

## RESOLUTION 06-01-2020

### DIGEST

CCBA: Procedure for Delegations to Submit Suggested Amendments and Statements in Support.  
Amends CCBA Rules of Operation and Procedure, article 2, sections 10-12 to allow delegations to submit suggested amendments and statements in support in advance of the Conference.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends CCBA Rules of Operation and Procedure, article 2, sections 10-12 to allow delegations to submit suggested amendments and statements in support in advance of the Conference. This resolution should be approved in principle because allowing delegations to suggest amendments early in the process would give other delegations and individual delegates more time to evaluate the amendments than when amendments are proposed on the floor of the Conference.

Currently, the CCBA Rules of Operation and Procedure allow delegations and other designated groups to submit counterarguments of 500 or fewer words to resolutions in advance of the annual Conference, but do not provide a mechanism for delegations or other designated groups to submit either statements in support of resolutions or proposed amendments to resolutions in advance of the annual Conference. (Rules Op. & Proc., art. 2, § 11.) The term “counterarguments” is not defined. (*Ibid.*) Further, the Rules of Operation and Procedure discuss amendment of resolutions only in article IV, Conference Floor Procedures.

This resolution would define the term “counterarguments” to mean “arguments against the resolution.” It would also allow delegations or other designated groups to submit statements in support of resolutions, limited to 150 or fewer words, by a designated date in advance of the annual Conference. It would also allow delegations and other designated groups to submit proposed amendments to resolutions, limited to 250 or fewer words, by a designated date in advance of the annual Conference.

The resolution would allow delegations and individual delegates to have adequate time to consider proposed amendments to resolutions. Under the current system, delegates often receive the text of proposed amendments on the same day the resolution is called up for debate at the annual Conference. This does not allow for the kind of thoughtful evaluation of statutory language that delegations are able to do at their annual caucuses. Moreover, it allows no time for the Resolutions Committee to evaluate the proposed amendments. By allowing amendments to be submitted before the Resolutions Committee prepares its reports, and before the delegations hold their caucuses, the resolution would allow delegates to devote the same time and effort to analyzing amendments as they now do for resolutions as initially submitted.

The resolution would also help to make it clear that “counterarguments” need to be arguments against resolutions. Every year, CCBA receives a number of statements designated as counterarguments to resolutions that are actually statements in support of resolutions. The provisions of this resolution allowing statements in support, and defining the term “counterarguments” would provide helpful clarification regarding a delegation or other designated group’s position on a resolution.

Therefore, this resolution should be approved in principle.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that the Board of Directors amend CCBA Rules of Operation & Procedure, article 2, sections 10, 11, and 12, to read as follows:

1 Article II

2 [Sections 1 through 9 remain unchanged.]

3 10. Manner of Submission: All resolutions, reports, ~~and~~ counterarguments, suggested  
4 amendments, and statements of support, shall be submitted electronically in the form prescribed  
5 by the Board and published on the CCBA website.

6 11. (a) Counterarguments: Counterarguments, which shall be defined as arguments  
7 against the resolution, shall not exceed 500 words. Counterarguments must be received by the  
8 Conference Chair and the Chair of Resolutions Committee no later than the date set for their  
9 receipt as published at the time of the preceding regular meeting. Counterarguments may be filed  
10 by any Association entitled to certify delegates to the Conference, ten members of the State Bar,  
11 any Section of the State Bar, the Board of Directors of the CCBA, and any other party authorized  
12 by the Board of Directors of the CCBA.

13 (b) Suggested Amendments: Suggested Amendments, which shall be defined as  
14 suggestions to improve the resolution, shall not exceed 250 words. Suggested Amendments need  
15 not be proposed language, but the ideas. They may include the idea(s) and the reasoning behind  
16 it/them. Suggested Amendments must be received by the Conference Chair and the Chair of  
17 Resolutions Committee no later than the date set for their receipt as published at the time of the  
18 preceding regular meeting. Suggested Amendments may be filed by any Association entitled to  
19 certify delegates to the Conference, ten members of the State Bar, any Section of the State Bar,  
20 the Board of Directors of the CCBA, and any other party authorized by the Board of Directors of  
21 the CCBA.

22 (c) Statements of Support: Statements of Support, which shall be defined as arguments  
23 for the resolution, shall not exceed 150 words. Statements of Support shall only include insights  
24 or arguments not mentioned in the proponent’s statement of reasons. Statements of Support must  
25 be received by the Conference Chair and the Chair of Resolutions Committee no later than the  
26 date set for their receipt as published at the time of the preceding regular meeting. Statements of  
27 Support may be filed by any Association entitled to certify delegates to the Conference, ten  
28 members of the State Bar, any Section of the State Bar, the Board of Directors of the CCBA, and  
29 any other party authorized by the Board of Directors of the CCBA.

30 12. Publication of Resolutions: As soon as possible after the Resolutions Committee files  
31 its reports, ~~the~~ all the proposed resolutions, together with all counterarguments, suggested

32 amendments, statements of support, and the reports of the Resolutions Committee shall be posted  
33 to the website. Electronic copies and paper copies of the resolutions, counterarguments and  
34 report may also be made available for purchase at a cost and in a manner to be published to the  
35 website.

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

**PROPONENT:** San Diego County Bar Association

### **STATEMENT OF REASONS**

The Problem: Currently, the only official option delegations have to publish when it comes to other delegations' resolutions is a counterargument. Counterarguments are valuable, but not the only useful information that delegations can offer. Sometimes counterarguments involve suggested amendments, which are not really counterarguments but ideas on how to make the resolution better and should not have the same heading. Similarly, delegations cannot publish reasons to support a resolution that might have been overlooked by the proponent but might be valuable for other delegations to consider.

