Family and Juvenile Law Advisory Committee Meeting

Call In Number: 877.820.7831
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FEBRUARY 1, 2018
10:00–11:40 A.M.
SAN FRANCISCO, CA

JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

FAMILY AND JUVENILE LAW ADVISORY COMMITTEE MEETING

JUDICIAL COUNCIL OF CALIFORNIA
FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

February 1, 2018
10:00 am.–4:00 p.m.
Judicial Council Boardroom
San Francisco, California

Agenda

Joint Meeting:
10:00-11:40 a.m. and 3:30-4:00 p.m.
877.820.7831 Listen Only Passcode: 3059688

Family Law Issues:
11:40 a.m.–3:30 p.m.
877.820.7831 Listen Only Passcode: 1456449

Juvenile Law Issues:
11:40 a.m.–3:30 p.m.
877.820.7831 Listen Only Passcode: 3059688

10:00 – 10:15 a.m.	Welcome Approval of Minutes *Hon. Jerilyn L. Borack, Cochair* *Hon. Mark A. Juhas, Cochair* *Audrey Fancy, Cocounsel* *Tracy Kenny, Cocounsel*
10:15 – 10:30 a.m.	Public Comment
10:30 – 10:35 a.m.	Review and Discussion of the 2018 Annual Agenda *Hon. Jerilyn L. Borack* *Hon. Mark A. Juhas*
10:35 – 10:45 a.m.	Legislative Update and Judicial Council Legislative Purview Discussion *Andi Liebenbaum, Attorney, Judicial Council Governmental Affairs*
10:45 – 10:55 a.m.	Remote Access to Court Records Update *Hon. Jerilyn L. Borack* *Corby Sturges, Attorney, Judicial Council Center for Families, Children & the Courts (CFCC)*
10:55 – 11:25 a.m.	Recent Developments Regarding the Indian Child Welfare Act *Hon. Jerilyn L. Borack* *Hon. Mark A. Juhas* *Ann Gilmour, Attorney, CFCC*

11:25 – 11:40 a.m.	Families Change: Guide to Separation & Divorce Demonstration *Bonnie Hough, Managing Attorney, CFCC* *Gabrielle Selden, Attorney, CFCC*
11:40 a.m. – 3:30 p.m.	Family Law Issues Juvenile Law Issues *(See Attached Agendas)*
3:30 – 4:00 p.m.	Socioeconomic Bias in the Judiciary *Hon. Mark A. Juhas* *Michelle Benedetto Neitz, Professor of Law, Golden Gate University School of Law*
4:00 p.m.	Adjourn

Family Law Issues

Judicial Council Sequoia Room, 3rd Floor

11:40 a.m. – 12:15 p.m.	**Working Lunch (*Sequoia Room*)** Findings on Child Custody Matters from Shriver Access to Civil Counsel Evaluation *Bonnie Hough*
12:15 – 12:35 p.m.	Implementation of Self-Help Recommendations from the Futures Commission *Bonnie Hough*
12:35 – 12:55 p.m.	Tribal Court–State Court Forum Legislative Proposal on Recognition of Domestic Relations Orders from Tribal Courts *Ann Gilmour*
12:55 – 1:10 p.m.	Family Law Legislative Update *Andi Liebenbaum*
1:10 – 1:35 p.m.	Access to Visitation Grant Program: Plan for Unspent Funds *Shelly La Botte, Senior Analyst, CFCC*
1:35 – 1:55 p.m.	Expert Testimony and Hearsay Issues in Family Law After *People v. Sanchez* *Hon. Mark A. Juhas*
1:55 – 2:55 p.m.	AB 1058 Allocation Methodology and Best Practices: Next Steps *Hon. Mark A. Juhas* *Hon. Sue Alexander (Ret.), Commissioner, Superior Court of Alameda County* *Anna Maves, Supervising Attorney, CFCC*
2:55 – 3:30 p.m.	Family Law Rules and Forms: • Transfer of Jurisdiction *Tracy Kenny* • Settled Statements *Gabrielle Selden*

Juvenile Law Issues

Judicial Council Boardroom, 3rd Floor

11:40 a.m. – 12:15 p.m.	**Working Lunch (*Catalina Room*)** Legislative Update *Andi Liebenbaum*
12:15 – 12:25 p.m.	Dual-Status Youth Data Standards Working Group Report and Next Steps *Hon. Patrick E. Tondreau, Judge, Superior Court of Santa Clara County* *Audrey Fancy* *Nicole Giacinti, Attorney, CFCC*
12:25 – 12:30 p.m.	Update on Competency Legislation *Hon. Patrick E. Tondreau* *Audrey Fancy* *Andi Liebenbaum*
12:30 – 1:00 p.m.	Mental Health Services Act Funding *Francine Byrne, Manager, Judicial Council Criminal Justice Services* *Ashley Mills, Senior Researcher, Mental Health Services Oversight and Accountability Commission*
1:00 – 2:00 p.m.	Court Appointed Counsel Workload: Update & Methodology *Hon. Jerilyn L. Borack* *Don Will, Deputy Director, CFCC*
2:00 – 2:30 p.m.	Court Appointed Special Advocates Funding Methodology *Hon. Jerilyn L. Borack* *Don Will*
2:30 – 2:45 p.m.	Remote Appearance by Incarcerated Parents *Hon. Jerilyn L. Borack* *Audrey Fancy*
2:45 – 3:15 p.m.	Juvenile Law Rules and Forms: Electronic Filing and Service *Diana Glick, Attorney, CFCC*
3:15 – 3:30 p.m.	Emerging issues (All)

Family and Juvenile Law Advisory Committee

Effective September 15, 2017 (Rev. 01/18/18)

Hon. Jerilyn L. Borack, Co-Chair
Judge of the Superior Court of California,
County of Sacramento

Hon. Mark A. Juhas, Co-Chair
Judge of the Superior Court of California,
County of Los Angeles

Hon. Sue Alexander (Ret.)
Commissioner of the Superior Court of California,
County of Alameda

Hon. Craig E. Arthur
Judge of the Superior Court of California,
County of Orange

Mr. Robert J. Bayer
Court Program Manager
Superior Court of California,
County of Ventura

Hon. Carolyn M. Caietti
Judge of the Superior Court of California,
County of San Diego

Hon. Roger C. Chan
Judge of the Superior Court of California,
County of San Francisco

Hon. Carol D. Codrington
Associate Justice of the Court of Appeal
Fourth Appellate District, Division Two

Hon. Tari L. Cody
Judge of the Superior Court of California,
County of Ventura

Hon. Michael J. Convey
Judge of the Superior Court of California,
County of Los Angeles

Mr. Kevin Darrow Cunningham
Attorney
Law Office of Kevin Cunningham

Ms. Mary Majich Davis
Chief Deputy Court Executive Officer
Superior Court of California,
County of San Bernardino

Ms. LaRon Dennis
Supervising Deputy District Attorney
Santa Clara County District Attorney's Office

Ms. Sylvia Deporto
Deputy Director of the Family and Children's Services
City and County of San Francisco
Human Services Agency

Ms. Kristen Erickson-Donadee
Assistant Chief Counsel
Intergovernmental Services
California Department of Child Support Services

Mr. G. Christopher Gardner
Assistant Public Defender
County of San Bernardino

Hon. Michael Gassner
Commissioner of the Superior Court of California,
County of San Bernardino

Hon. Susan M. Gill
Judge of the Superior Court of California,
County of Kern

Family and Juvenile Law Advisory Committee

Effective September 15, 2017 (Rev. 01/18/18)

Hon. Rebecca C. Hardie
Judge of the Superior Court of California,
County of Contra Costa

Ms. Leslie Heimov
Executive Director
Children's Law Center of California

Ms. Catherine Hohenwarter
Family Law Facilitator/Family Court Services Manager
Superior Court of California,
County of Yolo

Mr. John Daniel Hodson
Attorney
Hodson & Mullin Attorneys at Law

Ms. Sharon M. Lawrence
CEO
California CASA Association

Ms. Patricia Lee
Managing Attorney
San Francisco Public Defender's Office

Ms. Miranda Neal
Deputy County Counsel
Madera Office of County Counsel

Hon. Kimberly J. Nystrom-Geist
Judge of the Superior Court of California,
County of Fresno

Hon. Annemarie G. Pace
Judge of the Superior Court of California,
County of San Bernardino

Mr. Brian J. Richart
Chief Probation Officer
El Dorado County Probation

Ms. Sudha Shetty
Assistant Dean
Goldman School of Public Policy at
UC Berkeley

Hon. B. Scott Thomsen
Presiding Judge of the Superior Court of California,
County of Nevada

Hon. Patrick E. Tondreau
Judge of the Superior Court of California,
County of Santa Clara

Hon. Adam Wertheimer
Judge of the Superior Court of California,
County of San Diego

Hon. Heidi K. Whilden
Judge of the Superior Court of California,
County of Monterey

Hon. Daniel Zeke Zeidler
Judge of the Superior Court of California,
County of Los Angeles

CJER GOVERNING COMMITTEE LIAISON

Hon. Robert J. Trentacosta
Judge of the Superior Court of California,
County of San Diego

TCPJAC LIAISON

Hon. B. Scott Thomsen
Assistant Presiding Judge of the Superior Court of
California, County of Nevada

GOVERNMENTAL AFFAIRS LIAISON

Ms. Andi Liebenbaum
Attorney

JUDICIAL COUNCIL STAFF TO THE COMMITTEE

Ms. Audrey Fancy (J), Lead Staff
Supervising Attorney
Center for Families, Children & the Courts
Judicial Council of California

Ms. Tracy Kenny (F), Lead Staff
Attorney
Center for Families, Children & the Courts
Judicial Council of California

Ms. Carolynn Bernabe
Administrative Coordinator
Center for Families, Children & the Courts
Judicial Council of California

JUDICIAL COUNCIL OF CALIFORNIA
FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF CLOSED MEETING
ACTION BY EMAIL

June 21, 2017
4:30-5:30 pm

Advisory Body Members Present:	*Hon. Mark A. Juhas, Co-Chair*, Hon. Craig E. Arthur, Mr. Robert J. Bayer, Hon. Carolyn M. Caietti, Hon. Carol D. Codrington, Hon. Tari L. Cody, Hon. Michael J. Convey, Ms. Mary Majich Davis, Ms. LaRon Dennis, Ms. Sylvia Deporto, Hon. Suzanne Gazzaniga, Hon. Susan M. Gill, Hon. Rebecca C. Hardie, Ms. Leslie Heimov, Ms. Kathleen L. Hrepich, Ms. Sharon Lawrence, Ms. Patricia Lee, Mr. Miranda Neal, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, Ms. Sudha Shetty, Hon. B. Scott Thomsen, Hon. Adam Wertheimer, Hon. Heidi K. Whilden, and Hon. Daniel Zeke Zeidler
Advisory Body Members Absent:	*Hon. Jerilyn L. Borack, Co-Chair,* Hon. Sue Alexander, Hon. Brian Back, Mr. Kevin Darrow Cunningham, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Maureen F. Hallahan, Mr. John Daniel Hodson, Mr. Brian J. Richert, and Hon. Patrick Tondreau
Others Present:	Ms. Audrey Fancy, Ms. Tracy Kenny

CLOSED SESSION

The co-chairs of Family and Juvenile Law Advisory Committee have concluded that prompt action is needed regarding a recommendation to the Judicial Council that funds for the Access to Visitation Grant Program be reallocated from a lead grantee court that is declining to participate in the third year of the grant to their partner court so that the partner court can continue to provide supervised visitation services as specified in the original grant proposal.

No public comments were received by the 8:00 a.m. June 21st deadline. Members can submit their vote by email anytime between the receipt of this email and noon on June 23rd. According to the advisory body meeting policy, members should email their vote to all committee members and committee staff. You can do so by replying to all, deleting all email addresses in the Cc: box, and then send. Or you can just reply to all and send, but it will include the judicial assistants and JCC staff who have been copied on this email. As a reminder, you are voting on whether to support the recommendation that the Judicial Council reallocate Access to Visitation grant funds that were awarded to Mendocino to serve litigants in both Mendocino and Del Norte counties to Del Norte county alone because Mendocino no longer wishes to participate in the program. Your support of this recommendation will allow Del Norte County to continue to provide supervised visitation services that have been ongoing for this third and final year of this grant cycle. More information on the recommendation can be found in the attached draft report to the Judicial Council.

Action
Here are the results of the email vote:

Yes: 26
No: 0
No response: 7

The recommendation to reallocate Access to Visitation funds from Mendocino to Del Norte was approved.

It will move forward to the Judicial Council for its July 27-28 meeting.

ADJOURNMENT

Pending approval by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA
FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

June 29, 2017
4:30-5:30 pm

Advisory Body Members Present:	*Hon. Jerilyn L. Borack, Co-Chair,* Mr. Robert J. Bayer, Hon. Tari L. Cody, Hon. Michael J. Convey, Mr. Kevin Darrow Cunningham, Ms. LaRon Dennis, Ms. Sylvia Deporto, Hon. Suzanne Gazzaniga, Hon. Susan M. Gill, Ms. Leslie Heimov, Ms. Sharon Lawrence, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, and Dr. Cindy Van Schooten,
Advisory Body Members Absent:	*Hon. Mark A. Juhas, Co-Chair*, Hon. Sue Alexander, Hon. Craig E. Arthur, Hon. Brian Back, Hon. Carolyn M. Caietti, Hon. Carol D. Codrington, Ms. Mary Majich Davis, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Maureen F. Hallahan, Hon. Rebecca C. Hardie, Mr. John Daniel Hodson, Ms. Kathleen L. Hrepich, Ms. Patricia Lee, Mr. Miranda Neal, Mr. Brian J. Richert, Ms. Sudha Shetty, Hon. B. Scott Thomsen Hon. Patrick Tondreau, Hon. Adam Wertheimer, Hon. Heidi K. Whilden, and Hon. Daniel Zeke Zeidler
Others Present:	Ms. Penny Davis, Ms. Audrey Fancy, Ms. Tracy Kenny, Ms. Vida Terry, Mr. Anthony Villanueva, Mr. Don Will, 2-3 public members

OPEN MEETING

Call to Order and Roll Call

The staff called the meeting to order at 4:35 p.m., and took roll call.

Approval of Minutes

There are no meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

The committee will discuss the Juvenile Dependency: Proposed Allocation for Fiscal Year 2017-2018 for Court Appointed Special Advocate Local Assistance.

Juvenile Dependency: Proposed Allocation for Fiscal Year 2017-2018 for Court Appointed Special Advocate Local Assistance

Each year the Family and Juvenile Law Advisory Committee recommends to the Judicial Council allocations for Court Appointed Special Advocate (CASA) programs; allocations will be considered by the Judicial Council at the July 28th meeting. This funding is allocated to county-based programs that have been designated by the superior court and that meet the criteria in rule 5.655 and the program standards of the National CASA Association. On the recommendation of this committee, the Judicial Council at its August 23, 2013 meeting adopted a new methodology

for allocations with the intention of applying that methodology in fiscal year 2013-2014 and in subsequent years. At this meeting, the committee will be provided background information and options for the committee to use in formulating recommendations for CASA grant funding in FY 2017-2018. Allocations would fund 45 programs serving 50 counties.

Action
The committee voted unanimously (with one abstention) to recommend that the Judicial Council allocate the CASA funding according to the methodology adopted by the council in 2013. The committee also directed staff to meet with the CASA directors in California to determine if revisions should be made in the methodology in the future to ensure optimal use of CASA funds distributed by the council.

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:50 pm.

Pending approval by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA

FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

July 24, 2017
4:30-5:30 p.m.
877.820.7831; Listen Only Code: 3059688

Advisory Body Members Present:	*Hon. Jerilyn L. Borack, Co-Chair, Co-Chair,* Hon. Craig E. Arthur, Mr. Robert J. Bayer, Hon. Brian Back, Hon. Carol D. Codrington, Mr. Kevin Darrow Cunningham, Ms. Kathleen Hrepich, Ms. Miranda Neal, Ms. Sudha Shetty, Hon. B. Scott Thomsen, Hon. Adam Wertheimer, Dr. Cindy Van Schooten, and Hon. Daniel Zeke Zeidler
Advisory Body Members Absent:	*Hon. Mark A. Juhas,* Hon. Sue Alexander, Hon. Carolyn M. Caietti, Hon. Tari L. Cody, Hon. Michael J. Convey, Ms. Mary Majich Davis, Ms. LaRon Dennis, Ms. Sylvia Deporto, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Suzanne Gazzaniga, Hon. Susan M. Gill, Hon. Maureen Hallahan, Hon. Rebecca C. Hardie, Mr. John Daniel Hodson, Ms. Leslie Heimov, Ms. Sharon Lawrence, Ms. Patricia Lee, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, Mr. Brian J. Richert, Hon. Patrick Tondreau, and Hon. Heidi K. Whilden
Others Present:	Ms. Audrey Fancy, Ms. Tracy Kenny, Ms. Shelly La Botte, and Ms. Anna Maves

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 4:33 p.m., and took roll call.

Approval of Minutes

No meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

Access to Visitation Grant: Midyear Funding Reallocation for Fiscal Year 2017–2018

Review proposed recommendations to the Judicial Council regarding the midyear reallocation of unused funds for the Access to Visitation contract period of FY 2017–2018.

Action:

The recommendations to reallocate unused funds to the courts requesting additional funds for the Access to Visitation grant program was approved.

ADJOURNMENT

There being no further open meeting business, the meeting was adjourned at 4:41 p.m.

Approved by the advisory body on 2017.

JUDICIAL COUNCIL
OF CALIFORNIA

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AB1058 FUNDING ALLOCATION JOINT SUBCOMMITTEE

MINUTES OF OPEN MEETING

July 31, 2017
12:00 p.m. – 1:30pm
1-877-820-7831 and Enter Listen Only Passcode: 3059688

Advisory Body Members Present:	Hon. Irma Poole Asberry, Cochair, Hon. Mark Ashton Cope, Cochair, Hon. Mark A. Juhas, Cochair, Hon. Sue Alexander, Mr. Richard D. Feldstein, Ms. Rebecca Fleming, Ms. Alisha A. Griffin, Hon. Joyce D. Hinrichs, Ms. Sheran Morton, Mr. Stephen Nash, Hon. B. Scott Thomsen, Ms. Lollie Roberts (specially appointed)
Advisory Body Members Absent:	Hon. Lorna A. Alksne, Hon. C. Todd Bottke, Hon. Kevin C. Brazile, Hon. Jonathan B. Conklin, Hon. Maureen F. Hallahan, Hon. Ira R. Kaufman
Others Present:	Ms. Charlene Depner, Ms. Lucy Fogarty, Ms. Tracy Kenny, Ms. Anna Maves, Ms. Leah Rose-Goodwin, Ms. Denise Friday, Mr. Gary Slossberg, Ms. Nancy Taylor, Ms. Millicent Tidwell

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Approval of Minutes

Meeting minutes of 5/11/17 approved without objection**.**

III. INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

Item 1 (12:00 p.m.–12:05 p.m.)
Welcome
Presenters: Judge Asberry, Judge Cope, and Judge Juhas

Call to order at 12:01 p.m. Roll call taken.

The cochairs welcomed the Joint Subcommittee members and the public to the meeting and thanked staff for its preparation in advance of the meeting. It was noted that one public comment was received for the meeting from Commissioner Rebecca Wightman (San Francisco).

Anna Maves, AB 1058 Supervising Attorney and Program Manager, reviewed the timeline for the Joint Subcommittee. Ms. Maves reported that the direction from the Council was to have a recommendation for a

new funding methodology for fiscal year 2018-2019, which necessitates a recommendation to the Council by early 2018. The current proposed plan would be to have the recommendation presented to the Council at its January 2018 meeting. Prior to the Council reviewing the recommendation, the three advisory committees which provide membership to the Joint Subcommittee (i.e., Family and Juvenile Law Advisory Committee, Trial Court Budget Advisory Committee, and Workload Assessment Advisory Committee) would need to review the recommendation and approve, disapprove, or approve with modifications.

Tentatively, the next Joint Subcommittee meeting is scheduled for October 3, 2017, at the JCC Sacramento Office to review possible funding models with numbers. This will be an open, in-person meeting.

Item 2 (12:05 p.m.–12:35 p.m.)
Discussion of Guiding Principles for AB 1058 Funding Models
Presenters: Leah Rose-Goodwin, Manager, Office of Court Research

Ms. Rose-Goodwin led a discussion regarding guiding principles for funding models for the AB 1058 program to help staff in building models that are consistent with the direction of the Joint Subcommitte.

She offered the following policy questions that may be helpful in developing guiding principles:

- What are the federal requirements that need to be met by the AB 1058 program?
- Does the group wish to consider a phased-in approach?
- How important is the issue of stability in bulding a model?
- What causes the behaviors that we see in the data (e.g., quantities or counts of certain activities) and should the model incorporate those behaviors or should the model strive to provide a different level of service?

A member asked about what is meant by behaviors. Ms. Rose-Goodwin gave the example of “defaults” and the question of whether a model should consider the number of defaults of a court in determining funding.

Ms. Rose-Goodwin then posed the following additional questions:

- What is the basic level of service you would want to see?
- What are the fundamentals of the program that need to be in every jurisdiction?

A member suggested going through the Menu of Options document and talking about the guiding principles alongside that document. Another member added that he’s not as concerned with the specifics of the model and that he can accept almost any model as long as it is objectively justifiable and fair, meaining it’s fairly administered across the board. While recognizing that there are some individual circumstances that must be met, he emphasized the need to develop a funding model that is fair to everyone involved.

A member commented that this is a statewide program, so variances between courts are not really positive things. The AB 1058 program is outcome driven and must be responsive to federal mandates, so she encouraged staff to think about ways to administer the program at the state level so it is more streamlined. As an alternative, the member suggested that it be administrated regionally, possibly organized by appellate districts. She added that if the numbers are such that there’s not sufficient funding for the small courts, there needs to be a means to provide these services in small courts anyway so everyone across the state has access to these services. She expressed the concern that if small courts do not receive sufficient funding, these courts may decline to fund an AB 1058 program in their court. If the program was organized on a statewide level or by appellate districts, if one court, for instance, had a backlog of defaults, other courts could assist that court with this backlog. She noted that historically AB 1058 Commissioners initially viewed themselves as a part of a statewide program working and planning together, but over time courts have managed the program in ways that have not supported this statewide perspective and have interrupted the continuity of the program. The member stressed that the Council needs to ensure that every county is adequately served, stressing that, if there’s no way to address how courts are managing the program at the state leve, it’s difficult to improve the performance of the program everywhere.

Ms. Maves stated that the member's comments speak to the importance of administering the program consistently throughout the state with equal access to all individuals and the need to develop efficiencies. She pointed out that the Family and Juvenile Law Advisory Committee is looking at how to develop better efficiencies in the program. Another member added that, given the current political climate, regionalization may not get a lot of traction, despite the validity of these comments. Instead, he talked about how a floor could assist small courts and how it's important to consider giving courts whose funding may change a soft landing (e.g., phasing in the funding).

Another member commented that this discussion seems to go back to an earlier remark that the model must be objectively fair to everyone. She said that we must look at what works statewide for everyone.

A member suggested the group consider the level of service that constituents should receive (e.g., how quickly it takes to get into court). Talking in these terms can help the courts begin to set some baselines for levels of service that all courts should be able to provide. Responding to the members comments regarding organizing the program on a statewide or regional level, she also noted that there are several other states that have developed other types of models that may be worth considering.

A member asked if the group is still responding to the model offered by MAXIMUS at the last meeting. Ms. Maves answered that staff thought it would be benficial to start by asking for guiding principles from the group and then afterwards to look at a document that includes a number of options, including those presented by MAXIMUS, to get the group's direction. Ms. Rose-Goodwin added that staff felt that there were too many options to consder and therefore getting further direction from the group would be helpful as models begin to be built.

Ms. Rose-Goodwin asked, in talking about fairness and access to services, if there are some fundamentals as to what that means. A member responded that to her it means that if you walk in the door in one court and walk in the door in another court, you should not be treated very differently. There may be some small nuances that might be different, but you should be treated the same wherever you go. Other members agreed, with one pointing out that there's a tension of how to respect the individual decision-making of courts while still trying to accomplish what has been noted today. He added that there might be certain areas where trial courts are funded now that ought to be funded in a different way because they can't be dealt with individually. He posed the following dilemma: if the allocation is everyone gets the same amount based on the workload and then the courts make decisions and if then litigants are not treated the same way in each court, who is going to look at this and make changes to the funding?

Judge Juhas agreed that all litigants should have the same experience whether they are on the northern or southern part of the state, but he noted that part of the issue is that how a litigant is treated is driven partly by the practices of the LCSA. He added that while these issues are important to discuss, they may be outside the purview of this Subcommittee. Mr. Feldstein agreed, stating that in talking about performance standards the Subcommittee needs to be very careful in not trying to micromanage courts. It may be more helpful to think in terms of overall goals without dictating exactly how the goals should be achieved, since courts are in different circumstances and might have different means for meeting those goals. If there are performance goals set, he suggested that they be set at a fairly high level.

Ms. Griffin posed the question of what "should be treated the same" means. She added that being treated the same goes hand in hand with expecting some level of equitable service and access in every county. As such, there's a need to define what that expectation is. It may be simple things like how quickly a litigant gets in front of the court or how quickly a litigant gets a filed court order.

