

COUNTY COUNSEL’S ANALYSIS OF PROPOSED EVELYN CHEATHAM IOLERO INITIATIVE ORDINANCE

TABLE 1—PROVISIONS PREEMPTED BY STATE LAW:

SECTION	EXISTING ORDINANCE (SCC Title 2, Art. XXVII)	EVELYN CHEATHAM IOLERO INITIATIVE ORDINANCE	LEGAL ISSUE(S)
2-394 (b)(3)(vii)	No comparable provision.	Proposes to vest the IOLERO Director with independent subpoena power.	<p>Sonoma County, a general law county, lacks the authority to delegate subpoena power to the IOLERO Director. (<i>Dibb v. County of San Diego</i> (1994) 8 Cal.4th 1200, 1210; <i>see also</i> Senate Rules Committee Floor Analysis of AB 1185 (June 2020) at pp. 5-6.)</p> <p>Potential Cure: Assembly Bill 1185, currently pending before the state Legislature, would resolve this issue if adopted by the Legislature.</p>
2-395	No comparable provision.	Adds provision that prescribes minimum future annual budget for IOLERO, setting the floor at 1% of total annual budget for Office of Sheriff-Coroner.	<p>The adoption of the budget is a legislative function exclusively committed to the Board. (<i>County of Butte v. Superior Ct.</i> (1985) 176 Cal.App.3d 693, 698; Gov. C. §§ 29000-29065.) The electorate cannot, by initiative, in a general law county, enact an ordinance prescribing minimum future annual budgets; such an ordinance exceeds the electorate's initiative power and is constitutionally invalid. (<i>Totten v. Bd. of Supervisors</i> (2006) 139 Cal.App.4th 826, 830.)</p> <p>Potential Cure: Since the Board would be voluntarily placing this measure on the ballot, we may be able to argue that the Board is giving up its exclusive discretion over this component of the budget. However, this is one of the mandatory duties that the Board generally may not delegate.</p>

Impact of Unconstitutional Provisions. The legal infirmities outlined above make the specific provisions unenforceable, but would not render the entire ordinance invalid. The initiative ordinance contains a standard severability clause that allows sections or portions of the ordinance found to be unconstitutional or invalid to be stricken from the ordinance without affecting the validity of the remaining provisions of the ordinance. Thus, if voters approve the measure with the two legal issues discussed above, and someone mounts a successful legal challenge to the enforceability of the provisions in question, the offending provisions can simply be stricken from the ordinance, leaving the remainder in effect as drafted.

TABLE 2—ADDITIONAL LEGAL CONCERNS AND AMBIGUITIES:

SECTION	EXISTING ORDINANCE (SCC Title 2, Art. XXVII)	PROPOSED EVELYN CHEATHAM IOLERO ORDINANCE	LEGAL ISSUE
2-393(c)	Subsection (c) under “qualifications of Director and Staff” requires, among other things, that the Director to be an attorney licensed to practice law in the state of California.	The initiative ordinance deletes the requirement that the Director be licensed in the state of California. Additionally, the initiative ordinance would require that the Director be qualified as a “certified practitioner of oversight by NACOLE.	The deletion of the requirement that the Director be licensed to practice law “in the state of California” creates an ambiguity that does not currently exist and potentially creates some risk for the County. It is unclear whether the intent of the initiative is to remove this requirement and allow the Director to be licensed by any state or if the deletion was merely an oversight. If the former, the Civil Service Commission would have to agree to modify the requirements of the IOLERO Director’s job description. The current job description includes a mandatory requirement that the Director holds active membership in the State Bar of California. Further, the lack of a California bar license could jeopardize the confidentiality of certain investigations. In order to maintain the attorney-client privilege, the Director must be acting as an attorney (not merely a department head). If the Director is not licensed as an attorney in California, there is a valid argument that the Director is not acting in her/his capacity as an attorney and, therefore, the attorney-client privilege would not attach to an investigation conducted by the Director.
2-394(b)	No comparable provision.	Under powers and duties of IOLERO, the initiative ordinance would add new subsection (b)(3) to enumerate and expand IOLERO’s access to evidence and other investigative materials.	Both the broad language proposed in section 2-394(b)(3) and the specific provisions that provide the Director access to witnesses and evidence during a pending investigation could interfere with the investigative and prosecutorial functions of the Sheriff in violation of Government Code § 25303 and could expose the County to legal challenges.
	No comparable provision.	The initiative ordinance also adds new subsection (e) which mandates that the Sheriff-Coroner fully cooperate with IOLERO investigations, and further requires the Sheriff-Coroner provide IOLERO “direct,	The requirement to provide “direct and unfettered access” is very broad and could create legal issues for several of the subparagraphs under new subsection (e). For example, including investigations of tort claims and lawsuits (subparagraphs (e)(2) and (e)(4)), which

