



A Passage to the Statute Books

Questions and Answers about the Process of Writing California Law with Ciarán O’Sullivan

Ann Murphy

The annual California Conference of Bar Associations (CCBA) includes representatives from local and specialty bars from around the state, including The Bar Association of San Francisco (BASF), which traditionally has one of the largest delegations.

During the year, BASF’s delegates develop proposed changes to the statutes and rules of court, break into study groups to review these resolutions and those proposed by other bar associations from throughout the state, and make position recommendations to the BASF Board of Directors. Approved resolutions are disseminated for possible counterarguments, for comment by committees of the State Bar of California, for analysis by the conference’s own Resolutions Committee, and finally, for debate at the annual meeting of CCBA.

Over the years, many of BASF's resolutions passed by the conference have become part of CCBA's legislative program and are proposed as legislation before the California legislature. Many of these resolutions have been enacted and are now statutes. This article features questions to and answers from Ciarán O'Sullivan, the Law Office of Ciarán O'Sullivan, who wrote a resolution that became a California law in January 2014.

Ann Murphy [AM]: How many years have you been involved with BASF's delegation to the California Conference of Bar Associations?

Ciarán O'Sullivan [CO]: I first participated as a BASF delegate in 2006, and I have been to every statewide conference since 2008. A colleague of mine when I worked at Nossaman, John Hansen, had been a delegate for decades, and he suggested I join.

Participation has been richly rewarding for me. It is an opportunity to affect public policy. You meet prominent and interesting lawyers from around the state and learn from them. You hone your public speaking skills. The conference debates about fifty to sixty proposals each year so time is limited. If you want to speak, you have to learn to state your case in two or three minutes, with another minute for rebuttal. That's tougher than being in court! It's fantastic training for young lawyers, I would say.

Involvement also gets you more embedded with your local bar. Our delegation frequently includes past and future BASF presidents. All BASF directors have to participate at least once during their term. The chair of our delegation last year, Tim Moppin [BASF's president-elect and partner at Kaufman Dolowich Voluck], will be BASF president next year.

You make professional connections throughout California. It has costs in time and money, for sure, because we are all volunteers. But it pays for itself, either in business connections or in personal satisfaction, or both. You get CLE for participation. San Francisco's bigger firms usually

pay for their attorneys' involvement because it is an investment in their development. When I worked at Hanson Bridgett they sent two of us to the conference each year.

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AM: Can you tell me how you came to write this resolution, which became AB 1160?

CO: In 2011, the court of appeal published an opinion that I, like many other trusts and estates litigators, thought resulted in bad policy. The court held that a certain section of the Probate Code was applicable in situations where no one had ever imagined the statute would apply. The court explained that, though the legislative history reveals that the legislature may have intended the statute to apply to only a specific situation, the language in the statute must be construed as applying to other situations as well.

Under the court's construction, the fiduciary who administers an estate could conceivably be permitted to engage in acts amounting to self-dealing. For example, he could promote his personal interest at estate expense by taking sides, in his fiduciary capacity, in an heirship dispute in which he has a personal interest. The anomalous situation could also arise in which the prevailing party in a dispute ends up paying the loser's attorney's fees. As written, the statute thus produced bad policy.

This presented a problem that only the legislature could remedy, and since I was a delegate who had some expertise in this area I took it upon myself to try to change the statute so that it would apply only in the situation in which the legislature had originally intended that it apply. In essence, I was seeking to reinstate that part of the prior

law that had been inadvertently changed by the legislature, or so the court of appeal said, when it enacted the statute.

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AM: How much work did you put into this resolution, the BASF process, the CCBA process, the discussion at the annual meeting, and the work with CCBA's lobbyist to get the resolution sponsored, then approved?

CO: It took a lot of my attention for a while, especially during the legislature's session last year. But first I had to get BASF, and then CCBA as a whole, to agree with my idea. Initially I faced the same problem that the legislature faced in 1976, which is the problem of crafting a statute that does what you want it to do, but doesn't have unintended consequences. Not easy, I was to learn. Then I had to convince people the concept was a good idea. Let's face it, probate litigation procedure is not sexy stuff. Nonspecialists don't get it at all. The BASF delegation supported me, but many other bar associations were opposed. The executive committee of the State Bar of California's Trusts and Estates Section agreed with what I was trying to do but didn't like my first formulation of the proposed statute.