The Solution: This resolution allows delegations to submit suggested amendments and statements of support for resolutions, enabling them to submit other useful information for delegations to consider.

### **IMPACT STATEMENT**

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

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

### **AUTHOR AND/OR PERMANENT CONTACT:**

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**RESPONSIBLE FLOOR DELEGATE:** Ben Rudin

### **COUNTERARGUMENTS AND COMMENTS** **BY BAR ASSOCIATIONS AND CLA SECTIONS**

#### **OCBA**

The Orange County Bar Association opposes this resolution which seeks to add to the CCBA Rules of Operation and Procedure, Article II, Section 11(b) "Suggested Amendments." The proponent offers that suggestions "need not be proposed language, but the ideas." Clearly this is not workable or advisable for the Conference for several reasons.

First, the Conference is not merely a debating society. As lawyers, we are aware that words matter, particularly when they are the words to a statute. Even the best well-intentioned ideas can

have opposite results and unintended consequences due to poor draftsmanship. The work of the Conference is not just the proliferation of ideas but the creation of precision language which turns those ideas into statutory law.

Second, recent experience has shown that major hurried changes to resolutions on the Conference floor, while gaining the emotional support of a majority of delegates and their votes, has not resulted in a work product that CCBA can be proud of or that is ready for enactment by the Legislature. Our target audience, the California Legislature, expects and demands more from us as professionals. This resolution will not enhance the efficiency of the Conference or the quality of the final passed resolutions. In the end, the credibility of CCBA as an organization will be harmed in the eyes of the Legislature should this rule change be adopted.

## RESOLUTION 06-02-2020

### DIGEST

#### Courts: Elected Public Defenders

Amends California Constitution, article XI, section 1, to require the Legislature to provide for an elected public defender in each county.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution would amend California Constitution, article XI, section 1, to require the Legislature to provide for an elected public defender in each county. This resolution should be disapproved because it may lead to repeated and disruptive changes in leadership in public defender's offices, may result in the election of politicians who are overly influenced by special interests such as law enforcement, and is not appropriate for every county in California.

Currently, the California Constitution provides for an elected district attorney but not an elected public defender. Although the office of the public defender was originally envisioned as an elected position, in 1921 the Legislature opted to leave to the counties the decision whether to have a public defender, and whether to have that person be elected or appointed. (Brenner, *The California Public Defender: Its Origins, Evolution and Decline* (2010) Cal. Western L. Sch. <<http://scholarlycommons.law.cwsl.edu/fs/148>>.) California Government Code, section 27702, derived from that 1921 legislation, provides that the public defender may be elected or appointed. San Francisco is the only county with an elected public defender.

This resolution would amend the Constitution to add public defenders to the list of elected officials which each county must provide.

While there is concern that appointed public defenders are beholden to their Board of Supervisors, or other appointing body, and therefore do not strongly advocate for their clients, there is no basis to conclude that an elected public defender has more independence to give clients a robust defense. Rather, a public defender who must seek reelection may have less independence, particularly in counties where a candidate must please a small constituency who may not understand that every person, no matter how heinous the crime with which he or she is accused, is entitled to a strong and vigorous defense. Just as there have been recall elections against judges who make unpopular decisions, a constituency unhappy with a public defender's handling of specific cases may make him or her vulnerable to recall or defeat at the polls.

In 2016, twenty-five of California's fifty-eight counties voted for Donald Trump. ([https://en.wikipedia.org/wiki/2016\\_United\\_States\\_presidential\\_election\\_in\\_California#Statewide\\_results](https://en.wikipedia.org/wiki/2016_United_States_presidential_election_in_California#Statewide_results).) In those counties, an elected public defender might be more reluctant to push back against law enforcement than one who is appointed. As an example, in Florida, where public

defenders are elected, a candidate ran a campaign promising that his attorneys would not accuse police officers of lying. He won the endorsement of the police unions and, ultimately, the election. (<https://scholarship.law.missouri.edu/mlr>, at p. 821.) An appointed public defender, on the other hand, particularly one who has promoted through the ranks of the office, may be more committed to providing defendants -- especially publicly unpopular defendants -- with the vigorous defense that they are entitled to. Additionally, appointed public defenders can focus on ensuring their clients are represented, rather than taking time from their responsibilities to fundraise and advocate for reelection as elected public defenders must do.

Further, concerns regarding the appropriateness of having a public defender, and the independence of that official, will be different in each county and should not be addressed by a one-size-fits-all solution. A small county, such as Alpine County with its population of 1,129, has different political and budgetary concerns than Los Angeles County, which has a population of over ten million. ([https://www.california-demographics.com/counties\\_by\\_population](https://www.california-demographics.com/counties_by_population).) For some counties, it makes more sense to hire a contract attorney to serve in the role of public defender than to create a county office. This resolution would not only require every county to create, staff, and support that office, but also to take on the expenses of holding elections to fill the position. Allowing counties to determine the best procedures for selecting their own public defenders, allows flexibility that will promote justice within those communities.

Therefore, this resolution should be disapproved.

## **TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Article 11 of the California Constitution, section 1 to read as follows:

1 SEC. 1.

2 (a) The State is divided into counties which are legal subdivisions of the State. The  
3 Legislature shall prescribe uniform procedure for county formation, consolidation, and boundary  
4 change. Formation or consolidation requires approval by a majority of electors voting on the  
5 question in each affected county. A boundary change requires approval by the governing body of  
6 each affected county. No county seat shall be removed unless two-thirds of the qualified electors  
7 of the county, voting on the proposition at a general election, shall vote in favor of such  
8 removal. A proposition of removal shall not be submitted in the same county more than once in  
9 four years.