		unfettered access” to a variety of evidence, reports, videos, physical files, personnel files, and personnel.	fall outside IOLERO’s scope, could compromise the County’s defense on these claims. And unfettered access to employee personnel files could violate privacy laws with respect to certain information contained in those files (including home address, background information, etc.—see Cal. Constitution, art. I, § 1; Civil Code § 56.10.)
	No comparable provision.	The initiative ordinance adds new subsection (f) which requires the Sheriff-Coroner to provide the Director, upon her/his request, access to personally observe investigative interviews.	Giving the Director the right to be personally present during investigative interviews potentially conflict with the prohibitions in Government Code § 25303 and could expose the County to legal challenges.
	No comparable provision.	The initiative ordinance new subsection (g) which requires the Sheriff-Coroner to cooperate with IOLERO by providing “direct, unfettered access” to staff of the Sheriff’s Office under certain enumerated circumstances.	The breadth of “direct and unfettered access” to staff may employee’s rights under the Police Officers Bill of Rights (POBR) depending on the circumstances of the particular case. (See Gov’t Code §§ 3300 <i>et seq.</i>)

Impact of Foregoing Legal Concerns. None of the proposed amendments highlighted in Table 2 would render these provisions unenforceable. However, due to the breadth of the authorities bestowed upon the Director, each of these provisions is susceptible to as-applied challenges that they conflict with the prohibition in Government Code section 25303 that the Board not interfere with the exercise of the discretionary duties of the Sheriff-Coroner and other existing laws depending on the case-by-case circumstances.

TABLE 3—OTHER SUBSTANTIVE CHANGES EFFECTED BY PROPOSED INITIATIVE ORDINANCE:

SECTION	EXISTING ORDINANCE (SCC Title 2, Art. XXVII)	PROPOSED EVELYN CHEATHAM IOLERO ORDINANCE	LEGAL ISSUE
2-392	Establishes office of IOLERO and sets forth legislative purpose and mission statements.	Similarly establishes office of IOLERO and sets forth legislative purpose and mission statements. The initiative adds additional findings and expands IOLERO’s mission to include “providing independent investigations of employees of the sheriff-coroner where an investigation by that office is found by IOLERO to be incomplete or deficient in some way.”	No legal concerns.

2-393	Provides for appointment and qualifications of director and staff.	<p>Subsection (a) adds protections for director that limit removal during term of appointment <u>and</u> requires a 4/5 vote of the Board to remove.</p> <p>Subsection (c) imposes additional requirement on the Director to be qualified as a certified practitioner of oversight by NACOLE.</p> <p>Subsection (d) clarifies that the Director may contract with outside specialists as needed to fulfill IOLERO's missions.</p>	<p>No legal concerns.</p> <p>No legal concerns.</p> <p>No legal concerns.</p>
2-394	<p>Sets forth the powers and duties of IOLERO.</p> <p>Subsection (b) (2) charges the Director with reviewing, auditing, and analyzing administrative and public complaint investigations in coordination and cooperation with the Sheriff-Coroner.</p> <p>Subsection (b)(8) establishes CAC appointed by the Director.</p>	<p>Expands the powers and duties of IOLERO and imposes corresponding duties on the Sheriff-Coroner.</p> <p>The initiative ordinance would modify this section to specify the types of complaints subject to automatic review by IOLERO.</p> <p>Subsection (b)(9) in the initiative ordinance. Modifies existing requirements to mandate that IOLERO staff and support at least monthly meetings of the CAC and makes CAC independent of IOLERO.</p>	<p>No legal concerns.</p> <p>No legal concerns.</p>
2-396	No comparable provision.	Adds new requirement that IOLERO be subject to a performance audit at least every 3 years.	No legal concerns.
2-397	Existing ordinance makes the Director the appointing authority for members of the CAC (<i>see</i> SCC § 2-394(b)(8) discussed <i>supra</i> .)	Adds provisions to expand independence and role of CAC. Makes Board primary appointing authority. Imposes composition criteria for appointment based on diversity and demographics of County and establishes qualifications for membership on CAC.	No legal concerns.