Item 3 (12:35 p.m. - 12:50 p.m.)
Presentation on WAFM Funding Methodology
Presenters: Judicial Council Staff

Lucy Fogarty, Deputy Director of Budget Services, gave an overview of WAFM. WAFM is a method to assess funding need based on workload and provides a method to allocate available funding. The workload study on which WAFM is based is the Resource Assessment Study (RAS). It assesses the nonjudicial

workload. Currently, total trial court funding is not sufficient to meet the the total funding need statewide. If the funding were available to meet the need, there would be no need to reallocate funds.

RAS uses filings data to calculate the number of employees needed in each court to actually do the work. WAFM calculates the total cost of those employees, using an average salary statewide adjusted for the cost of labor in each jurisdiction per the Bureau of Labor Statistics (BLS). Non-personnel costs (e.g., operational costs) are then added in. The filings data are from a rolling 3-year average.

The following adjustments are made for small courts:

- Operational and Equipment Expense (OE&E): Small courts get a higher relative operational and equipment allocation as they cannot take advantage of the economies of scale that larger courts can take advantage of.
- FTE Allotment: For courts with less than 50 employees, if their FTE to salary ratio is lower than the median for courts in that group, their FTE to salary ratio is brought up to the median.
- Funding floors: There's an absolute funding group for small courts plus a graduated funding floor to allocate additional funding for those courts above the absolute funding floor.

WAFM does not include programs with dedicated funding streams, like AB 1058. WAFM also does not dictate how to use the funds (e.g., how employees are hired or paid); courts make these decisions. WAFM has been implemented gradually over 5 years, with the 5th year having 50% of the historical base being allocated via WAFM. Any new trial court funding also would be allocated via WAFM. The Council is in the 5th year of WAFM and has yet to decide how to proceed with WAFM. A Funding Methodology Subcommittee that was established in 2013 has been working on various parking lot issues that have been identified and currently is working on proposals on how WAFM should move forward.

Item 4 (12:50 p.m.–1:20 p.m.)
Review of Menu of Options for AB 1058 Funding Models
Presenters: Judicial Council Staff

Gary Slossberg, AB 1058 Attorney, directed the group to the Menu of Options documents. He noted that the models described in the documents follow the same general framework as WAFM with some adjustments based on specifics of the AB 1058 Program. The first document (Model Options 1) presented uses JBSIS filings and the case weighs from RAS. Model Options 2 uses either JBSIS filings or DCSS caseload data for cases with orders established in that federal fiscal year and the case weighs from RAS. Model Options 3 uses number of hearings by type from the DCSS caseload data and the MAXIMUS time study to estimate time for each hearing. Both Model Options 2 and 3 included the following: an adjustment for default cases, the ability to consider unique factors such as LEPs and poverty, the option of a stratified funding floor, the possibility of an absolute cap on any shifts in funding, and a different process for allocating the federal drawdown funds. Model Option 4 was identical to Model Options 2 and 3 with the addition of the option of using the FLF Electronic Database to track volume of customer interactions as a measure of workload, rather than using case filings or hearing data as a proxy for these customer interactions. Mr. Slossberg noted that given the limitations with the FLF Electronic Database identified at the last Subcommittee meeting, staff are working on improving the database to obtain more data that more accurately reflects FLF workload.

A member asked if when talking about defaults if there would be a goal in reducing the number of defaults or if instead it's simply to measure the number of defaults, recognizing that defaults may entail a different workload than other cases. Mr. Slossberg answered that it is the later. Another member asked if defaults are to be defined as the courts define them or as DCSS defines them. Mr. Slossberg responded that there's no definite answer, so the Subcommittee should give direction on this issue. Mr. Slossberg asked the following question:

- Should the model include an adjustment to workload based on the number of defaults a court processes?

One member commented that defaults should be considered as they impact workload. He added that since

defaults are not the result of a motion they most be tracked in some other way to account for the workload in processing them. A member suggested that the model include incentives to reduce the number of defaults, to which another member added that it all depends on what we are defining as defaults (e.g., defaults which include a stipulation signed by the respondent vs. defaults with no involvement from the respondent). A member asked if the court signing a stipulation should be deemed to have a higher workload than a default with no stipulation. Ms. Maves clarified that since the court has no control over how a default comes to the court, staff's approach was to not create incentives for reducing defaults, but rather to just measure the workload that the court has in actuality. Regarding stipulations, Ms. Maves pointed out that it is difficult to determine if the stipulation is connected to a hearing which requires the pulling of the file and other work by the court or if there's no hearing or other additional work connected to it. As such, staff proposes defining defaults as only those cases without a response on file and without a stipulation.

Mr. Slossberg asked the committee if anyone has an objection to adjusting the workload based on the number of defaults a court processes. One member responded that he has no objection, but he stated that he would want further discussion if it was proposed to create an incentive in the model to reduce defaults. Ms. Rose-Goodwin asked if the default rates reported by DCSS include the broader definition of defaults used by DCSS or the more narrower one preferred by some members of the Subcommittee. A member suggested having staff research the issue and presenting models at the October meeting with both options (i.e., with defaults included and not included).

Mr. Slossberg posed another question to the Subcommittee:

- Should court be required to accept federal drawdown (FDD) funds or should it be an opt-in?

A member answered that the FDD should be handled separately as a court's ability to spend it depends upon the general trial court budgets. As such, a court not spending all of their FDD is not a good measure of their need; rather, it's in large part a measure of the availability of trial court funds to match the 2/3 FDD that they may be entitled to. Ms. Maves gave a brief historical background on the FDD funds, noting that courts first had access to the FDD in 2008 when the program was flat-funded, which has continued to today. Use of the FDD has always been on a voluntary basis. Courts were not required to accept FDD funds. Court indicate whether they want FDD funds during the initial allocation process and also can ask for additional FDD funds at the mid-year reallocation process if the funds become available from courts who indicate that they will not use all of their funds. With the decrease in some courts' budgets with WAFM, courts have required less FDD funds. Since about 75% of AB 1058 expenditures are for personnel, then if courts were required to use FDD funds, courts that had problems paying the matching funds would have a great deal of instability.

The member reiterated that the allocation of the FDD funds should be different that the allocation of the base funds. Another member agreed.

One member, citing what was expressed in the public comment that was submitted, requested that the Subcommittee look at the historic spending patterns to try to avoid a situation in which courts that have turned back funds are allocated more money than they have ever been able to spend in the past. She also suggested that the funding model include an opportunity to pause and evaluate the impacts on the program of the new funding model. Ms. Maves acknowledged that staff is including these considerations in its discussions.

The member continued to note that the Summary of Models document mentioned that for some of the models "departures from RAS and WAFM need to be justified to the council." She asked if the council had directed that a WAFM-like model be adopted, as her understanding was that the council directed that a workload-based model be developed, but not necessarily WAFM. Ms. Maves confirmed that the charge from the council was to develop a new recommendation for a funding model based on workload, without stating that it must follow WAFM.

Item 5 (1:20 p.m.–1:25 p.m.)
Determine Next Steps, including Confirmation of October 3, 2017 In-Person Meeting at Sacramento JCC Office

Presenters: Judge Asberry, Judge Cope, and Judge Juhas

Ms. Maves noted staff, based on this discussion, would begin building out some models and input numbers into the models so they can be brought back to the Subcommittee at the next meeting. She asked if the Subcommittee members wanted staff to take any other steps.

One member proposed that the Subcommittee vote on whether or not they want staff to spend further time on Model 1 (i.e., the model that most follows the process of WAFM). She commented that it was her preference not to use this Model. Another member asked that Model 1 be looked at further to compare alongside the other models.

IV. ADJOURNMENT

Concluding Remarks and Adjourn

Judge Cope thanked the Subcommittee members and staff for their time and concluded the meeting at approximately 12:28 p.m.

Approved by the advisory body on enter date.

JUDICIAL COUNCIL OF CALIFORNIA
FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

August 10, 2017
4:30-5:30 pm

Advisory Body Members Present:	*Hon. Jerilyn L. Borack, Co-Chair,* Hon. Sue Alexander, Hon. Craig E. Arthur, Hon. Carolyn M. Caietti, Hon. Tari L. Cody, Hon. Michael J. Convey, Ms. Mary Majich Davis, Ms. LaRon Dennis, Ms. Sylvia Deporto, Hon. Susan M. Gill, Hon. Maureen F. Hallahan, Ms. Kathleen L. Hrepich, Ms. Patricia Lee, Hon. Annemarie G. Pace, Hon. Patrick Tondreau, and Hon. Daniel Zeke Zeidler
Advisory Body Members Absent:	*Hon. Mark A. Juhas, Co-Chair*, Hon. Brian Back, Mr. Robert J. Bayer, Hon. Carol D. Codrington, Mr. Kevin Darrow Cunningham, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Suzanne Gazzaniga, Hon. Rebecca C. Hardie, Ms. Leslie Heimov, Mr. John Daniel Hodson, Ms. Sharon Lawrence, Mr. Miranda Neal, Hon. Kimberly J. Nystrom-Geist, Mr. Brian J. Richert, Ms. Sudha Shetty, Hon. B. Scott Thomsen, Hon. Adam Wertheimer, and Hon. Heidi K. Whilden
Others Present:	Dr. Cindy Van Schooten, Hon. Roger Chan, Ms. Catherine Hohenwarter, Ms. Charli Depner, Ms. Audrey Fancy, Ms. Tracy Kenny, and Ms. Nicole Giacinti

OPEN MEETING

Call to Order and Roll Call

The staff called the meeting to order at 4:32 p.m., and took roll call.

Approval of Minutes

There are no meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1
Dual-Status Youth Data Standards Working Group (AB1911): Draft Legislative Report.

Action
Review and Discussion of Dual-Status Youth Data Standards Working Group (AB1911): Draft Legislative Report
AB1911 directed the Judicial Council to form a working group to discuss various issues related to dual status youth. The working group was charged with writing a legislative report detailing their findings and recommendations. A draft of the legislative report that the working group produced was provided to and discussed by the committee. The committee also considered comments received from members of the public. The committee commended the report and provided comments for the working group to consider as they finalize the report.

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:55 pm.

Pending approval by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA
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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

September 11, 2017
4:30-5:30 pm

Advisory Body Members Present:	*Hon. Jerilyn L. Borack, Co-Chair,* Hon. Craig E. Arthur, Hon. Carolyn M. Caietti, Hon. Carol D. Codrington, Hon. Tari L. Cody, Hon. Michael J. Convey, Ms. Mary Majich Davis, Ms. LaRon Dennis, Hon. Rebecca C. Hardie, Ms. Leslie Heimov, Ms. Sharon Lawrence, Ms. Patricia Lee, Mr. Miranda Neal, Hon. Annemarie G. Pace, Mr. Brian J. Richart, Hon. B. Scott Thomsen, and Hon. Patrick Tondreau
Advisory Body Members Absent:	*Hon. Mark A. Juhas, Co-Chair*, Hon. Sue Alexander, Mr. Robert J. Bayer, Mr. Kevin Darrow Cunningham, Ms. Sylvia Deporto, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Suzanne Gazzaniga, Hon. Susan M. Gill, Hon. Maureen F. Hallahan, Ms. Kathleen L. Hrepich, Mr. John Daniel Hodson, Hon. Kimberly J. Nystrom-Geist, Ms. Sudha Shetty, Hon. Adam Wertheimer, and Hon. Heidi K. Whilden, and Hon. Daniel Zeke Zeidler
Others Present:	Hon. Brian Back, Ms. Catherine Hohenwarter, Dr. Cindy Van Schooten, Ms. Charli Depner, Ms. Audrey Fancy, and Ms. Nicole Giacinti

OPEN MEETING

Call to Order and Roll Call

The staff called the meeting to order at 4:34 p.m., and took roll call.

Approval of Minutes

There are no meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1
The committee will review and discuss the Dual-Status Youth Data Standards Working Group (AB1911): Draft Legislative Report.

Action
Review and Discussion of Dual-Status Youth Data Standards Working Group (AB1911): Draft Legislative Report
The Legislature enacted Assembly Bill 1911 ([Eggman]; Stats. 2016, ch 637) that requires the Judicial Council to convene a prescribed group of stakeholders to define data elements and outcome tracking for youth involved in the dependency and delinquency system and report to the legislature by January 1, 2018. In Fall 2016 members of this committee volunteered to participate in the Dual-Status Youth Data Standards Working Group along with justice partners as designated in AB 1911. The Working Group prepared a Legislative report which the committee reviewed and approved for submission to PCLC. A member requested that the

accompanying Judicial Council report note the challenges with tracking AWOL and the privacy issues raised when developing outcome measures related to pregnancy.

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:55 pm.

Pending approval by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA
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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING WITH CLOSED SESSION

October 2, 2017
4:30-5:30 p.m.
877.820.7831; Listen Only Code: 3059688

Advisory Body Members Present:	*Hon. Mark A. Juhas, Co-Chair,* Hon. Sue Alexander, Hon. Craig E. Arthur, Mr. Robert J. Bayer, , Hon. Carolyn M. Caietti, Hon. Roger Chan, Hon. Carol D. Codrington, Hon. Michael J. Convey, Ms. LaRon Dennis, Mr. G. Christopher Gardner, Hon. Michael Gassner, Hon. Suzanne Gazzaniga, Hon. Susan M. Gill, Ms. Catherine Hohenwarter, Ms. Sudha Shetty, Hon. B. Scott Thomsen, Hon. Adam Wertheimer, and Hon. Heidi K. Whilden,
Advisory Body Members Absent:	*Hon. Jerilyn L. Borack, Co-Chair,* Hon. Brian Back, Hon. Tari L. Cody, Mr. Kevin Darrow Cunningham, Ms. Mary Majich Davis, Ms. Sylvia Deporto, Hon. Rebecca C. Hardie, Mr. John Daniel Hodson, Ms. Leslie Heimov, Ms. Sharon Lawrence, Ms. Patricia Lee, Mr. Miranda Neal, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, Mr. Brian J. Richert, Hon. Patrick Tondreau, Dr. Cindy Van Schooten, and Hon. Daniel Zeke Zeidler
Others Present:	Ms. Charli Depner, Ms. Audrey Fancy, Ms. Tracy Kenny, Ms. Shelly La Botte, Ms. Gabrielle Selden (only closed), and Mr. Greg Tanaka

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 4:33 p.m., and took roll call.

Approval of Minutes

No meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

Access to Visitation Grant Program

Review proposed recommendations to the Judicial Council for awarding federal grant funds for the Access to Visitation Grant program, and for reallocating any funds during the upcoming grant funding year.

Action:

Access to Visitation Grant Program

The committee approved recommendations to the Judicial Council for awarding federal grant funds for the Access to Visitation Grant program as proposed by the grant review group, as well

as a recommendation that the committee review the allocation of any funds that need to be reallocated during the grant cycle.

ADJOURNMENT

There being no further open meeting business, the meeting was adjourned at 4:43 p.m..

CLOSED SESSION

Item 1

Closed session under rule 10.75(c) "With the exception of any budget meetings, the meetings of the rule committees listed in this subdivision and of their subcommittees are closed unless the chair concludes that a particular agenda item may be addressed in open session."

Adjourned closed session at 4:43 p.m.

Approved by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA
FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

October 30, 2017
4:30-5:30 pm

Advisory Body Members Present:	*Hon. Mark A. Juhas, Co-Chair*, Hon. Sue Alexander, Hon. Craig E. Arthur, Mr. Robert J. Bayer, Hon. Tari L. Cody, Hon. Carol D. Codrington, Hon. Roger Chan, Ms. Mary Majich Davis, Ms. LaRon Dennis, Ms. Sylvia Deporto, Hon. Michael Gassner, Hon. Susan M. Gill, Ms. Catherine Hohenwarter, Hon. B. Scott Thomsen, and Hon. Adam Wertheimer
Advisory Body Members Absent:	*Hon. Jerilyn L. Borack, Co-Chair,* Hon. Brian Back, Hon. Carolyn M. Caietti, Hon. Michael J. Convey, Mr. Kevin Darrow Cunningham, Mr. G. Christopher Gardner, Hon. Suzanne Gazzaniga, Hon. Rebecca C. Hardie, Ms. Leslie Heimov, Mr. John Daniel Hodson, Ms. Patricia Lee, Ms. Sharon Lawrence, Mr. Miranda Neal, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, Mr. Brian J. Richert, Ms. Sudha Shetty, Hon. Patrick Tondreau, Hon. Heidi K. Whilden, Dr. Cindy Van Schooten, and Hon. Daniel Zeke Zeidler
Others Present:	Ms. Chelsie Bright, Ms. Charli Depner, Ms. Audrey Fancy, Ms. Tracy Kenny, Ms. Anna Maves, and Mr. Garry Slossberg

OPEN MEETING

Call to Order and Roll Call

The staff called the meeting to order at 4:30 p.m., and took roll call.

Approval of Minutes

There are no meeting minutes to approve.

The committee will review the Child Support Guideline Study for approval to move on to the Judicial Council (via the PCLC). Note that no public comments were received on this item (beyond those from the prior comment period).

The annual report on those trainings that were approved pursuant to CRC rules 5.210 (g) and 5.230 (e) for child custody evaluators, mediators, and recommending counselors. The committee is responsible, along with staff, for approving these trainings.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1
Review of the Statewide Uniform Child Support Guidelines: Legislative Report and Recommendations

The committee discussed the report and recommendations submitted by the contractor and the public comments submitted on the report. The committee recommended that the report be

submitted to the PCLC and the Judicial Council for its approval and transmission to the legislature with two modifications to the recommendations made by the contractor. These modifications were noted in its letter to the legislature accompanying the report. The modifications to the approved by the committee would: (1) recommend against a statutory change to require that the reasons for a deviation from the child support guideline amount be in writing as that change might be burdensome and the underlying objective could be obtained via improved training and forms, and (2) suggesting that a proposed statutory change to require child support calculators to generate one presumptive amount including the low income adjustment be revised to require that the calculators generate a presumptive amount and a range of possible orders.

ADJOURNMENT

There being no further business, the meeting was adjourned at 5:30 pm.

Pending approval by the advisory body on February 1, 2018.

JUDICIAL COUNCIL OF CALIFORNIA
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FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

January 22, 2018
4:30-5:30 pm

Advisory Body Members Present:	Hon. Craig E. Arthur, Mr. Robert J. Bayer, Hon. Roger Chan, Hon. Carol D. Codrington, Hon. Michael J. Convey, Mr. Kevin Darrow Cunningham, Ms. Mary Majich Davis, Ms. LaRon Dennis, Ms. Kristen Erickson-Donadee, Hon. Michael Gassner, Hon. Susan M. Gill, Ms. Catherine Hohenwarter, Ms. Sharon Lawrence, Ms. Patricia Lee, Mr. Miranda Neal, Hon. Kimberly J. Nystrom-Geist, Hon. Annemarie G. Pace, Hon. Adam Wertheimer, and Hon. Daniel Zeke Zeidler
Advisory Body Members Absent:	*Hon. Jerilyn L. Borack, Co-Chair, Hon. Mark A. Juhas, Co-Chair*, Hon. Sue Alexander, Hon. Carolyn M. Caietti, Hon. Tari L. Cody, Ms. Sylvia Deporto, Mr. G. Christopher Gardner, Hon. Suzanne Gazzaniga, Hon. Rebecca C. Hardie, Ms. Leslie Heimov, Hon. Mr. John Daniel Hodson, Mr. Brian J. Richart, Ms. Sudha Shetty, Hon. B. Scott Thomsen, Hon. Patrick Tondreau, and Hon. Heidi K. Whilden
Others Present:	Ms. Audrey Fancy, Ms. Nicole Giacinti, Ms. Shelly La Botte, Ms. Andi Liebenbaum, Ms. Anna Maves, Mr. Greg Tanaka, and Mr. Don Will

OPEN MEETING

Call to Order and Roll Call

The staff called the meeting to order at 4:33 p.m., and took roll call.

Approval of Minutes

There are no meeting minutes to approve.

DISCUSSION AND ACTION ITEMS (ITEMS 1-2)

Item 1
Review and Discussion of Access to Visitation Report to the Legislature (Action Required)
To review and make a recommendation to the Judicial Council on the statutorily required report to the legislature on the Access to Visitation grant program.

Action
The Judicial Council's Family and Juvenile Law Advisory Committee approved submission of the draft Judicial Council report and *California's Access to Visitation Grant Program (Federal Fiscal Years 2016–17 and 2017–18): 2018 Report to the Legislature* to the Judicial Council for consideration and approval at their March 1–2, 2018 meeting. This is a legislatively mandated report under Family Code section 3204(d) that is due on even-numbered years, on the first day of March. The report contains no formal recommendations.

Item 2
AB 1058 Funding Midyear Reallocation for FY 2017-18 and Proposed Allocation for FY 2018-19 (Action Required)
To review and discuss and to make recommendations to the Judicial Council regarding the funding for the AB 1058 child support program for the current and upcoming fiscal years.

Action
The committee recommended that the Judicial Council adopt the midyear reallocation of AB 1058 funds for FY 2017-18 based on the requests to program staff and to allocate funding for FY 2018-19 at the same level as the prior year contingent on the program receiving the same level of funding in the 2018-19 Budget Act. The committee took notice of the ongoing work of the AB 1058 Joint Funding Allocation Subcommittee and its intent to develop a revised workload based funding allocation for the FY 2019-20 budget year.

ADJOURNMENT

There being no further business, the meeting was adjourned at 5:22 pm.

Pending approval by the advisory body on February 1, 2018.

Family and Juvenile Law Advisory Committee
Annual Agenda—2018
Approved by RUPRO: October 24, 2017

I. ADVISORY BODY INFORMATION

Chair:	Hon. Jerilyn Borack and Hon. Mark A. Juhas, Co-chairs
Staff:	Ms. Audrey Fancy and Ms. Tracy Kenny, Co-lead Staff; Ms. Carolynn Bernabe, Administrative Coordinator, Center for Families, Children & the Courts

Advisory Body's Charge: Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children. [Rule 10.43]

Advisory Body's Membership: 34 members with 1 appellate court justice; 18 trial court judicial officers; 1 judicial administrator; 1 child custody mediator; 3 lawyers whose primary area of practice is family law; 1 lawyer specializing in governmental child support; 1 domestic violence prevention advocate; 1 chief probation officer; 1 child welfare director; 1 court appointed special advocate director; 1 county counsel assigned to juvenile dependency; 1 district attorney assigned to juvenile delinquency; 1 public-interest children's rights lawyer; 2 lawyer from public or private defender's office whose primary area is juvenile law.

Subgroups/Working Groups[1]:

The following have been established with approval from, or direction by, the Judicial Council or its internal advisory bodies (Rules and Project Committee or Executive and Planning):

- Protective Order Forms Working Group (POWG)
- Violence Against Women Education Program/Victims of Crime Act (VAWEP/VOCA)[2]
- Joint Juvenile Competency Issues Working Group
- AB 1058 Funding Allocation Joint Subcommittee
- Juvenile Dependency: Court-Appointed-Counsel Workload Working Group
- Joint Ad-Hoc Subcommittee on Remote Access

[1] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[2] On August 22, 2014, the Judicial Council approved a recommendation from the Family and Juvenile Law Advisory Committee that VAWEP become a standing subcommittee of the Family and Juvenile Law Advisory Committee. The composition of VAWEP has been guided by grant requirements and advisory committee chair review. A copy of the council report is available here: http://www.courts.ca.gov/documents/jc-20140822-itemE.pdf

Advisory Body's Key Objectives for 2018:

1. Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.
2. Provide recommendations to the Judicial Council for changes to or new statewide rules and forms to enable the council to fulfill legislative mandates.
3. Coordinate with related advisory groups to fulfill council directives in the area of domestic violence, family law, and juvenile law.