10 (b) The Legislature shall provide for county powers, an elected county sheriff, an elected  
11 district attorney, an elected public defender, an elected assessor, and an elected governing body  
12 in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing  
13 body shall prescribe by ordinance the compensation of its members, but the ordinance  
14 prescribing such compensation shall be subject to referendum. The Legislature or the governing  
15 body may provide for other officers whose compensation shall be prescribed by the governing  
16 body. The governing body shall provide for the number, compensation, tenure, and appointment  
17 of employees.

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

**PROPONENT:** 10 Members of the California Bar; Alicia M. Gámez, Dick Normington, Joachim Steinberg, Diana Passadori, James P. Lamping, James Brosnahan, Frank Z. Leidman, Dick Normington, Ciarán O'Sullivan, Jim Weixel, David Bigeleisen

## **STATEMENT OF REASONS**

The Problem: The untimely and tragic death of Jeff Adachi left a void where a great, elected Public Defender once stood in San Francisco, but his passing uncovered the little-understood fact that San Francisco is the only county with an elected Public Defender in the State of California.

Those of us lucky enough to live in a county with an elected public defender understand the value of an outspoken public voice for the defense. The office of the district attorney is charged with enforcing the laws on behalf of "the people." The public defender is charged with protecting the freedoms of the people accused of a crime. Yet, only San Francisco's public defender has an elected office that advocates for the defense of the people.

Our legal system is adversarial. Democracy requires strong advocacy on both sides of criminal justice in and out of court. After generations of one-sided emphasis on enforcement, we are now reaping the sour rewards of too great a reliance on unchallenged prosecution. Generations of implicit bias (if not outright racism) have led to habitual over-charging and an epidemic of over-incarceration.

In San Francisco, our elected public defender challenges those practices. Jeff Adachi's elected office gave him autonomy to pursue funding and equity. For example, when San Francisco's Crime Lab failed to disclose Brady violations, Jeff Adachi pressed for disclosure and thorough investigation. In the end, hundreds of convictions were thrown out.

Now, politicians regularly chart a political career through the office of the district attorney, but no parallel avenue exists for those seeking public office to advance through the office of the public defender. The result is an unbalanced political discourse skewed towards enforcement and away from rehabilitation and redemption. A political voice for the prosecution without an elected and vocal for the defense leads to disparities at every point in the system and impoverishes our democratic institutions.

An elected public defender is essential to enforce accountability from law enforcement, demand an adequate budget for the defense of the people when accused, and draw the public's attention to the role of the public defender in our civil society. (See generally, Benner, Laurence A., "The California Public Defender: Its Origins, Evolution and Decline" (2010). Faculty Scholarship. Paper 148. <http://scholarlycommons.law.cwsl.edu/fs/148>)

The Solution: Amending the California Constitution to provide for an elected public defender will foster for a balanced public discourse, provide a watchdog to guard against law enforcement excesses, ensure robust protection of the accused and the civil rights of the people, and restore public confidence in the institutions of criminal justice. An elected public defender is necessary for an independent advocate who will fight to ensure that every person accused and prosecuted will have a defense worthy of our constitution.

## **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

**IMPACT STATEMENT**

This resolution would affect Government Code sections 27700-27712 regarding the office of public defender.

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**RESPONSIBLE FLOOR DELEGATE:** Alicia M. Gámez

## RESOLUTION 06-03-2020

### DIGEST

#### Ballot Initiatives: Changes to Signature Requirements for Initiatives and Referenda

Amends the California Constitution, article II, sections 8 and 9, and Elections Code, section 9035 to change the signature requirements for referenda placed on the ballot.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends the California Constitution, article II, sections 8 and 9, and Elections Code, section 9035 to change the signature requirements for initiatives and referenda placed on the ballot. This resolution should be disapproved because it fails to demonstrate a problem, and the face of the resolution concedes that it may be incomplete.

California Constitution, article II, sections 8 and 9, and Elections Code, section 9035 currently provide a formula for determining the number of signatures needed to place initiatives and referenda on the ballot. In particular, the petition must be signed by five percent in the case of a referendum amending a statute, and eight percent in the case of a referendum amending the California Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

This resolution would change those numbers to 3.15 percent and five percent, respectively. This resolution would further change the basis of the measurement from the number of votes cast in the last gubernatorial election to the specified percentages of the total number of registered voters.

This resolution claims that the fluctuation in the required number of signatures presents a problem. However, the resolution fails to demonstrate that the fluctuation in the number of signatures required is significantly different from year-to-year such that it actually presents a problem. It also provides no explanation as to whether the resolution would make it easier or harder to get an initiative on the ballot or why the intended result would be a good thing.

This resolution should also be disapproved because the total number of registered voters in California fluctuates over time, just like the current measure of the number of votes cast in the last gubernatorial election, but the proposed statutory change fails to establish a fixed point upon which to measure the total number of voters. Without a fixed point in time to measure the total number of voters, and in turn the total number of signatures required, ballot authors, registrars, and the Secretary of State cannot ascertain just how many signatures are required. Is it a percentage of the total number of registered voters at the time the ballot initiative is circulated for signatures? Is it a percentage of the total number of registered voters at the time the signatures are submitted for verification? Therefore, in addition to failing to establish that there is a problem

to be corrected, the resolution would have the unintended consequence of creating ambiguity as to how many signatures are required in a particular year.

Also troubling is the fact that the resolution “*may* require additional statutory changes. Other statutes that mention the signature requirement as a % of gubernatorial votes *might* need changing. (Emphasis added.)” The fact that the resolution cannot identify which statutes would be affected means that it is facially incomplete.

Therefore, this resolution should be disapproved.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Constitution article II, sections 8 and 9, and Elections Code section 9035, to read as follows:

1 Art. II, § 8

2 (a) The initiative is the power of the electors to propose statutes and amendments to the  
3 Constitution and to adopt or reject them.

