JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-001
For business meeting on: March 11, 2022

Title
Judicial Council–Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings

Rules, Forms, Standards, or Statutes Affected
Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3

Recommended by
Legislation Committee
Hon. Marla O. Anderson, Chair

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
February 25, 2022

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Sharon Reilly, 916-323-3121
Sharon.Reilly@jud.ca.gov

Executive Summary

The Legislation Committee and the Criminal Law Advisory Committee (CLAC) recommend that the Judicial Council sponsor legislation to amend Penal Code sections 977, 1043, 1043.5, 1148, and 1193, and to enact Penal Code section 977.3. The proposed legislation would provide statutory authority for remote criminal proceedings, provide statutory authority for courts to order the physical presence of a misdemeanor defendant, and expand a defendant's right to waive their physical and remote presence in a felony case.

Recommendation

The Legislation Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code sections 977, 1043, 1043.5, 1148, and 1193, and to enact Penal Code section 977.3. The new statute would provide authority for remote criminal proceedings; the amendments would authorize courts to order the physical presence of a

misdemeanor defendant, and would expand a defendant's right to waive their physical and remote presence in a felony case.

Relevant Previous Council Action

In 2014, the Commission on the Future of California's Court System (Futures Commission) was formed. Its primary purpose was to study and recommend to the Chief Justice initiatives to serve the public effectively and efficiently by enhancing access to justice. The Futures Commission released its final report in 2017 and noted that, "the option to attend court proceedings remotely should ultimately be available for all noncriminal case types and appearances, and for all witnesses, parties, and attorneys in courts across the state."[1]

In 2018, in response to the Futures Commission recommendation on remote proceedings in noncriminal cases, the Information Technology Advisory Committee (ITAC) formed the Remote Video Appearances Workstream (the workstream), which analyzed the state of video and digital appearances in California courts, and made recommendations to "broaden the adoption of this emerging model for court appearances."[2] The workstream made several recommendations to develop legislative and rule proposals that would facilitate the use of video appearances in most civil proceedings. Following the workstream's report, the Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, and ITAC formed a joint ad hoc subcommittee to move forward with development of legislative and rule proposals. In the spring of 2020, these advisory committees circulated for public comment a proposal to sponsor legislation for courts to permit remote video appearances in any civil action or proceeding, including trials and evidentiary hearings.[3]

Also, in the Spring of 2020, in response to the COVID-19 pandemic, the Judicial Council adopted emergency rule 3, Use of technology for remote appearances, and emergency rule 5, Personal appearance waivers of defendants during health emergency. These emergency rules permit a defendant in a criminal proceeding to waive their personal appearance and appear remotely or to permit counsel to appear on the defendant's behalf. In light of the emergency rules, the Judicial Council adopted as one of its key legislative priorities for 2021 the continued sponsorship and support of legislation to improve judicial branch operational efficiencies. These efficiencies included cost-savings and cost-recovery measures as well as the ability to conduct proceedings remotely in order to expand safe and reliable access to justice.

---

[1] Judicial Council of Cal., *Report to the Chief Justice: Commission on the Future of California's Court System (2017)*, pp. 221–222, (Recommendation 5.1), available online at www.courts.ca.gov/documents/futures-commission-final-report.pdf.

[2] Remote Video Appearances Workstream, *Remote Video Appearances for Most Noncriminal Hearings 2018–2019: Workstream Phase 1 Report, Final (Nov. 20, 2019)*, p. 3 (Workstream Report), available online at www.courts.ca.gov/documents/jctc-20191125-materials.pdf.

[3] Invitation to Comment, LEG20-02, *Proposal for Judicial Council–Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings,* available online at http://www.courts.ca.gov/documents/leg20-02.pdf.

In line with these priorities, the council sought trailer bill language in the 2021–2022 budget to allow continued use of remote technology in civil proceedings. Negotiations ultimately resulted in the passage of Senate Bill 241 (Umberg; Stats. 2021, ch. 214) and accompanying budget trailer bill language contained in Assembly Bill 177 (Ting; Stats. 2021, ch. 257).

SB 241 enacted the "2021 California Court Efficiency Act," which, among other things, authorizes the use of remote technology in civil proceedings until July 1, 2023. The remote technology provision of the bill authorizes, in civil cases where a party has provided notice they intend to appear remotely, a party to appear remotely and the court to conduct conferences, hearings, and proceedings, in whole or in part, through the use of remote technology.

AB 177 requires the Judicial Council, by January 1, 2023, to submit a report to the Legislature and the Governor on the use of remote technology in civil actions by the trial courts, and requires the Judicial Council to convene a working group for the purpose of recommending a statewide framework for remote civil court proceedings that addresses equal and fair access to justice.

Analysis/Rationale

Guided by the Judicial Council's legislative priorities and lessons learned from the COVID-19 pandemic, the Criminal Law Advisory Committee developed this proposal as a companion to the civil remote proceeding legislative proposal. The proposal provides statutory authority for remote criminal proceedings, for courts to order the physical presence of a misdemeanor defendant, and for defendants to waive the right to be physically or remotely present in a felony case.

After SB 241 and AB 177 were chaptered in September 2021, the Legislation Committee revised this proposal to be consistent with the framework and terminology in those bills. This included replacing references to "personal presence" or being "personally present" with references to a defendant's physical or remote presence, referring to proceedings through the use of remote technology rather than remote appearances through the use of technology, and ensuring that the judge's ability to order the physical presence of the defendant was consistent throughout the different provisions. These technical changes did not circulate for public comment. The statutory revisions recommended by CLAC are underlined or struck through in black, and the revisions incorporating the framework and terminology of SB 241 and AB 177 are highlighted on pages 6–12.

Policy implications

This proposal supports the Judicial Council's current legislative priority to continue to sponsor and support legislation to improve judicial branch operational efficiencies, including the ability to conduct proceedings remotely in order to expand safe and reliable access to justice. In

addition, the proposal supports the branch's longstanding priority to increase public access to the courts.[4]

Comments

This proposal circulated for comment from April 9, 2021, to May 21, 2021, and received six comments, which were submitted by the director of operations of a superior court, a county bar association, a public defender's office, an individual public defender, an interpreter, and a member of the public. Two commenters agreed with the proposal, one agreed if modified, two did not agree, and one did not declare a position but appeared to agree with the proposal.

The commenter who agreed with the proposal if modified read the proposal as amending Penal Code section 977(b)(2) to permit a victim of crime to require a defendant to be physically present in court, noting that there is no such requirement in case law, statute, or a constitutional provision, including Marsy's Law. The committee clarified that the proposed language does not require the court to order the defendant to be physically present upon request of a victim, but states that the court may do so upon request of the victim, to the extent required by section 28 of article I of the California Constitution.

A commenter who disagreed with the proposal stated that remote appearances did not further the interests of the accused, and did not think that requiring the defendant's consent for a remote appearance was sufficient to override this concern. The committee disagreed, noting that in addition to requiring the defendant's consent, most defendants are represented by counsel who can help determine whether a remote or physical appearance in a particular proceeding is in the best interests of the defendant. The commenter also stated that an effective cross-examination could not be achieved during a remote proceeding. The committee responded that section 977.3 would protect a defendant's right to cross-examination by requiring the consent of the parties for any witness in a criminal proceeding to testify remotely, as well as require the defendant to make an informed waiver, on the record, of the right to have the witness testify in person. Finally, the commenter stated that allowing defense counsel to appear remotely could pit the client's interests against defense counsel's interests in arranging for multiple appearances in various courts in order to earn more income.

The committee disagreed that facilitating such conditional remote appearances by counsel in criminal matters would undermine the duty of loyalty. The committee noted that while it is conceivable that the provision might increase an individual attorney's ability to make appearances in various geographic locations without having to take into account travel time and expenses (thus reducing the cost to the clients), it is not inconsistent with any rule of professional

[4] In 2013, Chief Justice Tani G. Cantil-Sakauye proposed a framework to increase public access to the courts. Her vision, entitled Access 3D, combines strategies from the courts—actions that will ensure greater public access—with a reasonable reliance on funds reinvested into the judicial branch. The goals of Access 3D ensure that Californians have access to the justice system they expect and deserve. The three dimensions of Access 3D are: (1) improved physical access, by keeping courts open and operating during hours that benefit the public; (2) increased remote access, by increasing the ability of court users to conduct branch business online; and (3) enhanced equal access, by serving people of all languages, abilities, and needs, reflecting California's diversity.

conduct. Additionally, because such appearances may be made only with the consent of the client and subject to court approval, the committee did not share the commenter's concern that authorized remote appearances by counsel will result in prejudice to a defendant.

The other commenter who disagreed with the proposal was concerned that inadequate equipment, poor internet connections, and lack of technical knowledge, among other things, would make the work of court interpreters and stenographers difficult or impossible to do if they could not clearly hear the proceedings. Similar to SB 241, the proposal includes a provision for the Judicial Council to adopt rules of court to implement the policies and provisions of this section, and CLAC plans to consider rules addressing technology standards, training, and guidance to courts on conducting proceedings with remote appearances, including defendants with limited English proficiency.

Alternatives considered

CLAC discussed whether to revise section 977 to allow the court to exercise its discretion to order a remote appearance rather than rely on a defendant's consent. Though there was a measure of support for those changes, there was an overriding concern about opposition to remote appearances without the defendant's consent, and the committee ultimately decided to develop a proposal aimed at removing statutory barriers to the optional use of remote technology, with a defendant's consent, for a remote proceeding.

The committee discussed concerns that allowing prosecutors and defense attorneys to appear remotely could result in delayed resolution of cases, but ultimately decided that providing statutory authority for remote appearances by counsel when appropriate was a valuable procedural option.

Fiscal and Operational Impacts

The proposal would provide courts with statutory authority to permit, but not require, remote proceedings through the use of technology. Courts that choose to allow remote proceedings through the use of technology would need to devote fiscal resources and modify existing operations to support such appearances. Specifically, implementing remote criminal proceedings would result in staff, training, equipment, and software costs. However, the transition to remote proceedings during the COVID-19 pandemic has already resulted in all 58 local superior courts being able to hold proceedings remotely in at least one case type, and 39 courts in most or all case types. Further, the option to conduct remote proceedings may help courts reduce case backlogs associated with the pandemic, resulting in fiscal and operational benefits.

Attachments and Links

1. Pen. Code, §§ 977, 977.3, 1043, 1043.5, 1148, and 1193, at pages 6–12
2. Chart of comments, at pages 13–21

Sections 977, 1043, 1043.5, 1148, and 1193 of the Penal Code would be amended, and section 977.3 would be enacted, effective January 1, 2023, to read:

§ 977.

(a)

(1) In all cases in which the accused is charged with a misdemeanor only, they may appear by counsel only, except as provided in paragraphs (2) and (3). If the accused agrees, the initial court appearance, arraignment, ~~and~~ plea, and all other proceedings may be ~~by video~~ conducted remotely through the use of technology, as provided by subdivision (c). However, the court may specifically direct the defendant, either personally or through counsel, to be ~~personally~~ physically present at any particular proceeding or portion thereof.

(2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2.

(3) If the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. For purposes of this paragraph, a misdemeanor offense involving driving under the influence shall include a misdemeanor violation of any of the following:

(A) Subdivision (b) of Section 191.5.

(B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

(C) Section 23152 of the Vehicle Code.

(D) Section 23153 of the Vehicle Code.

(b)

(1) Except as provided in subdivision (c), in all cases in which a felony is charged, the accused shall be ~~personally~~ physically present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be ~~personally~~ physically or remotely present at all other proceedings unless they shall, with leave of court and with approval by defendant's counsel, ~~execute in open~~

~~court, a written~~ waiver ~~of~~ their right to be ~~personally~~ physically or remotely present, as provided by paragraph (2). ~~If the accused agrees, the initial court appearance, arraignment, and plea~~ appearances ~~may be by video~~ conducted ~~remotely through the use of technology, as provided by subdivision (c).~~

(2) ~~The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel., and t~~ The waiver of a defendant's right to be ~~personally~~ physically or remotely present ~~shall be~~ may be in writing and filed with the court or, with the court's consent, may be entered orally, either by the defendant or by the defendant's counsel of record. A defendant's oral waiver of the right to be ~~personally~~ physically or remotely present shall be on the record and state that the defendant has been advised of the right to be ~~personally~~ physically or remotely present for the hearing at issue and agrees that notice to the attorney that the defendant's physical or remote presence in court at a future date and time is required is notice to the defendant of that requirement. A waiver of the defendant's physical or remote presence may be entered by counsel, after counsel has stated on the record that the defendant has been advised of the right to be ~~personally~~ physically or remotely present for the hearing at issue, has voluntarily waived that right, and agrees that notice to the attorney that the defendant's physical or remote presence in court at a future date and time is required is notice to the defendant of that requirement. However, the court may specifically direct the defendant, either personally or through counsel, to be ~~personally~~ physically or remotely present at any particular proceeding or portion thereof, including upon request of a victim, to the extent required by Section 28 of Article I of the California Constitution. ~~The~~ A written waiver of the defendant's ~~personal~~ physical or remote presence shall be substantially in the following form:

"Waiver of Defendant's ~~Personal~~ Physical or Remote Presence"

"The undersigned defendant, having been advised of their right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be physically or remotely present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that their interest is represented at all times by the presence of their attorney the same as if the defendant were ~~personally~~ physically or remotely present in court, and further agrees that notice to his or her attorney that his or her physical or remote presence in court on a

particular day at a particular time is required is notice to the defendant of the requirement of their physical or remote appearance at that time and place."

(c)

(1) 977(c)(1): If the accused agrees, t~~T~~he court may conduct ~~permit the initial court appearance, and arraignment of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury,~~ ~~remote appearances~~ proceedings ~~to be conducted by two-way electronic audiovideo communication~~ through the use of remote technology ~~between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom.~~ ~~If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing.~~ The court may specifically direct the defendant, either personally or through counsel, to be physically present at any particular proceeding or portion thereof. If the defendant is represented by counsel, the attorney shall not be required to be ~~personally~~ physically present with the defendant if the remote technology allows for private communication between the defendant and the attorney, unless, upon request of defense counsel, the court allows the appearance without private communication. The defendant shall have the right to make their plea while physically present in the courtroom if they request to do so. If the defendant decides not to exercise the right to be physically present in the courtroom they shall ~~execute a written~~ waiver ~~of~~ that right. ~~A judge may order a defendant's personal appearance in court for the initial court appearance and arraignment~~. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(2)

(A) A defendant who does not wish to be ~~personally~~ physically or remotely present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding, or may submit a written request to the court, which the

court may grant in its discretion. The court may, when a defendant has waived the right to be ~~personally~~ physically or remotely present, require a defendant ~~held in any state, county, or local facility within the county on~~ with pending felony or misdemeanor charges to be present for noncritical portions of the trial when no testimonial evidence is taken, including, but not limited to, confirmation of the preliminary hearing, status conferences, trial readiness conferences, discovery motions, receipt of records, the setting of the trial date, a motion to vacate the trial date, and motions in limine, ~~by two-way electronic audiovideo communication~~ ~~remote appeareance~~ through the use of remote technology ~~between the defendant and the courtroom~~ in lieu of requiring the physical presence of the defendant and counsel for the parties in the courtroom. If the defendant is represented by counsel, the attorney shall not be required to be ~~personally~~ physically present with the defendant for noncritical portions of the trial, if the ~~audiovideo conferencing system or other~~ remote technology allows for private communication between the defendant and the attorney prior to and during the noncritical portion of trial. Any private communication shall be confidential and privileged pursuant to Section 952 of the Evidence Code.

(B) This paragraph does not expand or limit the right of a defendant to be personally present with their counsel at a particular proceeding as required by Section 15 of Article 1 of the California Constitution.

(d) * * *

(e)

A court may, as appropriate and practicable, allow a prosecuting attorney or defense counsel to participate in a criminal proceeding through the use of remote technology, without being physically present in the courtroom.

(f)

Consistent with its constitutional rule making authority, the Judicial Council may adopt rules ~~of court~~ to implement the policies and provisions of this section.

§ 977.3.

(a)

A witness in a criminal proceeding may testify in a hearing or trial ~~remotely~~ through the use of remote technology with the written or oral consent of the parties, on the record, and the agreement of the court. The defendant must make an informed waiver, on the record, of the right to have the witness testify in person.

(b)

Consistent with its constitutional rule making authority, the Judicial Council may adopt rules ~~of court~~ to implement the policies and provisions of this section.

§ 1043.

(a)–(d) * * *

(e)

If the defendant in a misdemeanor case fails to appear in person or to appear ~~remotely~~ through the use of remote technology in accordance with Section 977 at the time set for trial or during the course of trial, the court shall proceed with the trial, unless good cause for a continuance exists, if the defendant has authorized their counsel to proceed in their absence pursuant to subdivision (a) of Section 977.

If there is no authorization pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:

(1) Continue the matter.
(2) Order bail forfeited or revoke release on the defendant's own recognizance.
(3) Issue a bench warrant.
(4) Proceed with the trial in the defendant's absence as authorized in subdivision (f).