II. ADVISORY BODY PROJECTS

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
1.	**Implementation of Legislative Changes from the 2015-2016 Legislative Session** As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	may be appropriate for the council's consideration. a) **AB 1299 (Ridley-Thomas) Medi-Cal: specialty mental health services: foster children** *Ch.603, Statutes of 2016* Requires that the responsibility under Medi-Cal for providing specialty mental health services must be transferred within forty-eight hours of the child being moved to a new county. In certain situations, this presumptive transfer can be waived. b) **AB 1688 (Rodriguez) Dependent children: out-of-county placement: notice** *Ch. 608, Statutes of 2016* Requires the county to provide notice to the child's attorney and to the child if 10 years of age or older prior to moving the child to a placement outside the county and allows for the child to object to the move.					RUPRO not needed. Training only.
2.	**Implementation of Legislative Changes from the 2017-2018 Legislative Session**	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. <u>Family:</u> a) **AB 264 (Low): Protective orders** *Ch. 270, Statutes of 2017* Would require the court to consider issuing a protective order restraining the defendant from any contact with a percipient witness to a crime involving domestic violence, a violation of specified sex offenses, or a violation of laws relating to criminal gangs, if it is shown by clear and convincing evidence that the witness has been harassed.		Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3		programs, or information and analysis for council on why action on the council's part may or may not be necessary.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	b) **AB 413 (Eggman) Confidential communications: domestic violence** *Ch. 191, Statutes of 2017* Authorizes individuals seeking domestic violence restraining orders to record confidential communications if they contain evidence germane to the restraining order request for the sole purpose of providing that evidence in support of the request. c) **AB 712 (Bloom): Civil Actions: change of venue** *Ch. 316, Statutes of 2017* Requires a court to retain jurisdiction over emergency orders regarding child custody after a transfer of jurisdiction has been initiated but not assumed by the receiving court. Requires the council, by 1/1/19, to establish timeframes for a court to transfer and to assume jurisdiction. d) **AB 953 (Baker): Protective orders: personal information of minors**					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Ch. 384, Statutes of 2017 Authorizes a minor or a minor's guardian to petition the court to keep all information regarding the minor obtained when issuing a protective order under either of the above provisions, including, but not limited to, the minor's name, address, and the circumstances surrounding the protective order with respect to that minor, in a confidential case file. e) **AB 1396 (Burke): Surrogacy** *Ch. 326, Statutes of 2017* Clarifies that the parent and child relationship cannot be established between a child and a surrogate, as defined, by proof of having given birth. Requires the court to issue the judgment or order regarding parentage forthwith, unless specified conditions are met. f) **SB 179 (Atkins): Gender identity: female, male, or nonbinary**					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Ch. 853, Statutes of 2017 Changes the requirements for getting a new birth certificate issued to reflect a change in gender designation. g) **SB 204 (Dodd): Domestic violence: protective orders** *Ch. 98, Statutes of 2017* Enacts the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act, which would authorize the enforcement of a valid Canadian domestic violence protection order in a tribunal of this state under certain conditions. h) **SB 469 (Skinner D): Child support guidelines: low-income adjustments** *Ch. 730, Statutes of 2017* Extends existing low-income adjustment on the net disposable income threshold for child support obligors from 1/1/2018 to 1/1/2021. <u>Juvenile Dependency:</u>					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	i) **AB 404 (Stone): Foster care** *Ch. 732, Statutes of 2017* Makes changes to procedures relating to the placement of dependent children, including, among other things, by revising the preference to make a placement with specified relatives and, instead, to grant a preference for placement with any relative. j) **AB 604 (Gipson): Nonminor dependents: extended foster care benefits** *Ch. 707, Statutes of 2017* Expands the definition of nonminor dependent to include a nonminor subject to an order vesting temporary placement and care with a county child welfare department. k) **AB 1332 (Bloom): Juveniles: dependents: removal** *Ch. 665, Statutes of 2017* Would prohibit the removal of a child from the physical custody of his or her parent with whom the child did not reside at the time the petition was initiated, unless the juvenile court finds clear and					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent to live with the child or otherwise exercise the parent's right to physical custody, and there are no reasonable means available by which the child's physical and emotional health can be protected without removing the child from the child's parent's physical custody. l) **AB 1371 (Stone): Juveniles: ward, dependent, and nonminor dependent parents** *Ch. 666, Statutes of 2018* Extends prohibition for program of supervision from being undertaken until the parent has consulted with his or her counsel to a parent who is a nonminor dependent or ward of the juvenile court. m) **AB 1401 (Maeinschein): Juveniles: protective custody warrant** *Ch. 262, Statutes of 2017*					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Would authorize the court to issue a protective custody warrant, without filing a petition in the juvenile court alleging that the minor comes within the jurisdiction of the juvenile court as a dependent, if there is probable cause to believe the minor comes within the jurisdiction of the juvenile court as a dependent, there is a substantial danger to the safety or physical health of the child, and there are no reasonable means to protect the child's safety or physical health without removal. n) **SB 213 (Mitchell): Placement of children: criminal records check** *Ch. 733, Statutes of 2017* Prohibits final approval for adoption, placement, and licensure (for foster care providers and resource families) if a person in the house has been convicted of certain crimes.					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Juvenile Delinquency: o) **AB 90 (Weber): Criminal gangs** *Ch. 695, Statutes of 2017* Clarifies requirements to petition the court to be removed from state managed gang database. p) **AB 529 (Stone): Juveniles: sealing of records** *Ch. 685, Statutes of 2017* Would require, if a person who has been alleged to be a ward of the juvenile court and has his or her petition dismissed or if the petition is not sustained by the court after an adjudication hearing, the court to seal all records pertaining to that dismissed petition that are in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. q) **SB 312 (Skinner): Juveniles: sealing of records** *Ch. 679, Statutes of 2017* Expands the exception to sealing of juvenile court records to					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	include those cases where a finding on a serious or violent offense is reduced to a misdemeanor. r) **SB 462 (Atkins): Juveniles: case files: access** *Ch. 462, Statutes of 2017* Expands the list of who can be allowed to access an otherwise sealed juvenile case file to include law enforcement agencies, probation departments, or other specified agencies for the purposes of data collection and research, provided the court is satisfied that identifying information is protected.					

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
3.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	1(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	Ongoing requirement to adjust every other year, next adjustment to be effective January 1, 2018 (approved by the Judicial Council 3/24/17 in a technical report)	Revised form.	
4.	**Family Code section 3027** Proposed form addressing family law cases involving allegations of child abuse to ensure that court ordered evaluations and investigations comply with the statute and the specific directives of the court to obtain information.	1(e)	Judicial Council Direction: Origin of Project: Referral from JC as part of the Elkins work Resources: Probate and Mental Health Advisory Committee	January 1, 2019	New form.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
			Key Objective Supported:			
5.	**Court coordination and allegations of child abuse and neglect** A proposal to work collaboratively with Probate and Mental Health as well as the Committee on Providing Access and Fairness on issues related to court coordination and allegations of child abuse and neglect in guardianship cases. Initial joint work will include updating an existing pamphlet (JV-350) concerning guardianships established in juvenile court as well as the probate guardianship pamphlet (GC-205), both of which need significant revision.	1	Judicial Council Direction: Origin of Project: Resources: Probate and Mental Health Advisory Committee Key Objective Supported:	Ongoing	Revised guardianship pamphlets for juvenile and probate guardianships	
6.	**Proposition 47 & AB 2765, Proposition 57, and Proposition 64** Monitor implementation of three recently enacted proposition and assist juvenile courts with any required implementation: a) Proposition 47 enacted November 5, 2014, which	1	Judicial Council Direction: Statutory mandate and council delegation to the committee. Origin of Project: Statutory mandate	Ongoing	Rules, forms, or information and analysis for council on why action on the council's part may or may not be necessary.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767); b) Proposition 57 enacted November 8, 2016 which restructured the process for transfer of jurisdiction from juvenile to criminal court and eliminated the ability of prosecutors to directly file cases in criminal court; and c) Proposition 64 enacted November 8, 2016 which reduced most marijuana offenses for minors to misdemeanors and allows for prior offenses to be reclassified accordingly.		Resources: Criminal Justice Services Key Objective Supported: 2			
7.	**Assembly Bill 1058 Child Support Program Funding** Provide recommendations to the council for allocation of funding pursuant to Family Code sections 4252(b) and 17712.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee.	Ongoing	Council report with recommendations	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
			Origin of Project: Legislative mandate Resources: Finance office Key Objective Supported: Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.			
8.	**Access to Visitation Funding and Legislative Report** Provide recommendations to the council for allocation of funding pursuant to Family Code section 3204. Additionally, the committee will provide the council with the statutorily mandated legislative report on the program due every other year.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee. Resources: Judicial Council Finance office	Ongoing	Council report with recommendations and report to the legislature	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
			Origin of Project: Legislative mandate and Judicial Council direction Key Objective Supported: 1			
9.	**Serve as statutorily mandated Advisory Committee to the Judicial Council for the Court Appointed Special Advocates (CASA) grants program (Welf. & Inst. Code, § 100 et seq.)** Recommend annual funding to local programs pursuant to the methodology approved by the Judicial Council in August 2013. Conduct 5-year review of 2013 methodology and recommend changes if necessary.	1	Judicial Council Direction: Committee charge under CRC 10.43; Legislative mandate Origin of Project: Welf. & Inst. Code, § 100 et seq. and Judicial Council direction Resources: Judicial Council Finance office Key Objective Supported: 1	Ongoing	Council report with recommendations	
10.	**Blue Ribbon Commission on Children in Foster Care (BRC) recommendations**	1	Judicial Council Direction: Refer by the Judicial Council	Ongoing	Unknown	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Review and consider for action, when resources become available, the BRC recommendations related to court reform that have been ongoing, but have not yet been fully implemented because of significant budget challenges. Those recommendations broadly include: 1. Reducing caseloads for judicial officers, attorneys, and social workers; 2. Ensuring a voice in court and meaningful hearings for participants; 3. Ensuring adequately trained and resourced attorneys, social workers, and Court Appointed Special Advocates (CASA); and 4. Establish and monitor data exchange standards and information between the courts and child welfare agencies and those to be monitored by the Judicial Council Technology Committee, in consultation with the Family and Juvenile Advisory Committee, develop technical and operational		Origin of Project: Judicial Council Resources: Key Objective Supported: 1			

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	administration standards for interfacing court case management systems and state justice partner information systems.					
11.	**Family Law: Elkins Family Law Task Force recommendations** Continue to provide Judicial Council members input on council accepted recommendations for family law issues addressed by the Elkins Family Law Task Force	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Judicial Council Resources: Key Objective Supported: 1	Ongoing	Contribution to education and training content; review of relevant legislation with input for the council's consideration; recommendations, as needed, for rules and forms	
12.	**Consider referrals from the Commission on the Future of California's Court System** The Futures Commission made recommendations for significant reform in family and juvenile law. If those recommendations are referred to the committee it would review them and determine the next steps needed for implementation.	1	Judicial Council Direction: Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017 Origin of Project: Commission on the Future of California's Court System		Request for proposals for pilot mediation projects and legislation to authorize consolidate court pilot project	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	Family Recommendations: a) Provide mediation without recommendations as the first step in resolving all child custody disputes. b) Explore through pilot projects or otherwise whether additional services, including tiered mediation, would be effective in complex or contentious cases. Juvenile Recommendations: c) Establish a single juvenile court with consolidated jurisdiction over all juvenile court matters. d) Provide courts with jurisdiction over children and parents in all juvenile cases and provide children and parents counsel when appropriate. e) Test these proposals via pilot programs in a diverse set of courts.		Resources: Legal Services, Governmental Affairs Office			
13.	**Domestic Violence** Provide recommendations to the council on statewide judicial branch domestic violence issues in the area of family and juvenile	1	Judicial Council Direction: Referral of projects from the Domestic Violence Practice	Ongoing	Coordination of activities in subject matter area to avoid duplication of resources and potential conflict in rules, forms,	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	law, including projects referred from the work of the Domestic Violence Practice and Procedure Task Force and the Violence Against Women Education Program (VAWEP). Serve as lead committee for Protective Orders Working Group (POWG). Examine the need for statewide guidance on access to the California Courts Protective Order Registry (CCPOR). Examine need for clarification of restraining order forms regarding different formats of ammunition.		and Procedure Task Force Origin of Project: Judicial Council Resources: Criminal Justice Services Key Objective Supported: 3		and other areas. Possible rule of court to govern access to CCPOR.	
14.	**Legislation** As requested by the Judicial Council Policy Coordination and Liaison Committee review and recommend positions on legislation related to family and juvenile law matters.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: PCLC Resources: Governmental Affairs Office Key Objective Supported: 2	Ongoing	Subject matter expertise provided to PCLC so that council may take appropriate action	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
15.	**Education** Contribute to planning efforts in support of family and juvenile law judicial branch education.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project CJER Governing Committee Resources: CJER Key Objective Supported: 2	Ongoing	Subject matter expertise provided to CFCC, Education Division, and CJER Governing Committee so that content of programs can be coordinated across the branch	
16.	**Review approval of training providers under 5.210, 5.225, 5.230, and 5.518.** Training providers/courses are reviewed for compliance with these rules by Judicial Council staff, in consultation with the Family and Juvenile Law Advisory Committee.	1	Judicial Council Direction: Judicial Council Origin of Project: Judicial Council, result of name change (from AOC to JC) and review of delegations Resources: Judicial council Support Services, Legal Services, Key Objective Supported: 2	Ongoing	Approve providers	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
17.	**Serve as lead/subject matter resource for other advisory groups to avoid duplication of efforts and contribute to development of recommendations for council action.** Such efforts may include providing family and juvenile law expertise and review to working groups, advisory committees, and subcommittees as needed.	2	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: Respective advisory bodies Resources: Key Objective Supported: 2	Ongoing	Coordinated rules, forms, and legislative proposals	
18.	**Appellate Rule and Forms** Work with the Appellate Advisory Committee on the development of rules and forms regarding appellate procedures	2	Judicial Council Direction: Committee charge under rule 10.43	January 1, 2018	Rules and forms, incorporating information in education and training programs, or	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	related to juvenile and family law proceedings. For 2018 this may include a family law specific form for preparing a Proposed Statement on Appeal.		Origin of Project: AAC, courts, and members of the bar Resources: Legal Services Key Objective Supported: 2, 3		information and analysis for council on why action on the council's part may or may not be necessary.	
19.	**Rules Modernization Project and Implementation of AB 976** Each advisory committee was asked to include in their annual agendas for 2015 and 2016 an item providing for the drafting of proposed amendments to modernize the California Rules of Court related to their subject matter areas. This effort was undertaken in coordination with ITAC, which is responsible for developing and completing the overall rules modernization project. Implementation of council sponsored legislation (AB 976 (Berman) Electronic filing and service) that emerged from this project will require rule and form changes.	2(b)	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: ITAC	January 1, 2018	Implementation of eight technical changes effective January 1, 2016. Identification of further rule or form changes or necessary legislation.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
			Resources: Key Objective Supported: 2			
20.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model. Report to Committee in September 2018.	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council Judicial Council Resources: Finance Key Objective Supported: 1	Ongoing	Judicial Council report	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
21.	**Juvenile Law: Intercounty Transfers** Review requests under rule 5.610(g) to approve local collaborative agreements for alternative juvenile court transfer forms in lieu of JV-550.	2(b)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council. Judicial Branch Administration: Judicial Council Delegations to the Administrative Director of the Courts (October 25, 2013) Resources: Key Objective Supported: 2, 3	Ongoing	Judicial Council report	
22.	**Court Coordination and Efficiencies** Review promising practices that enhance coordination and increase efficient use of resources across case types involving families and children including review of unified court implementation possibilities, court coordination protocols, and methods for addressing legal mandates for domestic violence	2	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Committee charge Resources: Key Objective Supported: 3	Ongoing	Recommendations to groups and expertise will be offered to those that request it	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	coordination so as to provide recommendations for education content and related policy efforts.					
23.	**Indian Child Welfare Act Rules and Forms** In conjunction with the Tribal Court-State Court Forum and Probate and Mental Health Advisory Committee review for possible rules or forms new federal regulations governing court proceedings covered by the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) which became effective December 12, 2016.	2	Judicial Council Direction: Committee charge Origin of Project: Federal regulations Resources: Legal Services Key Objective Supported: 2	Ongoing	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.	
24.	**California ICWA Compliance Task Force Report** Review the recommendations in the California ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice 2017 and make recommendations for legislative and rules and forms revisions and other implementation steps as appropriate	2	Judicial Council Direction: Strategic Plan Goal II Origin of Project: California ICWA Compliance Task Force Report Resources: Tribal Court-State Court Forum and	TBD	Identification of potential projects within the purview of the committee.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
			California Supreme Court's Advisory Committee on the Code of Judicial Ethics Key Objective Supported: 2 & 3			
25.	**Consider Mental Health Issues Implementation Task Force Referrals** Review and consider recommendations referred by the Judicial Council following the task force's final report to the council. Recommend appropriate action within the committee's purview.	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council Resources: Legal Services, Criminal Justice Services office Key Objective Supported: 2, 3	Ongoing	Unknown	
26.	**Juvenile Law: Competency issues** To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of	2	Judicial Council Direction: Committee charge under CRC 10.43	January 1, 2018	Sponsored legislation.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. Continued work to secure legislative change consistent with the Governor's veto message on AB 935.		Origin of Project: Committee members and numerous suggestions from trial court judges in recent years. Resources: Collaborative Justice Courts Advisory Committee Key Objective Supported: 2, 3			
27.	**AB 1058 Funding Allocation Joint Subcommittee:** To enrich recommendations to the council and avoid duplication of effort, members of the committee will continue to collaborate with	Ongoing	Judicial Council Direction: Committee charge under CRC 10.43	Ongoing	Judicial Council resolution.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and make recommendations to the council for fiscal year 2019-20 allocations. In addition to approving the finalized recommendations on a funding methodology to allocate AB 1058 grant funds, the committee will examine strategies for courts to employ to manage their existing workloads within their future funding allocations to ensure that access to justice in child support matters is not compromised by the reallocation of funds.		Origin of Project: Legislative mandate Resources: Key Objective Supported: 2			
28.	**Dual-Status Youth** Pursuant to Assembly Bill 1911 ([Eggman]; Stats. 2016, ch 637) convene a group of stakeholders to define data elements and outcome tracking for youth involved in the dependency and	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Legislature	January 1, 2018	Legislative report.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	delinquency system and report to the legislature by January 1, 2018.		Resources: Key Objective Supported: 2			
29.	**Justice Partner Remote Access to Court Records Joint Ad Hoc Subcommittee** To develop an effective set of rules for the council in a timely manner and to avoid duplication of effort, members of the committee will (1) collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners, and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	1(c)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council and ITAC Resources: Legal Services and IT staff; staff to other advisory committees Key Objective Supported: 2	January 1, 2019	Adoption of rules effective January 1, 2019.	
30.	**AB 1058 Program Rule Changes** Consider implementation of rule changes to improve the efficient and effective operation of the AB	1(d)	Judicial Council Direction: Committee charge under rule 10.43	January 1, 2019	New and amended rules to implement needed changes in the program.	1/3/18 per Anaa: Given the timeframes to get these proposals ready for F&J for Spring 2018, we won't be moving forward with

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	1058 child support program in the courts to include: a) a new rule setting forth the minimum qualifications for an AB 1058 child support commissioner. b) Amend rule 5.330 to increase compliance with submission of federally required child support registry form. c) Amend rule 5.305(b) to clarify the requirements and timeframe for Title IV-D cases heard by a judge to be directed to the calendar of a child support commissioner. d) Amend rule 5.275 to require that child support calculators include the low income adjustment range on the first page and to conform fee requirements for child support calculator submission to the Judicial Council with current practice of the council not to accept payment of these fees.		Origin of Project: Program funder and staff. Resources: Legal Services Key Objective Supported: 2, 3			any of these this RUPRO cycle. These are still really good ideas for program improvement. We would still like to make these changes. Perhaps Spring 2019?

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
31.	**Minors and nonminor dependents** Continue monitoring implementation, and recommend rule and form changes as necessary, to improve the handling of proceedings involving nonminor dependents. The Judicial Council was a cosponsor of Assembly Bill 12, the original legislation that authorized extended foster care for young adults ages 18 to 21, which was enacted in 2010, with most of its provisions effective January 1, 2012. The council has supported each of the subsequent cleanup bills to make changes to ensure smooth and effective implementation of Assembly Bill 12: Assembly Bill 212 in 2011, Assembly Bill 1712 in 2012, and Assembly Bill 787 (Stone; Stats. 2013, ch. 487) in 2013.	2(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	Ongoing	Revised rules and forms.	
32.	**Technical Changes to Rules and Forms** Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2); "a nonsubstantive technical change or correction or	2(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Judicial Council.	Ongoing	Revised rules and forms.	

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity	
	a minor substantive change that is unlikely to create controversy….”		Resources: Legal Services Key Objective Supported: 2			

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2016 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
1.	As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.	
	a.) **AB 424 (Gaines) Court appointed child advocates: wards** *Chapter 71, Statutes of 2015* Summary: Expands the Court Appointed Special Advocate program to allow appointment of CASAs for any minor dependent, nonminor dependent, or ward who is subject to the jurisdiction of the juvenile court.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Court Appointed Special Advocates
	b.) **SB 794 (Comm. on Human Services) Child Welfare Services** Chapter 425, Statues of 2015 Summary: Implements federal legislation that modified title IVE findings that must be made at status review hearings for children in out of home placement.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Title IV-E Findings and Orders
	c.) **AB 1945 (Stone D) Juveniles: sealing of records** *Chapter 858, Statutes of 2016* *Passed by the Assembly and Senate and enrolled to the Governor* Summary: Allows a child welfare agency of a county responsible for the supervision and placement of a minor or nonminor dependent to access a record that has been ordered sealed for the limited purpose of determining an appropriate placement or service.	Completed effective September 1, 2017 Juvenile Law: Sealing of Records
	f.) **AB 2872 (Patterson) Children** *Chapter 702, Statutes of 2016* Summary: Allows an otherwise sealed juvenile case file to be inspected by a court-appointed investigator, acting within the scope	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018.

	of investigative duties of an active case, for the purpose of conducting a stepparent adoption, access to juvenile case files. g.) **SB 1060 (Leno D) Postadoption contact: siblings of dependent children or wards** *Chapter 719, Statutes of 2016* Summary: Requires a county placement agency to convene a meeting with a dependent, the dependent's sibling or siblings. The prospective adoptive parent or parents, and a facilitator, for the purpose of deciding whether to voluntarily execute a postadoption sibling contact agreement. Further requires the court to inquire about the status and results of this meeting at the first six-month review hearing. **SB 238 (Mitchell) Foster care: psychotropic medication** *Chapter 534, Statutes of 2015* Effective July 1, 2016 the Judicial Council implemented SB 238 during the urgency cycle. In Spring 2018 the committee circulated a proposal, enacted by the council in September 2017, to amended California Rules of Court, rule 5.640, relating to the administration of psychotropic medications to children who are dependents or wards of the court; adopted one form; and revised nine forms to address suggestions received from stakeholders who assisted with the implementation of recent statutory changes to the requirements for court authorization of psychotropic medication for foster children and others affected by this rule and these forms.	Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings Completed effective January 1, 2018. Juvenile Law: Psychotropic Medication
2.	**Commercially Sexually Exploited Children** Review legislation passed, signed, and chaptered in 2016 related to Commercially Sexually Exploited Children (CSEC) to determine which, if any, of the bills require Rules or Forms. Review to include: AB 1322 (Mitchell), AB 1276 (Santiago), AB 1678 (Santiago), AB 1682 (Stone), AB 1684 (Stone), AB 1702 (Stone), AB 1761 (Weber), AB 2498 (Bonta), SB 823 (Block), SB 1064 (Hancock), SB 1129 (Monning), and AB 2027 (Quirk).	Committee reviewed legislation and determined that no rule or form changes were required to implement the statutory changes.

3.	**Proposition 57** Develop rule and form proposal to implement Proposition 57: The Public Safety and Rehabilitation Act of 2016 which substantially amends the process by which juvenile offenders may be transferred to the jurisdiction of the criminal court by eliminating the authority of prosecutors to directly file petitions in criminal court and requiring that the juvenile court hold a hearing and determine if a transfer is appropriate.	Completed effective May 22, 2017. Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016
4.	**Proposition 64** Develop rule and form proposal to implement Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," commonly known as the "Adult Use of Marijuana Act." The Act legalizes and redesignates specified marijuana related offenses and regulates legalized use and for minors provides that most marijuana-related offenses are infractions.	Completed effective July 1, 2017 Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64
5.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	To the Judicial Council proposed to be effective January 1, 2018. Rules and Forms: Technical Amendments
6.	**Family Law: Changes to Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders** In continuation of 2015 annual agenda item 1 regarding implementation of AB 1081 (Quirk) effective July 1, 2017, amend rule 5.94 of the California Rules of Court, adopt *Order on Request to Continue Hearing* (form FL-307), and revising two forms, *Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders* and *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders*. The proposed changes would respond to specific suggestions from court professionals by increasing efficiencies in processing requests to continue hearings and requests for temporary emergency orders.	Completed effective September 1, 2017. Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders
7.	**FL-950, 955, 956 and 958 Limited Scope Representation; Rule 5.425**	Completed effective September 1, 2017. Family Law: Simplifying Limited Scope Representation Forms and Procedures

	Amend to simplify the procedure for withdrawing when scope of work has been completed. The State Bar reports that many attorneys are unwilling to make court appearance because the procedure that we have adopted for withdrawal is too complicated. Most states have adopted a simpler process. Proposed changes would likely reduce the number of hearings regarding withdrawal of counsel and promote more representation.	
8.	**Revise CRC 5.380** First adopted by the Judicial Council effective January 1, 2014 to implement in California the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorizing federally recognized tribes to develop their own tribal title IV-D child support programs when the Yurok Tribe became the first California tribe to begin accepting child support cases. Since initial implementation, the need for revisions to streamline and improve the process have been identified and should be undertaken in light of additional tribal title IV-D programs commencing operations in California.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family Law: Transfers of Title IV-D Child Support Cases Between State and Tribal Court
9.	**Revise CRC 5.552** To conform to the requirements of subparagraph (f) of section 827 of the Welfare and Institutions Code which was added effective January 1, 2015 to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court rule 5.552 which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552 continues to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Indian Child Welfare Act: Tribal Access to Court Records
10.	**Revise Form JV-732** Revise Judicial Council form JV-732 to ensure the form reflects the legally accurate procedures related to the commitment of a minor ward to the California Department of Corrections and Rehabilitation. The form revisions would ensure that the court provides complete and accurate information needed for the acceptance of youth to the	Completed effective September 1, 2017. Juvenile Law: Commitment to Department of Corrections and Rehabilitation

	California Department of Corrections and Rehabilitation, Division of Juvenile Facilities thus avoiding unnecessary delays in the court's disposition orders.	
11.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Consider a comprehensive update of the attorney workload data and time standards in the current workload model. Because any updates to the workload data and time standards will uniformly affect all trial courts, this pending work should not slow or delay the remaining three-year phase-in period previously approved by the Judicial Council for implementing the new dependency counsel funding methodology. Rather this recommendation recognizes that a comprehensive update could not be completed within the time frame set by the Judicial Council for final report from the joint committees.	Completed work on small court dependency workload effective July 1, 2017. Juvenile Dependency: Small Court Dependency Workload Working Group Final Recommendations

IV. Subgroups/Working Groups - Detail

Subgroups/Working Groups:

Subcommittee or working group name: **Protective Orders Forms Working Group** (includes representatives from the Civil and Small Claims Advisory Committee and Criminal Law Advisory Committee)

Purpose of subcommittee or working group: This working group was established at the direction of RUPRO to coordinate advisory committees' activities concerning protective orders that prevent domestic violence, civil harassment, elder and dependent abuse, and school place violence. The group assists in ensuring that there is consistency and uniformity, to the extent appropriate, in the different protective orders used in family, juvenile, civil, probate and criminal proceedings. The working group helps advisory committees and the Judicial Council by developing and updating Judicial Council protective order forms. It also reviews pending legislation and suggests new legislation to improve protective orders. It prepares proposals changes to the rules of court on protective orders, as necessary or appropriate. The Council has indicated that this advisory committee is to serve as lead for the Protective Orders Forms Working Group.

