RESOLUTION 01-01-2020

WRITTEN ARGUMENTS IN SUPPORT

BANSDC

1. Res Com contends that the resolution does "not further judicial fairness." In other words, Res Com's position is that it is okay for challenged judges to declare themselves unbiased. Res Com is incorrect. On its face, it is illogical and unreasonable to permit a judge challenged for bias decide if they are biased. This loophole in the law undermines judicial credibility and public confidence in our courts. I polled people in their twenties and thirties and they could not believe that there was a law that permitted a judge to declare themselves unbiased. They called it "insane." They said, "you're kidding," and "that doesn't happen, does it?" Those people are right. It makes no sense to allow a challenged judge decide if they are biased.
2. Next, Res Com claims that this is not a problem. There is no evidence to support that position. For two consecutive years CCBA delegates voted in favor of this change in the law, after many delegates and one witness lined up to say that this was a problem and that judges are, in fact, declaring themselves unbiased or effectively declaring themselves unbiased. Res Com has disregarded the voices of all of those Delegates who publicly supported this change. I incorporate here all statements of those Delegates in 2018 and 2019 which said that is was a problem. Additionally, I regularly get communications from lawyers and litigants throughout the state of California who are concerned that judges are declaring themselves unbiased with this loophole. So let's fix it now.
3. Next, Res Com claims that this resolution will "delay" cases. A petition to DQ the judge will go to another judge who will decide the issue. There will be little or no delay. Even assuming for the sake of discussion that there was a short delay, i.e., days to get the motion to a neutral judge, that short delay is worth it to preserve the appearance of fairness in our justice system, and stop undermining judicial credibility and public confidence in our courts.
4. Res Com contends that this resolution eliminates the ability to strike a petition to DQ a judge which is facially meritless or untimely. A neutral judge can strike it as facially meritless or untimely.
5. Res Com contends that the legislature has "considered this framework on numerous occasions" and does not want to make the change. There is nothing to support that statement.
6. Res Com claims "numerous cases have interpreted the framework for judicial disqualification" and found no vagueness. No cases have interpreted the change proposed in this resolution. Res Com cites *Briggs*, bit it is not a 170.4 case. It deals with 170.6, which is a different law. Res Com also cites *Panah*. *Panah* is a heinous death penalty case and it does not address 170.4's framework. It merely recites 170.3 and 170.4 fleetingly in a footnote in this lengthy case. Res Com also cites *Urias*, and that too is not applicable. It does not find or even comment that the 170.4 process is workable or proper. *Urias* is not applicable. It holds that a judge's failure to respond to or strike an allegedly untimely and or legally insufficient statement of disqualification equates to a consent for disqualification under 170.3.
7. Res Com contends that parties are not without remedies. Although there is a remedy, it is a writ process that are extremely difficult to win. The losing party can take a writ and they have, I believe, 10 days to do that. One, it is extremely difficult for most people to file a writ in 10 days. Two, most people cannot afford to hire a lawyer to complete and file a writ. Three, 95%

of writs are denied. In reality, if you file a DQ Petition and the challenged judge decides that he or she is not biased, you are stuck with that judge and that judge will almost surely *retaliate*.

8. Res Com's contention that this resolution would have "profound" implications for judicial economy is also factually incorrect and unsupported. The DQ petition would be sent to a neutral judge. There is no extra expense to do that. It costs the taxpayers the same amount of money if Judge A or Judge B decides the DQ petition. The state of California should relinquish the hackneyed excuse that judges do not subvert the law to stay on cases. It happens throughout the state of California. Claiming it's not a problem will not change history. It is a problem. On its face, it is a problem. Turning a blind eye will not solve the problem. On its face it is a terrible law and it is time to change it. There are plenty of potential situations for judges to have conflicts of interest and it is time to face reality and change this law. There is nothing more important to the survival of our justice system than the appearance of impartiality. If doing something different, disruptive and positive for our justice system appeals to you, then delete the loophole in 170.4(b) and vote in favor of resolution 01-01-2020.

SDCBA

A challenged judge should not be ruling on her disqualifications. It is just common sense that no one, even a judge, can be objective when their interests or reputation are at issue. The effect of this resolution would be that disqualification would be referred to another judge for decision. ResCom, however, opposes this very reasonable resolution, contending that it would have "profound implications for judicial economy, trial management and operation," and also that it would encourage more gamesmanship. However, ResCom's reasons are speculative and not compelling.