4 (b) An initiative measure may be proposed by presenting to the Secretary of State a  
5 petition that sets forth the text of the proposed statute or amendment to the Constitution and is  
6 certified to have been signed by electors equal in number to ~~5~~ 3.15 percent in the case of a  
7 statute, and ~~8~~ 5 percent in the case of an amendment to the Constitution, of ~~the votes~~ all electors  
8 in the State of California. ~~for all candidates for Governor at the last gubernatorial election.~~

9 (c) The Secretary of State shall then submit the measure at the next general election held  
10 at least 131 days after it qualifies or at any special statewide election held prior to that general  
11 election. The Governor may call a special statewide election for the measure.

12 (d) An initiative measure embracing more than one subject may not be submitted to the  
13 electors or have any effect.

14 (e) An initiative measure may not include or exclude any political subdivision of the State  
15 from the application or effect of its provisions based upon approval or disapproval of the  
16 initiative measure, or based upon the casting of a specified percentage of votes in favor of the  
17 measure, by the electors of that political subdivision.

18 (f) An initiative measure may not contain alternative or cumulative provisions wherein  
19 one or more of those provisions would become law depending upon the casting of a specified  
20 percentage of votes for or against the measure.

21

22 Art. II, § 9

23 (a) The referendum is the power of the electors to approve or reject statutes or parts of  
24 statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or  
25 appropriations for usual current expenses of the State.

26 (b) A referendum measure may be proposed by presenting to the Secretary of State,  
27 within 90 days after the enactment date of the statute, a petition certified to have been signed by  
28 electors equal in number to ~~5~~ 3.15 percent of all electors in the State of California ~~the votes for~~  
29 ~~all candidates for Governor at the last gubernatorial election~~, asking that the statute or part of it  
30 be submitted to the electors. In the case of a statute enacted by a bill passed by the Legislature on

31 or before the date the Legislature adjourns for a joint recess to reconvene in the second calendar  
32 year of the biennium of the legislative session, and in the possession of the Governor after that  
33 date, the petition may not be presented on or after January 1 next following the enactment date  
34 unless a copy of the petition is submitted to the Attorney General pursuant to subdivision (d) of  
35 Section 10 of Article II before January 1.

36 (c) The Secretary of State shall then submit the measure at the next general election held  
37 at least 31 days after it qualifies or at a special statewide election held prior to that general  
38 election. The Governor may call a special statewide election for the measure.

39  
40 § 9035

41 An initiative measure may be proposed by presenting to the Secretary of State a petition  
42 that sets forth the text of the proposed statute or amendment to the Constitution and is certified to  
43 have been signed by registered voters equal in number to 5 3.15 percent in the case of a statute,  
44 and 8 5 percent in the case of an amendment to the Constitution, of the total registered voters in  
45 the State of California ~~for all candidates for President Governor at the last presidential~~  
46 ~~gubernatorial election~~ preceding the issuance of the circulating title and summary for the  
47 initiative measure by the Attorney General.

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

**PROPONENT:** San Diego County Bar Associations

### **STATEMENT OF REASONS**

The Problem: The required number of signatures to qualify initiatives and referenda for the ballot has fluctuated dramatically. Most recently, 2014 saw a record low requirement of 3.3% of registered voters for constitutional amendments, and 2.1% for statutes and referenda. Even though the total registered voters had increased since the previous calculation, the total requirement went down over 200,000 for amendments and almost 140,000 for statutes and referenda. That was due to the 2014 gubernatorial election having the lowest percentage of turnout in a regularly-scheduled election in California at least since 1914, even lower than the 2002 election of Gray Davis vs. Bill Simon, despite 2.5 million more registered voters. After 2018 had the highest percentage turnout in a mid-term election since 1982 (John Cox, 2018 runner-up, received more votes than Jerry Brown did in 2014), the signature requirements shot up to 5.1% of registered voters for amendments and 3.2% for statutes and referenda. Those requirements are actually only a little higher than the historical average.

This fluctuation in signature requirements is unnecessary and preventable. The pool of available signatories is the number of registered voters, so the requirement ought to be a set percentage of that rather than how many of them actually voted in the last gubernatorial election. Furthermore, although we have not experienced this yet, we may end up with two candidates for Governor of the same party due to the top-two primary, just like we have for the U.S. Senate the last two times. If that happens, the signature requirements are likely to drop significantly due to many members of the party not represented skipping that race. That can be demonstrated with the last election, in which the gubernatorial election had over 1.3 million more voters than the Senate election.

The Solution: Since the initiative process was enacted in California, the median signature requirements relative to registered voters have been ~5.03% of registered voters for amendments and ~3.15% for statutes and referenda. Taking those historical figures, this resolution makes the requirement a consistent 5% of registered voters for constitutional amendments, and 3.15% for statutes and referenda. Some years would mean less than otherwise, and some would mean more, but it would be much more consistent and predictable. The signature requirements would be a little less right now with this in effect, and the vast dropoff in 2014 and any significant drop-offs or increases in the future would be prevented unless the total registered voters drastically changes.

**IMPACT STATEMENT**

This resolution may require additional statutory changes. Other statutes that mention the signature requirement as a % of gubernatorial votes might need changing.

**CURRENT OR PRIOR RELATED LEGISLATION**

None known

**AUTHOR AND/OR PERMANENT CONTACT:**

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**RESPONSIBLE FLOOR DELEGATE:** Ben Rudin

## RESOLUTION 06-04-2020

### DIGEST

#### Civil Rights: Rights for Unhoused Persons

Adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85 to codify unhoused persons' rights to use public spaces, due process, and civil claims.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

Nearly identical to Resolutions 12-11-2019, 09-01-2017 and 02-07-2018, which were disapproved, and similar to Resolution 05-06-2016, which was disapproved.

