



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

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Title	Agenda Item Type
Civil Trials: Voir Dire Rules of Court	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend rules 2.1034 and 3.1540	January 1, 2013
Recommended by	Date of Report
Civil and Small Claims Advisory Committee	September 6, 2012
Hon. Dennis M. Perluss, Chair	Contact
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### Executive Summary

Assembly Bill 1403 (Stats. 2011, ch. 409) amended, among other things, the civil voir dire statute, Code of Civil Procedure section 222.5. The Civil and Small Claims Advisory Committee therefore recommends that the Judicial Council amend the rules of court on jury selection in civil cases to implement the statutory amendments, and to delete those sections of the rules that are duplicative of or inconsistent with statutory provisions.

### Recommendation

The Civil and Small Claims Advisory Committee recommends that Judicial Council approve amendments to the rules of court, effective January 1, 2013, as follows:

1. Delete rule 2.1034 from Title 2, Trial Court Rules, and move it to Title 4, Criminal Rules, renumbered as rule 4.202, so that it no longer applies to civil actions; and

2. Amend rule 3.1540 to delete all provisions inconsistent with or contained in Code of Civil Procedure section 222.5.

The text of the amended rules is attached at pages 5–6.

### **Previous Council Action**

The council adopted rule 2.1034, on statements to the jury panel effective January 1, 1990, and has not amended it since that time.

Rule 3.1540, previously numbered 228, on examination of prospective jurors in civil cases, was adopted by the council effective January 1, 1949 and has been amended several times. The most recent amendments were in 1993, to add references in the rule as well as in the Standards of Judicial Administration to the then new form juror questionnaire and, in 1990, to delete any reference to criminal cases from the rule.

### **Rationale for Recommendation**

The California Rules of Court contain provisions concerning jury selection in civil actions in two places: at title 2, Trial Court Rules, and title 3, Civil Rules.<sup>1</sup> AB 1403 made changes to the voir dire statute, Code of Civil Procedure section 222.5,<sup>2</sup> that impact these rules of court. The rules must be amended to be consistent with the voir dire statute. At the same time, the rules should be amended to delete any provisions that are duplicative of the statute.

### **Rule 2.1034, Statements to the jury panel**

Current rule 2.1034 states that a trial judge “may, in his or her discretion, permit brief opening statements by counsel to the panel.” AB 1403 added a new statutory provision that a trial judge in a civil action “*should* allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process.” (Emphasis added.) Hence the rule of court has been superseded by the new statutory provision in civil cases and should no longer be applied in those actions.

Currently, rule 2.1034 is located in title 2 of the rules of court, Trial Court Rules, and is applicable to both civil and criminal jury trials. (See rule 2.2 (rules in this title apply to all cases in the superior courts).) AB 1403, however, addressed voir dire in civil cases only and did not include a similar provision or any provision at all regarding voir dire in criminal cases. Hence, while the current rule is no longer applicable in civil actions, it continues to be applicable in criminal actions. The advisory committee therefore recommends not deleting the rule altogether, but rather moving it into Title 4, Criminal Rules, so that it will apply only in criminal actions. The committee recommends renumbering it as rule 4.202, which will place it immediately following the other two rules applicable to jury selection in criminal actions. No change to the

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<sup>1</sup> Additional provisions regarding voir dire in civil cases may be found in the Standards of Judicial Administration at Title 2, Standards for Proceedings in the Trial Courts, and Title 3, Standards for Civil Cases. The committee reviewed those provisions and determined that they were not affected by AB 1403, so no amendments are required.

<sup>2</sup> AB 1403 can be found at [www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1401-1450/ab\\_1403\\_bill\\_20111002\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1401-1450/ab_1403_bill_20111002_chaptered.pdf).

text of either the rule or the comment following it has been made. The Criminal Law Advisory Committee has been advised of this proposed change and has no objection.

### **Rule 3.1540, Examination of prospective jurors in civil cases**

Rule 3.1540 applies to voir dire in civil actions only. There are several provisions within the rule that are inconsistent with or duplicative of provisions in Code of Civil Procedure section 222.5.