(f)–(g) * * *

§ 1043.5.

(a)–(c) * * *

(d)

Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to be physically present or to appear through the use of remote technology in accordance with Section 977.

(e) * * *

§ 1148.

If charged with a felony the defendant must, before the verdict is received, appear in person or appear ~~remotely~~ through the use of remote technology in accordance with Section 977, unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that the verdict be received in his absence. If for a misdemeanor, the verdict may be rendered in his absence.

§ 1193.

Judgment upon persons convicted of commission of crime shall be pronounced as follows:

(a)

If the conviction is for a felony, the defendant shall be ~~personally~~ physically present or appear ~~remotely~~ through the use of remote technology in accordance with Section 977 when judgment is pronounced against him or her, unless the defendant, in open court and on the record, or in a notarized writing, requests that judgment be pronounced against him or her in his or her absence, and that he or she be represented by an attorney when judgment is pronounced, and the court approves his or her absence during the pronouncement of judgment, or unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence; provided, that when any judgment imposing the death penalty has been affirmed by the appellate court, sentence may be reimposed upon the defendant in his or her absence by the court from which the appeal was taken, and in the following manner: upon receipt by the superior court from which the appeal is taken of the certificate of the appellate court affirming the judgment, the judge of the superior court shall forthwith make and cause to be entered an order pronouncing sentence against the defendant, and a warrant signed by the judge, and attested by the clerk under the seal of the court, shall be drawn, and it shall state the conviction and judgment and appoint a day upon which the judgment shall be executed, which shall not be less than 60 days nor more than 90 days from the time of making the order; and that, within five days thereafter, a certified copy of the order, attested by the clerk under the seal of the court, and attached to the warrant,

shall, for the purpose of execution, be transmitted by registered mail to the warden of the state prison having the custody of the defendant and certified copies thereof shall be transmitted by registered mail to the Governor; and provided further, that when any judgment imposing the death penalty has been affirmed and sentence has been reimposed as above provided there shall be no appeal from the order fixing the time for and directing the execution of the judgment as herein provided. If a pro se defendant requests that judgment in a noncapital case be pronounced against him or her in his or her absence, the court shall appoint an attorney to represent the defendant in the in absentia sentencing.

(b)

If the conviction be of a misdemeanor, judgment may be pronounced against the defendant in his absence.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
1.	Craig Downing Director of Operations Superior Court of Fresno County	NI	I reviewed the sponsor legislation for remote appearances and it addresses criminal law; however, traffic infraction cases fall under Title 4: Criminal Rules. With the JC sponsoring legislation to embrace remote appearances in criminal proceedings, is the traffic advisory group going to amend the rule of court for remote appearances in traffic Rule 4.220(a) and 4.220(d)(3) to mirror the language in the attached proposal.	The Traffic Advisory Committee is currently examining how the rule should be changed in light of Penal Code section 1428.5, new legislation authorizing remote proceedings in infraction cases (Assembly Bill 143 (Stats. 2021, ch. 70)).
2.	Orange County Bar Association by Larisa Dinsmoor President	AM	Leg 21-01 expands the law surrounding remote appearances through the use of technology. The changes are appropriate and permit expanded access through Penal Code 977 appearances via technology. The one issue appears in Section 977(b)(2), which permits a victim of a crime to require that a defendant be present in court. There is no such requirement in Marsy's Law, and this portion does not appear to be based upon any case law, statute, or constitutional provision. However, the court may specifically direct the defendant, either personally	The recommended language does not require the court to order the defendant to be physically present upon request of a victim. It states that the court may do so upon request of the victim.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

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

	Commenter	Position	Comment	Committee Response
			or through counsel, to be personally present at any particular proceeding or portion thereof, ~~including upon request of a victim,to the extent required by Section 28 of Article I of the California Constitution.~~	
3.	San Diego County: Office of the Primary Public Defender by Jeremy Thornton Deputy Public Defender	N	The California judiciary should protect the dignity of the accused and promote a robust attorney-client relationship – the LEG21-01 proposal does neither. Though well-intentioned, the proposed amendments to Penal Code sections, 977, 1043, 1043.5 and 1193, and the addition of Section 977.3 are ill-advised and should not be pursued. A. Remote appearances are dehumanizing and do not further the interests of the accused. The accused are routinely dehumanized in the criminal justice system. Prosecutors rarely refer to the accused by name, and instead identify them by the present charges and past convictions. One of the most important roles of a competent defense practitioner is to humanize the client. It is most difficult – and sometimes impossible – to do so when the client is reduced	

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

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

	Commenter	Position	Comment	Committee Response
			to an image on a screen. Empathy and sympathy for the many struggles of the client is noticeably absent when the proceedings involve remote appearances. That the accused must consent to the remote appearance is of no consolation. If there is one common likeness between individuals within the criminal justice system, it is a history of trauma. A large majority of the individuals who are accused of criminal conduct have been subject to, either singularly or a combination of: abuse, neglect, violence, racism, or sexual assault and exploitation. This maltreatment leads these individuals to believe that they are of little to no value. They are told that they are a pariah, they view themselves as such, and they seek to minimize their perceived cost to others. The consequence of remote proceedings as a result of these mistaken – but internalized – beliefs: the individuals are content to watch court actors make weighty decisions about the individuals' futures rather than participate in the decision-making process. In essence, court becomes a reality tv show, the ending of which is often a prison sentence for the viewer. By requiring	The proposal requires a defendant's consent to appear remotely through the use of technology in a criminal proceeding and does not permit a remote appearance over a defendant's objection. Further, most defendants are represented by counsel who can help determine whether a remote or physical personal appearance in a particular proceeding is in the best interests of the defendant.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

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

	Commenter	Position	Comment	Committee Response
			individuals to personally attend court, the courts convey a fundamental truth about the adjudication process: that the accused is a stake holder, has worth, and whose dignity must be respected. B. Effective advocacy cannot be achieved during a remote proceeding. An exacting cross-examination is necessary for effective advocacy; it is vital to the determination of credibility and reliability. This much was recognized by the United States Supreme Court: "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."	The committee acknowledges the commenter's concerns. However, section 977.3 would require the consent of the parties for any witness in a criminal proceeding to testify remotely, as well as require the defendant to make an informed waiver, on the record, of the right to have the witness testify physically in the courtroom. These requirements would protect the defendant's right to cross-examination.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			Confronting a witness with prior statements is a basic and fundamental component of cross-examination. More often than not, this is most effective with the visual component of defense counsel actually walking up to the witness and asking the witness to confront a prior inconsistent statement made by that witness. This is impossible when the witness is testifying by video. In this way, embracing a rule that permits witnesses to testify remotely will correspond to less-effective advocacy, which is antithetical to truth determination. C. Permitting defense counsel to appear remotely has the potential to undermine the duty of loyalty. Defense counsel cannot represent an individual if the representation will be materially limited because of the attorney's own interest. The proposal implicates this particular rule section in two ways. First, it allows an attorney to appear for court without having to be personally present with the client. Second, it permits an attorney to appear remotely without being personally present in the courtroom.	The committee does not agree that allowing attorneys to appear remotely (with the consent of the defendant and subject to judicial approval) poses a danger of undermining the right to effective assistance of counsel. While the committee recognizes and agrees with the assertion that competent counsel must have the capacity to engage in confidential communication with a client during a hearing at which the defendant's presence is required in order for the

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			The right to counsel includes the ability to confer with counsel during the proceedings. Competent defense counsel often speak with clients during proceedings and answer any questions that clients may have. An attorney cannot effectively do that while not standing or sitting immediately next to the client. Though the proposal has obvious implications to the right to counsel, it can be argued that this defect is cured if the attorney first gets permission from the client – and this is why the proposal implicates the duty of loyalty. An attorney may prefer the comfort of the attorney's office to the courtroom. In fact, for retained attorneys, remote appearances may even permit multiple appearances in various courts across counties; this means more income. A situation where the attorney considers the attorney's own comfort or income, i.e., the attorney's own interest, compromises the attorney's sober judgment and can materially limit the representation. The COVID-19 public health crisis introduced an immediate need to conduct court proceedings in a manner where individuals were distanced from each other. There was a cost to this, but	right to counsel to be effectuated, the proposed provision does not foreclose the use of technology to allow for such communication, as needed. Additionally, the committee does not share the view that facilitating such conditional remote appearances by counsel in criminal matters undermines the duty of loyalty. While it is conceivable that the rule might increase an individual attorney's ability to make appearances in various geographic locations without having to take into account travel time and expenses (thus reducing the cost to the clients), it is not inconsistent with any rule of professional conduct. And, because such appearances may be made only with the consent of the client and subject to court approval, the committee does not share the commenter's concern that occasional authorized remote appearances by counsel will result in prejudice to a defendant.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			the cost was outweighed by the dangers of the novel virus. The emergency measures that were put in place should not become the new normal. Instead, as the danger subsides there should be a corresponding restoration of the rights of the accused. For the aforementioned reasons, we oppose the LEG21-01 proposal.	
4.	Jason Gundel Assistant Public Defender Imperial County Public Defender's Office El Centro, California	A		The committee appreciates the comment.
5.	Azucena Puerta-Diaz	N	My name is Azucena Puerta-Diaz, and I am a Spanish Interpreter with over 25 years of experience working in state and federal courts, attorneys' offices, hospitals, education, and local, state, national, and international conferences. I have an MA in Linguistics from the University of Southern California, and I am certified by the Judicial Council of California, the US District Courts, and the American Translators Association. I object to the use of video remote in court proceedings when interpreter services are	

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			required. My experience is that video remote has had many problems that interfere with the ability of LEP persons to fully participate in hearings. I request the Legislature to NOT adopt the trailer bill on remote hearings, but instead take time to speak with those of us working in the courts, so that we can share the many problems we have experienced during the Covid-19 Pandemic. Technology is not up to par with the court needs of anyone participating in the judicial process. Bad equipment, poor internet connections, lack of knowledge and/or improper use of technology, among other things, difficult and sometimes make impossible the work of court interpreters and stenographers, who cannot hear part of the proceedings. Add to that issues related to acoustic shock, mental fatigue, remote audiovisual processing, discourse practices, and forensic linguistics, and the services cannot be adequately provided. Special times call for special circumstances, and the unexpected court shutdowns imposed by the unprecedented pandemic forced us to adapt to make the best with what we had. However, we should not make permanent the bad practices	The proposal includes a provision for the Judicial Council to adopt rules of court to implement the policies and provisions of this section. The committee recommends these rules address technology standards, training, and guidance to courts on conducting proceedings with remote appearances, including defendants with limited English proficiency. The rulemaking process includes a public comment period.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

LEG21-01

Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			that had to be implemented in an emergency. PLEASE DO NOT IMPLEMENT REMOTE INTERPRETING AS A STANDARD PRACTICE. IT DOES NOT WORK.	
6.	Kailin Wong Spanish Fork, UT	A	This will benefit all, should be implemented permanently.	The committee appreciates the comment.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-038
For business meeting on: March 10–11, 2022

Title
Civil Practice and Procedure: Adjustments to Dollar Amounts of Exemptions

Rules, Forms, Standards, or Statutes Affected
Adopt form EJ-186 and revise form EJ-156

Recommended by
Judicial Council staff
Anne Ronan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
April 1, 2022

Date of Report
February 15, 2022

Contact
James Barolo, 415-865-8928
james.barolo@jud.ca.gov

Executive Summary

Judicial Council staff recommend that the Judicial Council take the following actions required by statute to reflect changes in the California Consumer Price Index in relation to the enforcement of judgements: (1) adopt *Current Dollar Amounts Under Code of Civil Procedure Section 699.730(b)* (form EJ-186), and revise *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156), which include the three-year adjustments to the dollar amounts in provisions relating to enforcement of judgments, as required by Code of Civil Procedure section 703.150; and (2) approve for submission to the Legislature the report on potential adjustments to the dollar amounts of homestead exemptions, as required by Code of Civil Procedure section 703.150(c).

Recommendation

Judicial Council staff recommend that the Judicial Council take the following actions:

1. Adopt *Current Dollar Amounts Under Code of Civil Procedure Section 699.730(b)* (form EJ-186), effective April 1, 2022, which contains revised figures adjusted to reflect changes in the Consumer Price Index;

2. Revise *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156), effective April 1, 2022, which contains revised figures adjusted to reflect changes in the Consumer Price Index;

3. Approve, effective March 30, 2022, the report to the Legislature on potential adjustments to the dollar amounts of homestead exemptions from enforcement of civil judgments, in conformance with Code of Civil Procedure section 703.150(c); and

4. Direct Judicial Council staff to submit the report to the Legislature.

The new and revised forms are at pages 5–7, and the report is attached as Attachment A.

Relevant Previous Council Action

In 2004, the Judicial Council authorized the Administrative Office of the Courts[1] to prepare a list of the amounts of certain exemptions from enforcement of judgments and to periodically update the list as required by Code of Civil Procedure[2] section 703.150(d) and (e) to reflect changes in the California Consumer Price Index for All Urban Consumers (CCPI). (See Link A.) Pursuant to this authorization, a list entitled *Current Dollar Amounts of Exemptions From Enforcement of Judgments* was prepared and posted on the California Courts website in April 2004. The list contained the dollar amounts of exemptions effective as of April 1, 2004, and indicated that further adjustments would be made every three years. As statutorily mandated, the exemption amounts on the list were adjusted in 2007, 2010, 2013, 2016, and 2019. The council, rather than the Administrative Director, began approving the revisions to the form in 2013.

The requirement that the council report on potential adjustments to the homestead exemption based on changes in the CCPI (see § 703.150(c)) is a more recent addition to that statute. This is the fourth report to the Legislature prepared under that provision.

Analysis/Rationale

Exemptions to enforcement of judgments

Section 703.150(f) requires the Judicial Council to adjust the dollar amounts of several exemptions from the enforcement of judgment provided in sections 703.140(b) (for cases under title 11 of the United States Code) and 704.010 et seq. (for other cases) every three years based on changes to the CCPI during that period, and to publish the adjusted amounts together with the next scheduled date of adjustment. (See § 703.150(a), (b).) The list of the dollar amounts of exemptions needs to be adjusted again at this time.

[1] See Judicial Council of Cal., Advisory Com. Rep., *Exemptions From the Enforcement of Judgments* (Apr. 12, 2004), and minutes of the April 23, 2004, Judicial Council meeting, item 1, *www.courts.ca.gov/documents/age0404.pdf*.

[2] Unless otherwise noted, all statutory references hereafter are to the Code of Civil Procedure.

Based on the recently published 2021 CCPI figures[3] and using the formula attached to this report, staff have calculated the adjusted dollar amounts of the exemptions effective April 1, 2022, and revised the *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156) to show the adjusted amounts.[4]

In 2010, the Legislature amended the provisions on exemptions to address potential adjustments to the dollar amount of homestead exemptions provided in section 704.730(a). (See § 703.150(d).) The council is not to make these adjustments, but only to calculate what they would be under the same formula used for adjusting the other exemptions (i.e., based on the change in the CCPI over the past three years) and to provide that information to the Legislature, beginning on April 1, 2013, and at three-year intervals thereafter. (*Ibid.*)

Since the Judicial Council last reported on potential adjustments to dollar amounts of homestead exemption in 2019, the Legislature amended section 704.730. (Assem. Bill 1885; Stats. 2020, ch. 94.) The Legislature substantially increased the amounts of the homestead exemption effective January 1, 2021, and included in the amended statute provisions by which the amounts of the exemption automatically adjust every year based on changes in the California Consumer Price Index, starting January 1, 2022. (Code Civ. Proc. § 704.730(b).)

Although the adjustments have now been made automatic, the Legislature did not, when amending section 704.730, eliminate the provision for triannual reports for potential adjustments. In addition, should the Legislature continue to want the council to calculate and report on such adjustments, however, it is unclear how to calculate the requested dollar amounts, because, as explained in the report to the Legislature (Attachment A), the formula for annual adjustment in section 704.730(b) regarding homestead exemptions is different than the formula for triannual adjustments for other exemptions set forth in section 703.150(e). The report therefore provides the percentage change that would be applied under section 703.150(e), but does not attempt to generate specific dollar amounts. A copy of the formula used to generate the percentage is attached to the report to the Legislature.

Dollar amounts under section 699.730

Recently, the Legislature added a new set of figures to the list of dollar amounts that the council is to adjust and publish every three years under section 703.150(e) and (f): the figures contained in paragraph (7) of subdivision (b) of section 699.730. That code section provides that the principal place of residence of a judgment debtor is not subject to sale under execution of a judgment lien based on a consumer debt unless the debt was secured by the property at the time it was incurred. (See Code Civ. Proc., § 699.730(a).) However, the protections in section

[3] The California Department of Industrial Relations has published the figures on its website, at www.dir.ca.gov/OPRL/CPI/PresentCCPI.PDF.

[4] The current version of form EJ-156 was correctly revised in 2019, although it appears that the "Formula for adjusting exemption amounts on form EJ-156" attached to the 2019 report to the council at page 8 contained some minor typographical errors. Despite the errors on that sheet, the correct numbers were used to adjust the dollar amounts on form EJ-156, and it is those figures that are being adjusted in the proposed revision.