Number of advisory group members: 8

The Family and Juvenile Law Advisory Committee has 8 members who participate in the Protective Orders Working Group.

Number and description of additional members (not on this advisory group):

In addition to the 8 members from Family and Juvenile Law Advisory Committee, there are 6 members from other advisory groups on the Protective Orders Working Group: Civil and Small Claims (5), Criminal (1), and Domestic Violence Practice and Procedure Task Force (1). There is one former member of the Civil and Small Claims Advisory Committee (a retired commissioner) who is still participating in the group. There is a vacant position for a member of the Probate and Mental Health Advisory Committee.

Date formed: In 2007, at the direction of RUPRO. The formation of an interdisciplinary group to address protective order issues was originally suggested by the Chair of RUPRO in August 2006.

Number of meetings or how often the group meets:

Approximately 6-8 telephone meetings annually, depending on extent of business. (All meetings are by telephone.)

Ongoing or date work is expected to be completed:

Some core working group activities are ongoing—such as updating Judicial Council forms and reviewing legislation. Other activities—such as developing proposed Judicial Council-sponsored legislation—are projects of a specific duration.

Subcommittee or working group name: **Violence Against Women Education Program and Victims of Crime Act Committee**

Purpose of subcommittee or working group: Per Judicial Council referral, VAWEP/VOCA will continue to provide guidance and evaluation of the VAWEP grant-funded projects and make recommendations to improve court practice and procedure in domestic violence cases as directed by the Family and Juvenile Law Advisory Committee and as approved in the advisory committee's annual agenda.

As indicated by the Judicial Council, VAWEP will request that the chair of the Criminal Law Advisory Committee select one or more members of that advisory committee to serve on VAWEP to help address questions relating to court practice and procedure in criminal domestic violence matters.

In addition, the VAWEP/VOCA Committee will serve as the advisory body for use of an 18 month grant pursuant to the federal Victims of Crime Act that will fund education and assistance for courts in increasing compliance with court orders and implementing Marsy's law.

Date formed: 2003 as a committee; designated as a subcommittee by Judicial Council action, August 22, 2014.

Number of meetings or how often the group meets: 1 in person meeting and 1 teleconference anticipated

Ongoing or date work is expected to be completed: Ongoing.

Subcommittee or working group name: **Joint Juvenile Competency Issues Working Group**

Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are

raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. If AB 935 (Stone) Juvenile proceedings: competency is enacted, work will be commenced on implementing the changes in that legislation. Otherwise legislative changes will be pursued.

Date formed: designated as a subcommittee by RUPRO in December 2014.

Number of meetings or how often the group meets: Teleconferences as needed
Ongoing or date work is expected to be completed: January 1, 2019 if AB 935 is signed and rules and forms are enacted to implement its provisions.

Subcommittee or working group name: **AB 1058 Funding Allocation Joint Subcommittee**
Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and report back at the February 2016 Judicial Council meeting.

Date formed: designated as a subcommittee by RUPRO and E&P June 1, 2015.

Number of meetings or how often the group meets: 1 in person meeting anticipated
Ongoing or date work is expected to be completed: Ongoing

Subcommittee or working group name: **Juvenile Dependency: Court-Appointed-Counsel Workload Working Group**
Purpose of subcommittee or working group: Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model.

Date formed: N/A request designation as a subcommittee by RUPRO on October 23, 2017

Number of meetings or how often the group meets: 4 teleconferences anticipated
Ongoing or date work is expected to be completed: Preliminary report to committee in October 2018

Subcommittee or working group name: **Joint Ad Hoc Subcommittee on Remote Access**
Purpose of subcommittee or working group: The purpose of this subcommittee is to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other governmental agencies. (This is part of the Tactical Plan for Technology, 2017-2018, adopted by the Judicial Council.)

Date formed: April 19, 2017 (approved by RUPRO)
Number of meetings or how often group meets: as needed by teleconference only (1 meeting has been held; approximately 4 more are anticipated to complete the project)
Ongoing or date work is expected to be completed: January 1, 2019

Policy Coordination and Liaison Committee

ORIENTATION MATERIALS

WEDNESDAY, SEPTEMBER 13, 2017

JUDICIAL COUNCIL OF CALIFORNIA
GOVERNMENTAL AFFAIRS

Judicial Council of California
Governmental Affairs

Policy Coordination and Liaison Committee
Orientation Materials

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Policy Coordination and Liaison Committee

The role of the Policy Coordination and Liaison Committee (PCLC) is to represent the council before the legislative and executive branches of government, build consensus with stakeholders and individuals outside the branch and coordinate an annual plan for communication and interaction with other agencies and entities.

The charge and duties of the committee, set forth in California Rules of Court, rule 10.12, including the following:

1) Take positions on behalf of the council on pending legislative bills, after evaluating input from the council advisory bodies and the courts, provided that the position is consistent with the council's established policies and precedents;

2) Make recommendations to the council on all proposals for council-sponsored legislation and on an annual legislative agenda after evaluating input from council advisory bodies and the courts;

3) Represent the council's position before the Legislature and other bodies or agencies and acting as liaison with other governmental entities, the bar, the judiciary, and the public regarding council-sponsored legislation, pending legislative bills, and the council's legislative positions and agendas;

4) Build consensus on issues of importance to the judicial branch consistent with the council's strategic plan with entities and individuals outside the branch;

5) Develop an annual plan for communication and interaction with other branches and levels of government, components of the judicial system, the bar, the media, and the public; and

6) Direct any advisory committee to provide it with analysis or recommendations on pending or proposed legislation.

Voting

PCLC is made up of both voting members and advisory members of the Judicial Council. California Rule of Court 10.10(e) states that a nonvoting "advisory council member may vote on any internal committee matter unless the committee is taking final action on behalf of the council." Based on Rule 10.10(e) PCLC members may vote as follows:

Advisory Members

- Approval of legislative proposals for Invitation to Comment
- Recommending Judicial Council sponsorship of legislative proposals
- Recommending adoption of Judicial Council Legislative Priorities

Voting Members*

- Taking positions on pending legislation
- Approval of proposed Judicial Council-sponsored legislation under urgent circumstances

*A nonvoting advisory member may raise any issue to a vote by making or seconding a motion but may not vote on the issue.

Quorum at each meeting is determined by the type of vote being taken.

Judicial Council–sponsored Legislation Calendar

Month	Judicial Council
December – January	• Advisory committees, in consultation with Governmental Affairs staff, develop proposals for council–sponsored legislation.
February – March	• Advisory committee, in consultation with Governmental Affairs staff, circulates draft proposals for council–sponsored legislation to interested and affected parties.
April	• Deadline for public comment on proposed council–sponsored legislation.
May – July	• Advisory committee consults with Governmental Affairs staff regarding responses to comments and further development of proposals for council–sponsored legislation.
August	• Deadline for advisory committee and Governmental Affairs staff to jointly submit finalized draft proposals for council–sponsored legislation to the Policy Coordination and Liaison Committee (PCLC).
September	• PCLC makes recommendations for council action on council–sponsored legislative proposals for upcoming legislative year.
November	• Judicial Council acts on PCLC recommendations for council–sponsored legislation for upcoming legislative year.

Guidelines for Development of Judicial Council–sponsored Legislation

This summary describes the typical process the Judicial Council follows when developing and approving proposals for sponsored legislation. It also describes how Governmental Affairs advocates for these proposals in the Legislature. **Because it often takes several months to fully develop a legislative proposal, the process should begin early in the year.** *(See the Judicial Council–sponsored Legislation Calendar.)*

I. Judicial Council Process

A. Sources of Legislative Proposals

Judicial Council advisory committees are well situated to identify and develop proposals for statutory change. Committee members have extensive expertise in the committee's subject area and often have ideas for improving statutory law. In addition, advisory committees may receive requests for council sponsorship of legislative proposals from outside sources.

Suggestions for how an advisory committee may wish to identify proposals for council–sponsored legislation include:

- The advisory committee chair may devote a portion of one or more meetings each year to identifying legislative proposals for the following year's legislative session.

- The advisory committee may establish a working group or task force composed of committee members responsible for reviewing the relevant codes, or specific subjects or issues within those codes, to identify potential legislation.

- Advisory committees may receive legislative proposals from outside sources. When a person or organization submits a legislative proposal to the Judicial Council, the council may forward the proposal to the appropriate advisory committee and Governmental Affairs staff for consideration.

B. Advisory Committee Process for Developing Proposals

This section describes the steps an advisory committee takes to develop and review legislative proposals for substantive merit.

1. Assess Viability of Proposal – For each legislative proposal, the advisory committee must take the following actions:

    - The advisory committee, in consultation with Governmental Affairs staff, determines a time frame for consideration of the proposal, keeping in mind

the deadlines for submission of legislative proposals to PCLC (See JC-Sponsored Calendar).

- If the advisory committee rejects a proposal submitted by an outside source, committee staff shall notify the proponent of that action.

- If the advisory committee accepts or modifies a proposal from an outside source, or decides to recommend sponsorship of an internally generated proposal, the committee proceeds to the next steps.

2. Coordinate with Governmental Affairs – Advisory committee staff should work with Governmental Affairs staff to coordinate work on all aspects of the proposals.

3. Review and Analyze – Advisory committees review proposals for substantive merit before transmitting them to PCLC. A typical analysis of a proposal should include:

- A description of the problem to be addressed, including its scope.

- A description of how the problem affects the judicial branch.

- A description of the proposed solution.

- A discussion of any alternative solutions, including an analysis of why the recommended solution is preferable.

- A discussion of any opposing viewpoints.

- A description of any foreseeable problems with the proposed solution.

- Draft language for the proposed legislation.

- A determination whether the Judicial Council and/or the Legislature should give the proposal urgent consideration and the reasons for this.

Advisory committees should use the worksheet provided on page 17 to assist with this analysis and other important considerations.

4. Evaluate Sponsorship Criteria – Once an advisory committee determines that a particular proposal has merit, the committee should consider certain criteria in assessing whether Judicial Council sponsorship is appropriate and desirable. Limited resources, competing priorities, and political realities impose practical

limitations on the council's ability to sponsor every worthwhile legislative proposal presented. The advisory committee and Governmental Affairs should jointly consider each of the following questions:

- Is the proposal within the Judicial Council's purview?

Council–sponsored measures should involve only those issues that are central to the council's mission and goals as stated in the Judicial Council's Strategic Plan.

- Should the proposal be addressed through the Judicial Council's rulemaking authority rather than by a change in statute?

The council prefers to implement changes through rules of court wherever appropriate.

- Is the Judicial Council the best sponsor?

The advisory committee and Governmental Affairs staff may determine that a proposal more closely serves the mission or objectives of another organization. A Judicial Council–sponsored proposal should be within purview addressing issues fundamental to the administration of justice and broadly serving the needs of the courts statewide.

- What political factors are associated with the proposal?

Governmental Affairs is responsible for providing advice about the political factors associated with a proposal.

5. Circulate for Comment – If an advisory committee wishes to circulate a proposal for comment, the committee staff consults with Governmental Affairs. If it is determined that the proposal is appropriate for circulation, the committee submits the proposal to PCLC for consideration. If PCLC agrees with the advisory committee's recommendation, the proposal may be circulated for public comment. After the comment deadline, committee staff and Governmental Affairs jointly review the comments. Advisory committee staff then summarizes and presents the comments to the committee

6. Advisory Committee Action – Upon completion of the review procedures and consideration of the evaluation criteria above, the advisory committee may adopt one of the following actions:

- Approve the proposal as submitted.

- Approve the proposal with modifications.

- Reject the proposal. The advisory committee should inform the source of the proposal of this decision.

If the advisory committee approves the proposal, the committee forwards the proposal to PCLC for consideration. Final proposals must be submitted to PCLC using the template for memos to Judicial Council internal committees by the August deadline in order to be considered for Judicial Council sponsorship during the following legislative year. All advisory committee proposals submitted to PCLC are referred to Governmental Affairs, which may prepare a separate analysis and recommendation for PCLC.

C. Policy Coordination and Liaison Committee Action

Each September, PCLC reviews the proposal(s), the advisory committee recommendation(s), and any analyses and recommendations prepared by Governmental Affairs. PCLC may recommend the proposal for Judicial Council sponsorship and forward it to the Judicial Council, send it back to the advisory committee for further consideration, or take other action as necessary. If PCLC modifies or rejects the proposal, Governmental Affairs will return the proposal to the submitting advisory committee. The advisory committee may either accept PCLC's recommendation or request that the full council review PCLC's recommendation.

D. Judicial Council Action

The sponsored-legislation proposals are presented by PCLC to the Judicial Council in November for consideration. The Judicial Council reviews the proposals, along with PCLC's recommendation contained in a report prepared by Governmental Affairs. Once the council approves a proposal, it becomes "sponsored" legislation. If the Judicial Council does not approve a proposal for sponsorship, or takes a different action on the proposal, Governmental Affairs will communicate the action to the submitting advisory committee.

E. Delegation of authority to PCLC to sponsor legislative proposals on behalf of the council

The Judicial Council has delegated to PCLC the authority to take positions to sponsor legislative proposals on behalf of the council when time is of the essence. Acting under this delegation, PCLC shall notify the chairs of the Executive and Planning Committee and the Rules and Projects Committee of any PCLC meetings at which such actions will be considered so that they may participate if available. PCLC is also required to notify all

other Judicial Council members, if feasible, of the intended action. After acting under this delegation, PCLC is required to notify the Judicial Council of all actions taken.

II. Advocacy Process

A. Legislative Author

Governmental Affairs staff will seek a legislator to introduce the council–sponsored proposal. An appropriate author for the bill is one who:

- Has substantial experience with the subject of the bill; often the author is the chair or a member of the policy committee with subject-matter jurisdiction over the bill.
- Understands Judicial Council needs and objectives.
- Has experience with the legislative process.
- Is an effective negotiator with members of both parties.

B. Governmental Affairs Responsibilities

Governmental Affairs acts as the primary advocate for Judicial Council–sponsored legislation. Governmental Affairs advocates are responsible for the following, among other things:

- Preparing background material for the bill, including analyses and fact sheets for the author. The analyses include a description of the problem the bill seeks to address, an explanation of how the bill corrects that problem, the likely supporters and opponents of the bill, questions the bill raises that may need further research, and any other information necessary.
- Communicating information about the bill to the appropriate legislative committee(s) with subject-matter jurisdiction. Advocates work extensively with committee staff as well as the committee members. In moving through the legislative process, a bill will be heard by at least one policy committee and, if appropriate, a fiscal committee, before being debated and voted upon by the full membership on the floor of each house.
- Writing sponsorship letters and testifying at bill hearings. Recruiting witnesses for bill hearings if appropriate.
- Coordinating with stakeholders to build support of the bill.

- Coordinating the content and timing of communications between all supporters and the Legislature.

- Negotiating with the proposal's opponents to determine whether amendments can eliminate opposition and still achieve the council's objectives.

- Meeting with the Governor and/or his or her staff to advocate that the bill be signed into law.

Formulating a Position on Pending Legislation (<u>not</u> sponsored by Judicial Council)

The Judicial Council, acting through the Policy Coordination and Liaison Committee (PCLC), strives to improve the administration of justice by representing the interests of the judicial branch to the Legislature, the executive branch, other entities involved in the legislative process or interested in the judiciary, and the general public. The following are procedures Governmental Affairs uses in developing recommendations for taking positions on pending legislation.

Judicial Council Purview

The Judicial Council supports the integrity and independence of the judicial branch and seeks to ensure that judicial procedures enhance efficiency and access to the courts. The council generally does not take a position on substantive law or policy. However, the council may take a position on legislation that involve issues central to the council's mission and goals as stated in the Judicial Council's Strategic Plan. The council may also take a position on an apparent issue of substantive law if issues presented directly affect court administration or negatively affect existing judicial services by imposing unrealistic burdens on the judicial branch.

Positions on Legislation

Governmental Affairs reviews all introduced and amended legislation to determine whether a bill is of interest to the judicial branch. For each bill of interest, staff determines whether the council is likely to take, or may want to take a position on the bill. One or more council advisory committees (or subcommittees) within the appropriate subject area review each bill on which the council may want to take a position. The advisory committees either recommend a position or recommend that the council take no position.

Governmental Affairs submits bills on which an advisory committee recommends a position to PCLC for determination of a council position. Additionally, staff may also choose to bring a bill before PCLC on which an advisory committee has recommended no position. Staff presents each bill to PCLC with an analysis that includes a summary of the bill, a recommended position from one or more advisory committees and, if different, the staff recommendation, the rationale for the recommendation(s), positions the council has taken on related bills, fiscal and workload impacts, and other relevant information.

The council has established several positions PCLC may take on a bill. The positions are:

1) **<u>Oppose</u>**: An oppose position may be taken on a bill that conflicts with established council mission, goals or policies, and for which amendments would not resolve the conflict.
2) **<u>Oppose unless amended/Oppose unless funded</u>** An oppose, unless funded or oppose, unless amended position may be taken on a bill that the council will oppose

unless identified amendments are taken to address those conflicts with council policy, impacts on the courts, or unless funding issues are resolved.

3) **Neutral if amended/Neutral if funded**: A neutral position may be taken on a bill the substance of which does not implicate council policy, but on which technical corrections or amendments would improve the measure.

4) **Support in concept**: A support in concept position may be taken on a bill that, in concept, furthers council policy, but that is not yet drafted in sufficient detail for the council to support.

5) **Support if amended/Support if funded**: A support, if amended or support, if funded position may be taken on a bill that, with specified amendments or funding, would further the council's policies. Absent the amendments or necessary funding the council position would be neutral.

6) **Support:** A support position taken on a bill that aligns with or furthers council mission, goals or policies.

7) **No position:** A "no position" may be taken on a bill that addresses substantive issues on which the council takes no position, though the measure may affect the courts.

PCLC may also provide instruction to Governmental Affairs to do further research, raise concerns, or work with the author prior to taking a position on a bill.

PCLC Meeting Schedule and Agenda

PCLC meets regularly during the legislative session, usually by conference call. Beginning in late February or early March, the committee sets a schedule of meetings at least every three weeks. If a meeting is not needed, Governmental Affairs will notify PCLC members by e-mail of the cancellation. Late in the legislative session, and during budget negotiations, it may be necessary to schedule several meetings on short notice to discuss or resolve late-breaking issues. All PCLC meetings must be in compliance with California Rule of Court, Rule 10.75 governing meetings of advisory bodies.

Governmental Affairs prepares a written report on each bill for PCLC. Governmental Affairs may place bills that do not appear to require discussion or deliberation on PCLC's consent calendar. The consent calendar saves the committee time by eliminating the need to review bills that are consistent with clearly established council policies and positions. However, any committee member may remove an item from the consent calendar to discuss the bill's merits or the recommended action.

Bills that are on the discussion agenda include those that require discussion and those bills on which the staff recommendation differs from the recommendation of an advisory committee or when the recommendations from two or more advisory committees differ. In the latter instances,

staff will request that a representative of the advisory committee(s) participate in the PCLC meeting. The representatives will present the advisory committee's views, and take questions from PCLC members. PCLC may then excuse the guests and deliberate further and prior to taking action.

Legislative Advocacy

Once PCLC adopts a position on a bill, it is the official position of the Judicial Council. That position and associated policies become the cornerstone of Governmental Affairs advocacy efforts. The adopted position is presented in subsequent negotiating sessions, discussions with interested parties, and meetings with legislators. A letter setting forth the position and policies is sent to the bill's author, legislative committee members, the Governor, and other interested parties.

Generally, PCLC's initial guidance and position is sufficient to direct Governmental Affairs advocacy throughout the legislative process. Occasionally, as a bill progresses or is amended, staff will request further direction from PCLC because of a particular bill's significance, complexity, the sensitivity of an issue, or the direction taken by the amendments.

The Judicial Council advances its position on legislation most successfully when it allies itself with other entities such as county government representatives, law enforcement, attorneys, and consumer advocates. Governmental Affairs works to develop coalitions on issues of common interest. These coalitions often last for years, effectively supporting and opposing a variety of bills. For example, the council's efforts regarding trial court facilities legislation involved close coordination with the California State Association of Counties. Other groups with which the council has long-standing working coalitions include the Consumer Attorneys of California, the Bench-Bar Coalition, California Defense Counsel, the California Judges Association, the State Bar of California, and others. These and other working relationships have evolved during many years of cooperative effort.

Legislative Fiscal Impact Statement

In addition to its legislative screening process, Governmental Affairs identifies bills that require a fiscal impact statement. In the years since the State assumed responsibility for trial court funding, Governmental Affairs has, through joint efforts with the Budget Services Office, developed a process to ensure that both timely and accurate fiscal impact statements are submitted to the Legislature. The legislative advocate works with the budget staff to develop an accurate fiscal impact statement. The budget staff confirms the cost issues and, if necessary, works with the advocate to determine an appropriate approach and methodology, identify available resources, and clarify any technical issues affecting the analysis.

There are a variety of resources available to assist in the development of fiscal and workload analyses. The Office of Court Research assists in data collection and analysis. Governmental

Affairs also works closely with other council program areas (e.g., civil, criminal, family, and juvenile law, jury service, traffic programs, and the court interpreter program). Staff also works with local courts to assist in the development of fiscal analyses. A fiscal impact statement may be submitted on bills that the council has not taken a position on.

Judicial Council Legislative Policy Summary

The Judicial Council Legislative Policy Summary sets forth the council's historical policies on key legislative issues. The summary helps to ensure that council members, advisory committee members, and council staff have a common understanding of council policy on issues presented in proposed legislation. The summary reflects the council's most recent positions on legislative issues and identifies how those positions are derived from the Judicial Council's strategic plan. The Judicial Council adopts the Legislative Policy Summary on an annual basis.

Formulating a Judicial Council Position on Legislation (<u>not</u> sponsored by Judicial Council)

Governmental Affairs

As bills are introduced in the Legislature, Governmental Affairs identifies those that may affect the judicial branch. Governmental Affairs analyzes the bill for key aspects/impacts of the legislation and, if within Judicial Council purview, forwards the bill to a Judicial Council advisory committee for review and recommendation.

Advisory Committee

The advisory committee (or its subcommittee) reviews the legislation and recommends a position. The advisory committee recommendation along with Governmental Affairs report and recommendation are presented to the PCLC for review.

Policy Coordination and Liaison Committee

PCLC reviews the bill, Governmental Affairs report, and recommendation(s). The committee, on behalf of the Judicial Council, may adopt one of the following positions on the bill:

- oppose
- oppose unless amended (or funded)
- neutral
- support if amended (or funded)
- support
- no position

In an unusual circumstance, PCLC may refer the bill to the full Judicial Council for review and position. Once PCLC or the Judicial Council has taken a position on a bill, Governmental Affairs advocates that position throughout the legislative process.

Worksheet for Judicial Council–Sponsored Legislation Proposal

Advisory Committee: _____ Date: _____

Contact Person: _____

Governmental Affairs Liaison: _____

1. Describe the problem to be addressed.
2. How does this problem affect the judicial branch?
3. What is the proposed solution?
4. Discuss alternative solutions. Why is the recommended solution preferable?
5. Any foreseeable problems with the proposed solution?
6. Is the proposal within the Judicial Council's purview?
7. Could the proposal be carried out by amending the California Rules of Court instead of legislation?
8. Please estimate costs or operational impacts of the proposal.
9. Why is the Judicial Council the best sponsor?
10. What political factors are associated with the proposal? Is there any expected opposition or support for the proposal?
11. Does this proposal require urgent consideration? If so, why?

