

**RESOLUTION 07-04-05**

**DIGEST**

Bail: When Increases Raise the Rebuttable Presumption of Excessiveness

Amends Penal Code section 1271 to raise a rebuttable presumption that bail is excessive when set to prevent the defendant from posting bail.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1271 to raise a rebuttable presumption that bail is excessive when set to prevent the defendant from posting bail. This resolution should be disapproved because it is vague on how an amount can be calculated to prevent the defendant from bailing out and how the presumption can be rebutted.

The trial court is required to state what its considerations were in setting bail in excess of the bail schedule, and to set bail that reflects the court's conclusions. The court may neither deny bail nor set the bail in a sum that is the functional equivalent of no bail. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1109.) In addition, the trial court must state explicit reasons for a party on appeal being denied bail. (See *In re Podesto* (1976) 15 Cal.3d 921.) All defendants are entitled to bail unless statutorily prohibited under Penal Code Section 1271. *In re Bright* (1993) 13 Cal.App.4th 1664 provides that the charged offense, and not the punishment actually faced, controls the availability of bail.

This resolution provides no criteria for determining if bail is being set to prevent the defendant from posting bail. The amount of bail alone does not necessarily provide the proper guidance to the court or to the prosecution. Bail amounts are set given the potential seriousness of the crime and the risk that the defendant may flee. Bail is for the purpose of ensuring the defendant's attendance in court, not to prevent the posting of bail. There are no objective criteria available in the resolution to accurately determine if the amount is for the purpose of preventing the defendant from raising the bail. In addition, the resolution fails to provide guidance on how to rebut the presumption.

**TEXT OF RESOLUTION**

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1271 to read as follows:

- 1 § 1271
- 2       If the charge is for any other offense, he may be admitted to bail before conviction, as a
- 3 matter of right. Where a defendant is entitled to bail before conviction as a matter of right pursuant to
- 4 this section, the setting of bail in an amount calculated for the purpose of preventing the defendant
- 5 from posting bond raises a rebuttable presumption that the bail is excessive within the meaning of the
- 6 California Constitution, Article 1, Section 12, regardless of whether the defendant was able to post
- 7 bond.

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: There is no current law prohibiting bail being set in an amount calculated to prevent the defendant from bailing out.

This Resolution: Seeks to modify Penal Code Section 1271 to raise a rebuttable presumption that bail is excessive within the meaning of the California Constitution when set in an amount calculated to prevent the defendant from bailing out.

The Problem: All defendants are entitled to bail as a matter of right before conviction except in extremely limited circumstances. See Penal Code § 1271. Bail may not be excessive in amount. Cal. Const., Art. 1, § 12; U.S. Const., Eighth Amendment. Bail is not and should not be punitive in nature. A peace officer, judge or magistrate should not be able to circumvent the provisions of Penal Code § 1271 by setting, or recommending that bail be set in a certain amount known or expected to prevent the defendant from bailing out when otherwise unjustified. See Wagenmann v. Adams, 829 F.2d 196 (1<sup>st</sup> Cir. 1987). As the law in California currently sits, there is no statute or published authority proscribing such conduct. At least one district court has held that it is not “clearly established” that such conduct is impermissible or a violation of a defendant’s constitutional rights so as to overcome a qualified immunity challenge to an excessive bail claim brought under the Eighth Amendment or the California Constitution.

#### IMPACT STATEMENT

This resolution does not affect any other laws.

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RESPONSIBLE FLOOR DELEGATE: Elizabeth L. Bradley and Richard D. Kaplan.

#### COUNTERARGUMENT

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution creates a rebuttable presumption of excessiveness when bail is set by a court for the purpose of preventing a defendant from posting bail, but does not clearly define “excessive”. Furthermore, it creates a legislative restraint on a court’s discretion in setting bail in the court’s effort to protect the public.