



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GOVERNMENTAL AFFAIRS
770 L Street, Suite 1240 • Sacramento, California 95814-3368
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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

STEVEN JAHR
Administrative Director of the Courts

CORY T. JASPERSON
Director, Office of Governmental Affairs

March 27, 2014

Hon. Tom Ammiano
Member of the Assembly
State Capitol, Room 3146
Sacramento, California 95814

Subject: AB 885 (Ammiano), as amended April 29, 2013 – Oppose

Dear Assembly Member Ammiano:

The Judicial Council opposes AB 885, which requires the court, in any criminal trial or proceeding in which the court determines that the prosecuting attorney has failed to disclose materials and information required under law, to instruct the jury that the intentional failure to disclose the materials and information has occurred and that the jury may consider the failure to disclose as circumstantial evidence to support the presence of reasonable doubt.

The council believes the bill is unnecessary because it duplicates existing jury instructions. An existing jury instruction addresses the impact of the failure of the prosecution to provide evidence to the defense on what a jury may consider. Specifically, the jury instruction relating to untimely disclosure of evidence (CALCRIM No. 306), provides, in relevant part, “[a]n attorney for the (People/defense) failed to disclose ... In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.”

In addition, by statutorily requiring judges to deliver a specific jury instruction, AB 885 interferes with judicial discretion to deliver jury instructions that are appropriate to the unique facts and circumstances of each trial. There are many practical reasons why the drafting of jury instructions should be left to the discretion of the judicial branch. As case law evolves impacting

a jury instruction, judges and the Judicial Council are in the best position to quickly make revisions to the instructions based on that case law. Judges need the flexibility to deliver jury instructions that are appropriate to the facts and circumstances of each individual trial. Judges rely on that flexibility with their use of the model jury instructions adopted by the Judicial Council; the instructions set forth in AB 885 could be read as being directive. Rule 2.1050 of the California Rules of Court recognizes that a judge may need to modify an instruction if "he or she finds that a different instruction would more accurately state the law and be understood by jurors." Judges also need flexibility in responding to questions from jurors about what a jury instruction means.

The Judicial Council regularly updates and maintains jury instructions through its advisory committees on jury instructions. That process is rigorous and the proposed amendments are circulated for public comment before they are published. Trial judges and both prosecutors and defense attorneys are encouraged to submit for the Judicial Council's consideration suggestions for improving or modifying instructions or creating new instructions. The Judicial Council seeks to ensure that the jury instructions are both balanced and understandable to the average juror. The Judicial Council also seeks to draft jury instructions that will withstand judicial scrutiny. Finally, the Judicial Council updates the model jury instructions at least twice a year to reflect new statutes and case law, so they are current, reflecting constant changes in the law.

For these reasons, the Judicial Council opposes AB 885.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Reilly". The signature is written in dark ink and is positioned above the typed name and title.

Sharon Reilly
Senior Attorney

SR/yc-s

cc: Mr. Ignacio Hernandez, Public Policy Director, California Attorneys for Criminal Justice
Ms. June Clark, Deputy Legislative Secretary, Office of the Governor



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June 18, 2014

Hon. Loni Hancock, Chair
Senate Public Safety Committee
State Capitol, Room 2082
Sacramento, California 95814

Subject: AB 885 (Ammiano), as amended April 29, 2014 - Oppose
Hearing: Senate Public Safety Committee – June 24, 2014

Dear Senator Hancock:

The Judicial Council opposes AB 885, which requires the court, in any criminal trial or proceeding in which the court determines that the prosecuting attorney has failed to disclose materials and information required under law, to instruct the jury that the intentional failure to disclose the materials and information has occurred and that the jury may consider the failure to disclose as circumstantial evidence to support the presence of reasonable doubt.

The council believes the bill is unnecessary because it duplicates existing jury instructions. An existing jury instruction addresses the impact of the failure of the prosecution to provide evidence to the defense on what a jury may consider. Specifically, the jury instruction relating to untimely disclosure of evidence (CALCRIM No. 306), provides, in relevant part, “[a]n attorney for the (People/defense) failed to disclose ... In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.”