Governmental Affairs

The mission of Governmental Affairs is to promote and maintain effective relations with the legislative and executive branches and to present the Judicial Council's recommendations on legislative matters pursuant to constitutional mandate. (Cal. Const., art. VI, § 6). Governmental Affairs staff are responsible for the following subject matter areas:

Subject Matter	Contact
General Advocacy	Cory Jasperson, Laura Speed
Access to Justice/Self-represented Litigants	Andi Liebenbaum
Appellate Law	Daniel Pone
Bench-Bar Coalition	Laura Speed
Budget	Cory Jasperson
Civil Procedure	Daniel Pone
Communications Liaison	Laura Speed
Court Closures/Service Reduction	Laura Speed, Tayryn Edwards
Court Facilities	Cory Jasperson, Tayryn Edwards
Court Interpreters	Andi Liebenbaum
Court Reporters	Andi Liebenbaum
Court Security	Sharon Reilly
Criminal Procedure	Sharon Reilly
Day on the Bench	Laura Speed
Employment Issues (trial court labor, court staff, retirement)	Laura Speed
Family Law	Andi Liebenbaum
Fiscal Impact of Legislation/Appropriations	Cory Jasperson
Judgeships and Subordinate Judicial Officers	Andi Liebenbaum, Tayryn Edwards
Judicial Administration Fellowship Program	Laura Speed
Judicial Conduct	Laura Speed
Judicial Education	Laura Speed
Judicial Elections	Laura Speed
Judicial Service	Laura Speed
Jury Issues	Sharon Reilly, Daniel Pone
Juvenile Delinquency	Andi Liebenbaum
Juvenile Dependency	Andi Liebenbaum
Probate and Mental Health	Daniel Pone
Redistricting/Judicial Redistricting	Laura Speed
State Bar/Practice of Law	Daniel Pone
Traffic Law	Andi Liebenbaum, Sharon Reilly

Staff Biographies

Cory Jasperson leads the judicial branch's legislative and executive advocacy efforts as the Director of Governmental Affairs. Mr. Jasperson worked in the State Capitol for 12 years, holding positions in both the Assembly and Senate. Prior to joining the Judicial Council, he served as Chief of Staff to Senator Joe Simitian (D-Palo Alto). Mr. Jasperson also held the position of Chief of Staff to the Assembly Speaker pro Tempore. Before joining the Legislature in 2000, Mr. Jasperson worked at the Santa Clara County Board of Supervisors, Stanford University, and the Greenlining Institute, a statewide multi-ethnic public policy and advocacy center. He has a BA in International Relations from the University of California, Davis.

Laura Speed is the Supervising Attorney of Governmental Affairs. As Supervising Attorney, Laura joins Cory Jasperson, in managing the office's legislative and budget advocacy operations. Ms. Speed has served as the governmental relations and legislative officer for the County of Sacramento, as division chief in the Office of Stakeholder Relations with the California Public Employees Retirement System, as deputy chief of external affairs at the California Department of Corrections and Rehabilitation, and as a policy consultant at the California State Senate. In addition, she serves as an adjunct professor at the University of the Pacific, McGeorge School of Law, where she currently teaches a course in legal writing. Ms. Speed earned her bachelor's degree in political science from San Jose State University and her juris doctorate from McGeorge School of Law.

Luz Bobino is an Executive Secretary to the Director and Supervising Attorney of Governmental Affairs. Ms. Bobino joined Governmental Affairs in March 2000 from Sutter Health Information Technology as an application support analyst providing assistance in system analysis, design, development, documentation, and configuration as well as testing and training of the product. Ms. Bobino also worked for the Stockton Fire Department Executive Office as an office clerk, while attending San Joaquin Delta College, majoring in Psychology.

Yvette Casillas-Sarcos is an Administrative Coordinator with Governmental Affairs and has been employed by the Judicial Council since 1997. She is responsible for coordinating bill tracking and screening criminal and traffic legislation, as well as supporting the work of two advocates and the Policy Coordination and Liaison Committee. Ms. Casillas-Sarcos relocated to Sacramento in 1995 from Southern California and attended Sacramento City College, majoring in administration of justice.

Tayryn Edwards is the Judicial Administration Fellow with Judicial Council Governmental Affairs. Tayryn graduated from the University of Chicago in 2016, where she majored in English, served as president of university's mock trial program, and captained the women's lacrosse team. As an undergraduate Tayryn's coursework focused on postcolonialism, transnational literature, and human rights discourse. Tayryn previously spent a summer interning at the Sacramento DA's office, and devoted the past year to working with a nonprofit called Reading Partners.

Jenniffer Herman is an Administrative Coordinator with Governmental Affairs and has been employed by the Judicial Council since 2017. Prior to joining the Judicial Council, Ms. Herman was a personnel specialist with the California Department of Parks and Recreation. Ms. Herman relocated to Sacramento in 2006 from the Bay Area and attended Sacramento City College, majoring in English Literature.

Monica LeBlond has been the Administrative Support Supervisor at Governmental Affairs since January 2002. Prior to joining the Judicial Council, she worked as an administrative and quality manager for an environmental consulting firm in Sacramento. Ms. LeBlond has a bachelor's degree from the State University of New York.

Andi Liebenbaum is an Attorney with Governmental Affairs. Ms. Liebenbaum serves as a liaison between Judicial Council Advisory Committees and the Legislature on issues pertaining to access to justice, self-help and self-represented litigants, family law, juvenile delinquency and dependency, judicial officers, court interpreters, court reporters, and traffic law including fines, fees, penalties, and assessments. Prior to joining the council in 2012, Ms. Liebenbaum served as senior legislative consultant to Assembly Member Jared Huffman. She began her legal career as an attorney in juvenile dependency and delinquency matters, environmental policy including CEQA litigation, and immigration law. She transitioned into nonprofit workforce development and youth advocacy for 16 years, working throughout California and as a consultant to the US Department of State undertaking program development and capacity building in Central and South America. Ms. Liebenbaum received her undergraduate degrees from Boston University, and her juris doctorate from Loyola Law School in Los Angeles.

Daniel Pone is an Attorney with Governmental Affairs and has been with the Judicial Council since 2001. Prior to joining the Judicial Council, he worked for four years as a principal consultant for the California Assembly Judiciary Committee, working in areas of civil rights, constitutional law, general civil law, contracts, probate, mental health, consumer protection, and privacy. Prior to working in the Assembly, Mr. Pone worked for more than 11 years as a Senior Attorney for Protection & Advocacy, Inc., specializing in mental health law. Mr. Pone has a bachelor's degree in psychology from the University of Oklahoma and a juris doctorate from University of California at Davis.

Sharon Reilly has been with the Judicial Council since January 2013 as an Attorney for criminal law and traffic policy and legislation. Ms. Reilly previously served as chief counsel for the California Bureau of State Audits (BSA) for 13 years and served as a deputy legislative counsel in the California Office of Legislative Counsel for 9 years. As chief counsel with BSA, Ms. Reilly was the executive responsible for the Investigations Division, and also oversaw issues involving the criminal justice system, including juvenile justice realignment, campus crime statistics, the Three Strikes law, and probation requirements. While working at the Legislative Counsel Bureau she served as counsel to several legislative committees, including the Senate

Appropriations Committee, the Joint Legislative Budget Committee, and the Constitutional Revision Commission. A University of California, Berkeley graduate, Ms. Reilly earned her juris doctorate degree from the University of California at Davis.

Outreach Activities

Governmental Affairs seeks to promote effective communications within California's judicial branch, and with the legislative and executive branches of government. To enhance these efforts, Governmental Affairs has established outreach programs that inform the Governor, members of the Legislature, and the legal community about the judicial branch and issues of mutual concern.

State of the Judiciary Address

The Chief Justice of California typically delivers an annual State of the Judiciary address early in the calendar year to a joint session of the Legislature. The address focuses on significant issues and challenges facing the judiciary in the upcoming year. Following the address, a meet-and-greet is conducted, providing an opportunity for members of the Legislature, the executive branch, appellate and trial courts, and the Bench-Bar Coalition to discuss issues and meet informally with the Chief Justice and other judicial branch leaders.

Legislative Visits

Governmental Affairs coordinates legislative visits for council members as needed or requested.

Liaison Program

Working with interested groups toward achieving common goals has been a long-standing component of Governmental Affairs' advocacy work. The liaison program is the office's ongoing effort to work cooperatively with stakeholders involved with and important to the judicial branch, including the Attorney General, the California Judges Association, the California State Association of Counties, the California District Attorneys Association, the California Public Defenders Association, the State Bar of California, civil plaintiffs and defense bars, legal services organizations, and others. Where our positions on issues concur, we form alliances to enhance our advocacy efforts. When our positions on issues differ, we negotiate to reach agreements whenever possible. In support of this ongoing liaison effort, annual meetings are hosted with the leadership of several external organizations to discuss issues of mutual concern.

Statewide Bench-Bar Coalition

The Judicial Council coordinates the statewide Bench-Bar Coalition (BBC). The BBC enhances communication and coordinates the advocacy activities of the judicial community with local, minority and specialty bars associations and legal services organizations regarding issues of common interest, particularly in the legislative arena. Governmental Affairs also coordinates the BBC's annual Day in Sacramento, which is held in conjunction with the Chief Justice's State of the Judiciary address.

Day on the Bench Program

The Day on the Bench program is an event in which a legislator spends a day (or portion of a day) in court with a judge in the legislator's district. This program, cosponsored with the California Judges Association, is designed to give legislators an understanding of the volume, complexity, variety, and difficulty of a trial court judge's daily duties and responsibilities.

Publications and Information Services

To facilitate communication, staff distributes the following information on current legislative developments.

Legislative Status Chart – Governmental Affairs prepares a chart that provides an easy reference to all council actions on pending legislation, including Judicial Council-sponsored legislation.

Table of Bills Affecting Appellate Courts – Governmental Affairs prepares a chart of legislative bills that affect the appellate courts or that respond to California appellate court decisions.

Each year, Governmental Affairs publishes a comprehensive summary of enacted legislation that affects the courts or is of general interest to the legal community. The Legislative Summary includes brief descriptions of the measures, organized by subject. Current and prior-year summaries can be downloaded from the California Courts Website, Court-related Legislation page: www.courts.ca.gov/4121.htm

To view bills being tracked by Governmental Affairs visit the California Courts website at *www.courts.ca.gov/4121.htm*

A copy of any legislative measure may be obtained from the Bill Room in the State Capitol building by calling (916) 445-2323. Bills and legislative analyses can also be accessed on the Internet at *www.leginfo.ca.gov/bilinfo.html* free of charge.

For additional information on the Policy Coordination and Liaison Committee visit the committee's website at *www.courts.ca.gov/pclc.htm*

Remote Access to Trial Court Records

Annual Agenda Item:

Justice Partner Remote Access to Court Records Joint Ad Hoc Subcommittee
To develop an effective set of rules for the council in a timely manner and to avoid duplication of effort, members of the committee will (1) collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners, and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.

Background:

Existing rules (Cal. Rules of Ct., rules 2.500–2.507) govern public access to court records, including electronic records. These rules do not limit or otherwise address access to records by parties, attorneys, or other persons entitled to a greater level of access.

To clarify courts' authority to provide remote access to electronic records to those persons, the Rules and Policy Subcommittee of the Judicial Council's Information Technology Advisory Committee (ITAC) began work in spring 2017 to develop rules of court to govern remote access to electronic court records by parties, attorneys, local justice partners, and other government agencies. ITAC's legal staff initially consulted with other Judicial Council staff with experience working with courts and justice partners in various proceedings—including civil, criminal, family, juvenile, probate, domestic violence, and traffic—to formulate initial draft rules to present to the subcommittee.

Update:

In summer 2017, the Judicial Council authorized the creation of a joint subcommittee on remote access to electronic records, with members drawn from advisory committees addressing civil and small claims, criminal, family, juvenile, probate, domestic violence, and traffic law and process. Judge Borack and Kevin Cunningham represent this committee. Staff presented its draft rules to the subcommittee, which met three times by teleconference in the fall of 2017 and winter of 2018 to refine the proposal. The resulting revised draft rules are attached.

ITAC staff will present to revised draft to ITAC on February 2nd with a recommendation that the proposal circulate for public comment from April 9th–June 8th. Further review by the joint subcommittee is planned following the comment period.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Technology: Remote Access to Electronic Records

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 2.500—2.503; adopt rules 2.515—2.528 and rules 2.540—2.545.

Proposed by
Information Technology Advisory Committee
Hon. Sheila F. Hanson, Chair

Action Requested
Review and submit comments by June 8, 2018

Proposed Effective Date
January 1, 2019

Contact
Andrea L. Jaramillo, (916) 263-0991
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Executive Summary and Origin

The proposal makes limited amendments to rules governing public access to electronic trial court records, and creates a new set of rules governing remote access to such records by parties, parties' attorneys, court-appointed persons, authorized persons working in a legal organization or qualified legal services project, and government entities. The project to develop the new rules originated with the *California Judicial Branch Tactical Plan for Technology (2017-2018)*. Under the tactical plan, a major task under the "Technology Initiatives to Promote Rule and Legislative Changes" is to develop rules "for online access to court records for parties and justice partners[.]" (Judicial Council of Cal., *California Judicial Branch Tactical Plan for Technology (2017-2018)* (2017), p. 47.)

Background

Existing rules govern public access to electronic trial court records (Cal. Rules of Court, rules 2.500—2.507), but do not govern access to such records by parties, their attorneys, or justice partners. (See Cal. Rules of Court, rule 2.501(b).) Because courts are moving swiftly forward with making remote access to records available to these persons and entities, it is important to provide authority and guidance for the courts and others on these expanded forms of remote access.

Under the leadership of the Information Technology Committee (ITAC), nine advisory committees[1] formed the Joint Ad Hoc Subcommittee on Remote Access to develop remote access rules applicable to parties, their attorneys, and justice partners. The formation of the Joint Ad Hoc Subcommittee for this purpose was approved by the advisory bodies' internal oversight committees.

The Proposal

The existing rules governing electronic access to trial court records are found in of chapter 2 of division 4 of title 2 of the California Rules of Court (hereafter, chapter 2). Chapter 2's rules currently apply "only to access to court records by the public" and limit what is remotely accessible by the public to registers of action, calendars, indexes, and court records in specific case types. (Cal. Rules of Court, rules 2.501(b), 2.503(b).) The rules in chapter 2 "do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or rule." (Rule 2.501(b).)

Because chapter 2 only limits *public* remote access, there is a gap in the rules with respect to persons and entities that are not the public at large such as parties, parties' attorneys, and justice partners. Courts have had to fill this gap on a piecemeal, ad hoc basis. The purpose of the proposal is to create a new set of rules applicable statewide governing remote access to electronic records to provide more structure and guidance for the courts. The proposal does not create a right to remote access and it does not provide for a higher level of access to court records using remote access than one would get by viewing court records at the courthouse.

The proposal restructures and expands the scope of chapter 2. The proposal breaks chapter 2 into four articles to cover not only access by the public, but also to cover access by parties, their attorneys, legal organizations, court-appointed persons, and government entities. In brief, the new structure consists of:

- **Article 1: General Provisions.** This article builds on existing rules, covers broad concepts on access to electronic records, and expands on the definitions of terms used in chapter 2.
- **Article 2: Public Access.** This article consists of the existing public access rules, with minor amendments.
- **Article 3: Remote Electronic Access by a Party, Party's Attorney, Court-Appointed Person, or Authorized Persons Working in a Legal Organization or Qualified Legal Services Project.** The content of this article is new and covers remote electronic access by those listed in the article's title.
- **Article 4: Remote Electronic Access by Government Entities.** The content of this article is new and covers remote electronic access by government entities.

[1] ITAC, Appellate Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, Advisory Committee on Providing Access and Fairness, Traffic Advisory Committee, Civil and Small Claims Advisory Committee, Criminal Law Advisory Committee, and Tribal Court-State Court Forum.

Article 1: General Provisions
This article builds on existing rules and broadens the scope of chapter 2 beyond public access.

Rule 2.500. Statement of Purpose. The proposal amends the rule to expand the scope of the chapter to include access by parties, parties' attorneys, legal organizations, court-appointed persons, and government entities. Language on access to confidential and sealed records is stricken from subdivision (c) because the rules do allow access to such records for those who would be legally entitled to access them, e.g., while the public at large may not be legally entitled to access a sealed record under any circumstance, a party that could access a sealed record at the courthouse would be able to access that record remotely under the new rules.

Rule 2.501. Application, scope, and information to the public. The proposal amends subdivision (a) to provide more explanation of what types of records are and are not within the scope of chapter 2's provisions. Chapter 2 only governs access to "court records" as defined in chapter 2 and not any other type of record that is not a "court record." The proposal also adds an advisory committee comment providing additional details about the limitation in the scope of the rules to "court records."

The proposal amends subdivision (b) by striking out the existing language and replacing it with a new provision. The existing language is stricken out because the rules of the chapter in the proposal expand the scope beyond public access and so the limitations in the existing language are no longer applicable. Because the new rules expand the scope of remote access by allowing a greater level of remote access by certain persons and entities, the new provision requires courts to provide information to the public on who may access their court records under the rules of the chapter. Courts may provide the information by linking to information that will be publicly posted on courts.ca.gov and may also supplement with information on their own sites in plain language.

Rule 2.502. Definitions. The proposal expands on the definitions found in rule 2.502 by adding new terms applicable to the expanded scope of chapter 2. The proposal also makes minor edits to the existing definitions. Most of the definitions are discussed in other sections below where the terms are applicable. For example, the meaning of "government entity" is discussed below in conjunction with article 4, which covers remote access by government entities.

One item of note, however, is that within the scope of chapter 2, a "person" is a natural human being. The reason for this is that the remote access rules are highly person-centric when describing who can access what. Ultimately, the new rules contemplate that there will be some natural human being remotely accessing electronic court records and the rules identify which natural humans are authorized to do so. This is not to say the organizational entities cannot have access, but they must do so through natural persons.

Article 2: Public Access

Article 2 largely retains the existing public access rules found in rules 2.503—2.507. Rule 2.503 is the only one of these rules with substantive amendments and those amendments are minor. The amendments clarify that the rules in article 2 only apply to access to electronic records by the public.

The amendments also make a technical change to the list of electronic records to which a court must provide for electronic access by the public. Under rule 2.503(b), all records in civil cases must be available remotely, if feasible, except for those listed in rule 2.503(c)(1)—(9). Rule 2.503(c) lists all the case types where electronic access must be provided at the courthouse, but most not be provided remotely. However, under rule 2.503(c) there are ten case types, not nine. The omission in rule 2.503(b) of the tenth case type was accidental. Rule 2.503(c) was amended effective January 1, 2012 with an addition of a tenth case type, but there was no corresponding amendment to the reference to the list in rule 2.503(b). The proposal corrects the incongruity between subdivisions (b) and (c) of rule 2.503.

Article 3: Remote Electronic Access by a Party, Party's Attorney, Court-Appointed Person, or Authorized Persons Working in a Legal Organization or Qualified Legal Services Project

Article 3 contains new rules to cover remote electronic access by a party, party's attorney, court-appointed person, or authorized persons working in a legal organization or qualified legal services project. Each of these types of remote accessors are discussed below. The rules make clear that article 3 is not intended to limit remote electronic access available under article 2 (the public access rules). Accordingly, if someone could have remote electronic access to a court record under article 2, that person may do so without meeting the requirements of article 3. The rules under article 3, like the public access rules, require courts to provide remote electronic access if it is feasible to do so. Finally, the rules in article 3 include requirements for identity verification, security of confidential information, and additional conditions of access.

The rules in article 3 have occasional, intentional repetition with a goal of ensuring that the rules are clear for a person accessing the records. For example, under rule 2.515, which is the rule explaining the scope of article 3, there is a provision stating that article 3 does not limit the access available under article 2. This is repeated in rule 2.517, which is the rule applicable to parties. This is so that parties, who may not be versed in reading rules of court, do not have to search to understand that their ability to gain public access in article 2 is not limited by rule.

Rule 2.515. Application and scope. The proposed rule provides an overview of the scope of article 3 and who may access electronic records under article 3.

Rule 2.516. Remote access to extent feasible. The proposed rule requires courts to allow remote access to electronic records to the types of users identified in rule 2.515. This is similar to the

public access requirement existing in rule 2.503. The advisory committee comment recognizes financial means of technical capabilities may impact the feasibility of providing remote access.

Rule 2.517. Remote access by a party. The proposed rule allows broad access to remote electronic court records to a person (defined as a natural human being in the definitions in rule 2.502) when accessing electronic records in actions or proceedings in which that person is a party. The reason for this limitation is that there must ultimately be a natural human being who accesses the records. Parties that are not natural human beings can still gain access to their own electronic records, but must do though through an attorney or other "authorized person" under the other rules in article 3 or, for certain government entities, article 4.

Rule 2.518. Remote access by a party's designee. The proposed rule allows a party who is a natural person to designate other persons to access the party's electronic records provided that the party is at least 18 years of age. The rule allows the party to set limits on the designee's access such as to specific cases or for a specific period of time. In addition, the designee may only have the same access to a party's electronic records that a member of the public would be entitled to if he or she were to inspect the party's court records at the courthouse. For example, if a court record is sealed and the designee would not be entitled to view the court record at the courthouse, the designee cannot remotely access the electronic record. The rule sets forth basic terms of access, though there may be additional terms in a user agreement set by the court. The rule does not prescribe a particular method for establishing a designation as this may depend on the preferences and technical capabilities of individual courts.

Rule 2.519. Remote access by a party's attorney. The proposed rule allows a party's attorney to remotely access electronic records in the party's actions or proceedings. Remote access may also be provided to an attorney appointed by the court to represent a party pending the final order of appointment. Attorneys may also potentially gain access through rule 2.518, in which case, the provisions of that rule rather than 2.519 would apply.

Attorneys who are attorneys of record should be known to the court for remote access purposes since they are of record. The rule also accounts for providing remote access to attorneys who are not the attorneys of record in an underlying proceeding who may nonetheless be assisting a party. For example, an attorney may be assisting a party with limited aspects of their case, like document preparation, without becoming the attorney of record. Rule 2.518(c) requires an attorney who is not of record to obtain the party's consent to remotely access the party's court records and represent to the court in the remote access system that the attorney has obtained the party's consent. This provides a mechanism for an attorney not of record to be known to the court and provides the court with assurance that the party has agreed to allow the attorney to remotely access the party's electronic records. The proposed rule also sets forth basic terms of access.

Rule 2.520. Remote access by persons working in the same legal organization as a party's attorney. Because attorneys often work with other attorneys and legal staff, proposed rule 2.519

allows remote access by persons "working in" the same "legal organization" as a party's attorney. Both "legal organization" and "working in" are broad in scope. Under the definitions in rule 2.502, "legal organization" means "a licensed attorney or group of attorneys, nonprofit legal aid organization, government legal office, in-house legal office of a non-governmental organization, or legal program organized to provide for indigent criminal, civil, or juvenile law representation." Those "working in" the same legal organization as a party's attorney may include partners, associates, employees, volunteers, and contractors. The goal with the definition of "legal organization" and the scope of "working in" is intended to capture a full range of ways that attorneys may be working together and with others to provide representation to a party.

Under rule 2.519, a party's attorney can designate other persons working in the same legal organization to have remote access and the attorney must certify that those persons are working in the same legal organization and assisting the attorney with the party's case. The rule does not require certification to take any specific form. The proposed rule also sets forth basic terms of access.

Rule 2.521. Remote access by a court-appointed person. There are proceedings where the court may appoint someone to participate in a proceeding or represent the interests of someone who is not technically a "party" to a proceeding (e.g., a minor child in a custody proceeding). The rule provides common examples of court-appointed persons, but does not limit remote access to those examples. The proposed rule also sets forth basic terms of access.

Rule 2.522. Remote access by persons working in a qualified legal services project providing brief legal services. The proposed rule allows remote access to electronic records by persons "working in" a "qualified legal services project" providing "brief legal services." The rule contemplates legal aid programs offering limited, short-term services to individuals with their court matters.

"Brief legal services" for purposes of chapter 2 is defined in rule 2.502 and means "legal assistance provided without, or prior to, becoming a party's attorney. It includes advice, consultation, research, investigating case facts, drafting documents, and making limited third party contacts on behalf of a client."

The rule only applies to qualified legal services projects as defined in Business and Professions Code section 6213(a). The purpose of this limitation is to ensure that the organizations are bona fide entities subject to professional standards. The definition of "qualified legal services project" under Business and Professions Code 6213(a) is:

(1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California that meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

Where an attorney from a qualified legal services project does become a party's attorney and offers services beyond the scope contemplated under this rule, the remote access rules for a party's attorney would also provide a mechanism for access as could the party's designee rule. The proposed rule also sets forth basic terms of access.

Rule 2.523. Identity verification, identity management, and user access. The proposed rule requires a court to verify of a person eligible to have remote access to electronic records under article 3. Subdivision (b) describes the responsibilities of the court to verify identities and provide unique credentials to users. The rule does not prescribe any particular mechanism for identity verification or credentials as the best solutions may differ from court-to-court. Subdivision (c) describes responsibilities of users to provide necessary information for identity verification, consent to conditions of access, and only access the records the user is authorized to access. Subdivision (d) describes responsibilities of legal organizations and qualified legal services projects to verify the identity of users it designates and notify the court when a user is no longer working in the legal organization or qualified legal services project. Subdivision (e) makes it clear that courts may enter into contracts or participate in statewide master agreements for identity verification, identity management, or access management systems.

Rule 2.524. Security of confidential information. The proposed rule requires that where there is information in an electronic record that is confidential by law or sealed by court order, remote access must be provided through a secure platform and transmissions of the information must be encrypted. Like with the identity verification requirements, courts may participate in contracts for secure access and encryption services.

Rule 2.525. Searches and access to electronic records in search results. The proposed rule allows users who have access under article 3 to search for records by case number or case caption. The court must ensure that only users authorized to remotely access electronic records are able to access those records. The limitation on searches by case number or case caption is intended to prevent inadvertent unauthorized access. However, recognizing that unauthorized access may still occur, the rule includes measures for the user to take in that event.

Rule 2.526. Audit trails. The purpose of the proposed rule is to ensure courts are able to see who remotely accessed electronic records, under whose authority the user gained access, what electronic records were accessed, and under whose authority the user gained access. The audit trail is a tool to assist the courts in identifying and investigating any potential issues or misuse of remote access. The rule also requires the court to provide limited audit trails to authorized users remotely accessing remote records under article 3. The limited audit trail would only show who remotely access electronic records in a particular case, but would not show which specific electronic records were accessed. The reason for this more limited view at the case level rather than individual electronic record level is to protect confidential information.