#### Reasons:

This resolution adds Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85 to codify unhoused persons' rights to use public spaces, due process, and civil claims. This resolution should be disapproved because the exemptions and rights set out in the resolution are overly expansive, would undermine the ability of others to access clean and non-threatening public spaces, would jeopardize the economic vitality of local businesses, and place unreasonable financial and administrative burdens on municipalities.

There is no current California law that provides the types of rights this resolution proposes. However, 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.)

This long and complex resolution proposes a new statutory scheme that involves new laws that fall into the following 6 categories:

1. statements of legislative intent (new Sections 52.80; 52.83, subd. (a));
2. definitions of terms for this new statutory scheme (new Section 52.81, subd. (a)-(o));
3. a list of civil rights to be accorded to all unhoused person, with a requirement that municipalities post this list under the title of "HOMELESS PERSON'S BILL OF RIGHTS" and provide copies to the public upon request (new Section 52.82, subd. (a)-(b));
4. the rights of unhoused persons to use and reside on public property (new Section 52.83, subd. (a)-(d));
5. the rights of unhoused persons to due process related to the governmental entities taking away the possessions of unhoused persons and/or moving such persons out of the areas in which they are living (new Section 52.84(a)-(c)); and
6. the rights of unhoused persons to a civil claim with a prevailing party attorney's fee provision and per-violation penalties if any of the rights set out in this proposed statutory scheme are violated (new Section 53.85).

Under the resolution, unhoused persons are entitled to broad rights and immunities. They would not be subject to criminal, civil or administrative penalties for sleeping, eating, resting or engaging in religious practices on public property. Municipalities would not be permitted to remove them or their belongings unless (a) adequate housing (including room for every household member, handicap access, and no restrictions based on criminal history or substance abuse) is provided; and (b) an individualized assessment for each person being removed is conducted. Further, prior to removal, a municipality would have to provide at least five days written notice (resolutions from past years on this topic have included a 30-day notice period, i.e. Resolution 12-11-2019). If an unhoused person is not present at the time of removal, the municipality would have to document that the person received actual notice as well as photograph and catalogue any property removed. Even where removal is based on valid safety concerns, a municipality would have to make every attempt to clean up the hazard (without removal) or provide the persons responsible for creating the hazardous condition the means and opportunity to clean up/remedy the hazard, and ultimately provide alternative locations for those removed. The resolution further provides a civil cause of action for any violation of these rights, allowing the plaintiff to recover a variety of damages, including restitution, actual, compensatory and exemplary damages, a statutory award of \$1,000 per violation, and reasonable attorney fees to the prevailing party.

This resolution provides an important framework for providing unhoused persons with some due process regarding their possessions and includes some provisions that would require local governmental agencies to abide by the Eighth Amendment of the United States Constitution. However, it should be disapproved because the proposed definitions of terms are overbroad and unclear, the expansion of civil liability that municipalities would face is unjustifiable, and the rights granted to unhoused persons are at the unfair expense of others.

While local governmental authorities often treat unhoused persons unfairly and target this population for mistreatment, the problem is not solved by legislation that harms residents, people who to commute to jobs from other cities, business owners and children and/or denies residents, commuters, visitors and children the safe use of parks, playgrounds and other public spaces. Instead, a proposal that is narrowly tailored to focus on the due process rights and Eight Amendment protections would serve to protect the unhoused, hold local governmental authorities accountable for their mistreatment of the unhoused, and not negatively impact others.

There have been several legislative measures providing for a “right to rest” proposed in California, none of which were as broad as this resolution, and none of which were successful. Assembly Bill 5 (2013-2014 Reg. Sess.), Senate Bill 608 (2015-2016 Reg. Sess.), and Senate Bill 876 (2015-2016 Reg. Sess.), all died at the committee level.

Therefore, this resolution should be disapproved.

## **TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 52.80, 52.81, 52.82, 52.83, 52.84, and 53.85, to read as follows:

1    § 52.80

2       There is created a Homeless Person’s Bill of Rights to guarantee that the rights, privacy  
3 and property of persons experiencing homeless are adequately safeguarded and protected under  
4 the laws of this state. The rights afforded persons experiencing homelessness to ensure that their  
5 person, privacy and property are safeguarded and protected, as set forth in subsection Sections  
6 52.82 and 52.83 below, are available only insofar as they are implemented in accordance with  
7 other parts of the general statutes, state rules and regulations, federal law, the state Constitution  
8 and the United States Constitution.

9  
10   § 52. 81

11       For purposes of this part, the following definitions shall apply:

12       (a) “Adequate and accessible housing” means, at a minimum, living space:

13           (1) Where a person has both the right to reside and keep belongings on an ongoing,  
14 long term basis at any time of day or night;

15           (2) That meets living standards commonly acceptable to society, and includes safety  
16 from other individuals, the elements, and exposure to disease or filth, room to move about,  
17 storage space for belongings, the ability to maintain current household composition,  
18 accommodation for physical or mental limitations, and access to hygiene facilities; and

19           (3) That is accessible to the individual who is or will be living in that space, including  
20 that the individual must not be barred due to criminal background, treatment status, ability to  
21 show identification, household composition, physical or mental limitations, substance use  
22 disorder, or otherwise.

23       (b) “Hazardous condition” means a condition that creates an imminent public health or  
24 safety harm. The public health or safety harm must be created by the presence of  
25 a specific condition and not a generalized harm common to all who are unsheltered.

26       (c) “Homeless person(s)” and “person(s) experiencing homelessness” mean those  
27 individuals or members of families who lack a fixed, regular, and adequate nighttime residence,  
28 including people defined as homeless using the criteria established in the Homeless Emergency  
29 Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.