The first sentence in rule 3.1540(b) (examination by the trial judge), providing that the judge must examine the prospective jurors orally or by written questionnaire, or both, is unnecessary in light of the statutory requirement that the judge shall examine the prospective jurors. Because no rule is needed to set forth which methods the judge is to use, the advisory committee recommends that the first sentence be removed. The last sentence in that division, that a judge “may” use the Judicial Council form juror questionnaire, has also been deleted in light of the new provision in section 222.5, which states that a judge “shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires” when requested by the parties. The current rule provision could be read as providing broader discretion to refuse the use of a questionnaire than provided in the amended statute.

The last two sentences in rule 3.1540(c) have been deleted because they are contained in the statute. The provision that, upon request of the parties, the trial judge must permit counsel to question the jurors directly is contained in the first paragraph of section 222.5. The provision that the scope of the questioning must be within reasonable limits prescribed by the judge at his or her discretion is contained at the beginning of the third paragraph of the statute. Moreover, that paragraph in the statute now concludes with a limitation on that discretion, added by AB 1403, providing that a trial judge shall not establish a blanket time limit for voir dire.

As to rule 3.1540(d), regarding examination of prospective jurors outside the presence of the judge, the advisory committee recommends deleting this subdivision in its entirety, as it duplicates the last paragraph in section 222.5.<sup>3</sup>

Removing duplicative provisions from the rules clarifies that the requirements and procedures are statutorily based and eliminates the possibility of inconsistencies between statute and rule.

### **Comments, Alternatives Considered, and Policy Implications**

The proposal was circulated for public comment in spring 2012. Three comments were received. One, from the Superior Court of San Diego County, agreed with the proposal as circulated, and two, from bar organizations, agreed with the proposal generally, but sought modifications.<sup>4</sup>

First, the Committee on Administration of Justice (CAJ) of the State Bar of California asked that the last sentence of rule 3.1540(b) be retained, so that the rule would include explicit authorization to use the Judicial Council form jury questionnaire. The sentence provides that a

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<sup>3</sup> The advisory committee does not in any way intend this deletion to preclude such examinations, only notes that the provision already exists in statute.

<sup>4</sup> A chart setting forth the comments received and the committee’s responses to each is attached beginning at page 7.

judge may use that questionnaire form. The advisory committee considered this request, but as noted above, determined that the current rule provision could be read as providing broader discretion to refuse the use of a questionnaire than provided in the amended statute, which provides that a judge “shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires” when requested by the parties. Furthermore, as amended, the rule still provides that “the judge should consider the policies and recommendations in standard 3.25 of the Standards of Judicial Administration,” which standard includes express authorization to use the Judicial Council form questionnaire.

Second, the Orange County Bar Association commented that while it believes that the current rule should be made consistent with revised Code of Civil Procedure section 222.5, the amended rule “should *not* omit statutory provisions which make Rule 3.1540 ambiguous, unclear, or inconsistent with the statute.” (Emphasis added.) The commentator also objected to the deletion of rule provisions that are duplicative of statutory provisions. The advisory committee agrees with the initial comment, that the rule should be made consistent with statute, but disagrees with the comment that ambiguous, unclear, and inconsistent provisions should not be deleted. As to the objection to the deletion of duplicative provisions, the advisory committee determined that removing duplicative provisions from the rules is generally appropriate and is appropriate here. The deletion of the rule providing that counsel has the right to conduct oral voir dire does not, as objected by the commentator, eliminate counsel’s right to do so. That right is expressly provided for by statute and need not be repeated in a rule of court.

### **Implementation Requirements, Costs, and Operational Impacts**

Because the amendments do no more than align the rules with the current statute, they will not result in any additional implementation requirement or cost to the courts.

### **Attachments**

1. Cal. Rules of Ct., rules 2.1034, 3.1540, and 4.202, at pages 5–6.
2. Comments Chart at pages 7–8.

Rule 2.1034 of the California Rules of Court would be moved and renumbered and rule 3.1540 amended, effective January 1, 2013, to read:

**Title 2. Trial Court Rules**

**Division 8. Trials**

**Chapter 2. Conduct of Trial**

**Rule 2.1034. Statements to the jury panel**

~~Prior to the examination of prospective jurors, the trial judge may, in his or her discretion, permit brief opening statements by counsel to the panel.~~

**Comment**

~~This statement is not a substitute for opening statements. Its purpose is to place voir dire questions in context and to generate interest in the case so that prospective jurors will be less inclined to claim marginal hardships.~~

**Title 3. Civil Rules**

**Division 15. Trial**

**Chapter 4. Jury Trials**

**Rule 3.1540. Examination of prospective jurors in civil cases**

**(a) Application**

This rule applies to all civil jury trials.

