).

AB 1765 (Bannai); STATS 1980, Ch 1018

Support: Consumer Federation of California; Department of Consumer Affairs; Department of Finance; Office of the Governor, Legal Affairs Unit

Existing law requires that the defendant's name be present on any claim filed in small claims court,¹ but makes no explicit provisions for the amendment of a small claims complaint or judgment for the purpose of having the complaint conform to the defendant's legal name.² With the enactment of Chapter 1018, when a claim is filed against a person doing business under a fictitious business name,³ and the claim relates to the person's business, the judge is to inquire at the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.⁴ If the legal name is found to be different from the name on the claim, the judge must order the plaintiff's claim to be amended to conform to the legal name of the business.⁵ In addition, the plaintiff may, at any time during the hearing or after judgment, request the court to amend the plaintiff's claim or the judgment

1. See CAL. CIV. PROC. CODE §116.4(a).

2. See *id.* §§116-123.7, 128(8), 473. See generally *Union Bank v. Wendland*, 54 Cal. App. 3d 393, 400-01, 126 Cal. Rptr. 549, 554-55 (1976); *Thomson v. L. C. Rooney & Co.*, 112 Cal. App. 2d 420, 426-27, 246 P.2d 1017, 1020-21 (1952); *Rabbit v. Atkinson*, 44 Cal. App. 2d 752, 759-60, 113 P.2d 14, 18-19 (1941); *Mirabito v. San Francisco Dairy Co.*, 8 Cal. App. 2d 54, 57, 47 P.2d 530, 531 (1935) (concerning amendment of the complaint in a non-small claims court action).

3. See CAL. BUS. & PROF. CODE §17900 (definition of fictitious business name).

4. See CAL. CIV. PROC. CODE §117.19(a).

5. See *id.*

to conform to the legal name of the person against whom the claim was filed.⁶

Chapter 1018 further provides that, at the time judgment is rendered or notice of judgment is mailed to the parties, the clerk is to provide the judgment debtor with a form⁷ containing questions regarding the nature and location of the judgment debtor's assets.⁸ The judgment debtor must complete the form and cause it to be delivered to the judgment creditor within 35 days after the notice of entry of judgment was mailed by the clerk, unless the judgment is satisfied.⁹ If either an appeal or a motion to vacate the judgment is filed, the judgment debtor must deliver the completed form within 30 days after entry of judgment on the appeal or on the motion.¹⁰ Moreover, willful failure to comply with these provisions will subject the judgment debtor to possible sanctions; however, the judgment creditor must request the court to apply the sanctions.¹¹

Under Chapter 1018, all fees paid pursuant to the operation of the small claims division, except service of process fees paid to a registered process server, and all documents and papers filed with respect to any small claims action, judgment, or execution of judgment may, upon the request of either party, be made or delivered to the clerk of the small claims division.¹² In addition, upon the request of the judgment creditor and payment of the necessary postage, the clerk of the small claims court must deliver or cause to be delivered to the recorder in a timely manner the abstract of judgment along with the fees therefor.¹³ The provisions of Chapter 1018 are to remain in effect only until June 1, 1983, unless prior to June 1, 1983, a later enacted statute deletes or extends the date of repeal.¹⁴

6. *See id.*

7. *Id.* §117.19(b) (Judicial Council will approve or adopt the requisite form).

8. *See id.* §117.19(b).

9. *See id.*

10. *Id.*

11. *See id.* *See generally id.* §§714 (arrest and punishment for contempt of court), 714.5.

12. *See id.* §117.20.

13. *See id.*

14. *See CAL. STATS.* 1980, c. 1018, §4, at —.