699.730(a) do not apply to certain types of unpaid debts, including debts, other than student loan debt, owed to a financial institution at the time of the execution of a judgment lien, if certain requirements based on dollar amounts are met. (See Code Civ. Proc., § 699.730(b)(7).)

Just as for the exemption amounts, the statute requires that the council adjust the dollar amounts in section 690.730(b)(7) every three years, starting April 1, 2022, based on changes to the CCPI during that period, and to publish the adjusted amounts together with the next scheduled date of adjustment. (See § 703.150(c), (e) & (f).) Because these figures do not represent amounts of income or assets that are exempt from enforcement of judgment, but are instead amounts of a particular type of debt or judgment that cannot serve as the basis for the sale of a principal place of residence, the adjusted figures cannot simply be added to the existing form. Instead, staff is recommending a new, similar form, *Current Dollar Amounts Under Code of Civil Procedure Section 699.730(b)* (form EJ-186). The proposed form contains the statutorily required adjustment for April 1, 2022, which staff calculated using the formula attached to this report.

Policy implications

There are no policy implications to these recommendations; they are simply actions required by statute.

Comments

This proposal was not circulated for comment because the changes to the dollar amounts are technical, required by statute, and not subject to discretion.

Alternatives considered

No alternatives to publishing adjusted dollar amounts were considered in light of the statutory mandate that the council adjust the figures every three years beginning in 2004.

Fiscal and Operational Impacts

The implications for this proposal for the trial courts should be minimal. Forms EJ-156 and EJ-186 are informational only and are not filed with or completed by the courts. No costs or operational impacts are associated with the approval of the report to the Legislature.

Attachments and Links

1. Forms EJ-156 and EJ-186, at pages 5–7
2. Formula for adjusting dollar amounts, at page 8
3. Attachment A: *Report required under Code of Civil Procedure section 703.150(c)*
4. Link A: 2021 California Consumer Price Index for All Urban Consumers, Department of Industrial Relations, *www.dir.ca.gov/OPRL/CPI/PresentCCPI.PDF*

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 703.140(b)

The following lists the current dollar amounts of exemptions from enforcement of judgment under Code of Civil Procedure section 703.140(b) used in a case under title 11 of the United States Code (bankruptcy).

These amounts are effective April 1, 2022. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(e).)

DRAFT 2/12/2022 Not approved by the Judicial Council

Code Civ. Proc., § 703.140(b)	Type of Property	Amount of Exemption
(1)	The debtor's aggregate interest in real property or personal property that the debtor or a dependent of the debtor uses as a residence, or in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence	$ 31,950
(2)	The debtor's interest in one or more motor vehicles	$ 6,375
(3)	The debtor's interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor (value is of any particular item)	$ 800
(4)	The debtor's aggregate interest in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor	$ 1,900
(5)	The debtor's aggregate interest, plus any unused amount of the exemption provided under paragraph (1), in any property	$ 1,700
(6)	The debtor's aggregate interest in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor	$ 9,525
(8)	The debtor's aggregate interest in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent	$ 17,075
(11)(D)	The debtor's right to receive, or property traceable to, a payment on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent	$ 31,950

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 704.010 et seq.

The following lists the current dollar amounts of exemptions from enforcement of judgment under title 9, division 2, chapter 4, article 3 (commencing with section 704.010) of the Code of Civil Procedure.

The amount of the automatic exemption for a deposit account under section 704.220(a) is effective July 1, 2021, and unless otherwise provided by statute after that date, will be adjusted annually effective July 1 by the Department of Social Services under Welfare and Institutions Code section 11453 to reflect the minimum basic standard of care for a family of four as established by § 11452.*

The other amounts are all effective April 1, 2022. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(e).)

Code Civ. Proc. Section	Type of Property	Amount of Exemption
704.010	Motor vehicle (any combination of aggregate equity, proceeds of execution sale, and proceeds of insurance or other indemnification for loss, damage, or destruction)	$ 3,625
704.030	Material to be applied to repair or maintenance of residence	$ 3,825
704.040	Jewelry, heirlooms, art	$ 9,525
704.060	Personal property used in debtor's or debtor's spouse's trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $4,850)	$ 9,525
704.060	Personal property used in debtor's and spouse's common trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $9,700)	$ 19,050
704.220	Deposit account, generally (exemption without claim; amount per judgment debtor, section 704.220(a),(e))[1]	$ 1,826*
704.080	Deposit account with direct payment of social security or public benefits (exemption without claim, section 704.080(b))[2]	
	• Public benefits, one depositor is designated payee	$ 1,900
	• Social security benefits, one depositor is designated payee	$ 3,825
	• Public benefits, two or more depositors are designated payees[3]	$ 2,825
	• Social security benefits, two or more depositors are designated payees[3]	$ 5,725
704.090	Inmate trust account	$ 1,900
	Inmate trust account (restitution fine or order)	$ 325[4]
704.100	Aggregate loan value of unmatured life insurance policies	$ 15,250

1 This exemption does not preclude or reduce other exemptions for deposit accounts. However, if the exemption amount for the deposit account applicable under other automatic exemptions—such as those applicable for direct deposit of social security benefits or public benefits—is greater under the other exemptions, then those apply instead of this one. (Code Civ. Proc., § 704.220(b).)

2 The amount of a deposit account with direct deposited funds that exceeds exemption amounts shown is also exempt to the extent it consists of payments of public benefits or social security benefits. (Code Civ. Proc., § 704.080(c).)

3 If only one joint payee is a beneficiary of the payment, the exemption is in the amount available to a single designated payee. (Code Civ. Proc., § 704.080(b)(3) and (4).)

4 This amount is not subject to adjustments under Code Civ. Proc., § 703.150.

Print this form Save this form

CURRENT DOLLAR AMOUNTS UNDER CODE OF CIVIL PROCEDURE SECTION 699.730(b)

The following lists the dollar amounts set forth in section 699.730(b)(7) of the Code of Civil Procedure, adjusted pursuant to section 703.150.

The principal place of residence of a judgment debtor is not subject to sale under execution of a judgment lien based on a consumer debt unless the debt was secured by the property at the time it was incurred. (See Code Civ. Proc., § 699.730(a).) However, the provisions in section 699.730(a) do not apply to certain types of unpaid debts, including debts other than student loan debt, owed to a financial institution at the time of the execution of a judgment lien, if certain requirements based on dollar amounts are met. (See Code Civ. Proc. § 699.730(b)(7).)

The amounts stated here are effective April 1, 2022. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(e).)

Section 699.730(b)(7)(A)(i)	The amount of the original judgment on which the lien is based, when entered, was greater than $81,850
Section 699.730(b)(7)(A)(ii)	The amount owed on the outstanding judgment at the time of the execution on the judgment lien is greater than $81,850

DRAFT
2/12/2022
Not approved by
the Judicial Council

Calculation of Dollar Amounts Under Code of Civil Procedure Sections 699.730, 703.140(b), and 704.010 et seq. (Adjusted April 1, 2022)

The adjustments to the current dollar amounts of the exemptions provided in Code of Civil Procedure sections 703.140(b) and 704.010 et seq., in *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156), and to *Current Dollar Amounts Under Code of Civil Procedure Section 699.730(b)* (form EJ-186) are calculated as follows:

Formula

Under Code of Civil Procedure section 703.150(a), (b), (c), and (e), the adjustments to the dollar amount of the exemptions in sections 703.140(b) and 704.010 et seq. are calculated as follows:

$$\text{Adjusted dollar amount} = \left[\frac{\text{annual CCPI (2021)} - \text{annual CCPI (2018)}}{\text{annual CCPI (2018)}} + 1 \right] \times \text{Previous dollar amount}$$

This is similar to the method of calculation employed by the Judicial Conference of the United States in calculating adjustments to the federal bankruptcy exemptions, but it uses the California Consumer Price Index instead of the federal equivalent.

Definition

"CCPI" means the California Consumer Price Index for All Urban Consumers published by the Department of Industrial Relations, Division of Labor Statistics.

Calculation (as of April 1, 2022)

The calculation for the adjusted dollar amounts in Code of Civil Procedure sections 699.730, 703.140(b), and 704.010 et seq. is based on the following formula:

$$\text{Adjusted dollar amount} = \left[\frac{297.371 - 272.51}{272.51} + 1 \right] \times \text{Previous dollar amount} = 1.09123 \times \text{Previous dollar amount}$$

The adjustments of the dollar amounts of each of the individual exemptions is calculated by increasing the amounts of the individual exemptions by 9.123 percent, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(e).)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue
San Francisco, CA 94102-3688
Tel 415-865-4200
TDD 415-865-4272
Fax 415-865-4205
www.courts.ca.gov

March 30, 2022

Ms. Cara L. Jenkins
Legislative Counsel
1021 O Street, Suite 3210
Sacramento, California 95814

Ms. Erika Contreras
Secretary of the Senate
State Capitol, Room 3044
Sacramento, California 95814

Ms. Sue Parker
Chief Clerk of the Assembly
State Capitol, Room 319
Sacramento, California 95814

Re: *Report required under Code of Civil Procedure section 703.150(c)*

Dear Ms. Jenkins, Ms. Contreras, and Ms. Parker:

The Judicial Council respectfully submits this report as required by Code of Civil Procedure section 703.150(d). That statute provides that at three-year intervals beginning on April 1, 2013, the Judicial Council shall submit to the Legislature the amount by which the dollar amounts of the homestead exemptions in effect immediately before that date as provided in section 704.730(a) may be increased under the formula set forth in section 703.150(e), should the Legislature approve such an adjustment. The council notes, however, that it is no longer clear how to make that calculation and, even if it were, the adjusted dollar amounts no longer seem to be needed in light of recent legislation that provides for automatic adjustments of the homestead exemption amounts.

Since the Judicial Council last reported on potential adjustments to dollar amounts of homestead exemptions in 2019, the Legislature amended section 704.730. (See Assem. Bill 1885; Stats. 2020, ch. 94.) The Legislature substantially increased the amounts of the homestead

exemption effective January 1, 2021, and included in the amended statute provisions by which the amounts of the exemption automatically adjust every year based on changes in the California Consumer Price Index, starting January 1, 2022. (Code Civ. Proc. § 704.730(b).)

Although the adjustments have now been made automatic, the Legislature did not, when amending section 704.730, eliminate the provision for triannual reports for potential adjustments. If the Legislature should continue to want the council to calculate and report on such adjustments, however, it is unclear how to calculate the requested dollar amounts, because the formula for annual adjustments in section 704.730(b) regarding homestead exemptions is different than the formula for triannual adjustments for other exemptions set forth in section 703.150(e).

- Section 703.150(e) requires the Judicial Council to calculate an adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers (CCPI) for the *prior three-year period* ending December 31, to the dollar amount of exemptions "in effect immediately before" April 1 of every third year.

- Section 704.730(b) provides that, as of January 1, 2022, the amount of the homestead exemptions shall adjust *annually* based on the change in the annual CCPI for the prior *fiscal* year, published by the Department of Industrial Relations.

To adjust the dollar amounts of the homestead exemptions in effect immediately before April 1, 2022 (as required under section 703.150(e)), the council must first determine what those amounts are. Although section 704.730(b) provides that the amounts adjusted as of January 1, 2022 are based on the change in CCPI over the prior *fiscal* year, it is unclear what that change is. The Department of Industrial Relations updates the CCPI every two months, and provides an annual average for the calendar year, but does not publish a fiscal year CCPI. There is no definition of fiscal year in the Code of Civil Procedure; there is one in the Government Code, with the fiscal year beginning July 1 through June 30. However, because the Department of Industrial Relations does not publish a CCPI amount for July (it only publishes amounts for even numbered months), even using that definition does not clarify exactly how to calculate the adjusted amount. The dollar amounts of the homestead exemptions in section 704.730 could, as of January 1, 2022, be adjusted by 4.4% or 4.7%, or something else altogether, depending on what figures from the Department of Industrial Relations are considered to constitute CCPI for the prior fiscal year.[1]

[1] Assuming the fiscal year is from July 1 to June 30, the change could be measured using the change in the figures published for June 2020 and June 2021 (4.4%) or for August 2020 (the first CCPI published in that fiscal year) and August 2021 (4.7%). Other options exist, such as the change in figures published for August 2020 and June 2021 (the last CCPI during that fiscal year, but only 11 months later, with a 3.9% change). Calculating an annual CPI for

Moreover, once the current homestead exemption amounts are calculated, applying the adjustments required in section 703.150 would result in duplicative adjustments because, unlike the other exemptions to which that section applies, the homestead exemptions have already been increased twice during the three-year period that is considered under 703.150, with one of the increases based directly on changes in CCPI within that period.

For the above reasons, the council has not included specific dollar amounts in this report. However, the council reports that, should the Legislature decide to adjust the current homestead exemptions in section 704.730 based on the provisions for adjusting exemption amounts under section 703.150(e), the current dollar amounts of the homestead exemptions would be increased by 9.123%. The calculation for making the adjustments is attached.

If you have any questions related to this report, please contact Deborah Brown, Chief Counsel, at 415-865-7667, deborah.brown@jud.ca.gov.

Sincerely,

Martin Hoshino
Administrative Director
Judicial Council of California

MH/AMR
Attachment
Links: Code Civ. Proc., § 703.150:
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=703.150.&lawCode=CCP
Code Civ. Proc., § 704.730:
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=704.730.&lawCode=CCP

each of those periods (which is not a figure published by Department of Industrial Relations), and comparing it to an annual CPI from the prior fiscal year, could result in yet different percentages.

cc: Eric Dang, Counsel, Office of Senate President pro Tempore Toni G. Atkins
Alf Brandt, Senior Counsel, Office of Assembly Speaker Anthony Rendon
Shaun Naidu, Policy Consultant, Office of Assembly Speaker Anthony Rendon
Anita Lee, Principal Fiscal and Policy Analyst, Legislative Analyst's Office
Gabriel Petek, Legislative Analyst, Legislative Analyst's Office
Jessie Romine, Budget Analyst, Department of Finance
Margie Estrada, Chief Counsel, Senate Judiciary Committee
Mary Kennedy, Chief Counsel, Senate Public Safety Committee
Eric Csizmar, Consultant, Senate Republican Policy Office
Morgan Branch, Consultant, Senate Republican Policy Office
Alison Merrilees, Chief Counsel, Assembly Judiciary Committee
Sandy Uribe, Chief Counsel, Assembly Public Safety Committee
Jennifer Kim, Consultant, Assembly Budget Committee
Lyndsay Mitchell, Consultant, Assembly Republican Office of Policy & Budget
Gary Olson, Consultant, Assembly Republican Office of Policy & Budget
Daryl Thomas, Consultant, Assembly Republican Office of Policy & Budget
Amy Leach, Minute Clerk, Office of Assembly Chief Clerk
Cory T. Jasperson, Director, Governmental Affairs, Judicial Council
Jenniffer Herman, Administrative Coordinator, Governmental Affairs, Judicial Council

Attachment 1

**Calculation of Potential Increases to Dollar Amounts
Under Code of Civil Procedure Section 704.730
(for April 1, 2022)**

Formula
Under Code of Civil Procedure section 703.150(d) and (e), the potential adjustments to the dollar amount of the exemptions in sections 704.730 would be calculated as follows:

$$\text{Adjusted dollar amount} = \left[\frac{\text{annual CCPI (2021)} - \text{annual CCPI (2018)}}{\text{annual CCPI (2018)}} + 1 \right] \times \text{Previous dollar amount}$$

Definition
"CCPI" means the California Consumer Price Index for All Urban Consumers published by the Department of Industrial Relations, Division of Labor Statistics.

Calculation (as of April 1, 2022)
The calculation for potential adjustments to the dollar amounts in Code of Civil Procedure sections 704.730 et seq. is based on the following formula:

$$\text{Adjusted dollar amount} = \left[\frac{297.371 - 272.51}{272.51} + 1 \right] \times \text{Previous dollar amount} = 1.09123 \times \text{Previous dollar amount}$$

The adjusted amounts for each of the exemption amounts in section 703.740 would be calculated by increasing the individual dollar amounts by 9.123 percent with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(e).)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-080
For business meeting on March 11, 2022

Title
Judicial Branch Administration: Data Analytics Advisory Committee

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 10.68 and repeal rule 10.66

Recommended by
Hon. Marsha G. Slough, Chair,
Executive and Planning Committee
Hon. Kyle S. Brodie, Chair,
Judicial Council Technology Committee

Agenda Item Type
Action Required

Effective Date
March 11, 2022 and September 14, 2022

Date of Report
February 22, 2022

Contact
Leah Rose-Goodwin, Manager
(415) 865-7708
leah.rose-goodwin@jud.ca.gov

Executive Summary

The chairs of the Executive and Planning Committee and the Technology Committee recommend adoption of proposed California Rules of Court, rule 10.68 to establish the Data Analytics Advisory Committee to analyze, use, and share data to inform decisionmaking in order to enhance and expand vital and accessible services for all the people of California. The chairs also propose the repeal of rule 10.66 because the duties and responsibilities of the new proposed advisory body will include those of the Workload Assessment Advisory Committee established by that rule. If approved, the new rule will become effective as of March 11, 2022; rule 10.66 will be repealed as of September 14, 2022; and, nominations to the new advisory committee will be solicited as part of the 2022 nominations cycle.

