

## RESOLUTION 02-19-2008

### DIGEST

#### Misdemeanor Diversion: Statewide Application

Amends Penal Code section 1001.2 to make misdemeanor diversion uniformity available statewide.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Similar to Resolutions 03-04-04 and 03-17-07, both of which were approved.

#### Reasons:

This resolution amends Penal Code section 1001.2 to make misdemeanor diversion available statewide. This resolution should be approved in principle because of the need for fairness in the availability and application of misdemeanor diversion.

Diversion is the process in which prosecution of a misdemeanor offense can be postponed at any point in the proceeding from the charge to adjudication. While there are specific eligibility criteria, each county has the option of adopting diversion by ordinance. Even if the county adopts diversion, diversion can only be approved by the district attorney. The law does not allow the defendant a statutory right to diversion.

Current law allows the district attorney in each county to approve any diversion program used in that county. This results in some counties having no diversion program at all while a contiguous county has such a program. For example, in San Francisco County, almost all first offense misdemeanants are presumptively diversion-eligible. In the neighboring county of San Mateo, diversion is generally not available. The result is that a defendant in one county may receive a fine or jail sentence while another defendant in an adjacent county, arrested for the same misdemeanor under similar factual circumstances, is eligible for diversion.

While the courts have ruled that this diversity does not violate equal protection or the separation of powers (*Davis v. Municipal Court* (1988) 46 Cal.3d 64), fairness requires the equal and consistent application of diversion throughout the state. This resolution would eliminate the district attorney's ability to disapprove of diversion programs in his or her county, which is a present impediment to statewide implementation. This uniform application of a statewide statute is necessary in order to provide equal protection under the law.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Association recommends that legislation be sponsored to amend Penal Code section 1001.2 to read as follows:

1 § 1001.2

2 (a) This chapter shall not apply to any pretrial diversion or post trial programs for  
3 the treatment of problem drinking or alcoholism utilized for persons convicted of one or  
4 more offenses under Section 23152 or 23153 or former Section 23102 of the Vehicle Code  
5 or to pretrial diversion programs established pursuant to Chapter 2.5 (commencing with  
6 Section 1000) of this title nor shall this chapter be deemed to authorize any pretrial  
7 diversion or post trial programs for persons alleged to have committed violation of Section  
8 23152 or 23153 of the Vehicle Code.

9 ~~(b) The district attorney of each county shall review annually any diversion~~  
10 ~~program established pursuant to this chapter, and no program shall continue without the~~  
11 ~~approval of the district attorney.~~

12 ~~No person shall be diverted under a program unless it has been approved by the~~  
13 ~~district attorney. Nothing in this subdivision shall authorize the prosecutor to determine~~  
14 ~~whether a particular defendant shall be diverted.~~

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

**PROPONENT:** Bar Association of San Francisco

**STATEMENT OF REASONS:**

Existing Law: Under existing law, local prosecutors must approve programs for misdemeanor diversion. Some counties have no misdemeanor diversion programs whatsoever. For example, a first offense of shoplifting ban in San Francisco will result in diversion. Such an offense, if committed on the other side of the street in San Mateo County results in conviction with possible penalties of fine and imprisonment.

This Resolution: This resolution makes misdemeanor diversion available statewide.

The Problem: This is simply a matter of equal protection of the laws.

This resolution was passed twice previously by the Conference of Delegates in presently this form. It was not presented adequately to the legislation. Thus, we renew.

**IMPACT STATEMENT:**

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

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