Rule 2.527. Additional conditions of access. The proposed rule requires courts to impose reasonable conditions on remote electronic access to preserve the integrity of court records, prevent the unauthorized use of information, and limit possible legal liability. The court may require users to enter into user agreements defining the terms of access, providing for compliance audits, specifying the scope of any liability, and providing for sanctions for misuse up to and including termination of remote access. The court may require each user to submit a signed, written agreement, but the rule does not prescribe any particular format or technical solution for the signature or agreement.

Rule 2.528. Termination of remote access. The proposed rule makes clear that remote access to electronic records is a privilege and not a right and that courts may terminate any grant of permission for remote access.

Article 4: Remote Electronic Access by Government Entities

Article 4 contains new rules to cover remote access by government entities for legitimate governmental purposes by persons the government entities authorize. Under the definitions in rule 2.502, "government entity" means "a legal entity organized to carry on some function of the State of California or a political subdivision of the State of California. A government entity is also a federally recognized Indian tribe or a reservation, department, subdivision, or court of a federally recognized Indian tribe."

Rule 2.540. Application and scope. The proposed rule identifies which government entities may have remote access to which types of electronic records and is geared toward government entities that have a high volume of business before the court with respect to certain case types. Because it may be impossible to anticipate all needs across California's 58 counties and superior courts, the rule includes a "good cause" provision under which a court may grant remote access to electronic court records in particular case types beyond those specifically identified in the rule. The standard for "good cause" is that the government entity requires access to the electronic records in order to adequately perform its statutory duties or fulfill its responsibilities in litigation.

The proposed rule does not preclude government entities from gaining access to court records through articles 2 and 3. The proposed rule does not grant higher levels of access to court records

than currently exists. Rather, like with the rules under article 3, it only provides for remote access to records that the government entity would be able to obtain if its agents appeared at the courthouse to inspect the records in person.

Rule 2.541. Identity verification, identity management, and user access. The proposed rule largely mirrors rule 2.523 and describes responsibilities of the court, authorized persons, and government entities for identity verification and user access. The proposed rule also makes it clear that courts may enter into contracts or participate in statewide master agreements for identity verification, identity management, or access management systems.

Rule 2.542. Security of confidential information. The proposed rule largely mirrors rule 2.524 in requiring secured platforms and encryption of confidential or sealed electronic records, and authorizes courts to participate in contracts for secure access and encryption services.

Rule 2.543. Audit trails. The proposed rule mirrors rule 2.526 requiring the court to be able to generate audit trails and provide limited audit trails to authorized users.

Rule 2.544. Additional conditions of access. The proposed rule mirrors rule 2.527 requiring courts to impose reasonable conditions of access.

Rule 2.545. Termination of remote access. The proposed rule makes clear that remote access to electronic records is a privilege and not a right and that courts may terminate any grant of permission for remote access.

Implementation Requirements, Costs, and Operational Impacts

The rules require the courts to provide remote access under the new rules if it is feasible to do so and the rules recognize that financial and technological limitations may impact the feasibility of providing remote access. If feasible, implementation would require courts to create user agreements and have systems capable of complying with the rules. Costs and specific implementation requirements would be variable across the courts depending on current capabilities and approach to providing services.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- The reference to "concurrent jurisdiction" in proposed rule 2.540(b)(1)(xi) is intended to capture cases in which a tribal entity would have a right to access the court records at the court depending on the nature of the case and type of tribal involvement. Is "concurrent jurisdiction" the best way to describe such cases or would a different phrasing be more accurate?
- Is the standard for "good cause" in proposed rule 2.540(b)(1)(xii) clear?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- 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.
- What implementation guidance, if any, would courts find helpful?

Attachments and Links

1. Proposed rules 2.500, 2.501, 2.502, 2.503, 2.515, 2.516, 2.517, 2.518, 2.519, 2.520, 2.521, 2.522, 2.523, 2.524, 2.525, 2.526, 2.527, 2.528, 2.540, 2.541, 2.542, 2.543, 2.544, and 2.545 of the California Rules of Court.

Rules 2.500, 2.501, 2.502, and 2.503 of the California Rules of Court are amended and rules 2.515, 2.516, 2.517, 2.518, 2.519, 2.520, 2.521, 2.522, 2.523, 2.524, 2.525, 2.526, 2.527, 2.528, 2.540, 2.541, 2.542, 2.543, 2.544, and 2.545 of the California Rules of Court are adopted, effective January 1, 2019, to read:

Title 2. Trial Court Rules

Division 1. General Provisions

Chapter 2. ~~Public~~ Access to Electronic Trial Court Records

Article 1. General Provisions

Rule 2.500. Statement of purpose

(a) Intent

The rules in this chapter are intended to provide the public, parties, parties' attorneys, legal organizations, court-appointed persons, and government entities with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests.

(b) Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of court records maintained in electronic form. Providing ~~public~~ access to trial court records that are maintained in electronic form may save the courts, ~~and~~ the public, parties, parties' attorneys, legal organizations, court-appointed persons, and government entities time, money, and effort and encourage courts to be more efficient in their operations. Improved access to trial court records may also foster in the public a more comprehensive understanding of the trial court system.

(c) No creation of rights

The rules in this chapter are not intended to give the public, parties, parties' attorneys, legal organizations, court-appointed persons, and government entities a right of access to any record that they are not otherwise legally entitled to access. ~~The rules do not create any right of access to records that are sealed by court order or confidential as a matter of law.~~

Advisory Committee Comment

The rules in this chapter acknowledge the benefits that electronic ~~court~~ records provide but attempt to limit the potential for unjustified intrusions into the privacy of individuals involved in litigation that can occur as a result of remote access to electronic ~~court~~ records. The proposed rules take into account the limited resources currently available in the trial courts. It is contemplated that the rules may be modified to provide greater electronic access as ~~the~~ courts'

technical capabilities improve and ~~with the~~ knowledge is gained from the experience of ~~the courts in~~ providing electronic access under these rules.

Rule 2.501. Application, ~~and~~ scope, and information to the public

(a) Application and scope

The rules in this chapter apply only to trial court records as defined in Rule 2.502 (4). They do not apply to statutorily mandated reporting between or within government entities, the California Courts Protective Order Registry, or any other documents or materials that are not court records.

(b) ~~Access by parties and attorneys~~ Information to the public

~~The rules in this chapter apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or rule.~~

The website for each trial court must include a link to information that will inform the public of who may access their electronic records under the rules in this chapter and under what conditions they may do so. This information will be posted publicly on *www.courts.ca.gov*. Each trial court may post additional information, in plain language, as necessary to inform the public about the level of access that the particular trial court is providing.

Advisory Committee Comment

The rules on remote access do not apply beyond court records to other types of documents, information, or data. Rule 2.502 defines a court record as "any document, paper, or exhibit filed in an action or proceeding; any order or judgment of the court; and any item listed in Government Code section 68151(a), excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel, materials in the California Courts Protective Order Registry, statutorily mandated reporting between government entities, judicial administrative records, court case information, or compilations of data drawn from court records where the compilations are not themselves contained in a court record." (Rule 2.502(4), Cal. Rules of Court.) Thus, courts generate and maintain many types of information that are not court records and to which access may be restricted by law. Such information is not remotely accessible as court records, even to parties and their attorneys. If parties and their attorneys are entitled to access to any such additional information, separate and independent grounds for that access must exist.

Rule 2.502. Definitions

As used in this chapter, the following definitions apply:

(1) "Authorized person" means a person authorized by a legal organization, qualified legal services project, or government entity to access electronic records.

(2) "Brief legal services" means legal assistance provided without, or before, becoming a party's attorney. It includes advice, consultation, research, investigating case facts, drafting documents, and making limited third party contacts on behalf of a client.

~~(1)~~(3) "Court record" is any document, paper, or exhibit filed ~~by the parties to~~ in an action or proceeding; any order or judgment of the court; and any item listed in Government Code section 68151(a), excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy, that is maintained by the court in the ordinary course of the judicial process. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel, materials in the California Courts Protective Order Registry, statutorily mandated reporting between or within government entities, judicial administrative records, court case information, or compilations of data drawn from court records where the compilations are not themselves contained in a court record.

(4) "Court case information" consists of information created and maintained by a court about a case or cases that is not part of the court records that are filed with the court. This includes information in the case management system and case histories.

~~(4)~~(5) "Electronic access" means ~~computer~~ access by electronic means to court records available ~~to the public~~ through both public terminals at the courthouse and remotely, unless otherwise specified in the rules in this chapter.

~~(2)~~(6) "Electronic record" is a ~~computerized~~ court record that requires the use of an electronic device to access~~, regardless of the manner in which it has been computerized~~. The term includes both a ~~document~~ record that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on paper, microfiche, or any other medium that can be read without the use of an electronic device.

(7) "Government entity" means a legal entity organized to carry on some function of the State of California or a political subdivision of the State of California. A

government entity is also a federally recognized Indian tribe or a reservation, department, subdivision, or court of a federally recognized Indian tribe.

(8) "Legal organization" means a licensed attorney or group of attorneys, nonprofit legal aid organization, government legal office, in-house legal office of a non-governmental organization, or legal program organized to provide for indigent criminal, civil, or juvenile law representation.

(9) "Party" means a plaintiff, defendant, cross-complainant, cross-defendant, petitioner, respondent, intervenor, objector, or anyone expressly defined by statute as a party in a court case.

(10) "Person" means a natural human being.

~~(3)~~(11) "The public" means a person, a group, or an entity, including print or electronic media, ~~or the representative of an individual, a group, or an entity~~ regardless of any legal or other interest in a particular court record.

(12) "Qualified legal services project" has the same meaning under the rules of this chapter as in 6213(a) of the Business and Professions Code.

(13) "Remote access" means electronic access from a location other than a public terminal at the courthouse.

(14) "User" means an individual person, a group, or an entity that accesses electronic records.

Article 2. Public Access

Rule 2.503. ~~Public access~~ Application and scope

(a) General right of access by the public

(1) All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or made confidential by law.

(2) The rules in this article apply only to access to electronic records by the public.

(b) Electronic access required to extent feasible

A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so:

(1) * * *

(2) All records in civil cases, except those listed in (c)(1)–~~(9)~~(10).

(c) Courthouse electronic access only

A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide public remote ~~electronic~~ access only to the records ~~governed by~~ specified in subsection (b):

(1)–(10) * * *

(d) * * *

(e) Remote ~~electronic~~ access allowed in extraordinary criminal cases

Notwithstanding (c)(5), the presiding judge of the court, or a judge assigned by the presiding judge, may exercise discretion, subject to (e)(1), to permit remote ~~electronic~~ access by the public to all or a portion of the public court records in an individual criminal case if (1) the number of requests for access to documents in the case is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. An individualized determination must be made in each case in which such remote ~~electronic~~ access is provided.

(1) In exercising discretion under (e), the judge should consider the relevant factors, such as:

(A) * * *

(B) The benefits to and burdens on the parties in allowing remote ~~electronic~~ access, including possible impacts on jury selection; and

(C) * * *

(2) The court should, to the extent feasible, redact the following information from records to which it allows remote access under (e): driver license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses and phone

numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote ~~electronic~~ access. No juror names or other juror identifying information may be provided by remote ~~electronic~~ access. This subdivision does not apply to any document in the original court file; it applies only to documents that are available by remote ~~electronic~~ access.

(3) Five days' notice must be provided to the parties and the public before the court makes a determination to provide remote ~~electronic~~ access under this rule. Notice to the public may be accomplished by posting notice on the court's Web site. Any person may file comments with the court for consideration, but no hearing is required.

(4) The court's order permitting remote ~~electronic~~ access must specify which court records will be available by remote ~~electronic~~ access and what categories of information are to be redacted. The court is not required to make findings of fact. The court's order must be posted on the court's Web site and a copy sent to the Judicial Council.

(f)-(i) * * *

Advisory Committee Comment

The rule allows a level of access by the public to all electronic records that is at least equivalent to the access that is available for paper records and, for some types of records, is much greater. At the same time, it seeks to protect legitimate privacy concerns.

Subdivision (c). This subdivision excludes certain records (those other than the register, calendar, and indexes) in specified types of cases (notably criminal, juvenile, and family court matters) from public remote ~~electronic~~ access. The committee recognized that while these case records are public records and should remain available at the courthouse, either in paper or electronic form, they often contain sensitive personal information. The court should not publish that information over the Internet. However, the committee also recognized that the use of the Internet may be appropriate in certain criminal cases of extraordinary public interest where information regarding a case will be widely disseminated through the media. In such cases, posting of selected nonconfidential court records, redacted where necessary to protect the privacy of the participants, may provide more timely and accurate information regarding the court proceedings, and may relieve substantial burdens on court staff in responding to individual requests for documents and information. Thus, under subdivision (e), if the presiding judge makes individualized

determinations in a specific case, certain records in criminal cases may be made available over the Internet.

Subdivisions (f) and (g). These subdivisions limit electronic access to records (other than the register, calendars, or indexes) to a case-by-case basis and prohibit bulk distribution of those records. These limitations are based on the qualitative difference between obtaining information from a specific case file and obtaining bulk information that may be manipulated to compile personal information culled from any document, paper, or exhibit filed in a lawsuit. This type of aggregate information may be exploited for commercial or other purposes unrelated to the operations of the courts, at the expense of privacy rights of individuals.

Courts must send a copy of the order permitting remote ~~electronic~~ access in extraordinary criminal cases to: Criminal Justice Services, Judicial Council of California, 455 Golden Gate Avenue, San Francisco, CA 94102-3688.

Rule 2.504-2.507 * * *

Article 3. Remote Access by a Party, Party's Attorney, Court-Appointed Person, or Authorized Person Working in a Legal Organization or Qualified Legal Services Project

Rule 2.515. Application and scope

(a) No limitation on access to electronic records available through article 2

The rules in this article do not limit remote access to electronic records available under article 2.

(b) Who may access

The rules in this article apply to remote access to electronic records by:

(1) A person who is a party;

(2) A party's attorney;

(3) An authorized person working in the same legal organization as a party's attorney;

(4) An authorized person working in a qualified legal services project providing brief legal services;

(5) A court-appointed person.

Advisory Committee Comment

Article 2 allows remote access in most civil cases and the rules in article 3 are not intended to limit that access. Rather, the article 3 rules allow broader remote access by parties, parties' attorneys, authorized persons working in legal organizations, authorized persons working in a qualified legal services project providing brief services, and court-appointed persons to those electronic records where remote access by the public is not allowed.

Under the rules in article 3, a party, a party's attorney, an authorized person working in the same legal organization as a party's attorney, or a person appointed by the court in the proceeding basically has the same level of access to electronic records remotely that they would have if they were to seek to inspect the records in person at the courthouse. Thus, if they are legally entitled to inspect certain records at the courthouse, they could view the same records remotely; on the other hand, if they are restricted from inspecting certain court records at the courthouse (for example, because the records are confidential or sealed), they would not be permitted to view the records remotely. In some types of cases, such as unlimited civil cases, the access available to parties and their attorneys is generally similar to the public's but in other types of cases, such as juvenile cases, it is much more extensive (see Cal. Rules of Court, rule 5.552).

For authorized persons working in a qualified legal services program, the rule contemplates services offered in high-volume environments on an ad hoc basis. There are some limitations on access under the rule for qualified legal services projects. Where an attorney at a qualified legal services project does become a party's attorney and offers services beyond the scope contemplated under this rule, the access rules for a party's attorney would apply.

Rule 2.516. Remote access to extent feasible

To the extent feasible, a court that maintains records in electronic form must provide remote access to those records to the users described in rule 2.515, subject to the conditions and limitations stated in this article and otherwise provided by law.

Advisory Committee Comment

This rule takes into account the limited resources currently available in some trial courts. Many courts may not have the financial means or the technical capabilities necessary to provide the full range of remote access to electronic records authorized by this article. When it is more feasible and courts have more experience with remote access, these rules may be modified to further expand remote access.

Rule 2.517. Remote access by a party

(a) Remote access generally permitted

A person may have remote access to electronic records in actions or proceedings in which that person is a party.

(b) Level of remote access

(1) In any action or proceeding a party may be provided remote access to the same electronic records that he or she would be legally entitled to inspect at the courthouse.

(2) This rule does not limit remote access to electronic records available under article 2.

(3) This rule applies only to electronic records. A person is not entitled under these rules to remote access to any documents, information, data, or other types of materials created or maintained by the courts that are not electronic records.

Advisory Committee Comment

Because this rule only permits remote access by a party who is a person (defined under rule 2.501 as a natural person), it would not apply to organizational parties, which would need to gain remote access through the party's attorney rule or, for certain government entities with respect to specified electronic records, the rules in article 4.

Rule 2.518. Remote access by a party's designee

(a) Remote access generally permitted

A person, who is at least 18 years of age, may designate other persons to have remote access to electronic records in actions or proceedings in which that person is a party.

(b) Level of remote access

(1) A party's designee may have the same access to a party's electronic records that a member of the public would be entitled to if he or she were to inspect the party's court records at the courthouse.

(2) A party may limit the access to be afforded a designee to specific cases.

(3) A party may limit the access to be afforded a designee to a specific period of time.

(4) A party may modify or revoke a designee's level of access at any time.

(c) Terms of access

(1) A party's designee may access electronic records only for the purpose of assisting the party or the party's attorney in the action or proceeding.

(2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.

(3) All laws governing confidentiality and disclosure of court records apply to the records obtained under this article.

(4) Party designees must comply with any other terms of remote access required by the court.

(5) Failure to comply with these rules may result in the imposition of sanctions including termination of access.

Advisory Committee Comment

A party must be a natural person to authorize designees for remote access. Under rule 2.501, for purposes of the rules, "persons" are natural persons. Accordingly, the party designee rule would not apply to organizational parties, which would need to gain remote access through the party's attorney rule or, for certain government entities with respect to specified electronic records, the rules in article 4.

Rule 2.519. Remote access by a party's attorney

(a) Remote access generally permitted

(1) A party's attorney may have remote access to electronic records in the party's actions or proceedings under this rule or rule 2.518. If a party's attorney gains remote access through rule 2.518, the requirements of rule 2.519 do not apply

(3) If a court notifies an attorney of the court's intent to appoint the attorney to represent a party in a criminal, juvenile justice, child welfare, family law, or

probate proceeding, the court may grant remote access to that attorney before an order of appointment is issued by the court.

(b) Level of remote access

A party's attorney may be provided remote access to the same electronic records in the party's actions or proceedings that the party's attorney would be legally entitled to view at the courthouse.

(c) Terms of remote access for attorneys who are not the attorney of record in the party's actions or proceedings in the trial court

An attorney who represents a party, but who is not the party's attorney of record, may remotely access the party's electronic records, provided that the attorney:

(1) Obtains the party's consent to remotely access the party's electronic records.

(2) Represents to the court in the remote access system that the attorney has obtained the party's consent to remotely access the party's electronic records.

(d) Terms of remote access for all attorneys accessing electronic records

(1) A party's attorney may remotely accesses the electronic records only for the purposes of assisting the party with the party's court matter.

(2) A party's attorney may not distribute for sale any electronic records obtained remotely under the rules in this article. Such sale is strictly prohibited.

(3) A party's attorney must comply with any other terms of remote access required by the court.

(4) Failure to comply with these rules may result in the imposition of sanctions including termination of access.

Advisory Committee Comment

Subdivision (c). An attorney of record will be known to the court for purposes of remote access. However, there may be circumstances when a person engages an attorney for assistance, but that attorney is not the attorney of record in an action or proceeding in which the person is a party. Examples include, but are not limited to, when a party engages an attorney to (1) prepare legal documents, but not appear in the party's action (e.g., provide limited scope representation); (2) assist the party with dismissal/expungement or sealing of a criminal record where the attorney did not represent the party in the criminal proceeding; or (3) represent the party in an appellate matter

when the attorney did not represent the party in the trial court. Subdivision (c) provides a mechanism for an attorney not of record to be known to the court for purposes of remote access.

Rule 2.520. Remote access by persons working in the same legal organization as a party's attorney

(a) Application and scope

(1) This rule applies when a party's attorney is assisted by others working in the same legal organization.

(2) "Working in the same legal organization" under this rule includes partners, associates, employees, volunteers, and contractors.

(3) This rule does not apply when a person working in the same legal organization as a party's attorney gains remote access to records as a party's designee under rule 2.518.

(b) Designation and certification

(1) A party's attorney may designate that other persons working in the same legal organization as the party's attorney have remote access.

(2) A party's attorney must certify that the other persons authorized for access are working in the same legal organization as the party's attorney and are assisting the party's attorney in the action or proceeding.

(c) Level of remote access

(1) Persons designated by a party's attorney under subdivision (b) must be provided access to the same electronic records as the party.

(2) Notwithstanding subdivision (b), when a court designates a legal organization to represent parties in criminal, juvenile, family, or probate proceedings, the court may grant remote access to a person working in the organization who assigns cases to attorneys working in that legal organization.

(d) Terms of remote access

(1) Persons working in a legal organization may remotely access electronic records only for purposes of assigning or assisting a party's attorney.

(2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.

(3) All laws governing confidentiality and disclosure of court records apply to the records obtained under this article.

(4) Persons working in a legal organization must comply with any other terms of remote access required by the court.

(5) Failure to comply with these rules may result in the imposition of sanctions including termination of access.

Rule 2.521. Remote access by a court-appointed person

(a) Remote access generally permitted

(1) A court may grant a court-appointed person remote access to electronic records in any action or proceeding in which the person has been appointed by the court.

(2) Court-appointed persons include an attorney appointed to represent a minor child under Family Code section 3150; a Court Appointed Special Advocate volunteer in a juvenile proceeding; an attorney appointed under Probate Code section 1470, 1471, or 1474; an investigator appointed under Probate Code section 1454; a probate referee designated under Probate Code section 8920; a fiduciary, as defined in Probate Code section 39; an attorney appointed under Welfare and Institutions Code section 5365; or a guardian ad litem appointed under Code of Civil Procedure section 372 or Probate Code section 1003.

(b) Level of remote access

A court-appointed person may be provided with the same level of remote access to electronic records as the court-appointed person would be legally entitled if he or she were to appear at the courthouse to inspect the court records.

(c) Terms of remote access

(1) A court-appointed person may remotely access electronic records only for purposes of fulfilling the responsibilities for which he or she was appointed.

(2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.

(3) All laws governing confidentiality and disclosure of court records apply to the records obtained under this article.

(4) A court-appointed person must comply with any other terms of remote access required by the court.

(5) Failure to comply with these rules may result in the imposition of sanctions including termination of access.

Rule 2.522. Remote access by persons working in a qualified legal services project providing brief legal services

(a) Application and scope

(1) This rule applies to qualified legal services projects as defined in section 6213(a) of the Business and Professions Code.

(2) "Working in a qualified legal services project" under this rule means attorneys, employees, and volunteers.

(3) This rule does not apply to a person working in or otherwise associated with a qualified legal services project who gains remote access to court records as a party's designee under rule 2.518.

(b) Designation and certification

(1) A qualified legal services project may designate persons working in the qualified legal services project who provide brief legal services, as defined in article 1, to have remote access.

(2) The qualified legal services project must certify that the authorized persons work in their organization.

(c) Level of remote access

Authorized persons may be provided remote access to the same electronic records to which the authorized person would be legally entitled to inspect at the courthouse.

(d) Terms of remote access

(1) Qualified legal services projects must obtain the party's consent to remotely access the party's electronic records.

(2) Authorized persons must represent to the court in the remote access system that the qualified legal services project has obtained the party's consent to remotely access the party's electronic records.

(3) Qualified legal services projects providing services under this rule may remotely access electronic records only to provide brief legal services.

(4) Any distribution for sale of electronic records obtained under the rules in this article is strictly prohibited.

(5) All laws governing confidentiality and disclosure of court records apply to electronic records obtained under this article.

(6) Qualified legal services projects must comply with any other terms of remote access required by the court.

(7) Failure to comply with these rules may result in the imposition of sanctions including termination of access.

Rule 2.523. Identify verification, identity management, and user access

(a) Identity verification required

Before allowing a person who is eligible under the rules in article 3 to have remote access to electronic records, a court must verify the identity of the person seeking access.

(b) Responsibilities of the court

A court that allows persons eligible under the rules in article 3 to have remote access to electronic records must have an identity proofing solution that verifies the identity of, and provides a unique credential to, each person who is permitted remote access to the electronic records. The court may authorize remote access by a person only if that person's identity has been verified, the person accesses records using the credential provided to that individual, and the person complies with the terms and conditions of access, as prescribed by the court.

(c) Responsibilities of persons accessing records

A person eligible to be given remote access to electronic records under the rules in article 3 may be given such access only if that person:

(1) Provides the court with all information it directs in order to identify the person to be a user;

(2) Consents to all conditions for remote access required by article 3 and the court; and

(3) Is authorized by the court to have remote access to electronic records.

(d) Responsibilities of the legal organizations or qualified legal services projects

(1) If a person is accessing electronic records on behalf of a legal organization or qualified legal services project, the organization or project must approve granting access to that person, verify the person's identity, and provide the court with all the information it directs in order to authorize that person to have access to electronic records.

(2) If a person accessing electronic records on behalf of a legal organization or qualified legal services project leaves his or her position or for any other reason is no longer entitled to access, the organization or project must immediately notify the court so that it can terminate the person's access.