In addition, by statutorily requiring judges to deliver a specific jury instruction, AB 885 interferes with judicial discretion to deliver jury instructions that are appropriate to the unique

facts and circumstances of each trial. There are many practical reasons why the drafting of jury instructions should be left to the discretion of the judicial branch. As case law evolves impacting a jury instruction, judges and the Judicial Council are in the best position to quickly make revisions to the instructions based on that case law. Judges need the flexibility to deliver jury instructions that are appropriate to the facts and circumstances of each individual trial. Judges rely on that flexibility with their use of the model jury instructions adopted by the Judicial Council; the instructions set forth in AB 885 could be read as being directive. Rule 2.1050 of the California Rules of Court recognizes that a judge may need to modify an instruction if "he or she finds that a different instruction would more accurately state the law and be understood by jurors." Judges also need flexibility in responding to questions from jurors about what a jury instruction means.

The Judicial Council regularly updates and maintains jury instructions through its advisory committees on jury instructions. That process is rigorous and the proposed amendments are circulated for public comment before they are published. Trial judges and both prosecutors and defense attorneys are encouraged to submit for the Judicial Council's consideration suggestions for improving or modifying instructions or creating new instructions. The Judicial Council seeks to ensure that the jury instructions are both balanced and understandable to the average juror. The Judicial Council also seeks to draft jury instructions that will withstand judicial scrutiny. Finally, the Judicial Council updates the model jury instructions at least twice a year to reflect new statutes and case law, so they are current, reflecting constant changes in the law.

For these reasons, the Judicial Council opposes AB 885.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sharon Reilly".

Sharon Reilly
Senior Attorney

SR/yc-s

cc: Members, Senate Public Safety Committee
Hon. Tom Ammiano, Member of the Assembly
Ms. Mary Kennedy, Counsel, Senate Public Safety Committee
Ms. June Clark, Deputy Legislative Secretary, Office of the Governor
Mr. Eric Csizmar, Consultant, Senate Republican Office of Policy



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CORY T. JASPERSON
Director, Governmental Affairs

August 27, 2014

Hon. Tom Ammiano
Member of the Assembly
State Capitol, Room 3146
Sacramento, California 95814

Subject: AB 885 (Ammiano), as amended August 22, 2014 - Oppose

Dear Assembly Member Ammiano:

The Judicial Council regrettably continues to oppose AB 885, which authorizes the court, in any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose materials and information required under law, to instruct the jury that the intentional failure to disclose the materials and information has occurred and that the jury shall consider the failure to disclose in determining whether reasonable doubt of the defendant's guilt exists.

The council believes this bill is unnecessary because it duplicates existing jury instructions that address this issue. Specifically, the jury instruction relating to untimely disclosure of evidence (CALCRIM No. 306) provides, in relevant part, "[a]n attorney for the (People/defense) failed to disclose ... In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."^[1]

^[1] CALCRIM No. 306 provides:

The council also believes that creating a specific jury instruction, in statute, even a discretionary one, interferes with judicial discretion to deliver jury instructions that are appropriate to the unique facts and circumstances of each trial. The council believes that judges need the flexibility to deliver jury instructions that are appropriate to the facts and circumstances of each individual trial. Judges rely on that flexibility with their use of the model jury instructions adopted by the Judicial Council; the instructions set forth in AB 885 could be read as being directive. Rule 2.1050 of the California Rules of Court recognizes that a judge may need to modify an instruction if “he or she finds that a different instruction would more accurately state the law and be understood by jurors.” Judges also need flexibility in responding to questions from jurors about what a jury instruction means.

Finally, the Judicial Council regularly updates and maintains jury instructions through its advisory committees on jury instructions. That process is rigorous and the proposed amendments are circulated for public comment before they are published. Trial judges and both prosecutors and defense attorneys are encouraged to submit for the council’s consideration suggestions for improving or modifying instructions or creating new instructions. The council seeks to ensure that the jury instructions are both balanced and understandable to the average juror. The council also seeks to draft jury instructions that will withstand judicial scrutiny. Finally, the council updates the model jury instructions at least twice a year to reflect new statutes and case law, so they are current, reflecting constant changes in the law.

For these reasons, the Judicial Council regrettably remains opposed to AB 885.

Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

An attorney for the (People/defense) failed to disclose: *<describe evidence that was not disclosed>* [within the legal time period].