30       (d) “Impoundment” means any action by the municipality to remove or tow a vehicle  
31 used as a residence without the express approval of the vehicle’s owner.

32       (e) “Municipality” means any local jurisdiction and any of its contractors, agents,  
33 employees or partners.

34       (f) “Outdoor living space” means any outdoor public space that homeless individual(s)  
35 use to live or sleep in, as evidenced by the presence of a sleeping bag, shelter, tarp, tent,  
36 bed, cardboard, metal sheeting, furniture, or other objects demonstrating an intent to live in the  
37 location for one or more days, whether or not continuously.

38       (g) “Personal property” means any item which an individual owns and which might have  
39 value or use to that individual, regardless of whether the item is left unattended for temporary  
40 periods of time or whether it has monetary value. This does not include weapons other than  
41 knives, contraband, items which pose an obvious health or safety risk, or are clearly  
42 contaminated in a way which a reasonable person would conclude the items should not be stored  
43 with other property. Personal property includes non-rigid materials used for shelter, such as tents  
44 and tarps, but does not include building materials, such as wood products, metal, or rigid plastics

45 (h) “Public space” means any property that is owned by a government entity or any  
46 property upon which there is an easement for public use and that is held open to the public,  
47 including, but not limited to, plazas, courtyards, parking lots, sidewalks, public transportation  
48 facilities and services, public buildings, shopping centers, and parks.

49 (i) “Qualified outreach program” means a social service program with  
50 adequate oversight, training, and clinical supervision to conduct sufficient individualized  
51 outreach, and that the municipality contracts with or provides. Such programs shall have an  
52 established record of providing sustained, equitable, person-centered care, and staff providing  
53 services shall have training in the following areas: working with people with behavioral health  
54 issues including substance use disorder, mental disorders, or both; trauma-informed care,  
55 including people who have experienced or are experiencing gender- and gender-identity-based  
56 violence and violence based on sexuality; outreach, assessment, and engagement; harm reduction  
57 practices (including but not limited to safe needle exchange, use, and disposal, carrying and  
58 dispensing Narcan, informing individuals of rights (Good Samaritan Law) and treatment options  
59 (Buprenorphine and Methadone); cultural competence; confidentiality and grievance procedures;  
60 and may include peer coaches that include adequate oversight and clinical supervision.

61 (j) “Removal” means action to remove people, camps, structures, or personal  
62 property located at outdoor living spaces.

63 (k) “Rest” means the state of not moving, holding certain postures that include, but are  
64 not limited to, sitting, standing, leaning, kneeling, squatting, sleeping, or lying.

65 (l) “Sufficient individualized outreach” means individualized, person-centered  
66 outreach that responds to the unique needs of each person. Sufficient outreach involves:  
67 (m) Making an individual assessment of each affected individual, which includes, but is not  
68 limited to, considerations of household composition; disability; mental illness or other mental or  
69 emotional capacity limitations; substance use or treatment status; geographic needs, such as  
70 proximity to personal support, healthcare, employment and other geographic considerations; and  
71 ongoing support needs;

72 (1) Identifying and offering adequate and accessible housing, if available, based on this  
73 individual assessment; and

74 (2) If an offer is accepted, providing assistance with both the administrative and logistical  
75 aspects of moving into the identified adequate and accessible housing.

76 (n) “Unsafe location” means a public space that poses imminent danger of harm to  
77 individuals residing in that location or to the general public. The danger of harm must be created  
78 by the existence of the specific outdoor living space at that particular location and not  
79 generalized danger of harm common to all who are unsheltered. Unsafe locations include, but are  
80 not limited to, rights-of-way in industrial areas actively used for transporting people or goods  
81 and for providing ingress and egress to real property.

82 (o) “Unsuitable location” means a public space that has a specific public use that is  
83 substantially impeded as a result of an outdoor living space in that location. Improved areas of  
84 Municipality parks, including restored natural areas or natural areas actively undergoing  
85 restoration, and public sidewalks in front of houses and dwelling units are per se unsuitable.

86  
87 § 52.82.

88 (a) Each homeless person in this state has the right to:

89 (1) Free movement without restraint;

90 (2) Have equal opportunities for employment;

- 91 (3) Receive emergency medical care;  
92 (4) Register to vote and to vote;  
93 (5) Have personal information protected;  
94 (6) Have a reasonable expectation of privacy in his or her personal property; and  
95 (7) Receive equal treatment by state and municipal agencies.

96 (b) Each municipality shall conspicuously post in the usual location for municipal  
97 notices a notice entitled "HOMELESS PERSON'S BILL OF RIGHTS" that contains the text set  
98 forth in subsection (a) of this section. Each municipality shall make copies of such notice  
99 available to members of the public upon request.

100  
101 § 52.83.

102 (a) It is the intent of the Legislature that this section be interpreted broadly so as to  
103 prohibit policies or practices that are discriminatory in either their purpose or effect.

104 (b) Persons experiencing homelessness shall be permitted to use public space in the ways  
105 described in this section at any time that the public space is open to the public without  
106 discrimination based upon their housing status, and without being subject to criminal, civil, or  
107 administrative penalties. Permitted use of the public space include, but are not limited to, all of  
108 the following:

109 (1) Free movement without restraint.

110 (2) Sleeping or resting, and protecting oneself from the elements while sleeping or  
111 resting in a non-obstructive manner.

112 (3) Eating, sharing, accepting, or giving food.

113 (4) Praying, meditating, worshiping, or practicing religion.

114 (c) Nothing in this section shall prevent law enforcement from enforcing laws to protect  
115 the right of people to use the sidewalk pursuant to the Americans with Disabilities Act of  
116 1990 (42 U.S.C. Sec. 12101 et seq.).