**(b) Examination of jurors by the trial judge**

~~To select a fair and impartial jury, the trial judge must examine the prospective jurors orally, or by written questionnaire, or by both methods. In examining prospective jurors in civil cases, the judge should consider the policies and recommendations in standard 3.25 of the Standards of Judicial Administration. The judge may use the *Juror Questionnaire for Civil Cases* (form MC-001).~~

**(c) Additional questions and examination by counsel**

On completion of the initial examination, the trial judge must permit counsel for each party that so requests to submit additional questions that the judge will put to the jurors. ~~On request of counsel, the trial judge must permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of the additional questions or supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion.~~

~~**(d) Examination of juror outside the judge's presence**~~

1 ~~The court may, upon stipulation by counsel for all parties appearing in the action, permit~~  
2 ~~counsel to examine the prospective jurors outside a judge's presence.~~  
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4 **Title 4. Criminal Rules**  
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6 **Division 3. Trials**  
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8 **Rule 4.202. Statements to the jury panel**  
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10 Prior to the examination of prospective jurors, the trial judge may, in his or her discretion, permit  
11 brief opening statements by counsel to the panel.  
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13 **Comment**  
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15 This statement is not a substitute for opening statements. Its purpose is to place voir dire  
16 questions in context and to generate interest in the case so that prospective jurors will be less  
17 inclined to claim marginal hardships.

## SPR12-13

### Civil Trials: Voir Dire Rules of Court (amend rules 2.1034 and 3.1540)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Proposed Committee Response</b>
1.	Committee on Administration of Justice (CAJ), State Bar of California By: Saul Bercovitch, Legislative Counsel	AM	CAJ supports this proposal, subject to one modification. CAJ believes the last sentence of rule 3.1540(b) should be retained. The Invitation to Comment notes that the sentence, which provides that a judge “may” use the Judicial Council juror questionnaire form, will be removed in light of the new provision in Code of Civil Procedure section 222.5 that a judge “shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires” when requested by the parties. CAJ does not believe the new statutory language makes the language in the rule necessarily redundant, and believes retaining explicit authorization to use the form would be useful.	The committee concluded that this provision in the current rule could be read as providing broader discretion to refuse the use of a juror questionnaire than provided in the amended statute, and so concluded that it should be removed from the rule. Further, the committee notes that the remaining provision of amended rule 3.1540(b) directs the judicial officer conducting voir dire to consider the policies and recommendations in Standard 3.25 of the Standards of Judicial Administration, which standard expressly authorizes the use of the Judicial Council juror questionnaire form.
2.	Orange County Bar Association By: Dimetria Jackson, President	AM	The OCBA believes that Rule 3.1540 should be made consistent with CCP 222.5 but not omit statutory provisions which make Rule 3.1540 ambiguous, unclear, or inconsistent with the statute. For instance, the proposed Rule now eliminates all rights of counsel to conduct oral voir dire. Even if that provision, and others, are duplicative of the statute, they cannot be eliminated. Perhaps a reference to the mandatory provisions of CCP 222.5 is necessary.	<p>The committee agrees that the rule should be made consistent with the statutory provisions, but has concluded that any provisions in the rule that are ambiguous, unclear, or inconsistent in light of the statute should be deleted.</p> <p>The committee notes that the requirement that the trial judge must permit counsel to question the jurors directly is contained in the first paragraph of Code Civ. Proc. § 222.5. Hence there is no need to repeat the provision in a rule of court. The committee concluded that rule provisions that were duplicative of statute should be removed in order to clarify that the requirements and procedures are statutorily based, and to eliminate the possibility of inconsistencies between statute and rule..</p>

**SPR12-13****Civil Trials: Voir Dire Rules of Court** (amend rules 2.1034 and 3.1540)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Proposed Committee Response</b>
3.	Superior Court of San Diego County By: Michael Roddy, Executive Officer	A	No additional comments.	The committee appreciates the comment; no specific reply is required.