Recommendation

The chairs of the Executive and Planning Committee and of the Technology Committee recommend that the Judicial Council:

1. Adopt rule 10.68 of the California Rules of Court to establish the Data Analytics Advisory Committee, effective March 11, 2022;

2. Repeal rule 10.66 of the California Rules of Court to retire the Workload Assessment Advisory Committee established by the rule, effective September 14, 2022;

The proposed adopted and repealed rules are attached at pages 5 and 6.

Relevant Previous Council Action

On May 21, 2021, the Judicial Council accepted the *Data and Information Governance Policy Concepts* from the Information Technology Advisory Committee.[1] The report was the final work product of the Information Technology Advisory Committee's Data Analytics Workstream, which was charged with recommending a data analytics strategy for the branch that included developing branchwide data and information governance policy recommendations. The discussion at the May Judicial Council meeting highlighted the need for ongoing work in this subject area beyond the workstream's report.

Analysis/Rationale

Following council acceptance of the workstream's report, the chairs of the Executive and Planning Committee and the Technology Committee formed a joint working group consisting of representatives from each of the two committees to consider governance options for leading and planning judicial branch data and analytics strategies and policies.[2] Over the course of several discussions, the group discussed the business need for and objectives of policy development in this subject area and determined that a standing advisory body was needed to lead and plan branch data and analytic strategy. The joint working group then reviewed the areas of focus and annual agendas of existing council advisory bodies to determine if there were any that had the same or similar duties and scope of responsibility of the proposed new committee.

The joint working group determined that the area of focus and duties of the Workload Assessment Advisory Committee (WAAC) were substantively aligned to the proposed scope and duties for the new committee, although the proposed new committee's scope and duties are broader. The joint working group concluded that the WAAC's areas of work should be included as part of the new committee's scope; specifically, the joint working group recognized the need to continue the important workload analyses currently conducted under the direction of the WAAC in understanding and measuring trial court workload and allocating resources to courts on the basis of empirical data. (See proposed rule 10.68(b)(2).) Given the importance of WAAC's work, if the Judicial Council approves creation of the new advisory committee, WAAC

[1] Judicial Council of Cal., *Judicial Branch Administration: Judicial Branch Data and Information Governance Policy Concepts* (Apr. 23, 2021), https://jcc.legistar.com/LegislationDetail.aspx?ID=4889531&GUID=DA4EF655-4FB7-4773-99E3-6F0B2C83DB42.

[2] Joint working group members were Hon. Marsha G. Slough and Hon. Ann C. Moorman from the Executive and Planning Committee and Hon. Kyle S. Brodie and Mr. Shawn Landry from the Technology Committee.

will continue its work through the current advisory committee year, which is why the repeal of the authorizing rule is deferred until September 14, 2022. Additionally, all current members of WAAC will be invited to submit applications in response to a solicitation for membership in the new committee.

Policy implications

This proposal will promote better data-driven decisionmaking, foster transparency, and improve the administration of justice by making recommendations to the Judicial Council in the areas of judicial branch data and information strategy. This work supports Judicial Council efforts to modernize and improve access to justice and complements Judicial Council information technology modernization efforts.

Comments

The working group members made periodic, informational updates to their respective committees throughout the deliberative process, with the most recent updates occurring at the February 8, 2022 Executive and Planning Committee meeting and the February 14, 2022 Technology Committee meeting. There were no comments made in response to these updates.

Additionally, presiding justices, presiding judges, and court executive officers were invited to an informational webinar on December 17, 2021, to learn about the proposed committee. About 50 attendees participated. A few attendees made comments in support of the proposal. One question was asked regarding the proposed merging of the Workload Assessment Advisory Committee with the new proposed committee and how the former's work and charter would be incorporated into the new committee, and the proponents assured the group that the proposed rule would ensure that the new committee would take over the work.

Following the webinar, the proposal circulated for public comment from December 21, 2021, to January 14, 2022. One comment, in support of the proposal, was received from an IT Deputy at a superior court. The comments chart is attached at page 7.

Alternatives considered

The joint working group considered a number of alternatives when determining how to move forward. One option was to create a new advisory body with an area of focus that did not overlap with any existing advisory body. This option was rejected in the interest of maintaining the existing number of Judicial Council advisory bodies.

Rather than creating the proposed new advisory committee, the joint working group considered the alternative of substantially amending and expanding the scope and duties of the Workload Assessment Advisory Committee. However, once the group started drafting the rule language to address the relevant issues, it became apparent that drafting an area of focus for a new advisory committee—which will have a more expansive focus than WAAC—would be more straightforward than making substantial amendments to WAAC's charge in the current rule of court.

Another option was to consolidate the work of the Judicial Branch Statistical Information System (JBSIS) Subcommittee of the Court Executives Advisory Committee as well as the Workload Assessment Advisory Committee into the proposed new advisory body. This alternative was not pursued further because the technical and tactical nature of the JBSIS Subcommittee's work differs from the proposed focus of the new advisory committee on governance and management of data. The joint working group anticipates that the JBSIS Subcommittee and the proposed advisory committee would certainly coordinate and consult with each other.

Fiscal and Operational Impacts

This proposal will not create any direct fiscal impacts. Because the proposal calls for establishing a new advisory committee and retiring another, there is no net increase in administrative costs needed to support the new advisory body. In terms of operational impacts, Judicial Council staff will coordinate any transitional activities needed to ensure that any reports and recommendations normally made by the Workload Assessment Advisory Committee are transferred to the Data Analytics Advisory Committee.

Attachments and Links

1. Cal. Rules of Court, rules 10.66 and 10.68, at pages 5 and 6
2. Chart of comments, at page 7

Rule 10.66 of the California Rules of Court is repealed as of September 14, 2022 and rule 10.68 is adopted, effective March 11, 2022, to read:

Rule 10.66. Workload Assessment Advisory Committee [Repealed]

~~**(a) Area of focus**~~

~~The committee makes recommendations to the council on judicial administration standards and measures that provide for the equitable allocation of resources across courts to promote the fair and efficient administration of justice.~~

~~**(b) Additional duties**~~

~~In addition to the duties specified in rule 10.34, the committee must recommend:~~

~~(1) Improvements to performance measures and implementation plans and any modifications to the Judicial Workload Assessment and the Resource Assessment Study Model;~~

~~(2) Processes, study design, and methodologies that should be used to measure and report on court administration; and~~

~~(3) Studies and analyses to update and amend case weights through time studies, focus groups, or other methods.~~

~~**(c) Membership**~~

~~(1) The advisory committee consists of an equal number of superior court judicial officers and court executive officers reflecting diverse aspects of state trial courts, including urban, suburban, and rural locales; size and adequacy of resources; number of authorized judgeships; and for judicial officers, diversity of case type experience.~~

~~(2) A judicial officer and court executive officer may be from the same court.~~

Rule 10.68. Data Analytics Advisory Committee

(a) Areas of focus

The committee makes recommendations to the Judicial Council regarding the collection, use, and sharing of judicial branch data and information to inform decisionmaking, promote transparency, and improve the administration of justice while ensuring the security of nonpublic data and data sources.

(b) Additional duties

In addition to the duties described in rule 10.34, the committee must:

(1) Develop and recommend policies, or revisions to existing policies, concerning standards and measures to use in collecting, analyzing and sharing data and information that will advance the goals of increased access to justice, greater transparency and accountability, and enhanced delivery of services to the public.

(2) Develop and recommend performance measures, studies, and methodologies to measure and report on court administration, practices, and procedures, including workload assessments; and

(3) Identify, analyze, and report on emerging issues related to branch data and information, including usage of data and information to support branch projects and initiatives.

(c) Membership

The committee must include at least one member from each of the following categories:

(1) Appellate justice;

(2) Trial court judicial officer;

(3) Trial court or appellate court administrator; and

(4) Court staff with data and information management expertise.

(d) Member selection

Factors to be considered in making all appointments to the committee include a candidate's general expertise and experience in data, information, or technology governance and management.

SP21-12

Judicial Branch Administration: Data and Information Governance Advisory Committee

(Adopt Cal. Rules of Court, rule 10.68 and repeal rule 10.66)

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

	Commenter	Position	Comment	Committee Response
1.	Tim Cool, Chief Deputy of IT Superior Court of Riverside County	A	The Courts have a wealth of data that could be used to better serve the public and to increase access to justice.	No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-081
For business meeting on: March 11, 2022

Title
Criminal Law: Felony Sentencing

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453

Recommended by
Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
March 14, 2022

Date of Report
February 24, 2022

Contact
Sarah Fleischer-Ihn, 415-865-7702,
sarah.fleischer-ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends amendments to specified felony sentencing rules of the California Rules of Court to reflect several major legislative changes were made to sentencing of felony offenses and enhancements, which went into effect January 1, 2022. The recommended amendments will reflect statutory changes (1) requiring aggravated factors to be stipulated to by the defendant or found true beyond a reasonable doubt when imposing the upper term of a felony offense or enhancement; (2) allowing courts to consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records, but that this exception may not be used to select the upper term of an enhancement; (3) discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice; (4) regarding mitigating circumstances requiring imposition of the lower term; (5) identifying specified mitigating circumstances for consideration in sentencing; (6) allowing an act or omission that is punishable in different ways by different laws to be punished under either of those provisions; and (7) amending dismissal of enhancements due to specified mitigating circumstances. The recommended amendments would also clarify that courts may consider aggravating factors in exercising discretion in imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining

whether to exercise discretion pursuant to Penal Code section 1385(c) and make nonsubstantive technical amendments.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective March 14, 2022:

1. Repeal rules 4.300 and 4.453 to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;

2. Amend rule 4.405 to:

    - clarify the definition of "base term," and add definitions of "principal term," "subordinate term," and "offense;"

    - modify the definition of "aggravation" to apply to factors that justify the imposition of the upper prison term or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c); and

    - amend the advisory committee comment to reflect changes regarding sentencing triads;

3. Amend rule 4.406 to :

    - delete a provision requiring the court to state reasons for declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, to reflect the repeal of Welfare and Institutions Code section 707.2;

    - require a court to state reasons for selecting a term for either an offense or an enhancement; and

    - amend the advisory committee comment to rule 4.406 to reflect changes regarding sentencing triads;

4. Amend the advisory committee comment to rule 4.408 to reflect changes regarding sentencing triads;

5. Amend rule 4.411.5 to:

    - require the contents of a probation officer's presentence investigation report to include: whether factors in aggravation were proven beyond a reasonable doubt or

stipulated; specific factors in mitigation that may require imposition of low term; and discussion of both aggravating and mitigating factors related to disposition;

- to require the contents of a probation officer's presentence investigation report to include any mitigating factors pursuant to Penal Code section 1385(c);

- to delete references to chargeable probation services and attorney fees under Penal Code section 987.8, to reflect the repeal of these fees by Assembly Bill 1869 (Stats. 2020, ch. 92);

6. Amend rule 4.414 to state that a court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when determining a defendant's suitability for probation;

7. Amend rule 4.420 to

   - clarify in the title that it addresses offenses, and not enhancements;

   - reflect changes regarding sentencing triads, including under what circumstances the court may impose the upper term;

   - reflect changes regarding mandatory imposition of the low term under specified circumstances; and

   - amend the advisory committee comment to reflect changes regarding sentencing triads and to include a definition of "interests of justice;"

8. Amend the advisory committee comment to rule 4.421 to reflect changes regarding sentencing triads and nonsubstantive technical amendments;

9. Amend rule 4.423 to add mitigating factors specified in Penal Code section 1385(c);

10. Amend rule 4.424 to reflect changes allowing the court to use its discretion regarding which act or omission to punish under Penal Code section 654;

11. Amend rule 4.425 to clarify that a court may consider any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when considering whether to impose consecutive or concurrent sentences, with specified exceptions;

12. Amend rule 4.427 to:

    - reflect changes to Penal Code section 1385(c) regarding dismissal of enhancements; and

- amend the advisory committee comment to reflect changes to Penal Code sections 1170.1, regarding requirements to impose the upper term of an enhancement, and 1385(c), regarding dismissal of enhancements;

13. Amend rule 4.428 to reflect changes regarding enhancements with triads and include a new section on dismissal of enhancements under Penal Code section 1385(c);

14. Amend the advisory committee comment to rule 4.428 to include definitions of "furtherance of justice" and "great weight;"

15. Amend the advisory committee comment to rule 4.437 to state that the requirement that a statement in aggravation or mitigation include notice of intention to rely on new evidence may include either party's intention to provide evidence to prove or contest the existence of a factor in mitigation that would require imposition of the low term for the underlying offense or dismissal of an enhancement; and

16. Amend rule 4.447 of the California Rules of Court to refer to Penal Code section 1385(c).

The proposed amended rules are attached at pages 9–27.

Relevant Previous Council Action

The Judicial Council last amended the felony sentencing rules of the California Rules of Court, rules 4.401–4.480, effective January 1, 2018, to (1) reflect amendments and updates related to changes in California's Determinate Sentencing Law, indeterminate sentences, and sentencing enhancements; (2) reflect statutory amendments enacted as part of the Criminal Justice Realignment Act; (3) provide guidance to courts on the referral of cases to probation for investigation reports; (4) clarify the use of risk/needs assessments in a probation officer's presentence report; (5) add the reporting requirements of Penal Code section 29810(c)(2) to the contents of a probation officer's presentence report; and (6) make nonsubstantive technical amendments.

Analysis/Rationale

Effective January 1, 2022, several major legislative changes were made to sentencing of felony offenses and enhancements.

Penal Code section 1170(b)(1)-(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement (Sen. Bill 567; Stats. 2021, ch. 731).

Penal Code section 1170(b)(6) was added to require the imposition of the low term of custody in specified circumstances, except if imposition of the low term would not be in the interests of

justice if aggravating factors outweigh mitigating factors. The specified circumstances are (1) if the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; (2) the person was a youth (defined as any person under 26 years of age) at the time of the commission of the offense; or (3) prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking (Assem. Bill 124; Stats. 2021, ch. 695).

Penal Code section 1385 was amended to direct the exercise of judicial discretion in striking enhancements in specified circumstances, unless the court finds that dismissal would endanger public safety (Sen. Bill 81; Stats. 2021, ch 721). The specified circumstances are as follows:

- Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- The current offense is connected to mental illness.
- The current offense is connected to prior victimization or childhood trauma.
- The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.
- The enhancement is based on a prior conviction that is over five years old.
- Though a firearm was used in the current offense, it was inoperable or unloaded.

Most of the recommended amendments reflect these changes to Penal Code sections 1170, 1170.01, and 1385. In addition, the proposed amendments reflect the committee's conclusion that the new statutory requirements for imposition of an upper term of an offense or enhancement do not apply when the court is imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c). (See *People v. Black* (2007) 41 Cal.4th 799, 815-816 (*Black II*) [aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme; one function is to raise the maximum permissible sentence from the middle term to the upper term, and the other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense].) These changes are reflected in the recommended amendments to rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.425, 4.427, 4.428, 4.437, and 4.447.

Finally, Penal Code section 654 was amended to allow an act or omission that is punishable in different ways by different laws to be punished under either of those provisions (Assem. Bill 518; Stats. 2021, ch. 441). The statutory amendment is reflected in the recommended amendment to rule 4.424.

The committee also recommends repealing rules 4.430 and 4.453, and amending rule 4.406 to reflect statutory changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (Sen. Bill 92; Stats. 2021, ch. 18).

Policy implications

The proposed rule amendments reflect several major legislative changes to sentencing of felony offenses and enhancements, which went into effect January 1, 2022, and should take effect immediately to ensure that the rules of court are consistent with statute.

Comments

Six stakeholders submitted comments: two superior courts (Los Angeles and San Diego Counties), a public defender's office (San Diego County), the Pacific Juvenile Defender Center, California Attorneys for Criminal Justice, and a member of the public. One commenter agreed with the proposal and five agreed if modified. The committee incorporated several comments suggesting further clarity and consistency in the rules.

Standard of proof of aggravating circumstances when the mitigating circumstances in section 1170(b)(6) are present

The San Diego County Public Defender's Office recommended that the rules state that aggravating circumstances in the context of Penal Code section 1170(b)(6) must be stipulated to by the defendant or proven true beyond a reasonable doubt. The committee does not recommend this language because section 1170(b)(6) does not state that aggravating circumstances that the court relies on to not impose the lower term must be proven beyond a reasonable doubt or stipulated to by the defendant.

Official record of conviction when imposing the upper term can only be used to prove the existence of a prior conviction but not an enhancement attached to the prior conviction

Penal Code section 1170(b)(1)–(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement (Sen. Bill 567; Stats. 2021, ch. 731).

