

RESOLUTION 07-03-2016

DIGEST

Prostitution: Excluding Condoms as Evidence of Prostitution

Adds Evidence Code section 1162 and deletes section 782.1 to provide that condoms shall not be admissible as evidence of prostitution.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Evidence Code section 1162 and delete section 782.1 to read as follows:

- 1 §1162
2 In any prosecution under §§647 or 653.22 of the Penal Code, the possession of one or
3 more condoms shall be inadmissible as evidence in support of the commission of the crime.
4
5 ~~§782.1~~
6 ~~In any prosecution under Sections 647 and 653.22 of the Penal Code, if the possession of~~
7 ~~one or more condoms is to be introduced as evidence in support of the commission of the crime,~~
8 ~~the following procedure shall be followed:~~
9 ~~(a) A written motion shall be made by the prosecutor to the court and to the defendant~~
10 ~~stating that the prosecution has an offer of proof of the relevancy of the possession by the~~
11 ~~defendant of one or more condoms.~~
12 ~~(b) The written motion shall be accompanied by an affidavit in which the offer of proof~~
13 ~~shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine~~
14 ~~if the offer of proof is sufficient to order a hearing pursuant to subdivision (c). After that~~
15 ~~determination, the affidavit shall be resealed by the court.~~
16 ~~(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out~~
17 ~~of the presence of the jury, if any, and at the hearing allow questioning regarding the offer of~~
18 ~~proof made by the prosecution.~~
19 ~~(d) At the conclusion of the hearing, if the court finds that evidence proposed to be~~
20 ~~offered by the prosecutor regarding the possession of condoms is relevant pursuant to Section~~
21 ~~210, and is not inadmissible pursuant to Section 352, the court may make an order stating what~~
22 ~~evidence may be introduced by the prosecutor. The prosecutor may then offer evidence pursuant~~
23 ~~to the order of the court.~~
24 ~~(e) An affidavit resealed by the court pursuant to subdivision (b) shall remain sealed,~~
25 ~~unless the defendant raises an issue on appeal or collateral review relating to the offer of proof~~
26 ~~contained in the sealed document. If the defendant raises that issue on appeal, the court shall~~
27 ~~allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit.~~
28 ~~If the issue is raised on collateral review, the court shall allow the district attorney and~~
29 ~~defendant's counsel access to the sealed affidavit. The use of the information contained in the~~
30 ~~affidavit shall be limited solely to the pending proceeding.~~

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Currently, with some restrictions, the prosecution can enter condoms into evidence in support of the commission of prostitution. Such a power provides a huge disincentive for johns and prostitutes to use condoms, which creates a great public health issue both in pregnancy risk and STD transmission.

The Solution: This resolution prohibits the prosecution from using condoms as evidence of prostitution. Other exclusions of publicly good actions exist because we want those actions to be encouraged. Possession of insurance cannot be used to prove negligence because we want people to have insurance. The same is true for subsequent remedial measures. Likewise, possession and use of condoms should not be evidence of prostitution because prostitutes and johns should be using condoms.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

AB 336 (2014).

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This proposal adds Evidence Code section 1162 and deletes section 782.1 to provide that condoms shall not be admissible as evidence of prostitution. This resolution should be approved in principle because it will encourage sex industry workers to use safer sex practices, thereby reducing the transmission of STDs.

In 2014, the Legislature enacted Evidence Code section 782.1 to permit a prosecutor in a prostitution case to use the defendant's possession of condoms as evidence of prostitution. The result of that legislation is the concern that sex industry workers will be discouraged from using condoms if the condoms are used as evidence of prostitution. The result is an increase in unsafe sex, particularly among populations with a higher exposure to HIV and other STDs, such as drug

users and prostitutes. This resolution eliminates the disincentive to use condoms and promotes the safety of sex industry workers.

This resolution would have the effect of deleting Evidence Code section 782.1, which enacted the current procedures permitting prosecution to introduce evidence of the defendant's possession of condoms in a prostitution prosecution.