There is no reason to conclude that another judge would spend more resources resolving a question of bias about a challenge to a fellow judge than the challenged judge would in ruling about herself. Arguably, a challenged judge could, in an overabundance of caution, expend considerably more time and effort to ensure a strong justification from a claim of bias, than would another judge deciding for her, because that other judge would be more dispassionate and more objective, and thereby more efficient.

Similarly, regarding gamesmanship, it is likely there would be ***less*** opportunity for gamesmanship because the decision would be by a currently-unknown judge versus the challenged judge, whose predilections in such matters is known and hence, whose decision might be predictable. When the matter is decided by someone who can be objective, it is more likely to be decided on the merits, and not gamesmanship.

The right to justice is predicated on getting an unbiased judge. This resolution would better ensure that justice would be done.

RESOLUTION 02-01-2020

WRITTEN ARGUMENTS IN SUPPORT

SDCBA

I support this Resolution, as amended by SDCBA, because all candidates in Homeowner election, should be required have the same qualifications, without regard as to whether they were nominated candidate or they are a write-in candidate.

Presently, there is a nonsensical loop-hole in the statutes that allows someone who is unqualified to be nominated to run for a board seat can nevertheless run for a board seat as a write-in candidate. This doesn't make any sense because the obvious intent of SB323 in having qualifications at all is to ensure that whoever might be elected is qualified to serve. How that person is elected, either though nomination or write-in, is and should be immaterial. A prospective candidate cannot overcome their lack of qualifications by running as a write-in.

As originally proposed, this Resolution, addition to imposing the qualifications on write-in candidates as nominees, also seeks to shorten the timeline for HOA elections. ResCom disapproved this Resolution but only discussed possible problems resulting from shortening the election timeline. ResCom did not say or even mention that it disapproved based on the Resolution's other goal of extending qualifications to write-in candidates.

The friendly amendment pares down the Resolution leaving just those changes which were not objected to by ResCom. Specifically, the friendly amendment only retains those proposed changes to Civ. C. §5105(f), lines 76-81 of the Resolution, dealing with qualifications for write-in candidates. Every other change, i.e., everything objected to by ResCom, is deleted.

The Resolution, as amended, would further the intent of SB323, which was ensure the democratic function of HOA elections are preserved by preventing unscrupulous boards undermining the election of qualified candidates by running unqualified write-in candidates. It is unfair and a violation of the principles of equal protection that a nominated candidate must meet the qualifications set by statute and the governing documents, but not a write-in candidate.

For these reasons I urge that all delegates approve of Resolution 02-01-2020, per the proposed amendment.

RESOLUTION 03-01-2020

WRITTEN ARGUMENTS IN SUPPORT

LACBA

ResCom's disapproval is that this resolution will not broaden the prohibition on using police reports, and would hamper defendants in admitting police reports. The author has already agreed to accept a friendly amendment that would address the former, and the latter is a small price to pay to end what current events have demonstrated so acutely to be a fiction: that a police report is likely to be truthful and accurate simply because it is written by a police officer.

Police officers lie. Those lies are memorialized in police reports. Those reports become "the truth." But they are not the truth. Dash cams, body-worn video, and recordings by other citizens have demonstrated that these lies occur on a daily basis. The LAPD is no longer using its CalGangs database because they discovered that records were routinely falsified and individuals were labeled gang members who were not. Police reports are one version of an event. There is nothing that makes them more reliable – or less likely to be false – than the statements of a civilian witness, whose written account of what occurred would never be admissible in a criminal proceeding. Police officers should be treated no differently than those civilian witnesses. That is why this resolution is needed.

In terms of the resolution not affecting resentencing proceedings or criminal proceedings not under the Penal Code, the author has already agreed to accept a friendly amendment changing the language to address that issue. First, while resentencing hearings are in fact part of the "criminal case," the amendment would change the language from "criminal case" to "criminal proceeding" to avoid any ambiguity on that point. Second, the amendment would take out the specific reference to the Penal Code at the exclusion of Vehicle Code, Health and Safety Code, etc. The language amending both of these is below.

ResCom is correct that this resolution does not change the law regarding reliable hearsay at probation and parole hearings. However, again as recent events have made abundantly clear, there is nothing inherently reliable about police reports. This resolution prevents the courts from instead falling back on the business records exception to admit them, as occurred in *Hall* in the resentencing context. In addition, the author has agreed to a friendly amendment to specify that police reports are not admissible in any criminal proceeding or civil commitment merely because they are deemed reliable. (See below.)