The proposed amendments include advisory committee comments to rules 4.405, 4.408, and 4.421 referencing the exception:

> In determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records. This exception may not be used to select the upper term of an enhancement.

The San Diego County Public Defender's Office recommended additional language stating that "this exception only applies to the base crime of the prior conviction and not to any

enhancements attached to that base crime" which is a restatement of another clause in Penal Code section 1170(b)(3) ("This paragraph does not apply to enhancements imposed on prior convictions."). The committee does not recommend adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.

Restitution order becoming a judgment

California Attorneys for Criminal Justice recommended deleting language in rule 4.411.5 concerning a recommendation by the probation officer about whether any restitution order should become a judgment under section 1203(j) if unpaid. They noted that under section 1214(b), any restitution order is a judgment, so that it was unclear why the probation officer would recommend that it should become a judgment, and could result in a conflict between court orders and section 1214(b). Because this would be an important substantive change to the proposal, the committee believes public comment should be sought before they are considered for adoption, and the committee will consider this suggestion during the next rules cycle.

Legislative history on application of Penal Code section 1385(c), dismissal of enhancements, to alternative sentencing schemes.

The advisory committee comment to rule 4.428 included the following language in the proposal that circulated for comment:

> The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assm. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)

Three commenters – California Attorneys for Criminal Justice, the Pacific Juvenile Defender Center and the San Diego County Public Defender's Office – raised concerns about whether the Legislature intended for dismissals of enhancements under section 1385(c) to apply to prior serious and violent felony convictions and adjudications under the Three Strikes Law. In light of these comments, the committee has deleted the above paragraph referring to legislative history and case law from its recommendation.

Alternatives considered

The committee did not consider alternatives, determining that the rule amendments were needed to reflect legislative changes.

Fiscal and Operational Impacts

No implementation or operational impacts are likely.

Attachments and Links

1. Cal. Rules of Court, rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.433, at pages 9–27
2. Attachment A: Chart of comments, at pages 28–57

Rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, and 4.447 are amended, and rules 4.300 and 4.453 are repealed, effective March 14, 2022, to read:

~~**Rule 4.300. Commitments to nonpenal institutions**~~

~~When a defendant is convicted of a crime for which sentence could be imposed under Penal Code section 1170 and the court orders that he or she be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice under Welfare and Institutions Code section 1731.5, the order of commitment must specify the term of imprisonment to which the defendant would have been sentenced. The term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.~~

~~**Advisory Committee Comment**~~

~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.~~

~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.~~

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

(1) * * *

(2) "Base term" is the determinate or indeterminate sentence imposed for the commission of a crime, not including any enhancements that carry an additional term of imprisonment. ~~determinate term in prison or county jail under section 1170(h) selected from among the three possible terms prescribed by statute; the determinate term in prison or county jail under section 1170(h) prescribed by statute if a range of three possible terms is not prescribed; or the indeterminate term in prison prescribed by statute.~~

(3) When a person is convicted of two or more felonies, the "principal term" is the greatest determinate term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable count-specific enhancements.

(4) When a person is convicted of two or more felonies, the "subordinate term" is the determinate term imposed for an offense, plus any count-specific enhancements applicable to the offense ordered to run consecutively to the principal term.

~~(3)~~ (5) "Enhancement" means an additional term of imprisonment added to the base term.

(6) "Offense" means the offense of conviction unless a different meaning is specified or is otherwise clear from the context. The term "instant" or "current" is used in connection with "offense" or "offense of conviction" to distinguish the violation for which the defendant is being sentenced from an enhancement, prior or subsequent offense, or from an offense before another court.

~~(4)~~ (7) "Aggravation~~,~~" or "circumstances in aggravation" ~~"mitigation," or "circumstances in mitigation"~~ means factors that justify the imposition of the upper prison term referred to in ~~Penal Code~~ section 1170(b) and 1170.1, or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to ~~Penal Code~~ section 1385(c). ~~that the court may consider in its broad sentencing discretion authorized by statute and under these rules.~~

(8) "Mitigation" or "circumstances in mitigation" means factors that the court may consider in its broad sentencing discretion authorized by statute and under these rules.

~~(5)~~ (9) "Sentence choice" means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial.

~~(6)~~ (10) "Section" means a section of the Penal Code.

~~(7)~~ (11) "Imprisonment" means confinement in a state prison or county jail under section 1170(h).

~~(8)~~ (12) "Charged" means charged in the indictment or information.

~~(9)~~ (13) "Found" means admitted by the defendant or found to be true by the trier of fact upon trial.

~~(10)~~ (14) "Mandatory supervision" means the period of supervision defined in section 1170(h)(5)(A), (B).

~~(11)~~ (15) "Postrelease community supervision" means the period of supervision governed by section 3451 et seq.

~~(12)~~ (16) "Risk/needs assessment" means a standardized, validated evaluation tool designed to measure an offender's actuarial risk factors and specific needs that, if successfully addressed, may reduce the likelihood of future criminal activity.

~~(13)~~ (17) "Evidence-based practices" means supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.

~~(14)~~ (18) "Community-based corrections program" means a program consisting of a system of services for felony offenders under local supervision dedicated to the goals stated in section 1229(c)(1)–(5).

~~(15)~~ (19) "Local supervision" means the supervision of an adult felony offender on probation, mandatory supervision, or postrelease community supervision.

~~(16)~~ (20) "County jail" means local county correctional facility.

Advisory Committee Comment

~~Following the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270, the Legislature amended the determinate sentencing law to remove the presumption that the court is to impose the middle term on a sentencing triad, absent aggravating or mitigating circumstances. (See Sen. Bill 40; Stats. 2007, ch. 3.) It subsequently amended sections 186.22, 186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for an enhancement. (See Sen. Bill 150; Stats. 2009, ch. 171.) Instead of finding facts in support of a sentencing choice, courts are now required to state reasons for the exercise of judicial discretion in sentencing.~~

The Legislature amended the determinate sentencing law to require courts to order imposition of a sentence or enhancement not to exceed the middle term unless factors in aggravation justify imposition of the upper term and are stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats. 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified records of conviction. This exception may not be used to select the upper term of an enhancement.

The court may exercise its judicial discretion in imposing the middle term or low term and must state the facts and reasons on the record for choosing the sentence imposed. In exercising this discretion between the middle term and the low term, the court may rely on aggravating factors

that have not been stipulated to by the defendant or proven beyond a reasonable doubt. (*People v. Black* (2007) 41 Cal.4th 799.)

The Legislature also amended the determinate sentencing law to require courts to order imposition of the low term when the court finds that certain factors contributed to the commission of the crime unless the court finds that it would not be in the interests of justice to do so because the aggravating factors outweigh the mitigating factors. (Pen. Code, § 1170(b)(6).)

Rule 4.406. Reasons

(a) * * *

(b) When reasons required

Sentence choices that generally require a statement of a reason include, but are not limited to:

(1) Granting probation when the defendant is presumptively ineligible for probation;

(2) Denying probation when the defendant is presumptively eligible for probation;

~~(3) Declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;~~

~~(4)~~ (3) Selecting a term for either an offense or an enhancement ~~one of the three authorized terms in prison or county jail under section 1170(h) referred to in section 1170(b) for either a base term or an enhancement~~;

~~(5)~~ (4) Imposing consecutive sentences;

~~(6)~~ (5) Imposing full consecutive sentences under section 667.6(c) rather than consecutive terms under section 1170.1(a), when the court has that choice;

~~(7)~~ (6) Waiving a restitution fine;

~~(8)~~ (7) Granting relief under section 1385; and

~~(9)~~ (8) Denying mandatory supervision in the interests of justice under section 1170(h)(5)(A).

Advisory Committee Comment

* * *

Rule 4.408. Listing of factors not exclusive; sequence not significant

(a)–(b) * * *

Advisory Committee Comment

The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf., Evid. Code, § 351.)

The court may impose a sentence or enhancement exceeding the middle term only if the facts underlying the aggravating factor were stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170(b)(2).)

However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified records of conviction. This exception may not be used to select the upper term of an enhancement. (Pen. Code, § 1170(b)(3).)

The Legislature also amended the determinate sentencing law to require courts to order imposition of the low term when the court finds that certain factors contributed to the commission of the crime unless the court finds that it would not be in the interests of justice to do so because the aggravating factors outweigh the mitigating factors. (Pen. Code, § 1170(b)(6).)

Rule 4.411.5. Probation officer's presentence investigation report

(a) Contents

A probation officer's presentence investigation report in a felony case must include at least the following:

(1) A face sheet showing at least:

(A) The defendant's name and other identifying data;

(B) The case number;

(C) The crime of which the defendant was convicted, and any enhancements which were admitted or found true;

(D) Any factors in aggravation including whether the factors were stipulated to by the defendant, found true beyond a reasonable doubt at trial by a jury, or found true beyond a reasonable doubt by a judge in a court trial;

~~(D)~~ (E) The date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;

~~(E)~~ (F) The defendant's custody status; and

~~(F)~~ (G) The terms of any agreement on which a plea of guilty was based.

(2)–(5) * * *

(6) Any relevant facts concerning the defendant's social history, including those categories enumerated in section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings. This includes:

(A) ~~f~~Facts relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of his or her U.S. military service; and

(B) Factors listed in section 1170(b)(6) and whether the current offense is connected to those factors.

(7)–(9) * * *

(10) Any mitigating factors pursuant to section 1385(c).

~~(10)~~ (11) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison or county jail term under section 1170(h) that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

~~(11)~~ (12) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of

custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes that a hearing be held for the purposes of denying good behavior, work, or participation credit.

~~(12)~~ (13) A statement of mandatory and recommended restitution, restitution fines, and other fines, fees, assessments, penalties, and costs to be assessed against the defendant; ~~including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and~~ a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid~~.~~; ~~and~~, when appropriate, any finding concerning the defendant's ability to pay.

~~(13)~~ (14) Information pursuant to ~~Penal Code~~ section 29810(c):

(A)–(B) * * *

(b)–(c) * * *

Rule 4.414. Criteria affecting probation

Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

(a)–(b) * * *

(c) Suitability for probation

In determining the suitability of the defendant for probation, the court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.

Advisory Committee Comment

* * *

Rule 4.420. Selection of term of imprisonment for offense

(a) When a ~~sentence~~ judgment of imprisonment is imposed, or the execution of a ~~sentence~~ judgment of imprisonment is ordered suspended, the sentencing judge

must, in their sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (b). ~~select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules.~~

(b) The court may only choose an upper term when (1) there are circumstances in aggravation of the crime that justify the imposition of an upper term, and (2) the facts underlying those circumstances have been (i) stipulated to by the defendant, (ii) found true beyond a reasonable doubt at trial by a jury, or (iii) found true beyond a reasonable doubt by the judge in a court trial.

(c) Notwithstanding paragraphs (a) and (b), the court may consider the fact of defendant's prior convictions based on a certified record of conviction without it having been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial. This exception does not apply to the use of the record of a prior conviction in selecting the upper term of an enhancement.

~~**(b)**~~ **(d)** In selecting between the middle and lower terms of imprisonment, ~~exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170(b),~~ the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.

(e) Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice, the court must order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:

(1) The defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;

(2) The defendant is a youth, or was a youth as defined under section 1016.7(b) at the time of the commission of the offense; or

(3) Prior to the instant offense, or at the time of the commission of the offense, the defendant is or was a victim of intimate partner violence or human trafficking.

(f) Paragraph (e) does not preclude the court from imposing the lower term even if there is no evidence of the circumstances listed in paragraph (e).

~~(e)~~ **(g)** To comply with section 1170(b)(5), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

~~(d)~~ **(h)** A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term.

~~(e)~~ **(i)** The reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record.

Advisory Committee Comment

~~The determinate sentencing law authorizes the court to select any of the three possible terms of imprisonment even though neither party has requested a particular term by formal motion or informal argument. Section 1170(b) vests the court with discretion to impose any of the three authorized terms of imprisonment and requires that the court state on the record the reasons for imposing that term.~~

It is not clear whether the reasons stated by the judge for selecting a particular term qualify as "facts" for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified, judges should avoid the use of reasons that may constitute an impermissible dual use of facts. For example, the court is not permitted to use a reason to impose a greater term if that reason also is either (1) the same as an enhancement that will be imposed, or (2) an element of the crime. The court should not use the same reason to impose a consecutive sentence as to impose an upper term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not improper to use the same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 106.)

The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used as a factor in aggravation.

People v. Riolo (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does not require the judgment to state the base term (upper, middle, or lower) and enhancements,

computed independently, on counts that are subject to automatic reduction under the one-third formula of section 1170.1(a).

Even when sentencing is under section 1170.1, however, it is essential to determine the base term and specific enhancements for each count independently, in order to know which is the principal term count. The principal term count must be determined before any calculation is made using the one-third formula for subordinate terms.

In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at an informed decision whether to make terms consecutive or concurrent; and the base term for each count must be stated in the judgment when sentences are concurrent or are fully consecutive (i.e., not subject to the one-third rule of section 1170.1(a)).

Case law suggests that in determining the "interests of justice" the court should consider the constitutional rights of the defendant and the interests of society represented by the people; the defendant's background and prospects, including the presence or absence of a record; the nature and circumstances of the crime and the defendant's level of involvement; the factors in aggravation and mitigation including the specific factors in mitigation of Penal Code section 1170(b)(6); and the factors that would motivate a "reasonable judge" in the exercise of their discretion. The court should not consider whether the defendant has simply pled guilty, factors related to controlling the court's calendar, or antipathy toward the statutory scheme. (See *People v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a)–(c) * * *

Advisory Committee Comment

~~Circumstances in aggravation may justify imposition of the middle or upper of three possible terms of imprisonment. (Section 1170(b).)~~

~~The list of circumstances in aggravation includes some facts that, if charged and found, may be used to enhance the sentence.~~

Courts may not impose a sentence greater than the middle term except when aggravating factors justifying the imposition of the upper term have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do not apply to consideration of aggravating factors for the lower or middle term. If the court finds

that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the commission of the offense, the court must impose the lower term (see rule 4.420(e)) unless the court finds that the aggravating factors outweigh the mitigating factors to such a degree that imposing the lower term would be contrary to the interests of justice. In this instance, since the court is not addressing the imposition of the upper term, the court may consider factors in aggravation that have not been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

In determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on a certified record of conviction. This exception may not be used to select the upper term of an enhancement.

This rule does not deal with the dual use of the facts; the statutory prohibition against dual use is included, in part, in the comment to rule 4.420.

~~Conversely, such facts as infliction of bodily harm, being armed with or using a weapon, and a taking or loss of great value may be circumstances in aggravation even if not meeting the statutory definitions for enhancements or charged as an enhancement.~~

~~Facts concerning the defendant's prior record and personal history may be considered. By providing that the defendant's prior record and simultaneous convictions of other offenses may not be used both for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases.~~

Refusal to consider the personal characteristics of the defendant in imposing sentence may raise serious constitutional questions. The California Supreme Court has held that sentencing decisions must take into account "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Rodriguez* (1975) 14 Cal.3d 639, 654, quoting *In re Lynch* (1972) 8 Cal.3d 410, 425.) In *Rodriguez* the court released petitioner from further incarceration because "it appears that neither the circumstances of his offense *nor his personal characteristics* establish a danger to society sufficient to justify such a prolonged period of imprisonment." (*Id.* at p. 655, fn. omitted, italics added.) "For the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (*Pennsylvania ex rel. Sullivan v. Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

~~Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion. Some of the cases that had relied on that circumstance in aggravation were reversed on appeal because there was only a single victim in a particular count.~~

~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b).~~ Other statutory ~~circumstances~~ factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term if stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime include that:

(1)–(9) * * *

(10) If a firearm was used in the commission of the offense, it was unloaded or inoperable.

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1)–(2) * * *

(3) The defendant experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence and it was a factor in the commission of the crime;

(4) The commission of the current offense is connected to the defendant's prior victimization or childhood trauma, or mental illness as defined by section 1385(c);

(5) The defendant is or was a victim of intimate partner violence or human trafficking at the time of the commission of the offense, and it was a factor in the commission of the offense;

(6) The defendant is under 26 years of age, or was under 26 years of age at the time of the commission of the offense;

(7) The defendant was a juvenile when they committed the current offense;

~~(3)~~ (8) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;

~~(4)~~ (9) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;

(10) Application of an enhancement could result in a sentence over 20 years;

(11) Multiple enhancements are alleged in a single case;

(12) Application of an enhancement could result in a discriminatory racial impact;

(13) An enhancement is based on a prior conviction that is over five years old;

~~(5)~~ (14) The defendant made restitution to the victim; and

~~(6)~~ (15) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was satisfactory.

(c) * * *

Advisory Committee Comment

* * *

Rule 4.424. Consideration of applicability of section 654

Before determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court must determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of execution of the sentence imposed on some of the counts. If a stay of execution is required due to the prohibition against multiple punishments for the same act, the court has discretion to choose which act or omission will be punished and which will be stayed.