117 (d) Nothing in this section shall prevent law enforcement from enforcing the Penal Code,  
118 except subdivision (e) of Section 647 of the Penal Code, so far as it prohibits rest.

119  
120 § 52.84.

121 (a) A municipality may respond appropriately to emergency situations such as fires,  
122 crimes, or medical crises as it normally would with outdoor living spaces. However, except as  
123 specified in (b) the municipality may undertake a removal or impoundment action only when the  
124 municipality has satisfied the following conditions:

125 (1) Adequate and accessible housing is available beginning at least 5 days before the time  
126 of removal or impoundment, to all individuals whose persons, personal possessions and/or  
127 vehicles are being removed or impounded.

128 (2) The affected individuals have been engaged with sufficient outreach over a period of  
129 not less than 5 days, to allow those interested to move voluntarily to adequate and accessible  
130 housing. Sufficient outreach involves, at a minimum: (1) making an individual assessment of  
131 each affected individual, which includes, but is not limited to, considerations of household  
132 composition; disability; pets, service and support animals, mental illness or other mental or  
133 emotional capacity limitations; substance use or treatment status; geographic needs, such as  
134 proximately to personal support, healthcare, employment and other geographic considerations;  
135 and ongoing support needs; (2) identifying and offering adequate and accessible housing based  
136 on this individual assessment; and (3) if an offer is accepted, providing assistance with both the

137 administrative and logistical aspects of moving into the identified adequate and accessible  
138 housing.

139 (3) The Municipality has provided written notice meeting the following requirements:

140 (A) The specific date and time the removal or impound will take place, which must  
141 not be fewer than seven (7) days from notice date;

142 (B) Explanation of the actions that will be taken during the removal or impoundment and  
143 how loss of personal property can be avoided;

144 (C) Information about where personal property will be safeguarded if seized during  
145 the removal or impoundment and how it can be retrieved after removal or impoundment;

146 (D) Contact information for the outreach organizations that will work with that site as  
147 specified in subsection (2) above; and

148 (E) A statement that adequate and accessible housing is available for all affected  
149 individuals.

150 (F) Notice must be provided in languages likely to be spoken by impacted individuals,  
151 and through methods capable of being understood by persons with physical and mental  
152 disabilities.

153 (G) Notice must be posted in a conspicuous location at the relevant outdoor living space  
154 or on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that  
155 location.

156 (b) If an outdoor living space or a vehicle used as a residence is in an unsafe or unsuitable  
157 location, or creates or contains a hazardous condition, the municipality may undertake a removal  
158 or impoundment action if conducted in accordance with the procedures set forth in this Section.

159 (1) Prior to conducting removal or impoundment actions based on unsafe or unsuitable  
160 locations, the municipality must do the following:

161 (A) The municipality must inform all individuals staying at such location the reasons that  
162 it is unsafe or unsuitable at least 72 hours prior to any removal or impoundment.

163 (B) The municipality must identify and make available a nearby, alternative location to  
164 camp or park that is safe and suitable to all affected individuals.

165 (C) The municipality must conduct sufficient individualized outreach.

166 (2) Prior to conducting removal or impoundment actions based on hazardous conditions,  
167 the municipality must do the following:

168 (A) Provide access to basic garbage, sanitation, and harm reduction services as dictated  
169 by the nature of the hazardous condition, for at least 72 hours.

170 (B) Make reasonable efforts to identify the likely source of the hazardous condition and  
171 take action against only those responsible for creating the hazardous condition.

172 (C) Provide a meaningful opportunity to cure the hazardous condition, including:

173 (i) An effective cure notice of the specific conditions that create the hazardous  
174 condition and information on how that condition can be remedied; and

175 (ii) Provision of necessary items, such as garbage bags and bins, cleaning supplies, rodent  
176 traps, intravenous needle receptacles, and/or portable toilets, among others, that would allow the  
177 individuals to cure the hazardous condition. The municipality must allow individuals at least 72  
178 hours to cure the hazardous condition before posting notice of removal or impoundment, and  
179 shall not conduct removal or impoundment if the hazardous conditions have been cured.

180 (D) The municipality must conduct direct outreach through site visits to: (a) inform all  
181 affected individuals prior to or during the cure period that the location has a hazardous condition

182 and the actions needed to cure that condition; and (b) inform all affected individuals whether the  
183 hazardous condition has been remedied after the cure period, and if not, why not.

184 (3) Prior to removal or impoundment, the municipality must provide written  
185 notice meeting the following requirements:

186 (A) The specific date and time the removal or impound will take place;

187 (i) The removal or impound may not take place fewer than 72 hours from the date of  
188 notice in the case of unsafe or unsuitable location;

189 (ii) The removal or impound may not take place fewer than five (5) days from the date of  
190 notice in the case of a hazardous condition

191 (B) Explanation of how the location of the outdoor living space or vehicle is unsafe  
192 and/or unsuitable, or the hazardous condition has not been remedied;

193 (C) Explanation of the actions that will be taken during the removal or impoundment and  
194 how loss of personal property can be avoided;

195 (D) Information about where personal property will be safeguarded if seized during the  
196 removal or impoundment and how it can be retrieved after removal or impoundment;

197 (E) Clear directions to the alternative location, which must be accessible to public transit.  
198 If public transit is needed to reach the alternative location, municipalities shall provide a means  
199 of transportation to said alternative location. Means of transportation shall include, but not be  
200 limited to no cost public transit, shuttle service, taxi and/or ride sharing service.

201 (F) Contact information for the outreach organizations that will work with that site as  
202 described in subsection (4) below; and

203 (G) If available, a statement that adequate and accessible housing is available for all  
204 affected individual;

205 (H) Notice must be provided in languages likely to be spoken by impacted individuals,  
206 and through methods capable of being understood by persons with physical and mental  
207 disabilities.