Finally, in the SVP context, Welfare and Institutions Code section 6600, subdivision (a)(3) provides a hearsay exception for any documentary evidence regarding the qualifying offense(s). This clearly includes police reports. However, contrary to ResCom's claim, this is not the "only topic for which they are likely to be offered." Rather, it is incredibly common for evaluators to rely on conduct that did not result in a conviction or did not result in a conviction for a qualifying offense. There is no hearsay exception for those police reports. Given *Sanchez* and its progeny, an expert in an SVP case can no longer discuss that prior alleged conduct unless it has been

proved by admissible evidence or is subject to a hearsay exception. This resolution would prevent the use of the business records exception to admit those underlying police reports.

Below is the modified statutory language from the resolution, with friendly amendments:

§ 1271

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business, but not including, in a criminal proceeding or civil commitment, a police report;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(e) Police reports are not admissible in any criminal proceeding or civil commitment merely because they are deemed reliable.

§ 1280

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee, but not including, in a criminal proceeding or civil commitment, a police report.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(d) Police reports are not admissible in any criminal proceeding or civil commitment merely because they are deemed reliable.

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

RESOLUTION 04-01-2020

WRITTEN ARGUMENTS IN SUPPORT

LACBA

I would respectfully suggest that Rescom's current analysis is incomplete. The analysis suggests disapproval because the resolution would "allow a civil compromise for property damage to preclude criminal prosecution for the offense of leaving the scene of an accident." The analysis, however, overlooks three things:

First, to the extent that the analysis suggests that civil compromise is inappropriate in the criminal complaint context, California law *already* allows the alleged victim of a low-level property offense to accept a civil compromise in lieu of prosecution, with the approval of a judge. Specifically, for more than 150 years, California's Penal Code 1377 has allowed judges to approve civil compromises where the alleged victim wants to settle the case. Use of this statute allows courts to quickly compensate victims and resolve low level property-damage related disputes without requiring courts, victims, defendants, witnesses, and taxpayers to go through the cost, inefficiency, and harm of the criminal court process. This is especially true now, where any appearance in court includes a corresponding risk of infection to all participants.

Second, until very recently, section 1377 was predominantly used to settle hit and run cases, that is, cases where the defendant is accused of being in an accident (no matter how minor and whether at fault or not) and then leaving without exchanging information. Sometimes the judge approves the civil compromise because the case is weak and sometimes because it is in the interest of both the alleged victim and the court system to have the case processed and the victim be paid quickly, rather than waiting months for an uncertain outcome. The application of the statute to hit and runs changed not because the legislature believed that it was inefficient or undesirable, but because a single panel of the court of appeal claimed (despite 150 years of contrary precedent) that the statute did not apply to accusations of hit and run.

Finally, the analysis overlooks that refusing to apply the compromise statute in this context hurts the alleged victim as well as the defendant and taxpayer. Under the statute, a civil compromise cannot be approved by the judge unless the alleged victim supports the civil compromise. Thus, it is only when the alleged victim *wants* to settle that a compromise can occur. Refusing to allow a civil compromise means that the wishes of the alleged victim are not respected and that, instead, the alleged victim will be required to come to court (thereby missing work/childcare/risking infection) as the criminal case continues against their will. The court system has enough trouble handling serious cases where a victim *wants* prosecution to focus time, energy, and scarce resources pursuing a minor prosecution where the victim has been compensated for their loss and does not wish to proceed.

In short, this resolution does not call for anything new or untested, it calls for the restoration of the same civil compromise system that has been successfully used in California for more than a century and a half. Especially now, as our court system faces pandemic related case backlog and funding cuts, California cannot afford to ignore proven alternatives in favor of the deeply flawed and deeply slow "traditional" criminal system.

RESOLUTION 06-04-2020

WRITTEN ARGUMENTS IN SUPPORT

BALIF

This resolution provides for an important framework for handling the homelessness crisis in California. While this resolution may be directed at unhoused persons, the rights, immunities and framework provided apply to all people. This resolution is particularly prescient given the death of George Floyd, the black lives matter movement, the global pandemic, wildfires and ongoing racist behavior by police forces against people of color. Indeed, the only identify factor police may use to determine if a person is homeless is the color of their skin and other outward appearance. Here, the rights enumerated by this resolution provide safety and a framework to all Californians to provide fair and equitable solutions to homelessness.