(e) Vendor contracts, statewide master agreements, and identity and access management systems

A court may enter into a contract with a vendor to provide identity verification, identity management, or user access services. Alternatively, if a statewide identity verification, identity management, or access management system, or a statewide master agreement for such systems is available, courts may use those for identity verification, identity management, and user access services.

Rule 2.524. Security of confidential information

(a) Secure access and encryption required

If any information in an electronic record that is confidential by law or sealed by court order may lawfully be provided remotely to a person or organization described in rule 2.515, any remote access to the confidential information must be provided through a secure platform and any electronic transmission of the information must be encrypted.

(b) Vendor contracts and statewide master agreements

A court may enter into a contract with a vendor to provide secure access and encryption services. Alternatively, if a statewide master agreement is available for secure access and encryption services, courts may use that master agreement.

Advisory Committee Comment

This rule describes security and encryption requirements while levels of access are provided for in rules 2.517–2.522.

Rule 2.525. Searches and access to electronic records in search results

(a) Searches

A user authorized under this article to remotely access a party's electronic records may search for the records by case number or case caption.

(b) Access to electronic records in search results

A court providing remote access to electronic records under this article must ensure that authorized users are only able to access the electronic records at the levels provided in this article.

(c) Unauthorized access

If a user gains access to an electronic record that the user is not authorized to access under this article, the user must:

(1) Report the unauthorized access to the court as directed by the court for that purpose;

(2) Destroy all copies, in any form, of the record; and

(3) Delete from the user's browser history all information that identifies the record.

Rule 2.526. Audit trails

(a) Ability to generate audit trails required

The court must have the ability to generate an audit trail that identifies each remotely accessed record, when an electronic record was remotely accessed, who remotely accessed the electronic record, and under whose authority the user gained access to the electronic record.

(b) Limited audit trails available to authorized users

(1) A court providing remote access to electronic records under this article must make limited audit trails available to authorized users under this article

(2) A limited audit trail must show the user who remotely accessed electronic records in a particular case, but must not show which specific electronic records were accessed.

Rule 2.527. Additional conditions of access

To the extent consistent with these rules and other applicable law, a court must impose reasonable conditions on remote access to preserve the integrity of its records, prevent the unauthorized use of information, and limit possible legal liability. The court may choose to require each user to submit a signed, written agreement enumerating those conditions before it permits that user to remotely access electronic records. The agreements may define the terms of access, provide for compliance audits, specify the scope of liability, and provide for the imposition of sanctions for misuse up to and including termination of remote access.

Rule 2.528. Termination of remote access

(a) Remote access a privilege

Remote access to electronic records under this article is a privilege and not a right.

(b) Termination by court

A court that provides remote access may terminate the permission granted to any person eligible under the rules in article 3 to remotely access electronic records at any time for any reason.

Article 4. Remote Access by Government Entities

Rule 2.540. Application and scope

(a) Applicability to government entities

The rules in this article provide for remote access to electronic records by government entities described in subsection (b) below. The access allowed under these rules is in addition to any access these entities or authorized persons working for such entities may have under the rules in articles 2–3.

(b) Level of remote access

(1) A court may provide authorized persons from government entities with remote access to electronic records as follows:

(i) Office of the Attorney General: criminal electronic records and juvenile justice electronic records.

(ii) California Department of Child Support Services: family electronic records.

(iii) Office of a district attorney: criminal electronic records and juvenile justice electronic records.

(iv) Office of a public defender: criminal electronic records and juvenile justice electronic records.

(v) County department of probation: criminal electronic records, juvenile justice electronic records, and child welfare electronic records.

(vi) Office of city attorney: criminal electronic records, juvenile justice electronic records, and child welfare electronic records.

(vii) Office of county counsel: criminal electronic records, mental health electronic records, child welfare electronic records, and probate electronic records.

(viii) County child welfare agency: child welfare electronic records.

(ix) County public guardian: criminal electronic records, mental health electronic records, and probate electronic records

(x) County agency designated by the board of supervisors to provide conservatorship investigation under chapter 3 of the Lanterman-Petris-Short Act (Welf. & Inst. Code, §§ 5350–5372): criminal electronic records, mental health electronic records, and probate electronic records.

(xi) Federally recognized Indian tribe (including any reservation, department, subdivision, or court of the tribe) with concurrent jurisdiction: child welfare electronic records, family electronic records, juvenile justice electronic records, and probate electronic records.

(xii) For good cause, a court may grant remote access to electronic records in particular case types to government entities beyond those listed in (b)(1)(i)-(xi). For purposes of this rule, "good cause" means that the government entity requires access to the electronic records in order to adequately perform its statutory duties or fulfill its responsibilities in litigation.

(xiii) All other remote access for government entities is governed by articles 2–3.

(2) Subject to (b)(1), the court may provide a government entity with the same level of remote access to electronic records as the government entity would be legally entitled to if a person working for the government entity were to appear at the courthouse to inspect court records in that case type. If a court record is confidential by law or sealed by court order and a person working for the government entity would not be legally entitled to inspect the court record at the courthouse, the court may not provide the government entity with remote access to the confidential or sealed electronic record.

(3) This rule applies only to electronic records. A government entity is not entitled under these rules to remote access to any documents, information, data, or other types of materials created or maintained by the courts that are not electronic records.

(c) Terms of remote access

(1) Government entities may remotely access electronic records only to perform official duties and for legitimate governmental purposes.

(2) Any distribution for sale of electronic records obtained remotely under the rules in this article is strictly prohibited.

(3) All laws governing confidentiality and disclosure of court records apply to electronic records obtained under this article.

(4) Government entities must comply with any other terms of remote access required by the court.

(5) Failure to comply with these requirements may result in the imposition of sanctions including termination of access.

Advisory Committee Comment

Subdivision (b)(3). On the applicability of the rules on remote access only to electronic records, see Advisory Committee Comment to rule 2.501.

Rule 2.541. Identify verification, identity management, and user access

(a) Identity verification required

Before allowing a person or entity eligible under the rules in article 4 to have remote access to electronic records, a court must verify the identity of the person seeking access.

(b) Responsibilities of the courts

A court that allows persons eligible under the rules in article 4 to have remote access to electronic records must have an identity proofing solution that verifies the identity of, and provides a unique credential to, each person who is permitted remote access to the electronic records. The court may authorize remote access by a person only if that person's identity has been verified, the person accesses records using the name and password provided to that individual, and the person complies with the terms and conditions of access, as prescribed by the court.

(c) Responsibilities of persons accessing records

A person eligible to remote access to electronic records under the rules in article 4 may be given such access only if that person:

(1) Provides the court with all information it needs to identify the person to be a user;

(2) Consents to all conditions for remote access required by article 4 and the court; and

(3) Is authorized by the court to have remote access to electronic records.

(d) Responsibilities of government entities

(1) If a person is accessing electronic records on behalf of a government entity, the government entity must approve granting access to that person, verify the person's identity, and provide the court with all the information it needs to authorize that person to have access to electronic records.

(2) If a person accessing electronic records on behalf of a government entity leaves his or her position or for any other reason is no longer entitled to access, the government entity must immediately notify the court so that it can terminate the person's access.

(e) Vendor contracts, statewide master agreements, and identity and access management systems

A court may enter into a contract with a vendor to provide identity verification, identity management, or user access services. Alternatively, if a statewide identity verification, identity management, or access management system or a statewide master agreement for such systems is available, courts may use those to for identity verification, identity management, and user access services.

Rule 2.542. Security of confidential information

(a) Secure access and encryption required

If any information in an electronic record that is confidential by law or sealed by court order may lawfully be provided remotely to a government entity, any remote access to the confidential information must be provided through a secure platform and any electronic transmission of the information must be encrypted.

(b) Vendor contracts and statewide master agreements

A court may enter into a contract with a vendor to provide secure access and encryption services. Alternatively, if a statewide master agreement is available for secure access and encryption services, courts may use that master agreement.

Rule 2.543. Audit trails

(a) Ability to generate audit trails required

The court must have the ability to generate an audit trail identifying when an electronic record was remotely accessed, who remotely accessed the electronic record, and under whose authority the user gained access to the electronic record.

(b) Audit trails available to government entity

(3) A court providing remote access to electronic records under this article must make limited audit trails available to authorized users of the government entity.

(4) A limited audit trail must show the user who remotely accessed electronic records in a particular case, but must not show which specific electronic records were accessed.

Rule 2.544. Additional conditions of access]

To the extent consistent with these rules and other applicable law, a court must impose reasonable conditions on remote access to preserve the integrity of its records, prevent the unauthorized use of information, and protect itself from liability. The court may choose to require each user to submit a signed, written agreement enumerating those conditions before it permits that user to access electronic records remotely. The agreements may define the terms of access, provide for compliance audits, specify the scope of liability, and provide for sanctions for misuse up to and including termination of remote access.

Rule 2.545. Termination of remote access

(a) Remote access a privilege

Remote access under this article is a privilege and not a right.

(b) Termination by court

A court that provides remote access may terminate the permission granted to any person or entity eligible under the rules in article 4 to remotely access electronic records at any time for any reason.

Juvenile & Family Law: Indian Child Welfare Act Issues

Annual Agenda Items:

Item 23: Indian Child Welfare Act Rules and Forms In conjunction with the Tribal Court-State Court Forum and Probate and Mental Health Advisory Committee review for possible rules or forms new federal regulations governing court proceedings covered by the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) which became effective December 12, 2016. Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

Item 24: California ICWA Compliance Task Force Report Review the recommendations in the California ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice 2017 and make recommendations for legislative and rules and forms revisions and other implementation steps as appropriate. Identification of potential projects within the purview of the committee.

Background:

Effective December 12, 2016 the federal government enacted regulations implementing the Indian Child Welfare Act "ICWA" (19 USC §§1901-1963). These regulations are found at 25 CFR §§23.1 – 23.144.[1] In December 2016 the Bureau of Indian Affairs also issued new Guidelines for state courts concerning ICWA. (Guidelines for Implementing the Indian Child Welfare Act, December 2016)[2] There are some areas where current California law, rules and practice do not conform to the new federal regulations and guidelines.

On March 21, 2017, the California ICWA Compliance Task Force published its report to the California Attorney General's Bureau of Children's Justice.[3] The report discussed areas in which the Task Force states that California is failing to comply with the requirements of the Indian Child Welfare Act. There are 20 formal recommendations beginning on page 94. Issues raised throughout the report, as well as some of the formal recommendations, relate to and are within the purview of the Judicial Branch.

Update:

During the Spring 2017 RUPRO cycle, the Tribal Court – State Court Forum and the Family and Juvenile Law Advisory Committee co-sponsored a proposal to amend rule 5.552 of the California rules of court concerning access to confidential juvenile court files. The proposal was

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[1] Available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&r=PART&n=25y1.0.1.4.13

[2] Available at https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf

[3] That report is available here: https://turtletalk.files.wordpress.com/2017/03/icwa-compliance-task-force-final-report-2017.pdf

approved and the rule amendment became effective January 1, 2018. The change partially addresses the concerns in the ICWA Task Force report concerning tribal access to records.

Both the Tribal Court – State Court Forum and the Family and Juvenile Law Advisory Committee established small working groups to focus on these two ICWA related matters. Each of these groups had several conference calls.

The groups concluded not to recommend legislative action on the part of the Judicial Council, nor to recommend any further specific amendments to rules and forms at this time. For now the focus will be on education and creating tools, job aids and other resources to assist with understanding the requirements of the new federal regulations and guidelines as well as further the recommendations in the ICWA Task Force Report.

As part of the educational efforts, a session on the impact of the regulations and guidelines was conducted at Beyond the Bench. Those materials and resources are available here There was also a session on the ICWA Compliance Task Force Report. Those materials are available here .

Staff have also prepared updated recommended findings and orders charts for ICWA (copies attached).

Staff can report that the California Tribal Families Coalition (successor organization to the California ICWA Compliance Task Force) intends to introduce legislation to conform California law to the new ICWA regulations and guidelines. Staff will update the committee on that legislation once it is introduced.

ICWA Findings and Orders: Legal Citations*

Revised 10/15/2017

Findings and orders must be based on sufficient supporting evidence, presented to the court by the agency.

General – when there is "reason to know" the child is an Indian child.

(1) **Counsel (25 U.S.C. 1912(b); Welf. & Inst. Code §317(a)(2):**
- (a) The court appoints counsel for the Indian custodian (at any involuntary removal, placement, or termination proceeding).

(2) **Continuance (25 U.S.C. 1912(a); 25 C.F.R. §23.112Welf. & Inst. Code §224.2(d) rule 5.482(a)):**
- (a) The court continues the hearing on foster care placement or termination of parental rights, because the BIA and tribes have not received notice 10 days in advance of this hearing.
- (b) The court grants the parent, Indian custodian, or Tribe 20 days to prepare for the hearing.

(3) **Dismissal in Favor of Release to Noncustodial Parent/Indian Custodian (25 U.S.C. 1903(6):**
- (a) The court finds that the case can be dismissed, because the child can be released to an Indian custodian who is ready, willing, and able to care for the child.

(4) **Scope of Testimony of Qualified Expert Witness (25 U.S.C. 1912(e); 25 C.F.R. §§23.121-23.122; Guidelines[1] G.2; Welf. & Inst. Code §224.6; rule 5.484(a)(1) and 5.485(a)(2)):**
- (a) Are there particular conditions in the home that are likely to result in serious emotional or physical harm to the child?
- (b) Is the parents conduct likely to result in serious physical or emotional harm to the child?
- (c) If the answer is yes, can the conditions be alleviated and/or the parents persuaded to modify their conduct with the provision of active efforts and culturally appropriate services?

(5) **Indian Child/Application of the Act (25 U.S.C. §1903(1) & (4); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; Welf. & Inst. Code §224.1 (a) & (c); rule 5.480:**
- (a) The court finds reason to know the child is an Indian child based upon (specify:) _____, and concludes that the Act applies.
- (b) The court finds, after the agency has inquired and the court has inquired, and all participants have confirmed on the record, that there is no information indicating that the child is an Indian child. The court concludes that the Act does not apply, but instructs the parties to inform the court if they receive any information providing reason to know the child is an Indian child.

(6) **Jurisdiction (25 U.S.C. 1911 & 1922; 25 C.F.R. 23.110; Guideline F.1 & F.2; Welf. & Inst. Code 305.5; Rule 5.483):**
- (a) The court finds that it has jurisdiction over the proceeding because:
  - (1) The court finds that the residence and domicile of the child are not on a reservation where the tribe exercises exclusive jurisdiction; AND
  - (2) The court finds that the child is not already under the jurisdiction of a tribal court. OR
- (b) The court finds that it does not have jurisdiction because the child is under the exclusive jurisdiction of the tribal court. OR
- (c) The court finds that the child is under the exclusive jurisdiction of the tribal court, but that there is a basis for emergency jurisdiction in accordance with 25 U.S.C. 1911.

(7) **Transfer (25 U.S.C. 1911(b); 25 C.F.R. §§23.115-23.119; Guidelines F.2-F.6; Welf. & Inst. Code 305.5(b), 381 & 827.15; Rule 5.483):**
- (1) The court has considered the request to transfer the child's case to the tribal jurisdiction and other relevant evidence and:
  - (a) The court finds and orders that the child's case is ordered transferred to the tribal jurisdiction of the _____ tribal court located at _____ (insert address):
    - (1) The receiving court shall direct whether and how physical custody of the child shall be transferred;
    - (2) The case file shall be transferred to the receiving court. The transferring court shall maintain at a minimum a copy of the order of transfer and the findings of fact.
  - (b) The request to transfer is denied because there is good cause not to transfer the child's case due to the following circumstances:
    - (1) The tribal court has declined jurisdiction;
    - (2) The parent (specify):_____ opposes the transfer.
    - (3) The court finds in accordance with 25 C.F.R. §23.118 that there is good cause to deny the transfer (specify):
      _____

(8) **Protective Custody Warrant If there is reason to know child is an Indian child (25 C.F.R. §23.113(d))**
- (1) Emergency removal is necessary to prevent imminent physical damage or harm to the child;
- (2) Appropriate steps have been taken to notify the child's tribe, parents and Indian custodian;
- (3) Efforts have been made to assist the parents or Indian custodian so that the child may be safely returned to their custody.

[1] The term "Guidelines" refers to the Guidelines for Implementing the Indian Child Welfare Act, December 2016, U.S. Department of the Interior, Office of the Assistant Secretary – Indian Affairs, Bureau of Indian Affairs available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

*This chart is based on laws in effect at the time of publication—1/1/2018. Federal and state laws can change at any time. Chart compiled by the Judicial Council of California's Center for Families, Children & the Courts, Tribal/State Programs Unit 455 Golden Gate Ave., San Francisco, California 94102, (415) 865-7739, cfcc@jud.ca.gov

Recommended ICWA Findings and Orders

Initial Hearing

Inquiry (25 C.F.R. §23.107; Guideline B.1; Welf. & Inst. Code §224.3; Rule 5.481(a)):

(1) The court finds that the social worker/probation officer has asked the child, if old enough, and his or her parents or legal guardians, and the following relatives,_____, whether there is information indicating the child is an Indian child.

(2) The court, on the record, has asked the child, if old enough, and his or her parents or legal guardians, all participants in the proceedings, and the following relatives,_____, whether there is information indicating the child is an Indian child.

(3) The parties are instructed to inform the court if they receive any information indicating that the child is an Indian child.

ICWA-020:

The mother, biological father, legal guardian, presumed father, alleged father, Indian custodian, other (specify):_____ were provided with a *Parental Notification of Indian Status* (form ICWA-020) and ordered to complete form ICWA-020 and to submit it to the court before leaving the courthouse today.

Reason to know (25 C.F.R. 23.107(c); Guideline B.1; Welf. & Inst. Code 224.3(b)):

(1) The court finds that there is no information indicating or suggesting that the child is an Indian child. Unless new information is received indicating that the child is an Indian child, ICWA does not apply. OR

(2) The court finds that there is information indicating or suggesting that the child is an Indian child and ICWA does or may apply; and

- (a) The agency has presented evidence in the record that it has exercised due diligence to identify and work with all of the Tribes where the child may be a member or eligible for membership to verify the child's status;
- (b) Notice has been provided as required by law as discussed below; and
- (c) The court will treat the child as an Indian child until it is determined on the record that the child is not an Indian child.

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)):

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.

(2) Unless there is a basis to take emergency jurisdiction, the court finds that notice was received at least 10 days in advance of the hearing;

(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Requirements to authorizing Detention or Removal When there is Reason to Know the Child is an Indian Child

Emergency Jurisdiction (25 U.S.C. 1922; 25 C.F.R. 23.2 & 23.113; Guidelines C.1 – C.9; Welf. & Inst. Code 305.5(k)):

(1) The court finds that emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) The petition or request for emergency removal or accompanying documents contains the information required 25 C.F.R. §23.113(d) including a statement of the efforts that have been taken to assist the parents or Indian custodians so that the Indian child may be safely returned to their custody;

(3) The child's placement does_____ OR does not_____ conform to the placement preferences; and

(4) The court sets an interim review hearing on _____ (no more than 30 days from date of emergency removal) to determine whether the emergency has ended.

No Basis for Emergency Jurisdiction (ie. Does not meet the requirements set out in 25 C.F.R. 23.2 & 23.113 and Guidelines C.1-C.9)

Detriment (25 U.S.C. 1912(e); 25 C.F.R. §23.121(a),(c) & (d); Guideline G.1; Welf. & Inst. Code §361(c)(6); rule 5.484(a)):

(1) The court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, and evidence regarding the prevailing social and cultural practices that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical harm to the child.

Qualified Expert Witness (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guideline G.2; Welf. & Inst. Code §361.7(c); Rule 5.484(a)):

(1) The court finds _____ (name of witness) qualified to provide expert testimony on the issue of whether continued custody of the child by _____ (parent(s), legal guardian or Indian custodian) is likely to result in serious emotional or physical harm to the child;

(2) The court finds that there was evidence regarding the prevailing social and cultural standards of the child's tribe, including the tribe's family organization and child-rearing practices.

(3) If the qualified expert witness evidence was presented in writing rather than live testimony, the court finds that all parties waived their right to live testimony by stipulation in writing and that the waiver was knowingly, intelligently and voluntarily made.

Placement Preferences (if the child is placed) (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because:

- (a) The child is placed with a member of the child's extended family; or
- (b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
- (c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or

(e) The child is placed in accordance with the preferences established by the tribe; or

(2) The court finds that there is good cause to depart from the placement preferences based on _____.

Active Efforts (25 U.S.C. 1912(d); 25 C.F.R. §§23.2, 23.120; Guidelines E1 – E6; Welf. & Inst. Code §361(d), Rule 5.484(c)):

(1) Upon review of the detention report, the court finds that:

(a) Affirmative, active, thorough, and timely efforts have been made to prevent the breakup of the Indian family and these efforts have proved unsuccessful;

(b) These efforts included assisting the parent(s) or Indian custodian through the steps of the case plan and accessing or developing the resources necessary to satisfy the case plan;

(c) To the maximum extent possible, the efforts were provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe; and

(d) These efforts and case plan have, to the maximum extent possible, been developed and conducted in partnership with the Indian child, the parents, extended family and tribe, and utilized the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

Jurisdiction

Inquiry (25 C.F.R. §23.107; Guideline B.1; Welf. & Inst. Code §224.3; Rule 5.481(a)):

(1) The court finds that the agency has asked the child, if old enough, and his or her parents or legal guardians, and the following relatives,_____, whether there is information indicating or suggesting the child is an Indian child.

(2) The court, on the record, has asked the child, if old enough, and his or her parents or legal guardians, all case participants and the following relatives,_____, whether there is information indicating or suggesting the child is an Indian child.

(3) The court instructs all parties to advice the court if they subsequently obtain information indicating or suggesting that the child is an Indian child.

ICWA-020 (if this is the parties' first appearance):

The mother, biological father, legal guardian, presumed father, alleged father, Indian custodian, other (specify):_____ were provided with a *Parental Notification of Indian Status* (form ICWA-020) and ordered to complete form ICWA-020 and to submit it to the court before leaving the courthouse today.

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)):

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.

(2) The court finds that notice was received at least 10 days prior to the hearing.

(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Disposition

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)):

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.

(2) The court finds that notice was received at least 10 days prior to the hearing.

(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Detriment (25 U.S.C. 1912(e); 25 C.F.R. §23.121(a),(c) & (d); Guideline G.1; Welf. & Inst. Code §361(c)(6); rule 5.484(a)):

(1) The court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, and evidence regarding the prevailing social and cultural practices that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical harm to the child.

Qualified Expert Witness (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guideline G.2; Welf. & Inst. Code §361.7(c); Rule 5.484(a)):

(1) The court finds _____ (name of witness) qualified to provide expert testimony on the issue of whether continued custody of the child by _____ (parent(s), legal guardian or Indian custodian) is likely to result in serious emotional or physical harm to the child;

(2) The court finds that there was evidence regarding the prevailing social and cultural standards of the child's tribe, including the tribe's family organization and child-rearing practices.

(3) If the qualified expert witness evidence was presented in writing rather than live testimony, the court finds that all parties waived their right to live testimony by stipulation in writing and that the waiver was knowingly, intelligently and voluntarily made.

Placement Preferences (if the child is placed) (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because:

(a) The child is placed with a member of the child's extended family; or
(b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
(c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
(e) The child is placed in accordance with the preferences established by the tribe; or

(2) The court finds that there is good cause to depart from the placement preferences based on _____.

Active Efforts (25 U.S.C. 1912(d); 25 C.F.R. §§23.2, 23.120; Guidelines E1 – E6; Welf. & Inst. Code §361(d), Rule 5.484(c)):

(1) Upon review of the detention report, the court finds that:
(a) Affirmative, active, thorough, and timely efforts have been made to prevent the breakup of the Indian family and these efforts have proved unsuccessful;
(b) These efforts included assisting the parent(s) or Indian custodian through the steps of the case plan and accessing or developing the resources necessary to satisfy the case plan;
(c) To the maximum extent possible, the efforts were provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe; and
(d) These efforts and case plan have, to the maximum extent possible, been developed and conducted in partnership with the Indian child, the parents, extended family and tribe, and utilized the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

Prepermanency Review Hearings

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)):

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.
(2) The court finds that notice was received at least 10 days prior to the hearing.
(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Placement Preferences (if the child is placed) (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because:
(a) The child is placed with a member of the child's extended family; or
(b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
(c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
(e) The child is placed in accordance with the preferences established by the tribe; or

(2) The court finds that there is good cause to depart from the placement preferences based on _____.

Active Efforts (25 U.S.C. 1912(d); 25 C.F.R. §§23.2, 23.120; Guidelines E1 – E6; Welf. & Inst. Code §361(d), Rule 5.484(c)):

(1) Upon review of the detention report, the court finds that:
(a) Affirmative, active, thorough, and timely efforts have been made to prevent the breakup of the Indian family and these efforts have proved unsuccessful;
(b) These efforts included assisting the parent(s) or Indian custodian through the steps of the case plan and accessing or developing the resources necessary to satisfy the case plan;
(c) To the maximum extent possible, the efforts were provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe; and
(d) These efforts and case plan have, to the maximum extent possible, been developed and conducted in partnership with the Indian child, the parents, extended family and tribe, and utilized the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

Recommended ICWA Findings and Orders

Permanency Hearing (Hearing Terminating Reunification Services)

Inquiry (25 C.F.R. §23.107; Guideline B.1; Welf. & Inst. Code §224.3; Rule 5.481(a)):

(1) The court finds that the agency has asked the child, if old enough, and his or her parents or legal guardians, and the following relatives,_____, whether there is information indicating or suggesting the child is an Indian child.