208 (I) Notice must be posted in a conspicuous location at the relevant outdoor living space or  
209 on the relevant vehicle, as well as affixed to all tents and structures used for shelter at that  
210 location.

211 (4) Sufficient individualized outreach must involve, at a minimum, the following actions:

212 (A) Informing all affected individuals of the availability of the alternative location for the  
213 outdoor living space or vehicle, or offering adequate and accessible housing; and

214 (B) Offering assistance with both the administrative and logistical aspects of moving into  
215 the identified alternative location or adequate and accessible housing.

216 (c) During a removal or impoundment, the Municipality will safeguard all personal  
217 property free of charge according to the following requirements:

218 (1) For individuals present at the time of the removal or impoundment who have accepted  
219 the offer of an adequate and accessible housing but do not have the ability to transport their  
220 personal property, the Municipality shall transport all personal property to the location of the  
221 accepted housing the day of the removal or impoundment.

222 (2) For individuals absent at the time of the removal or impoundment, the Municipality  
223 must document that those individuals had actual notice of the removal or impoundment.  
224 document that those individuals had actual notice of the removal or impoundment.

225 (3) For individuals absent at the time of removal or impoundment, or present but who did  
226 not accept the offer of adequate and accessible housing and do not have the ability to transport  
227 their personal property, the Municipality will safeguard all personal property as follows:

228 (A) Personal property must be photographed and catalogued by location and with  
229 identifying details of the personal property prior to being put into storage. Such information must  
230 be searchable by computer or by calling a Municipality agent

231 (B) The location of the storage facility must be accessible by public transportation and  
232 accessible to those with disabilities.

233 (C) Its operating hours must extend beyond normal business hours to accommodate  
234 those who work or have other obligations during midweek during normal business hours.

235 (D) Photo identification shall not be required as a condition of retrieval;

236 (E) The Municipality must post notice for 90 days at the location of the removal or  
237 impoundment with the location of the seized personal property and instructions for reclaiming  
238 such personal property.

239 (F) After 90 days, the Municipality may dispose of any unclaimed personal items  
240 provided all the above requirements have been met.

241

242 § 53.85.

243 (a) Any person whose rights have been violated pursuant to this part may enforce those  
244 rights in a civil action.

245 (b) The court may award appropriate injunctive and declaratory relief, restitution for loss  
246 of property or personal effects and belongings, actual damages, compensatory damages,  
247 exemplary damages, statutory damages up to one thousand dollars (\$1,000) per violation, and  
248 reasonable attorney's fees and costs to a prevailing party.

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

**PROPONENT:** Bay Area Lawyers for Individual Freedom

## **STATEMENT OF REASONS**

The Problem: Existing laws do not provide a frame work for municipalities to support basic civil and human rights for people experiencing homelessness. Often conducted with little or no notice, forced dispersals or "sweeps" displace homeless people from public space, and often result in the loss or destruction of people's possessions, including identifying documents, medications, clothing and food. As such, with the loss of possessions, medications, and documents, forced dispersals perpetuate the cycle of homelessness. Lacking from state law is an outline for how to link homeless people to permanent housing opportunities, medical treatment and/or sanitation.

Several municipalities in California have offensive and anachronistic laws targeting homeless people. In September 2018, the Ninth Circuit in *Martin et al v City of Boise*, 902 F.3d 1031(9th Cir. 2018) held that these laws are "cruel and unusual" and constitute a violation of the Eighth Amendment. Judge Berzon wrote, "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. The US Supreme Court denied certiorari of *Martin* on December 16, 2019 and thus California municipalities must address the needs of homeless individuals where no indoor sleeping option is available.

The Solution: This resolution provides California municipalities with a framework to address homelessness in a rational and humane way. By protecting the due process rights of homeless persons to their personal property, this resolution breaks the cycle of homelessness by providing accountability and a means to deal with homelessness. By assessing a homeless individual's needs based on the totality of their situation, including disability, substance use history, and housing availability; this resolution gives municipalities the tools needed to effectively address the root causes of homelessness. Municipalities still have the ultimate power to immediately deal with emergency situations and violations of the ADA. By providing an opportunity to cure hazardous conditions, this resolution permits homeless individuals and municipalities the opportunity to create safe and sanitary spaces. To ensure adherence, this resolution provides aggrieved individuals injunctive and declaratory relief, restitution, damages, statutory damages of \$1,000 per violation, fees and costs.

#### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

#### **IMPACT STATEMENT**

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

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#### **COUNTERARGUMENTS AND COMMENTS** **BY BAR ASSOCIATIONS AND CLA SECTIONS**

##### **SDCBA**

The SDCBA Delegation recommends Disapproval of Resolution 06-04-2020. Homelessness is a grave problem in California. However, the answer to that problem is not to grant homeless persons new rights to occupy public property without complying with laws of general applicability.

The proposal is intended to severely limit local government's ability to interact and regulate the conduct of the homeless occupying public spaces. Local governments are at the forefront of working on homelessness issues and need the flexibility to address the public health and safety issues that arise with homelessness. A state law granting homeless rights would hamper local governments' ability to innovate and develop novel solutions to address homelessness. Finally, permitting \$1,000 damages for each alleged violation would lead to a proliferation of unmeritorious lawsuits against local governments that drain scarce public resources.

Legislation addressing homelessness must strike a balance that allows for local governments to maintain safe, healthy, and clean public spaces for all of its residents and ensuring resources are available to help homeless individuals get back on their feet. Real solutions lie in providing resources for affordable housing and for treating underlying problems, not creating a set of

exemptions, new privileges and rights for the homeless to occupy public and private property without complying with laws that apply to all others in society.