In September 2018, the Ninth Circuit in *Martin et al v City of Boise*, 902 F.3d 1031(9th Cir. 2018) held that, "As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter," *Id*. at 1048. Currently, counties are having difficulty applying the requirements of *Martin* due to a lack of guidance by the state. Los Angeles City Attorney, Mike Feuer said, "we agree with the central tenet of Boise that no one should be susceptible to punishment for sleeping on a sidewalk at night if there's no alternative shelter at that point," he continues, "But the rationale sweeps too broadly ... It makes the opinion unclear and, therefore, the opinion raises more issues than are resolved. And so it leaves jurisdictions like us without the certainty that we need." CCBA has the opportunity to provide guidance to local municipalities which are struggling to apply the tenets of *Martin*.

Res Com alleges that "unhoused persons currently can (and do) bring civil rights suits under 42 U.S.C. § 1983, and the Ninth Circuit has been receptive to those actions. (See, e.g., *Lavan v. City of Los Angeles* (9th Cir. 2012) 693 F.3d 1022, cert. denied June 24, 2013; see also *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584.)" While the Ninth Circuit may be receptive to suits under 42 USC 1983, only EIGHT of these cases have been brought since 2012. Also, overlooked by Res Com in this argument, are issues that inhibit the ability for homeless individuals to bring such a suit, including: locating a homeless individual, finding counsel to represent them, assessing damages, and/or providing identifying documentation. Further, if this case were to be taken pro per, the requirements to file are financial burdensome as is the process of filing suit in federal district court. While there may be the opportunity to file "In Forma Pauperis" to waive fees for filing, the process is extremely difficulty for a person who lacks legal support, a permanent address and/or identifying documentation.

Ultimately, this resolution provides a framework and a starting point for the state of California to address homelessness. This resolution is the only one advanced by any CCBA organization to address homelessness and now is the opportune time to provide some guidance to the legislature.

RESOLUTION 07-02-2020

WRITTEN ARGUMENTS IN SUPPORT

NLGSF

The disapproval recommendation concludes the proposed statute "fails to create the strict liability it seeks to create" but gives no clue what more is needed to make the fatal shooting of an unarmed, non-threatening person compensable as the proposed bill unambiguously does. More importantly, the recommendation contains no discussion of whether making such fatalities compensable as a matter of strict liability public policy is desirable. These recurring incidents are understandably profoundly disturbing and produce troubled and often dangerous protests expressing frustration at excess force resulting in unnecessary death. Presently, such deaths are not compensable as a matter of law and they certainly ought to be in a just society. Agency strict liability is a just solution.

The disapproval recommendation does not account for or refute the many examples in our proposal of firearm fatalities that occur without wrongful conduct by an individual law enforcement officer such as panic, mistaken judgment, or an unintentional weapon discharge. The discussion of the benefits capped at $70,000 under California Victims Compensation law is not relevant because the proposed bill does not treat unarmed, non-threatening persons fatally shot by law enforcement as crime victims.

Orange County Bar Association opposition insists that law officer wrongdoing must be proven in all instances of unnecessary fatal shootings and similarly fails to account for or refute the many examples in our proposal of firearm fatalities that occur without wrongful conduct by an individual law enforcement officer such as panic, mistaken judgment, or an unintentional weapon discharge. Why subject those officers

RESOLUTION 09-02-2020

WRITTEN ARGUMENTS IN SUPPORT

SDCBA

Historically, law enforcement used provisions such as Penal Code section 647 to engage in clandestine surveillance targeting homosexual men in public restrooms. Many public loitering laws were adopted with the specific intent to allow law enforcement to target homosexual men in public. Public loitering laws have historically been applied in a discriminatory manner to single out one segment of the population – homosexual men – based on their sexual orientation. In today's environment, non-gender conforming people and the homeless are similarly vulnerable to law enforcement activity to enforce this statute.

The California loitering statute should not remain on the books because it is a painful reminder of a time of considerable discrimination against and law enforcement harassment of homosexual men in California. From the 1960s through the 1990s, California law enforcement used the loitering statute to entrap homosexual men in public restrooms. Plainclothes officers commonly elicited indecent proposals for sex from homosexual male targets leading to misdemeanor charges under the loitering statute. Further, clandestine surveillance purporting to enforce the loitering statute was often used to charge homosexual men with the far greater crime of sodomy. Importantly, repealing the loitering statute will not allow sexual acts in public restrooms to go unpunished. Instead, the loitering statute merely prohibits the conduct of loitering "in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful acts." Other provisions of the Penal Code make sexual acts in a public restroom unlawful.