In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

[However, the fact that the defendant’s attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]

<Consider for multiple defendant cases> [You must not consider the fact that an attorney for defendant *<insert defendant’s name>* failed to disclose evidence when you decide the charges against

Hon. Tom Ammiano
August 27, 2014
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Sincerely,

A handwritten signature in cursive script that reads "Sharon Reilly". The signature is written in dark ink and is positioned above the printed name and title.

Sharon Reilly
Senior Attorney

SR/yc-s

cc: Ms. June Clark, Deputy Legislative Secretary, Office of the Governor



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Director, Governmental Affairs

September 9, 2014

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: AB 885 (Ammiano) – Request for Veto

Dear Governor Brown:

The Judicial Council strongly opposes AB 885 and respectfully requests that you veto the bill. AB 885 authorizes the court, in any criminal trial or proceeding in which the court determines that the prosecuting attorney has intentionally or knowingly failed to disclose materials and information required under law, to instruct the jury that the intentional failure to disclose the materials and information has occurred and that the jury *shall* consider the failure to disclose in determining whether reasonable doubt of the defendant's guilt exists.

The council has three major concerns with AB 885: (1) it interferes with the discretion of judges to interpret the law when rendering jury instructions that are appropriate to the individual facts and circumstances of a case; (2) by requiring the jury to consider the impact that only a prosecutor's failure to disclose evidence has on the case, the instruction lacks the balance and neutrality that judges are required to employ when delivering jury instructions; and (3) the instruction is unnecessary because the Judicial Council has already developed a balanced instruction that address late production of evidence by either the prosecution or the defense and has existing processes to consider amending jury instructions.

The council firmly believes that, because the judicial branch has constitutional responsibility for interpreting laws enacted by the Legislature, identifying the need for and the drafting of jury instructions is something that must remain within the exclusive purview of the Judicial Branch. Jury instructions, by their very nature, require a judge to interpret the law and communicate in plain English to the jury about how they should apply the law to the particular facts and circumstances of a case. The council believes that creating a specific jury instruction, in statute, interferes with judicial discretion to deliver balanced jury instructions that are appropriate to the unique facts and circumstances of each trial. Judges rely on that flexibility with their use of the model jury instructions adopted by the Judicial Council and the council is concerned that the instruction stated in AB 885 could be read as being directive. Rule 2.1050 of the California Rules of Court recognizes that a judge may need to modify an instruction if “he or she finds that a different instruction would more accurately state the law and be understood by jurors.” Judges also need flexibility in responding to questions from jurors about what a jury instruction means.

Unfortunately, the instruction described in AB 885 is argumentative and lacks the balance and neutrality that judges ordinarily apply when exercising their discretion to deliver appropriate jury instructions. Specifically, if a judge delivers the instruction, a logical reading of the bill is that the judge *must tell* the jury that they “*shall* consider the failure to disclose in determining whether reasonable doubt of the defendant’s guilt exists.” Trial judges have honed the skills of drafting and delivering instructions, and in each case they must consider proposed jury instructions from both the prosecution and the defense. Ultimately, the trial judge must reconcile the requests, ensuring that all areas where instructions are necessary are covered, with neutrality and clarity. Settling the jury instructions to be given to a jury is a vital and significant part of each trial and trial judges engage in this activity over and over again. Trial judges are uniquely suited to draft instructions that are neutral, not influenced by advocacy, and which are understandable. This is not a task that should be undertaken in a political environment. Moreover, trial judges are duty bound to provide instructions, including custom crafted instructions if necessary, on every principle of law that must enter into a jury’s consideration. A judge also seeks to deliver jury instructions that will withstand judicial scrutiny.

Recognizing the need to address the impact of untimely disclosure of evidence in a criminal trial, the Judicial Council has already developed an existing jury instruction that addresses the issue. Specifically, the jury instruction relating to untimely disclosure of evidence (CALCRIM No. 306) provides, in relevant part, “[a]n attorney for the (People/defense) failed to disclose ... In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.”^[1] Thus, the jury instruction described in AB 885 is unnecessary.

^[1] CALCRIM No. 306 provides:

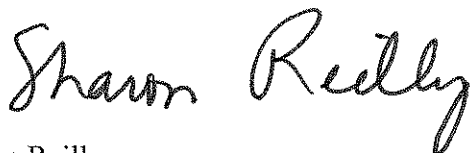
Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.