Rule 4.425. Factors affecting concurrent or consecutive sentences

Factors affecting the decision to impose consecutive rather than concurrent sentences include:

(a) * * *

(b) Other facts and limitations

Any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial, may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

(1) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's sentence in prison or county jail under section 1170(h); and

(3) A fact that is an element of the crime. ~~may not be used to impose consecutive sentences.~~

Advisory Committee Comment

* * *

Rule 4.427. Hate crimes

(a)–(b) * * *

(c) Hate crime enhancement

If a hate crime enhancement is pled and proved, the punishment for a felony conviction must be enhanced under section 422.75 unless the conviction is sentenced as a felony under section 422.7.

(1) The following enhancements apply:

(A) An enhancement of a term in state prison as provided in section 422.75(a). Personal use of a firearm in the commission of the offense is an aggravating factor that must be considered in determining the enhancement term.

(B) An additional enhancement of one year in state prison for each prior felony conviction that constitutes a hate crime as defined in section 422.55.

(2) The court may strike enhancements under (c) if it finds mitigating circumstances under rule 4.423, or pursuant to section 1385(c) and states those mitigating circumstances on the record.

(3) The punishment for any enhancement under (c) is in addition to any other punishment provided by law.

(d)–(e) * * *

Advisory Committee Comment

Multiple enhancements for prior convictions under subdivision (c)(1)(B) may be imposed if the prior convictions have been brought and tried separately. (Pen. Code, § 422.75(d).)

In order to impose the upper term based on section 422.75, the fact of the enhancement pursuant to sections 422.55 or 422.6 must be stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

Any enhancement alleged pursuant to this section may be dismissed pursuant to section 1385(c).

Rule 4.428. Factors affecting imposition of enhancements

(a) Enhancements punishable by one of three terms

If an enhancement is punishable by one of three terms, the court must, in its sound discretion, order imposition of a sentence not to exceed the middle term, unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. ~~, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing. In exercising its discretion in selecting the appropriate term, the court may consider factors in mitigation and aggravation as described in these rules or any other factor authorized by rule 4.408.~~

(b) Striking or dismissing enhancements under section 1385

If the court has discretion under section 1385(a) to strike an enhancement in the interests of justice, the court also has the authority to strike the punishment for the enhancement under section 1385(~~e~~b). In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.

(c) Dismissing enhancements under section 1385(c)

(1) The court shall exercise the discretion to dismiss an enhancement if it is in the furtherance of justice to do so, unless the dismissal is prohibited by initiative statute.

(2) In exercising its discretion under section 1385(c), the court must consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in section 1385(c) are present.

(A) Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety.

(B) The circumstances listed in 1385(c) are not exclusive.

(C) "Endanger public safety" means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.

(3) If the court dismisses the enhancement pursuant to 1385(c), then both the enhancement and its punishment must be dismissed.

Advisory Committee Comment

Case law suggests that in determining the "furtherance of justice" the court should consider the constitutional rights of the defendant and the interests of society represented by the people; the defendant's background and prospects, including the presence or absence of a record; the nature and circumstances of the crime and the defendant's level of involvement; the factors in aggravation and mitigation including the specific factors in mitigation of section 1385(c); and the factors that would motivate a "reasonable judge" in the exercise of their discretion. The court should not consider whether the defendant has simply pled guilty, factors related to controlling the court's calendar, or antipathy toward the statutory scheme. (See *People v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)

How to afford great weight to a mitigating circumstance is not further explained in section 1385. The court is not directed to give conclusive weight to the mitigating factors, and must still engage in a weighing of both mitigating and aggravating factors. A review of case law suggests that the court can find great weight when there is an absence of "substantial evidence of countervailing considerations of sufficient weight to overcome" the presumption of dismissal when the mitigating factors are present. (*People v. Martin* (1996) 42 Cal.3d 437.) In exercising this discretion, the court may rely on aggravating factors that have not been stipulated to by the

defendant or proven beyond a reasonable doubt at trial by a jury or a judge in a court trial. (*People v. Black* (2007) 41 Cal.4th 799.)

~~The legislative history on Senate Bill 81 states that the presumption created by section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assem. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess., June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)~~

Rule 4.437. Statements in aggravation and mitigation

(a)–(e) * * *

Advisory Committee Comment

Section 1170(b)(4) states in part:

"At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts."

This provision means that the statement is a document giving notice of intention to dispute evidence in the record or the probation officer's report, or to present additional facts.

The statement itself cannot be the medium for presenting new evidence, or for rebutting competent evidence already presented, because the statement is a unilateral presentation by one party or counsel that will not necessarily have any indicia of reliability. To allow its factual assertions to be considered in the absence of corroborating evidence would, therefore, constitute a denial of due process of law in violation of the United States (14th Amend.) and California (art. I, § 7) Constitutions.

The requirement that the statement include notice of intention to rely on new evidence will enhance fairness to both sides by avoiding surprise and helping to ensure that the time limit on pronouncing sentence is met. This notice may include either party's intention to provide evidence to prove or contest the existence of a factor in mitigation that would require imposition of the low term for the underlying offense or dismissal of an enhancement.

Rule 4.447. Sentencing of enhancements

(a) Enhancements resulting in unlawful sentences

Except pursuant to section 1385(c), ~~A~~a court may not strike or dismiss an enhancement solely because imposition of the term is prohibited by law or exceeds limitations on the imposition of multiple enhancements. Instead, the court must:

(1) Impose a sentence for the aggregate term of imprisonment computed without reference to those prohibitions or limitations; and

(2) Stay execution of the part of the term that is prohibited or exceeds the applicable limitation. The stay will become permanent once the defendant finishes serving the part of the sentence that has not been stayed.

(b) Multiple enhancements

Notwithstanding section 1385(c), ~~I~~if a defendant is convicted of multiple enhancements of the same type, the court must either sentence each enhancement or, if authorized, strike the enhancement or its punishment. While the court may strike an enhancement, the court may not stay an enhancement except as provided in (a) or as authorized by section 654.

Advisory Committee Comment

Subdivision (a). Statutory restrictions may prohibit or limit the imposition of an enhancement in certain situations. (See, for example, sections 186.22(b)(1), 667(a)(2), 667.61(f), 1170.1(f) and (g), 12022.53(e)(2) and (f), and Vehicle Code section 23558.)

Section 1385(c) requires that in the furtherance of justice certain enhancements be dismissed unless dismissal is prohibited by any initiative statute.

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129–1130; *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)

Only the portion of a sentence or component thereof that exceeds a limitation is prohibited, and this rule provides a procedure for that situation. This rule applies to both determinate and indeterminate terms.

Subdivision (b). A court may stay an enhancement if section 654 applies. (See *People v. Bradley* (1998) 64 Cal.App.4th 386; *People v. Haykel* (2002) 96 Cal.App.4th 146, 152.)

~~Rule 4.453. Commitments to nonpenal institutions~~

~~When a defendant is convicted of a crime for which sentence could be imposed under Penal Code section 1170 and the court orders that he or she be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice under Welfare and Institutions Code section 1731.5, the order of commitment must specify the term of imprisonment to which the defendant would have been sentenced. The term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.~~

~~Advisory Committee Comment~~

~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.~~

~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.~~

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	Caitlin Peters	**AM**	1.) Does the proposal appropriately address the stated purpose? -It addresses the need for change but it neglects to address cases for example “warbler”. If the defendant is available for the warbler misdemeanor then a felony 5 year probation and in custody sentence should not be an appropriate sentence. Also, I feel and have witnessed many civil cases wrongly admitted into criminal court resulting in incarceration of inmates criminally when the matter should have been civilly. Mainly, the biggest concern is accountability and the information for abusive practices. More times than not a judge knows the “victim” and inevitably discriminates on the defendant by criminal convictions instead of civil judgement when civil is the jurisdiction in which it belongs. Without the ability to exercise our constitutional rights inevitably fiscal overhead is sky rocketing as a multitude of corrupt judges continue to disregard “justice for all” because there’s no justice when a civilian challenge the justices. A defendant challenging the Justices ends up incarcerated, discriminated against, and the abuse becomes excessive abuse done at the hands of “Justice”. The advisory committee also seeks comments from courts on the following cost and implementation matters:	The committee has reviewed the comment, but the concerns raised regarding alleged practices in the courts are outside the scope of this proposal, which is to implement the changes in felony sentencing enacted in recent legislation.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			2.) Would the proposal provide cost savings? If so, please quantify. -If the courts acted with an ethical mind and no greed your cost and savings would be appropriate and not in gross excess. There is no "changes" that can fix this aside from criminal prosecution to judicial administration committing crimes against civilians and the way the conduct abusive practices within the individual justice systems. 3.) What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? * TEACH ETHICS AND THEN HOLD ACCOUNTIBILITY FOR ABUSIVE PRACTICES. TEACH HUMAN KINDNESS. WHEN HIRING DO NOT HIRE CRIMINALS WITH NO ETHICS TO CONDUCT JUDICIAL BUSINESS. NO MORE TENURE. IF A JUDGE IS FOUND TO BE IN VIOLATION OF ANYTHING THEY ARE OUT AND IF THAT IS IGNORED THEN THEY ARE INCARCERATED. YOU WANT TO SAVE TAX PAYERS DOLLARS THEN FIX YOU COLLEAGUES AND NOT THE CIVILIANS. TEACH WHAT THE TRUE MEANING OF	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			INTENT IS AND CONDUCT AUDITS AND REVIEWS RANDOMLY OF DIFFERENT VOLUMES OF COURT PROCEEDINGS TO ENSURE SUPERIOR COURTS ARE ACTING ACCORDINGLY, IF NOT THEN YOU NEED TO ACT ACCORDINGLY. 4.) How well would this proposal work in courts of different sizes? * THE PROBLEM IS NOT IN SIZE BUT IN NEGLIGENCE BY UPPER COURTS TO HOLD LOWER COURTS ACCOUNTABILITY FOR ABUSIVE BEHAVIORS. ALSO, THE INABILITY TO REQUEST ASSISTANCE IN MATTERS OF UNETHICAL PRACTICES CONDUCTED BY SUPERIOR COURT OR EMPLOYEES IS APPALLING. QUIT WRONGFULLY PROSECUTING AND ENSLAVING US CITIZENS IN PRIVATE FOR PROFIT PRISONS. MAKING THE INCARCERATION AND CORRUPT COURT JUSTICES GO HAND IN HAND DUE TO A NEED. TAKE ACCOUNTABILITY AND THE PROCESS OF GAINING ACCOUNTABILITY BE OF MORE PRIORITY AND YOU WONT HAVE AN UNEQUAL BALANCE OF INMATES ARRESTED WITHOUT BEING A DANGER TO SOCIETY. WHICH IS TRULY THE ONLY REASON A PERSON SHOULD EVER	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			BE INCARCERATED.	
2.	California Attorneys for Criminal Justice by Stephen Munkelt, Executive Director	**AM**	See comments on specific provisions below.	
3.	Pacific Juvenile Defender Center by Lana Kreidie and Jonathan Laba, Executive Board Members	**AM**	See comments on specific provisions below.	
4.	San Diego County Public Defender's Office	**AM**	See comments on specific provisions below.	
5.	Superior Court of Los Angeles County by Bryan Borys	**A**	We have no objections to the proposed changes. See comments on specific provisions below.	
6.	Superior Court of San Diego County by Mike Roddy, Court Executive Officer	**AM**	• Does the proposal appropriately address the stated purpose? **Yes.** • Would the proposal provide cost savings? If so, please quantify. **No.** • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?	No response required.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			Unknown at this time. • How well would this proposal work in courts of different sizes? **The impact should not differ based on court size.** See comments on specific provisions below.	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.405, Definitions		
Commenter	**Comment**	**Committee Response**
San Diego County Public Defender's Office	(7) "Aggravation," or "circumstances in aggravation" means factors that justify the imposition of the upper prison term, *or a prison term exceeding the low term if the court finds that factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the offense*, referred to in Penal Code sections 1170(b) and 1170.1, or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of the low term *when Penal Code section 1170(b)(6) factors are not present*, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to Penal Code section 1385(c). **Advisory committee comment** The Legislature amended the determinate sentencing law to require courts to order imposition of a sentence or enhancement not to exceed the middle term unless factors in aggravation justify imposition of the upper term and are stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats. 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified ~~official~~ records *of conviction. This exception can only be used to prove the existence of a prior conviction and does not apply to any enhancements attached to the prior conviction. (Pen. Code § 1170, subd. (b)(3).)* This exception may not be used to select the upper term of an enhancement.	The committee is not adding this language to the recommended rule because aggravating circumstances under section 1170(b)(6) are incorporated into the definition. The committee agrees to change "certified official records" to "certified records of conviction." The committee is not adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.405, Definitions		
Superior Court of Los Angeles County	One issue for consideration: Rule 4.405(2) amends the definition of "base term." It eliminates language regarding the use of the "base term" for crimes that carry determinate or indeterminate sentences. There is no apparent reason for this amendment other than to simplify the previous definition. None of the new laws requires changes to the definition of the "base term."	The committee is recommending the amendment to simplify the definition of base term.
Superior Court of San Diego County	• Since 4.405(10) (as amended) defines the term "section" as a "section of the Penal Code," perhaps delete "Penal Code" where it appears in 4.405(7) (as amended); 4.411.5(a)(6)(B), (a)(10), and (a)(14); 4.427(c)(2) and advisory committee comments; 4.428 advisory committee comments; and 4.447 advisory committee comments. • Rule 4.405(17) (as amended) – add a period to the end of the sentence.	The committee agrees with these suggestions.

SP22-02
Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)
All comments are verbatim unless indicated by an asterisk (*).

Rule 4.408, Listing of factors not exclusive; sequence not significant		
Commenter	**Comment**	**Committee Response**
San Diego County Public Defender's Office	**Advisory Committee Comment (re: Rule 4.408 - page 10)** *** However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on a certified ~~official records~~ *record of conviction. This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime.* This exception may not be used to select the upper term of an enhancement. (Pen. Code § 1170(b)(3).)	The committee agrees to amend "certified official records" to "certified records of conviction." The committee declines to add language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.
Superior Court of San Diego County	In the advisory committee comment to rule 4.408, it may be a good idea to repeat the info that the low term may be mandatory in some cases (similar to the language in advisory committee comment for rule 4.405).	The committee agrees with the recommendation.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.411.5, Probation officer's presentence investigation report		
Commenter	**Comment**	**Committee Response**
Superior Court of San Diego County	• In rule 4.411.5(a)(1)(C) consider adding the following underlined language: "…any enhancements which were **admitted or** found true." • Rule 4.411.5(a)(11) (as amended) – keep the "and." • In rule 4.411.5(a)(14) (as amended), consider adding the following underlined language "restitution, restitution fines, **and** other fines, **fees, assessments, penalties, and** costs…"	The committee agrees with these suggestions and has incorporated them into the amendments that it is recommending to the Council.
California Attorneys for Criminal Justice	Rule 4.411.5(a)(13) This concern is directed to language that has been in the Rule previously, but which may be inappropriate or obsolete. The Rule generally is describing requirements for the probation officer's pre-sentence report. Subdivision (a)(13) is proposed to read: "A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant; a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid.; and, when appropriate, any finding concerning the defendant's ability to pay."	

Rule 4.411.5, Probation officer's presentence investigation report		
	Under Penal Code § 1214(b) any restitution order is a judgment, so it is unclear why the probation officer should recommend that it should become a judgment. If the probation officer recommended that the restitution not be made a judgment the court's orders would be in conflict with § 1214, and the defendant would be mis-advised, and led to believe the sum could not be collected as a judgment. CACJ believes the clause "a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid" should be dropped from the Rule.	Because this would be an important substantive change to the proposal, the committee believes public comment should be sought before it is considered for adoption. The committee will consider this suggestion during the next rules cycle.

SP22-02
Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)
All comments are verbatim unless indicated by an asterisk (*).

Rule 4.420, Selection of term of imprisonment for offense		
Commenter	**Comment**	**Committee Response**
San Diego County Public Defender's Office	**Rule 4.420. Selection of term of imprisonment <u>for offense</u>.** (c) Notwithstanding paragraphs (a) and (b), the court may consider the fact of defendant's prior convictions based on a certified record of conviction without it having been stipulated to by the defendant or found true beyond a reasonable doubt to a jury at trial or the judge in a court trial. *This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime.* This exception does not apply to the use of the record of a prior conviction in selecting the upper term of an enhancement. (d) In selecting between the middle term and the lower terms of imprisonment, the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at a trial by a jury or a judge in a court trial. The relevant circumstances *that do not require stipulation by the defendant or proof beyond a reasonable doubt* may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.	The committee is not adding the proposed language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing. The committee is not adding this additional clause, as the requirements are articulated in the prior sentence.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 4.420, Selection of term of imprisonment for offense		
San Diego County Public Defender's Office	(e) Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating circumstances, *which were stipulated to by the defendant or found true beyond a reasonable doubt by a jury at trial or by a judge in a court trial*, outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice, the court must order imposition of the lower term if any of the following was a contributing factor in the commission of the offense: (1)-(3) * * * *This paragraph does not apply to a sentence that must be imposed pursuant to Penal Code section 1170(b)(6). Where a factor listed in Penal Code section 1170(b)(6) is a contributing factor in the commission of the offense,* ***the court must impose the low term*** *unless the circumstances in aggravation so far outweigh the circumstances in mitigation that imposition of the low term is contrary to the interest of justice. A court may only use circumstances in aggravation that have been proved beyond a reasonable doubt or stipulated to by the defendant.* **Advisory Committee Comment** Case law suggests that in determining the "interests of justice" the court should consider the constitutional rights of the defendant and the interests of society represented by the people; the defendant's background and prospects, including the presence or absence of a record; the nature and circumstances of the crime and the defendant's level of involvement; the factors in aggravation and mitigation including the specific factors in mitigation of Penal Code section 1170(b)(6) *and section 1385(c)*; and the factors that would motivate a "reasonable judge" in the exercise of their discretion. The court should not consider whether the defendant	The committee is not adding this comment to its recommendations because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant. The committee is not adding a reference to section 1385(c) to its recommended comment, since this rule concerns selecting the term of imprisonment for the offense, not enhancements.