By the time of the conference, which took place in 2011 on the *Queen Mary* in Long Beach, it looked like my resolution was going down in flames. That is when the fun started. The conference has some of the flavor of an old-style political convention: larger delegations have hospitality suites and caucus rooms, and there is constant lobbying and cajoling to get delegations to change their positions. I worked with our friends at the Alameda [County] Bar [Association] delegation to propose a friendly amendment with new language. I lobbied to get my resolution resched-

uled for a later debate time so that I would have more time to change minds. I vividly remember hustling from ballroom to ballroom on that enormous old liner in order to address members of the larger bar associations such as Los Angeles, Sacramento, and Orange County as they met for cocktails, breakfasts, and lunches. We passed it with a close vote.

The CCBA lobbyist, Larry Doyle, got Assemblyman Don Wagner to sponsor the bill. Wagner is a lawyer, understood the need for the bill, and thought it was important. Before any legislative votes were taken, however, we had numerous meetings with legislative staffers, representatives of the Judicial Council, the California Judges Association, the relevant state bar executive committee, which by now was supporting the bill, and other stakeholders. Their participation improved the bill. The resulting statute comports with what appears to have been the legislature's original intent when it first enacted the statute in 1976.

Being a civil procedure bill we had to deal with the judiciary committees of the two houses. You learn how much power committee staffers have, even very junior ones. They can easily kill a bill for any of a variety of reasons. It was plain sailing through the Assembly but it got hairy in the Senate. I don't think we could have passed this bill without the hand-holding provided by Larry Doyle. Thanks to him I no longer have a uniformly negative opinion of lobbyists. Governor Jerry Brown signed the bill last September [2013] and it became law this last January [2014].

AM: Is this your first resolution that has become law?

CO: Yes. In 2012, I did have one other resolution relating to civil discovery timelines passed by the conference and sponsored as a bill, AB 1918, but it died in the Assembly Judiciary Committee.

The conference typically gets about fourteen resolutions enacted into law each year, which is a great batting average. We are definitely one of the most successful interest groups in the state. CCBA and the BASF delegation also played an important role in the enactment of last year's restoration of part of the funds drained from the state's

courts over the past few years, including SB 75 by Senator Mark Leno. Jim Brosnahan [a past BASF president and senior trial counsel at Morrison & Foerster], an ever-present voice at the conference, was the responsible floor delegate for the BASF resolution that got us involved in this important issue.

AM: How does that make you feel getting a bill passed through the California legislature?

CO: There is a definite feeling of satisfaction knowing that a solo practitioner in San Francisco can start the process of changing California law for the better. We lawyers are in a unique position to know where the law needs tweaking and changing. Legislators, fewer and fewer of whom are lawyers nowadays, recognize that we have expertise in matters relating to the administration of justice, which is why what comes out of the conference is taken seriously in Sacramento. At the very least they know that our proposals have been thoroughly studied and debated, and that our resolutions actually look like statutes are supposed to look. They like that: ready-to-introduce legislation!

AM: What is your advice to people considering joining BASF's delegation?

CO: Do it. You will not regret it. Delegates study, debate, and vote on resolutions proposing changes in the law first at the local delegation level and then again at the statewide annual conference level. Any delegate can write a resolution that might become law. I would suggest that for the first year or two you just watch and enjoy yourself until you learn the ropes. But then start writing resolutions. That is what really draws you in.

But I would never do this were it not also fun. I always say that just practicing law all day would drive me nuts—I need activities like this for my sanity, to prevent burn-out, and to maintain an interest in the legal system. The conference is held in conjunction with the State Bar of California's Annual Meeting every September or October. It alternates between southern and northern California, at a time of year when the weather is at its best in places

like Monterey and San Diego. So for me it is also a mini-vacation, and I associate it with cargo shorts, Hawaiian shirts, seeing familiar faces from up and down the state, and observing the art of public speaking and persuasion as practiced by some great lawyers.

Ciarán O'Sullivan of the Law Office of Ciarán O'Sullivan is chair of The Bar Association of San Francisco's delegation to the California Conference of Bar Associations. He is also a past chair and currently is on the executive committee of the BASF Estate Planning, Probate, and Trust Section.

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The California Conference
of Bar Associations will
be held in San Diego from
September 12–14, 2014.
BASF's delegation is now being
formed, so to get involved,
contact Barbara Fanning at
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