Finally, the Judicial Council, through its Advisory Committee on Criminal Jury Instructions (CALCRIM committee), regularly updates and maintains recommended jury instructions for use by criminal courts, prosecutors, and defense counsel. Those instructions are highly acclaimed and were selected for an award for jury innovation by the National Center for State Courts. The committee's process is very rigorous, and involves the work of experts, including distinguished jurists, prosecutors and defense attorneys, and a law professor. The CALCRIM committee's proposed jury instructions and amendments are circulated for public comment before they are adopted by the Judicial Council and published. Trial judges and both prosecutors and defense attorneys are encouraged to submit for the council's consideration suggestions for improving or modifying instructions or creating new instructions. In drafting model instructions, the CALCRIM committee is committed to ensuring the instructions are neutral, balanced, and understandable to the average jury. In Attachment A, the Chair of the CALCRIM committee has provided further background on the committee's concerns about AB 885's lack of balance.

Finally, the council believes that AB 885 is unnecessary because the council updates the model jury instructions at least twice a year to reflect new statutes, case law, and suggestions from trial judges, prosecutors, and defense attorneys, so the instructions are current, reflecting constant changes in the law. The council believes that under the existing processes, the author of AB 885 has the opportunity to suggest revisions to jury instructions to the council for its consideration.

For these reasons, the Judicial Council requests your veto of AB 885.

Sincerely,



Sharon Reilly
Senior Attorney

An attorney for the (People/defense) failed to disclose: *<describe evidence that was not disclosed>* [within the legal time period].

In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

[However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]

<Consider for multiple defendant cases> [You must not consider the fact that an attorney for defendant *<insert defendant's name>* failed to disclose evidence when you decide the charges against

Hon. Edmund G. Brown, Jr.

September 9, 2014

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SR/yc-s

cc: Hon. Tom Ammiano, Member of the Assembly

Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor

Attachment A

AB 885's language stands in contrast to the jury instruction on flight, which is legislatively mandated by Penal Code section 1127c. Instead of directing the jury as to what it "shall" do, CALCRIM No. 372 instructs the jury that a defendant's flight immediately after a crime or after being accused of a crime "*may show*" that the defendant was aware of his guilt, and *if the jury concludes* the defendant fled, "it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself." AB 885 lacks the neutral language of CALCRIM No. 372—that instruction is not argumentative, it directs the jury how it *may* consider the evidence, and cautions against its over-emphasis. AB 885, unfortunately, is not carefully drafted, fair and neutral, and non-argumentative, as the CALCRIM committee strives to do with its instruction.

Another concern is that AB 885 lacks a logical nexus between discovery compliance and a defendant's constitutional right to proof beyond a reasonable doubt based upon the evidence. A discovery violation is a procedural matter ordinarily handled by a judge, and not an evidentiary issue for the jury. A judge would not instruct a jury to consider the prosecution's diligent compliance with discovery obligations when deciding guilt or innocence. Yet AB 885 singles out discovery non-compliance as reflecting on reasonable doubt. Because the instruction lacks balance, CALCRIM is concerned that a very real danger exists, for example, that if the jury were to conclude there was no discovery violation or it was of no consequence, the jury might consider that circumstance as proof of guilt on the theory the prosecution did everything by the book. Or, if the court were to conclude that there was a discovery violation that involved inculpatory evidence, the jury might not understand that and inappropriately conclude that the discovery violation itself created reasonable doubt even though the evidence itself was not exculpatory.

Similarly, if the jury concludes exculpatory, AB 885 also mandates language that is inconsistent with CALCRIM No. 220, which defines reasonable doubt and has repeatedly been upheld by the appellate courts of California. CALCRIM No. 220 directs the jury to "impartially compare and consider all the evidence that was received throughout the entire trial." AB 885, on the other hand, requires the jury to consider evidence that was not received in trial because discovery violations are not issues presented to the jury. Judges are frequently cautioned not to tamper with the reasonable doubt instruction, and the CALCRIM committee has very serious concerns about requiring a jury to link a procedural discovery issue to the evidentiary question of whether or not reasonable doubts exists.