Rule 4.420, Selection of term of imprisonment for offense		
	has simply pled guilty, factors related to controlling the court's calendar, or antipathy toward the statutory scheme. (See *People v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)	
Superior Court of San Diego County	Rule 4.420(c) (as amended) - change to "…by a jury or a judge in a court trial;" change (e)(2) (as amended) to "section 1016.7(b) (instead of "subd. (b) of…) to match other citation formatting in the rules.	The committee is modifying the language in its recommended rule to "at trial by a jury or a judge in a court trial," and has changed the reference to 1016.7(b).

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.421, Circumstances in aggravation		
Commenter	**Comment**	**Committee Response**
California Attorneys for Criminal Justice	The fourth paragraph of the proposed comment reads: "By providing that the defendant's prior record and simultaneous convictions of other offenses may not be used both for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases." As amended, § 1170(b)(3) says that prior convictions proven by a certified record may be used as factors in aggravation without being pled and proven. Neither this subdivision nor any other part of the statute describes a procedure for "simultaneous convictions." Hence the meaning of the quoted text is unclear. The first paragraph of the comment already points out that aggravating facts may be used in choosing the lower or mid-terms without being plead and proven. Dual use of facts is also referenced in the first paragraph, and under Rule 4.420(e). CACJ believes the quoted language should be deleted.	The committee agrees that the sentence is not clear and is deleting it from the recommendation.

Rule 4.421, Circumstances in aggravation		
San Diego County Public Defender's Office	**Advisory Committee Comment** *** Courts may not impose a sentence greater than the middle term except when aggravating factors justifying the imposition of the upper term have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do not apply to consideration of aggravating factors for the lower or middle term, *unless the low term must be imposed pursuant to Penal Code section 1170(b)(6)*. If the court finds that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the commission of the offense, the court must impose the lower term (see rule 4.420(e)) unless the court finds that the aggravating factors, *which have been stipulated to by the defendant or found true beyond a reasonable doubt by a jury at trial or a judge at a court trial*, outweigh the mitigating factors to such a degree that imposing the lower term would be contrary to the interests of justice. ~~In this instance, since the court is not addressing the imposition of the upper term, the court may consider factors in aggravation that have not been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.~~ In determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on *a* certified ~~official records~~ *record of conviction. This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime.* This exception may not be used to select the upper term of an enhancement. ***	The committee is not adding this language to its recommendation because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant. The committee agrees to amend "certified official records" to "certified records of conviction." The committee is not adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.

Rule 4.421, Circumstances in aggravation		
	~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b).~~ Other statutory ~~circumstances~~ factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term, *or to exceed the low term if the court finds that factors pursuant to Penal Code section 1170(b)(6) contributed to the commission of the offense*, if stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.	The committee is not adding this language because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.

SP22-02
Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)
All comments are verbatim unless indicated by an asterisk (*).

Rule 4.423, Circumstances in mitigation		
Commenter	**Comment**	**Committee Response**
Superior Court of San Diego County	• In rule 4.423(b) (as amended), subsection (6) would seem to also cover juvenile offenders listed in subsection (7).	The committee is keeping both of these factors in its recommendation, as rule 4.423(b)(6) reflects statutory language from Penal Code section 1170(b)(6)(B), and rule 4.423(b)(7) reflects statutory language from Penal Code section 1385(c)(3)(G).
	• Rule 4.423(b)(4) (as amended) and 4.428(c)(2)(B) and (3) - add "section" before "1385(c)."	The committee agrees with this suggestion.

SP22-02
Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)
All comments are verbatim unless indicated by an asterisk (*).

Rule 4.425, Factors affecting concurrent or consecutive sentences		
Commenter	**Comment**	**Committee Response**
San Diego County Public Defender's Office	**Rule 4.425. Factors affecting concurrent or consecutive sentences** Factors affecting the decision to impose consecutive rather than concurrent sentences include: **(a) * * *** **(b) Other facts and limitations** Any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial, may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: (1) A fact used to impose the upper term *or a term other than the low term if factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the commission of the offense*; (2) – (3) *** **Advisory Committee Comment (top of page 20)** In order to impose the upper term, *or a term other than the low term if factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the commission of the offense,* based on Penal Code section 422.75, the fact of the enhancement pursuant to Penal Code sections 422.55 or 422.6 must be stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.	The committee is not adding this language because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.425, Factors affecting concurrent or consecutive sentences		
Superior Court of San Diego County	Rule 4.425(b)(3) there should be a period after the word "crime" and the remainder of the sentence deleted.	The committee agrees with this suggestion.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

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

Rule 4.428, Factors affecting imposition of enhancements		
Commenter	**Comment**	**Committee Response**
Superior Court of San Diego County	• Recommend that 4.428(b) be repurposed/retitled so that it addresses striking the punishment on the enhancement and subdivision (c) addresses dismissing the enhancement itself. Typically, an enhancement would be "dismissed" and a sentence/punishment would be "stricken" although the two terms are and can be used interchangeably, as written in section 1385. If the subdivisions are not going to be separated out between one subdivision that addresses striking the punishment on the enhancement and one dismissing the enhancement itself, then it is recommended that subdivision (b) mirror section 1385 and add the term "dismiss" to the title and the body of the text. In other words, it should include the language "strike or dismiss."	The committee has changed the title to recommended rule 4.428(b) as "striking or dismissing enhancements under section 1385."
	• Rule 4.428, change citation to the legislative history to "…Reg. Sess., June…."	The committee agrees with this suggestion.

SP22-02
Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)
All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements		
California Attorneys for Criminal Justice	*Rule 4.428 Advisory Comment One area of concern is the proposed advisory comments to Rule 4.428 on the imposition of enhancements, in Paragraph 3 of the proposed comment. This states that the new provisions regarding dismissal of enhancements do not apply to One Strike, Two Strike or Three Strike sentencing, because these are "alternative sentencing schemes", not "offense specific enhancements." The comment references a portion of the legislative history to support this conclusion. We request that this paragraph be deleted or substantially amended. There will be many defendants with Three Strike sentences, or under other "alternate schemes" who will argue that the new amendments do apply in their cases. The statute does not specifically address this question, and there is no case authority at this early date. Because this will be an important issue for many defendants, it should be and will be litigated. CACJ believes it is inappropriate for the Council to state this opinion as a fact, before litigation with evidence, full briefing and argument. This comment essentially "puts a thumb on the scale" of every trial court's analysis of the issue before litigation. It seems clear there are other considerations to be brought forward before a final determination whether "alternative sentencing schemes" are exempt from the standards for dismissal of enhancements. See, for example, the Senate Public Safety analysis for 3/16/21, which talks about enhancements doubling a person's sentence or converting a determinate term into a life sentence, almost certainly referring to strikes; and its extensive reference to the Committee for the Revision of the Penal Code, which wrote extensively about strikes in its 2020 Annual Report.	In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender's Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.

Rule 4.428, Factors affecting imposition of enhancements		
	There is also §1385(c)(3)(G), affording great weight in favor of dismissal where a "prior juvenile adjudication [] triggers the enhancement or enhancements applied in this case." This almost certainly refers to a juvenile "strike" offense. The council should not make a comment, like this one, which seems to preempt the interpretation of a new, and ambiguous, statute. We recognize that an important function of the advisory comments to the Rules is to signal potential issues. But this can be done without suggesting that the council has an opinion on the correct resolution of the issue. We would have no objection if this paragraph were amended to say that it is unclear whether the changes will apply to "alternative sentencing schemes" such as Three Strikes, as distinct from "enhancements."	

Rule 4.428, Factors affecting imposition of enhancements		
Pacific Juvenile Defender Center	*Specifically, we request the following paragraph be deleted from the proposed Advisory Committee Comment to Rule 4.428: The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assm. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.) **Comment Regarding Proposed Advisory Committee Comment to Rule 4.428** Senate Bill 81, effective January 1, 2022, amended Penal Code section 1385 by adding provisions "aim[ing] to provide clear guidance on how and when judges may apply sentence enhancements." (Sen. Com. Public Safety, Report on Sen. Bill 81 (2021- 2022 Reg. Sess.) March 16, 2021, p. 3.) SB 81's highly consequential changes to Penal Code section 1385 were derived from recommendations made by the Commission for the Revision of the Penal Code ("CRPC"), whose 2020 Annual Report is quoted extensively in the various committee analyses for SB 81. As quoted in the Senate Public Safety Committee analysis:	In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender's Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.

Rule 4.428, Factors affecting imposition of enhancements		
	Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when "in furtherance of justice." Courts have not clarified or defined this standard, and the California Supreme Courtnoted that the law governing when judges should impose or dismiss enhancements remains an "amorphous concept." As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power. The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes Law for nonviolent crimes. (Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 5.) Despite the legislation's laudable goal to provide "clear guidance on how and when judges may apply sentence enhancements," there are various unresolved legal issues regarding the applicability of SB 81 to different types of "enhancements." One such issue is whether the nine mitigating circumstances described in new section 1385(c) apply to prior serious and violent felony convictions and	

Rule 4.428, Factors affecting imposition of enhancements		
	(Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 3.) The Three Strikes Law is the only penalty provision that doubles a person'ssentence. The reference to "enhancements" is this language must be a reference to "strikes." 1) The Senate Public Safety Committee analysis cites a September 2017 publication of the Public Policy Institute of California titled *Sentence Enhancements: Next Targets of Corrections Reform*. As quoted in the committee analysis, the publicationdescribes strikes as "enhancements": Aside from second and third strikes, the most common enhancementadds one year for each previous prison or jail term. (Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16,2021, p. 3.)[3] 2) Both Senate and Assembly analyses unambiguously state that SB 81 implements the recommendations of the Commission on the Revision of the Penal Code (CRPC), and the CRPC's recommendations regarding sentencing enhancements, as contained in it 2020 Annual Report, unquestionably included "strikes." In fact, both the Senate and Assembly analyses quote the portions of the CRPC's report that reference theThree Strikes Law. To repeat the language we quoted earlier in this Comment: [3] The PPIC report describes the Three Strikes Law as an enhancement mechanism: "California's best-known sentence enhancement mechanism is the Three Strikes Law, passed in 1994. The lawdoubles the sentence of	

Rule 4.428, Factors affecting imposition of enhancements		
	any offender convicted of a second serious or violent crime. A third conviction results in a sentence of between 25 years to life. There are roughly 38,000 second andthird "strikers" in California prisons, a little more than one-third of the prison population." Report found at https://www.ppic.org/blog/sentence-enhancements-next-target-corrections- reform (as of February 14, 2022). Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when "'in furtherance of justice." Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an "amorphous concept." As a result, this discretion may be inconsistently exercised and under used because judges do not have guidance on how courts should exercise the power. The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes. (Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 5; Assm. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.)June 29, 2021, p. 3.) 3) While the Assembly Public Safety analysis concludes that	

Rule 4.428, Factors affecting imposition of enhancements		
	"enhancements" do not include "alternative sentencing schemes," it does so in reliance on the definition inthe California Rules of Court, and cites cases that support this narrow definition. (Assm. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) June 29, 2021, pp. 5- 6). But in fact, as demonstrated in *People v. Brookfield* (2009) 47 Cal.4th 583, 592, "enhancements" sometimes include "alternative sentencing schemes." And a reading of the case law on this point demonstrates that when there are competing interpretations, the question should be decided by the appellate courts based on statutory language and legislative intent rather than on how other cases interpreted other statutes and initiatives. In Brookfield, the Supreme Court notes that the Legislature, when crafting future legislation on the subject, may want to consider the distinction the courts have drawn between "enhancements" and penalty provisions in other prior contexts. (Id. at p. 595.) But at no point does the Supreme Court impose this narrow definition on the Legislature; in fact, they instead recognize the Legislature's broader definition in the legislation at issue in that case. For the reasons stated above, the legislative history and statutory language taken as a whole suggest the Legislature intended the term "enhancements" to include "alternative sentencing schemes," unless those alternative sentencing schemes are explicitly excluded under Penal Code section 1385(c)(1). The language of Penal Code section 1385(c)(3)(G) provides further evidence that SB 81 was intended to apply to "strikes." The seventh of the nine mitigating circumstances created by	

Rule 4.428, Factors affecting imposition of enhancements		
	SB 81 -- and one of particular interest to PJDC, as an association of juvenile defenders – is contained in subdivision (c)(3)(G). The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case. (Pen. Code, §1385, subd. (c)(3)(G).) This subdivision applies in two circumstances: • If the defendant was a juvenile when they committed the current offense; and • If the defendant was a juvenile when they committed any prior juvenile adjudication that triggers the enhancement in the current case. Juvenile adjudications are not considered "convictions." (Welf. & Inst. Code, §203.) The one exception in the sentencing "enhancements" context is the Three Strikes Law, which defines a juvenile adjudication as a "conviction" for purposes of the Three Strikes Law if specified circumstances are met. (See Pen. Code, §§667, subd. (d)(3); 1170.12, subd. (b)(3); People v. Garcia (1999) 21 Cal.4th 1.) The undersigned are aware of no other juvenile adjudications that trigger sentencing "enhancements," as that term must be used in section 1385(c)(3)(G), when appended to adult criminal charges. The language in the second bullet point has meaning only if it applies to juvenile adjudications being used as "strikes" in criminal court. When interpreting a statute, the courts must endeavor to harmonize and give effect to all of its provisions. (People v. Garcia, supra, 21 Cal.4th at p. 6.)	

Rule 4.428, Factors affecting imposition of enhancements		
	Applying that principle, section 1385(c)(3)(G) must be read to apply to juvenile "strikes," which are the "enhancements" that explicitly are referenced in that subdivision. If SB 81 were interpreted to not apply to "strikes," the referenced language in 1385(c)(3)(G) would be surplusage. Since subdivision (c)(3)(G) must be interpreted to apply to juvenile "strike" adjudications, the Legislature plainly used the word "enhancement" in Penal Code section 1385(c) – as exemplified by its use in section 1385(c)(3)(G) -- to include "strikes" under the Three Strikes Law. This interpretation is not only necessary in order to give meaning to the language in section 1385(c)(3)(G), but is also consistent with the purpose of SB 81, and its intended codification of the recommendations of the Commission on the Revision of the Penal Code, as discussed above. For the foregoing reasons, we request the Judicial Council delete the proposed language in Rule 4.428 that mandates that SB 81 does not apply to "strike" convictions and adjudications.	
San Diego County Public Defender's Office	Advisory committee comment: ~~The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assem. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v.*	In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender's Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.

Rule 4.428, Factors affecting imposition of enhancements		
	~~*Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)~~ (Penal Code section 1385 is the vehicle with which courts dismiss prior strike offenses for the purposes of sentencing when it is in the furtherance of justice to do so. (See People v. Superior Court (Romero) (1996) 13 Cal.4th 497.) There is no question that prior strike sentencing significantly enhances a defendant's sentence. Senate Bill 81 defines and assists the court in its exercise of discretion to dismiss enhancements in the furtherance of justice pursuant to Penal Code section 1385. Though One Strike, Two Strike and Three Strike sentencing have been considered "alternative sentencing schemes" and not "enhancements" by some courts, these cases all significantly predate section 1385(c). Further, the actual language of the section 1385(c) is silent as to its application to prior strike sentencing. The Advisory Committee should, thus, also remain silent on this issue until the courts have had a chance to interpret the new law.)	

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-093
For business meeting on March 11, 2022

Title
Judicial Branch Administration: Sunset Emergency Rules in Response to the COVID-19 Pandemic

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, emergency rules 3, 5, 6, 7, 8, 9, 10, and 13

Recommended by
Hon. Marsha G. Slough, Chair, Executive and Planning Committee
Hon. David M. Rubin, Chair, Judicial Branch Budget Committee and Litigation Management Committee
Hon. Kyle S. Brodie, Chair, Technology Committee
Hon. Marla O. Anderson, Chair, Legislation Committee
Hon. Carin Fujisaki, Chair, Rules Committee

Agenda Item Type
Action Required

Effective Date
March 11, 2022

Date of Report
March 1, 2022

Contact
Michael I. Giden
michael.giden@jud.ca.gov

Executive Summary

The chairs of the Judicial Council's six internal committees recommend that the Judicial Council amend emergency rules 3, 5, 6, 7, 8, 9, 10, and 13 to sunset the rules on June 30, 2022. This recommendation responds to the request of Chief Justice Tani G. Cantil-Sakauye that the chairs of the internal committees develop and propose to the Judicial Council a plan for retiring any emergency rules that are still in effect. This is consistent with the council's original intent that the rules be temporary to address the emergency presented by the initial impact of the COVID-19 pandemic.

Recommendation

The chairs of the Judicial Council's six internal committees recommend that the Judicial Council, effective March 11, 2022:

1. Amend emergency rules 3, 5, 6, 7, 8, and 13 to sunset on June 30, 2022; and

2. Amend emergency rules 9 and 10 to sunset on June 30, 2022, to confirm that the effect of the tolling or extension in the rules may extend beyond the date of the sunset, and to add advisory committee comments explaining the long-term effect of the two rules.

The proposed text of the amended rules is attached at pages 7–9.

Relevant Previous Council Action

The Judicial Council, on April 6, 2020, adopted 11 emergency rules on a variety of topics to address the impact of the COVID-19 pandemic on California residents and the courts in an effort to help courts continue to carry out their constitutional mission while protecting the health and safety of court users, court employees, and judicial officers.[1] The council then adopted emergency rule 12 (Electronic service) on April 17, 2020,[2] and emergency rule 13 (Effective date for requests to modify support) on April 20, 2020.[3]

As circumstances changed, the Legislature enacted certain statutory solutions to address the impact of the pandemic, and courts began to adapt to the new conditions. In response to these developments, the Judicial Council made changes to the emergency rules, repealing or sunsetting many of the rules. The most significant actions included the following:

- On June 10, 2020, the council repealed emergency rule 4 (Emergency bail schedule), returning to local trial courts the authority to set county bail schedules.[4]

- On August 13, 2020, the council amended emergency rule 1 (Unlawful detainers) and emergency rule 2 (Judicial foreclosures—suspension of actions), both effective September 1,

[1] Judicial Council of Cal., *Judicial Branch Administration: Emergency Rules in Response to the COVID-19 Pandemic* (Apr. 4, 2020), *https://jcc.legistar.com/View.ashx?M=F&ID=8233133&GUID=4CE2DDDF-426E-446C-8879-39B03DE418B3*.

[2] Judicial Council of Cal., *Civil Practice and Procedure: Emergency Electronic Service Rule in Response to the COVID-19 Pandemic* (Apr. 14, 2020), *https://jcc.legistar.com/View.ashx?M=M&ID=777460&GUID=6220851F-3454-4B7D-AEEC-626FC7AC965F*.

[3] Judicial Council of Cal., *Family Law: Emergency Rule Regarding Effective Date to Modify Support in Response to COVID-19 Pandemic* (Apr. 19, 2020), *https://jcc.legistar.com/View.ashx?M=A&ID=777454&GUID=82EB3587-DFCC-42CE-AA75-97A21CE2507C*.

[4] Judicial Council of Cal., *Criminal Procedure: Emergency Bail Schedule* (June 8, 2020), *https://jcc.legistar.com/View.ashx?M=A&ID=793396&GUID=148E67E5-F24A-4FEC-AA1B-609CA5D3B2D1*.

2020, in anticipation of the Legislature enacting statutes to address evictions during the pandemic.[5]

- On November 13, 2020, the council repealed emergency rule 11 (Depositions through remote electronic means) and emergency rule 12 (Electronic service) in response to Senate Bill 1146 (Stats. 2020, ch. 112), which codified and made permanent the provisions in the two rules.[6]

- On November 19, 2021, the council amended emergency rule 3 (Use of technology for remote appearances) to remove civil proceedings from the scope of the rule, effective January 1, 2022, to coincide with the effective date of Code of Civil Procedure section 367.75 (Sen. Bill 241; Stats. 2021, ch. 214), which the Legislature enacted to govern remote civil proceedings.[7]

Analysis/Rationale

Background

On March 4, 2020, Governor Gavin Newsom declared a state of emergency in response to the spread of COVID-19 in California. Continuing to respond to the crisis and assist the courts, Governor Newsom on March 27, 2020, issued Executive Order N-38-20,[8] which, among other things, gave the Judicial Council of California and its Chairperson the authority to take actions necessary to maintain access to the essential operations of California's court system while protecting the health and safety of California residents. Over the course of several months in 2020, the Judicial Council adopted 13 emergency rules and Chief Justice Tani G. Cantil-Sakauye signed four statewide emergency orders under her constitutional and other legal authority, including the authority granted in the executive order.

As noted above, as the courts and public adapted to changes resulting from the COVID-19 pandemic, the Judicial Council repealed or sunsetted five of the emergency rules.

On February 17, 2022, Governor Newsom announced a new plan for the state as we move from the pandemic phase of COVID-19 to a new endemic phase. The next week, on February 25, 2022, Governor Newsom signed Executive Order N-04-22, which states that many executive orders that Governor Newsom issued in response to the COVID-19 pandemic will expire between February 25, 2022 and June 30, 2022. Some expired that day, others will expire on

---

[5] Judicial Council of Cal., *Civil Practice and Procedure: Emergency Rules for Unlawful Detainer and Foreclosure Proceedings in Response to State of Emergency Related to COVID-19 Pandemic* (Aug. 11, 2020), *https://jcc.legistar.com/View.ashx?M=A&ID=801461&GUID=192A1F2D-D881-4DE4-9711-4EC6ADAA8A5E*.

[6] Judicial Council of Cal., *Civil Practice and Procedure: Emergency Rules for Remote Depositions and Electronic Service in Response to the COVID-19 Pandemic* (Oct. 23, 2020), *https://jcc.legistar.com/View.ashx?M=F&ID=8875495&GUID=EDDD2187-8262-45AE-8DD7-28AD77CFD9E8*.

[7] Judicial Council of Cal., *Judicial Branch Administration: Emergency Rule on Use of Technology for Remote Appearances* (Oct. 28, 2021), *https://jcc.legistar.com/View.ashx?M=F&ID=9943235&GUID=2151CCEB-D89E-4F7F-8D3C-01BD74D9C5E6*.

[8] Executive Order N-38-20, *https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-N-38-20.pdf*.

March 31, 2022, and still others will expire on June 30, 2022. Executive Order N-38-20 is among the last group of these executive orders, which will expire on June 30, 2022. These events mark an important and hopeful change as the residents and government of our state transition to a semblance of pre-COVID-19 California.

To ensure timely access to justice for all, and in alignment with the Governor's announcement and the imminent transition, the Chief Justice has asked the chairs of the internal committees to develop and present to the Judicial Council a proposal for retiring the eight emergency rules that currently remain in effect.

Proposed amendments

In response to the Chief Justice's request, based on the state's efforts to transition into a new approach to COVID-19, as well as the courts' increasing ability to accommodate the changes resulting from the pandemic, the chairs of the internal committees recommend that the following rules sunset on June 30, 2022:

- Emergency rule 3 (Use of technology for remote appearances)
- Emergency rule 5 (Personal appearance waivers of defendants during health emergency)
- Emergency rule 6 (Emergency orders: juvenile dependency proceedings)
- Emergency rule 7 (Emergency orders: juvenile delinquency proceedings)
- Emergency rule 8 (Emergency orders: temporary restraining or protective orders)
- Emergency rule 9 (Tolling statutes of limitations for civil causes of action)
- Emergency rule 10 (Extensions of time in which to bring a civil action to trial)
- Emergency rule 13 (Effective date for requests to modify support)

Effect of the sunsets

The proposed sunsets of the eight emergency rules do not nullify any of the valid actions that courts or litigants were authorized to take under the rules when they were in effect.

Although this is true for all eight emergency rules, it is particularly relevant for emergency rules 9 and 10, which by their nature may have an effect that extends beyond their proposed sunset dates. Emergency rule 9 tolled the statutes of limitation and repose for one of two time periods in 2020, depending on the length of the applicable statute of limitation or repose.[9] Emergency rule 10 added six months to the time in which to bring a civil case to trial.

With respect to emergency rule 9, whether the effect of the tolling will go beyond the rule's sunset date will depend on the specific facts of the case and the applicable statute of limitation or repose. Two examples demonstrate this. In the first example, the effect of the tolling stays well within the sunset date: Assume the right to file a cause of action subject to the four-year statute of limitation in Code of Civil Procedure section 337 first accrued on February 15, 2017. The

[9] Emergency rule 9(a) tolled the statutes of limitations and repose for civil causes of action that exceed 180 days from April 6, 2020, until October 1, 2020. Emergency rule 9(b) tolled the statutes of limitations and repose for civil causes of action under 180 days from April 6, 2020, until August 3, 2020.

statute of limitation, having been tolled from April 6, 2020, until October 1, 2020, under emergency rule 9(a), would expire in August 2021 rather than in February 2021—before the proposed June 30, 2022, sunset.

In the second example, assume the right to file a cause of action subject to the four-year statute of limitation in Code of Civil Procedure section 337 first accrued on February 15, 2020. The statute of limitation, having been tolled from April 6, 2020, until October 1, 2020, under emergency rule 9(a), would expire in August 2024 rather than February 2024—almost two years after the proposed June 30, 2022, sunset date. To ensure that the litigant in this second example does not lose the benefit of the tolling period due to the sunset date, the proposed amendment clarifies that the "sunset does not nullify the effect of the tolling of the statutes of limitation and repose under the rule."

The same two possibilities exist under the proposed amendment to rule 10. In the first example, assume a civil action subject to Code of Civil Procedure section 583.310 was filed on February 15, 2016. The time in which to bring the action to trial would fall in August 2021, having been extended by six months for a total time of five years and six months, rather than February 2021—before the proposed June 30, 2022, sunset.

In the second example, assume a civil action subject to Code of Civil Procedure section 583.310 was filed on February 15, 2020. The time in which to bring the action to trial would fall in August 2025, having been extended by six months for a total time of five years and six months, rather than February 2025—several years after the sunset date. Again, to assure that the litigant in this second example does not lose the benefit of the six-month extension due to the sunset date, the proposed amendment to emergency rule 10 clarifies that the "sunset does not nullify the effect of the extension of time in which to bring a civil action to trial under the rule."

The internal chairs also propose that both of the advisory committee comments be amended to explain that the sunset does not nullify the effect of either the tolling (in emergency rule 9) or the extension of time in which to bring a case to trial (in emergency rule 10). In addition, the comments include an example of how the effect of the rule may extend beyond the sunset date, depending on the facts in the case, and that the benefit of the rules still accrue to the litigant after the sunset date.

Looking to the future

The Legislature has already enacted legislation to perpetuate or expand on some of the earlier sunsetted and repealed emergency rules. For example, coinciding with the sunset of emergency rule 1, the Legislature enacted a series of bills that expanded on the rule to comprehensively address the issues facing landlords and tenants during the pandemic.[10] Similarly, in Senate Bill

[10] Assembly Bill 3088 (Stats. 2020, ch. 37), Senate Bill 91 (Stats. 2021, ch. 2), Assembly Bill 81 (Stats. 2021, ch. 5), and Assembly Bill 832 (Stats. 2021, ch. 27).

1146 (Stats. 2020, ch. 112), the Legislature enacted statutes that codified emergency rule 11 (Depositions through remote electronic means) and emergency rule 12 (Electronic service).

Prior to the Judicial Council's adoption of emergency rules 3 and 5 in 2020, trial courts had no statutory authority to use remote technology for criminal proceedings, except under limited circumstances. During the past two years, trial courts relied on these two emergency rules to provide for appearances in criminal cases via remote technology, which has been useful both in minimizing the spread of COVID-19 and also in increasing efficiencies in criminal court calendars. Now that emergency rules 3 and 5 are being sunsetted, these efficiencies and the increased access to justice that they enabled should be extended post-pandemic—but that would best be accomplished with statutory changes. The Judicial Council is eager to work with the Governor's administration, the Legislature, and justice partners to enact a statutory authorization for remote criminal appearances. If a bill were to be enacted, courts would be better situated to transition criminal cases to post-pandemic operations, consistent with how remote proceedings in civil cases transitioned from the emergency rules to Code of Civil Procedure section 367.75 (Sen. Bill 241, stats. 2021, ch. 214).

Policy implications

The eight emergency rules to be retired under this proposal have capably served their purpose to temporarily address an emergency situation. Consistent with the council's mission, they increased access to justice, and protected the rights of litigants while allowing courts to safeguard the health of court users, court employees, and judicial officers. Now that the state and courts are transitioning to a new post-pandemic era, it is time for these eight remaining emergency rules to sunset.

Comments

Consistent with rule 10.75(o), this proposal was posted to provide the public with notice and an opportunity to comment for 24 hours before being submitted to the Rules Committee and Executive and Planning Committee for action by email.

Alternatives considered

The internal committee chairs considered taking no action on these eight emergency rules. To do so, however, would be inconsistent with the temporary nature of the emergency rules, which are authorized under the Governor's executive order.

Fiscal and Operational Impacts

There may be some costs and operational impacts resulting from the proposed retirement of the eight emergency rules. But these impacts are the result of the need to return to pre-pandemic procedures and operations.

Attachments and Links

1. Proposed Cal. Rules of Court, emergency rules 3, 5, 6, 7, 8, 9, 10, and 13, at pages 7–9

Emergency rules 3, 5, 6, 7, 8, 9, 10, and 13 of the California Rules of Court are amended, effective March 11, 2022, to read:

Emergency rule 3. Use of technology for remote appearances

(a) * * *

(b) Sunset of rule

This rule will ~~remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until~~ sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.

Emergency rule 5. Personal appearance waivers of defendants during health emergency

(a)–(e) * * *

(f) Sunset of rule

This rule will ~~remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until~~ sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.

Emergency rule 6. Emergency orders: juvenile dependency proceedings

(a)–(c) * * *

(d) Sunset of rule

This rule will ~~remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until~~ sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.

* * *

Emergency rule 7. Emergency orders: juvenile delinquency proceedings

(a)–(e) * * *

(f) Sunset of rule

Emergency rules 3, 5, 6, 7, 8, 9, 10, and 13 of the California Rules of Court are amended, effective March 11, 2022, to read:

This rule will ~~remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until~~ sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.

* * *

Emergency rule 8. Emergency orders: temporary restraining or protective orders

(a)–(e) * * *

(f) Sunset of rule

This rule will sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.

Emergency rule 9. Tolling statutes of limitations for civil causes of action

(a)–(b) * * *

(c) Sunset of rule

This rule will sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council. This sunset does not nullify the effect of the tolling of the statutes of limitation and repose under the rule.

Advisory Committee Comment

Emergency rule 9 is intended to apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil cause of action. The term "civil causes of action" includes special proceedings. (See Code Civ. Proc., §§ 312, 363 ["action," as used in title 2 of the code (Of the Time of Commencing Civil Actions), is construed "as including a special proceeding of a civil nature"); special proceedings of a civil nature include all proceedings in title 3 of the code, including mandamus actions under §§ 1085, 1088.5, and 1094.5—all the types of petitions for writ made for California Environmental Quality Act (CEQA) and land use challenges]; see also Pub. Resources Code, § 21167(a)–(e) [setting limitations periods for civil "action[s]" under CEQA].)

The rule also applies to statutes of limitations on filing of causes of action in court found in codes other than the Code of Civil Procedure, including the limitations on causes of action found in, for example, the Family Code and Probate Code.

Emergency rules 3, 5, 6, 7, 8, 9, 10, and 13 of the California Rules of Court are amended, effective March 11, 2022, to read:

Subdivision (c). The sunset of the rule does not nullify the effect of the tolling of the statutes of limitation and repose established by the rule. Depending on the specific facts of the case and the applicable statute of limitation or repose, the effect of the tolling may survive beyond the sunset date of the rule. For example, if the right to file a cause of action subject to the four-year statute of limitation in Code of Civil Procedure section 337 first accrued on February 15, 2020, the statute of limitation, having been tolled from April 6, 2020, until October 1, 2020, under subdivision (a), would expire in August 2024 rather than February 2024.

Emergency rule 10. Extensions of time in which to bring a civil action to trial

(a)–(b) * * *

(c) Sunset of rule

This rule will sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council. This sunset does not nullify the effect of the extension of time in which to bring a civil action to trial under the rule.

Advisory Committee Comment

The sunset of the rule does not nullify the effect of the six-month extension established by the rule for all civil actions filed on or before April 6, 2020. Depending on the specific facts of the case, the effect of the extension may survive beyond the sunset date of the rule. For example, if a civil action subject to Code of Civil Procedure section 583.310 was filed on February 15, 2020, the time in which to bring the action to trial would fall in August 2025, having been extended by six months for a total time of five years and six months, rather than February 2025.

Emergency rule 13. Effective date for requests to modify support

(a)–(d) * * *

(e) Sunset of rule

This rule will ~~remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until~~ sunset on June 30, 2022, unless otherwise amended or repealed by the Judicial Council.