(2) The court, on the record, has asked the child, if old enough, and his or her parents or legal guardians, all case participants and the following relatives,_____, whether there is information indicating or suggesting the child is an Indian child.

(3) The court instructs all parties to advice the court if they subsequently obtain information indicating or suggesting that the child is an Indian child.

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)):

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.

(2) The court finds that notice was received at least 10 days prior to the hearing.

(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Placement Preferences (if the child is placed) (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because:

- (a) The child is placed with a member of the child's extended family; or
- (b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
- (c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
- (e) The child is placed in accordance with the preferences established by the tribe; or

(2) The court finds that there is good cause to depart from the placement preferences based on _____.

Active Efforts (25 U.S.C. 1912(d); 25 C.F.R. §§23.2, 23.120; Guidelines E1 – E6; Welf. & Inst. Code §361(d), Rule 5.484(c)):

(1) Upon review of the detention report, the court finds that:

- (a) Affirmative, active, thorough, and timely efforts have been made to prevent the breakup of the Indian family and these efforts have proved unsuccessful;
- (b) These efforts included assisting the parent(s) or Indian custodian through the steps of the case plan and accessing or developing the resources necessary to satisfy the case plan;
- (c) To the maximum extent possible, the efforts were provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe; and
- (d) These efforts and case plan have, to the maximum extent possible, been developed and conducted in partnership with the Indian child, the parents, extended family and tribe, and utilized the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

Hearing Terminating Parental Rights (WIC 366.26 & WIC 727.31)

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)) for both dependency and delinquency foster care cases:

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.

(2) The court finds that notice was received at least 10 days prior to the hearing.

(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Detriment (25 U.S.C. 1912(e); 25 C.F.R. §23.121(a),(c) & (d); Guideline G.1; Welf. & Inst. Code §361(c)(6); rule 5.484(a)):

(1) The court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, and evidence regarding the prevailing social and cultural practices that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical harm to the child.

Qualified Expert Witness (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guideline G.2; Welf. & Inst. Code §361.7(c); Rule 5.484(a)):

(1) The court finds _____ (name of witness) qualified to provide expert testimony on the issue of whether continued custody of the child by _____ (parent(s), legal guardian or Indian custodian) is likely to result in serious emotional or physical harm to the child;

(2) The court finds that there was evidence regarding the prevailing social and cultural standards of the child's tribe, including the tribe's family organization and child-rearing practices.
(3) If the qualified expert witness evidence was presented in writing rather than live testimony, the court finds that all parties waived their right to live testimony by stipulation in writing and that the waiver was knowingly, intelligently and voluntarily made.

Active Efforts (25 U.S.C. 1912(d); 25 C.F.R. §§23.2, 23.120; Guidelines E1 – E6; Welf. & Inst. Code §361(d), Rule 5.484(c)):

(1) Upon review of the detention report, the court finds that:
  (a) Affirmative, active, thorough, and timely efforts have been made to prevent the breakup of the Indian family and these efforts have proved unsuccessful;
  (b) These efforts included assisting the parent(s) or Indian custodian through the steps of the case plan and accessing or developing the resources necessary to satisfy the case plan;
  (c) To the maximum extent possible, the efforts were provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe; and
  (d) These efforts and case plan have, to the maximum extent possible, been developed and conducted in partnership with the Indian child, the parents, extended family and tribe, and utilized the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

Placement Preferences (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because, in the case of an adoptive or pre-adoptive placement:
  (a) The child is placed with a member of the child's extended family; or
  (b) An exhaustive search was made for a placement with a member of the child's extended family, and those efforts are documented in detail in the record and the child is placed with other members of the child's tribe; or
  (c) An exhaustive search was made for a placement with a member of the child's extended family or other member of the child's tribe, and those efforts are documented in detail in the record and the child is placed with another Indian family; or
  (d) The child is placed in accordance with the preferences established by the tribe; or
  (e) The court finds that there is good cause to depart from the placement preferences based on _____.
(2) In the case of a foster care placement:
  (a) The child is placed with a member of the child's extended family; or
  (b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
  (c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  (d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
  (e) The child is placed in accordance with the preferences established by the tribe; or
  (f) The court finds that there is good cause to depart from the placement preferences based on _____.

Postpermanency Reviews (when the child is in planned permanent living arrangement)

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)) for both dependency and delinquency foster care cases:

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.
(2) The court finds that notice was received at least 10 days prior to the hearing.
(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Placement Preferences (25 U.S.C. 1915; 25 C.F.R. §§23.129, 23.131 & 23.132; Guideline H2-H.5; Welf. & Inst. Code § 361.31; Rule 5.484(b)):

(1) The court finds that the child's current placement complies with the placement preferences because, in the case of an adoptive or pre-adoptive placement:
  (a) The child is placed with a member of the child's extended family; or
  (b) An exhaustive search was made for a placement with a member of the child's extended family, and those efforts are documented in detail in the record and the child is placed with other members of the child's tribe; or
  (c) An exhaustive search was made for a placement with a member of the child's extended family or other member of the child's tribe, and those efforts are documented in detail in the record and the child is placed with another Indian family; or
  (d) The child is placed in accordance with the preferences established by the tribe; or
  (e) The court finds that there is good cause to depart from the placement preferences based on _____.

(2) In the case of a foster care placement:
   (a) The child is placed with a member of the child's extended family; or
   (b) An exhaustive search was made for a placement with a member of the child's extended family, and the efforts are documented in detail in the record and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
   (c) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe and the efforts are documented in detail in the record and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
   (d) An exhaustive search was made for a placement with a member of the child's extended family, or a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority and the efforts are documented in detail in the record and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
   (e) The child is placed in accordance with the preferences established by the tribe; or
   (f) The court finds that there is good cause to depart from the placement preferences based on _____.

Finalization of Adoption & Adoption Order

Notice (25 U.S.C. 1912(a); 25 CFR 23.11 & 23.111; Guidelines D1-D7; Welf. & Inst. Code 224.2; rule 5.481(b)) for both dependency and delinquency foster care cases:

(1) The court finds notice has been provided to the child's parents, and Indian custodian if applicable, and all tribes of which the child may be a member or eligible for membership by sending a *Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030*) with a copy of the petition by registered or certified mail with return receipt requested, and additional notice has been sent by first-class mail to the tribal chairperson unless the tribe has designated another agent for service. Proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status.
(2) The court finds that notice was received at least 10 days prior to the hearing.
(3) The court finds either that the identity or location of the parent or Indian custodian or the tribe cannot be determined; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt has been filed with the court.

Reporting Requirements (25 U.S.C. 1951; 25 C.F.R. §23.140; Guideline J.2; Family Code §9208):

(1) A copy of this order shall be sent to the Secretary of the Interior including:
   (a) The names and tribal affiliation of the child,
   (b) The names and addresses of the biological parents,
   (c) The names and addresses of the adoptive parents,
   (d) The identity of any agency having files or information relating to such adoptive placement, and
   (e) Any affidavit of the biological parents that their identity remain confidential if applicable.

JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Revised 01/2018

Indian Child Welfare Act ("ICWA") Requirements*

Applicability (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480)
ICWA applies to any state court proceeding involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child's home & not even in part upon the child's criminal conduct.

Indian Child (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b))
Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive.

Indian Custodian (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a))
Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.

Intervention/Invalidation (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rule 5.482(e))
An Indian child, Indian custodian, & Indian child's tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with ICWA.

Inquiry (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.3; Rule 5.481)
In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, & the Indian custodian as soon as possible whether there is information indicating or suggesting the child is an Indian child & must record the information, if applicable, on the petition. In all child custody cases, at their first court appearance, the parent or guardian must be ordered to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating or suggesting the child is an Indian child & instruct them to inform the court if they subsequently receive such information.

Circumstances That May Provide Reason to Know the Child Is an Indian Child (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.3(b); Rule 5.481(a)(5))
1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; 3. The child or family has received services or benefits that are available to Indians, from a tribe or a federal agency, such as the Indian Health Service; 4. The child is or was a ward of a tribal court; or 5. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe.

Notice (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.2, 727.4(a)(2); Rule5.481(b))
When: At the commencement of each distinct child custody proceeding whenever it is known or there is reason to know that an Indian child is involved.
How: Party seeking foster care placement, guardianship, or termination of parental rights must notify the parent & Indian custodian, & the Indian child's tribe, of the pending proceedings in the manner specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.2. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all proceedings except excluded delinquency proceedings. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child's Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child's birth certificate if available. 3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified.

Active Efforts (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §361.7; Rule5.484(c))
The party seeking an involuntary foster care placement, guardianship, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved they must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child's tribe. Active efforts to provide services must include attempts to use the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers.

Qualified Expert Witness Testimony (QEW) (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.484(a))
Before the court orders foster care or adoptive placement, establishes a guardianship or terminates parental rights, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. This person cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights. Persons most likely to meet the requirements for a QEW are: 1. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization & childrearing practices; 2. any expert witness with substantial experience in the delivery of child & family services to Indians & extensive knowledge of prevailing social & cultural

*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act; and California statutes and rules of court.

standards & childrearing practices within the child's tribe; & 3. a professional person having substantial education & experience in the area of his or her specialty.

Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.484(b))
The following placement preferences & standards must be followed in any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian.
Foster Care, Guardianships, & Custody to Non-parent: If reason to know the child is an Indian child, the court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the Indian child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the Indian child's extended family; 2. a foster home licensed, approved, or specified by the Indian child's tribe; 3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family; 2. other members of the Indian child's tribe; 3. another Indian family. The tribe, by resolution, may establish a different preference order, which must be followed if it provides for the least restrictive setting.

Placement Standards& Records (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5**;** Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1))
The preferences of the Indian child & the parent must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or qualified expert witness testimony. The California Department of Social Services must maintain a record of each placement of an Indian child & active efforts to comply with the placement preferences.

Good Cause to Deviate From the Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3))
The court may determine that good cause exists not to follow the placement preferences, which may include the following considerations: 1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; 2. The request of the child, if the child is of sufficient age & capacity to understand the decision that is being made; 3. The presence of a sibling attachment that can be maintained only through a particular placement; 4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; 5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social & cultural ties. The party requesting a different order has the burden of establishing good cause. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Burden of Proof & Qualified Expert Witness (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1**;** Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a))
The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence,* including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt,* including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

Adoption (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487)
The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

Jurisdiction & Transfer (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483)
Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record.
Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.

Right to Counsel (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2))
The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.

Examination of Reports & Documents (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b))
The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.

Full Faith & Credit (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5)
Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.

Right to Additional Time (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a))
With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot proceed until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation if requested.

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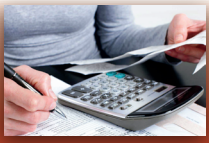

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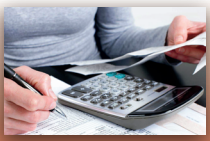

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SOCIOECONOMIC BIAS IN THE JUDICIARY

MICHELE BENEDETTO NEITZ*

ABSTRACT

Judges hold a prestigious place in our judicial system, and they earn double the income of the average American household. How does the privileged socioeconomic status of judges affect their decisions on the bench? This Article examines the ethical implications of what Ninth Circuit Chief Judge Alex Kozinski recently called the "unselfconscious cultural elitism" of judges.** This elitism can manifest as implicit socioeconomic bias.

Despite the attention paid to income inequality, implicit bias research and judicial bias, no other scholar to date has fully examined the ramifications of implicit socioeconomic bias on the bench. The Article explains that socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations. The Article reviews social science studies confirming that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias. The Article verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

The Article contends that the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the document designed to regulate the behavior of judges, fails to effectively eliminate implicit socioeconomic bias. The Article recommends innovative revisions designed to strengthen the Code's prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial decisions, and will bring this issue to the forefront of the judicial agenda.

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** United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting).

I. INTRODUCTION

In the early 1970s, Robert William Kras asked the United States Supreme Court to allow him to proceed in bankruptcy court without paying the requisite filing fees.[1] Mr. Kras lived in a small apartment with multiple extended family members and his younger child was hospitalized with cystic fibrosis.[2] Mr. Kras had been unemployed for several years, after losing his job with a life insurance company when the premiums he had collected were stolen out of his home.[3] His wife had to give up her employment due to her pregnancy, and she was focused on caring for their ill son. The family lived on public assistance benefits and had no real assets.[4]

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[1] United States v. Kras, 409 U.S. 434, 437 (1973).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 438.

Mr. Kras was indisputably living in poverty. Hoping to improve his prospects for future employment, Mr. Kras desired a discharge in bankruptcy. However, Mr. Kras was turned away before he even reached the bankruptcy courtroom because he could not afford the $50 in filing fees to submit his bankruptcy petition.[5]

The Supreme Court denied Mr. Kras's request to waive his filing fees, holding that the statute requiring payment of fees to access bankruptcy courts did not violate the United States Constitution. The majority opinion, written by Justice Blackmun, noted that the filing fees, when paid in weekly $1.92 installments, represented a sum "less than the price of a movie and little more than the cost of a pack or two of cigarettes."[6] Justice Blackmun declared that if Mr. Kras "really needs and desires [bankruptcy], this much available revenue should be within his able-bodied reach."[7] Using disparaging words such as "little more" and "able-bodied," the Court presumed that any individual could afford the $50 filing fee.[8]

In dissent, Justice Thurgood Marshall declared the majority of the Court had demonstrated a fundamental misunderstanding of the lives of poor people.[9] Justice Marshall explained, "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."[10] Despite the majority's apparent belief that poor people go to the theater on a weekly basis, Justice Marshall made clear that poor people rarely, if ever, see a movie.[11] Instead, the "desperately poor" must choose to use their limited funds for more important things, including caring for a sick child as Mr. Kras was required to do.[12] Justice Marshall rebuked his colleagues for their insensitivity to the plight of poor people: "[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how [poor] people live."[13]

Nearly forty years later, the Chief Judge of the Ninth Circuit echoed Justice Marshall with similar observations about the assumptions of his colleagues on the bench. In *United States v. Pineda-Moreno*, a Fourth Amendment case upholding the placement of a Global Positioning System (GPS) device on a defendant's car parked outside his modest home, the Ninth Circuit denied the defendant's petition for a rehearing en banc on his motion to suppress the GPS evidence.[14] Dissenting from

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[5] *Id.* This amount represents approximately $250 in 2011 dollars. Deborah L. Rhode, *Thurgood Marshall and His Clerks*, *in* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 314, 321 (Todd C. Peppers & Aremus Ward eds., 2012).

[6] *Kras*, 409 U.S. at 449.

[7] *Id.*

[8] Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond* United States v. Kras, 2 AM. BANKR. INST. L. REV. 57, 60 (1994).

[9] *Kras*, 409 U.S. at 460 (Marshall, J., dissenting).

[10] *Id.* (Marshall, J., dissenting)

[11] *Id.* (Marshall, J., dissenting).

[12] *Id.* (Marshall, J., dissenting).

[13] *Id.* (Marshall, J., dissenting).

[14] United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir. 2010).

the denial of the petition for rehearing, Chief Judge Kozinski took the analysis one step beyond the case's constitutional implications.[15] Chief Judge Kozinski deplored the fact that his fellow Ninth Circuit judges failed to appreciate how their decision, allowing the placement of the GPS tracking device on the defendant's car because he had not shielded it from public view, would impact poor people differently than wealthy people. Constitutional interpretation should not give preference to wealthy individuals, yet "when you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep."[16]

Why do some judges overlook the impacts of their decisions on poor people? Chief Judge Kozinski posited that the reason lies in "unselfconscious cultural elitism."[17] Most likely, the *Kras* Court and the *Pineda-Moreno* majority were not actively attempting to create laws favoring the rich over the poor. But this consequence is one result of the lack of socioeconomic diversity on the bench.[18] Chief Judge Kozinski noticed that "No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity, or sex, are selected from the class of people who don't live in trailers or urban ghettos."[19] Accordingly, his colleagues did not appreciate that "the everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live."[20]

Justice Marshall and Chief Judge Kozinski acknowledged the difference between judges and most of their litigants: Judges overwhelmingly come from wealthy backgrounds, and many have never walked in the shoes of economically disadvantaged people.[21] In effect, elite judges may render decisions that negatively impact poor individuals simply because they do not recognize that they are doing so.

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[15] *Pineda-Moreno,* 617 F.3d 1120. For a full examination of this case, see *infra* Part III.A.

[16] *Pineda-Moreno,* 617 F.3d at 1123.

[17] *Id.* (Kozinski, C.J., dissenting).

[18] *Id.* (Kozinski, C.J., dissenting).

[19] *Id.* (Kozinski, C.J., dissenting).

[20] *Id.* (Kozinski, C.J., dissenting).

[21] Of course, there are some judges who overcame great poverty and other challenges to achieve their roles on the bench. *See, e.g.*, Bob Egelko, *Federal Judge Nominee Troy Nunley Works His Way Up*, SAN FRANCISCO CHRONICLE, July 9, 2012, *available at* http://www.sfgate.com/default/article/Federal-judge-nominee-Troy-Nunley-works-his-way-up-3692208.php?cmpid=emailarticle&cmpid=emailarticle#photo-3170832 (describing Judge Troy Nunley's path from childhood poverty to a judgeship). Judge Nunley, a Sacramento County Superior Court judge, was nominated by President Obama to the U.S. District Court in Sacramento on June 25, 2010. But such judges are a rarity, particularly in the prestigious federal courts. For example, Supreme Court justices disproportionately come from three Ivy League law schools: Harvard, Yale, and Columbia. SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010 (2010). Eight of the nine current justices attended one of those three law schools. *Id.* Moreover, as discussed *infra* Part II.A., even those judges who came from poverty now earn much higher incomes than average Americans.

Opponents seeking to deny Chief Judge Kozinski's charge of elitism may point to the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the model standard of ethics intended to provide guidance for judicial behavior.[22] The Code specifically prohibits judges from employing bias on the basis of socioeconomic status when adjudicating cases.[23] Judicial ethicists might therefore argue that Chief Judge Kozinski's observations about the wealthy positions of judges are irrelevant to judicial decision-making processes; judges may be wealthier than some litigants, but the Code forbids judges from being influenced by socioeconomic bias. Yet the Code's success in preventing socioeconomic bias is subject to some debate. For example, did the conduct of the Supreme Court majority in *Kras* or the Ninth Circuit panel in *Pineda-Moreno* rise to the level of bias?

This Article examines the ethical implications of the "unselfconscious cultural elitism" of judges.[24] Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people. These gaps have contributed to patterns of judicial decision-making that appear to be biased against poor people as compared to others.

Although judges are required to decide cases in a neutral and impartial manner, every judge may be influenced in some way by his or her personal beliefs. Many judges, aware of the potential for this influence, actively work to separate their judicial determinations from their personal opinions. In some cases, however, a judge's particular viewpoints may result in biased decision-making processes—whether or not the judge is aware that such bias exists. Bias is defined as "inclination; prejudice; predilection," and judicial bias is "a judge's bias toward one or more of the parties to a case over which the judge presides."[25] Moreover, judicial bias may be subtle and implicit.

Part II of this Article begins with consideration of the two manifestations of bias at issue in this context: Socioeconomic bias and implicit bias. Socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations.

Because socioeconomic bias is subtle, most judges do not explicitly display bias against poor people. Nonetheless, new scientific research confirms that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, Part II explains that even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias.

Part III verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

Part IV assesses the role of the ABA Model Code of Judicial Conduct (the Code) in the elimination of such bias. The Model Code is designed to ensure fairness and neutrality on the bench. This section recommends changes designed to strengthen

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[22] *See generally* MODEL CODE OF JUDICIAL CONDUCT (2011).

[23] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

[24] *Pineda-Moreno,* 617 F.3d at 1123 (Kozinski, C.J., dissenting).

[25] BLACK'S LAW DICTIONARY 183 (9th ed. 2009).

the Code's prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial deliberations, thus minimizing the impact of such biases on poor litigants.

II. THE CHALLENGES OF IDENTIFYING IMPLICIT SOCIOECONOMIC BIAS

A. The Economic Status of Judges

Judicial salaries are much higher than those earned by average Americans. Nearly all state and federal judges in the United States earn a six figure salary. For example, in 2010, district court judges earned a set salary of $174,000, and circuit court judges made $184,000.[26] Supreme Court justices make over $200,000.[27] Depending on the jurisdiction, state court judges may make more or less than federal judges. For example, state appellate judges earn salaries ranging from $105,050 in Mississippi (the state with the lowest paid state appellate judges) to $204,599 in California (the state boasting the highest salaries for its appellate judges). [28] In 2010, the median household income was $49,445.[29] Thus, judges earn more than double the income of the average American.

Like all people, judges are influenced by their economic backgrounds.[30] Since people are "more favorably disposed to the familiar, and fear or become frustrated with the unfamiliar," the wealthy positions of most judges may prevent them from fully appreciating the challenges faced by poor litigants in their courtrooms.[31] Low-income people "are not just like rich people without money."[32] Workers in low-wage jobs are often teetering on the edge of abject poverty: "They cannot save, cannot get decent health care, cannot move to better neighborhoods, and cannot send their children to schools that offer a promise for a successful future."[33]

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[26] *Judicial Salaries Since 1968*, U.S. COURTS, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalariescJudi.pdf (last visited Jan. 23, 2013).

[27] *Id.* Notably, federal judges have not received reliable cost of living pay increases in the last decade, and are paid less than some federal employees in the executive branch and banking industries. *Federal and Judicial Pay Increase Fact Sheet*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx (last visited Jan. 23, 2013).

[28] NAT'L CTR. FOR STATE COURTS (NCSC), 36(2) SURVEY OF JUDICIAL SALARIES (Jan. 1, 2011). These differences can be attributed to the cost of living discrepancies among various states.

[29] *Income Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011), http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html. This amount represented a 2.3% decline from the median in 2009 as a result of the recent recession. *Id.*

[30] Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 53 (1985).

[31] *Id.*

[32] Stephen Wexler, *Practicing Law for Poor People,* 79 YALE L. J. 1049, 1049 (1969-1970).

[33] DAVID SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 4 (2005).

Additionally, living in poverty "creates an abrasive interface with society; poor people are always bumping into sharp legal things."[34] Thus, for poor people, everyday living requires the "the ability to live with [the] unrelenting challenges and chronic instability of being poor."[35] Judges, on the other hand, generally have well-paid and stable employment positions.[36] This discrepancy creates an economic imbalance in courtrooms that may result in socioeconomic bias.

The difference in economic status between judges and litigants has not gone unnoticed, and the public is increasingly equating wealth with the ability to obtain fairness in American courts. A recent survey by the National Center for State Courts found that Californians believe the level of fairness in state courts is least for those with low incomes and non-English speakers.[37] Nationally, 62% of Americans believe the courts favor the wealthy.[38]

These statistics reveal the importance of evaluating judicial socioeconomic bias in American courtrooms. If judges' decisions are influenced—consciously or unconsciously—by their elite and privileged status, the public trust in the American judicial system will continue to be undermined. Conversely, increased judicial attention to the problem of socioeconomic bias will signal to the public that judges recognize the importance of justice for all litigants, regardless of economic class.

B. Socioeconomic Bias vs. Class Privilege

The elite status of most judges enables them to enjoy the benefits of class privilege, meaning that their life experiences are different than those of lower-income people.[39] Some judges may not recognize their privileged positions, since they "believe that their success is based on their individual merit, gaining the 'supreme privilege of not seeing themselves as privileged.'"[40]

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[34] Wexler, *supra* note 32, at 1050.

[35] Eden E. Torres, *Power, Politics, and Pleasure: Class Differences and the Law,* 54 RUTGERS L. REV. 853, 863 (2002) (citing Alan Wald, *A Pedagogy of Unlearning: Teaching the Specificity of U.S. Marxism*, *in* PEDAGOGY, CULTURAL STUDIES, AND THE PUBLIC SPHERE 125, 143 (Amitava Kumar ed., 1997)).

[36] Federal judges enjoy lifetime tenure. U.S. CONST. art. III § 1. Appointed federal judges may serve specific terms. 28 U.S.C.A. § 631(a), (e) (West 2012) (District Court judges appoint magistrate judges to their respective jurisdictions to eight-year terms); *cf.* CAL. CONST. art. VI, § 16(d)(2) (When vacancies arise on the California Supreme Court or a court of appeal, the Governor appoints judges who hold office until the first general election following their appointment.) By contrast, elected judges may have to run for election to retain their positions. CAL. CONST. art. VI, § 16(c) (California superior court judges are elected to 6-year terms.)

[37] NAT'L CTR. FOR STATE COURTS (NCSC), TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (Dec. 2006), *available at* http://www.courts.ca.gov/documents/Calif_Courts_Book_rev6.pdf.

[38] Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007).

[39] *See supra* Part II.A.

[40] Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1195 (2008) (quoting PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 163 (1990)).

Nevertheless, the influence of class privilege may contribute to implicit assumptions about members of particular socioeconomic groups, resulting in class bias. For example, class privilege may rise to the level of bias in the case of a judge who "acquired his judicial predispositions through the sympathies instilled by a corporation practice and other schools of privilege."[41] This type of judge is "conscientiously predisposed to favor privileged classes," and may then "carr[y] that predisposition into every case by him considered."[42] While it can be difficult to recognize these predispositions, "the conscientious judge who believes in class privileges and undemocratic distinctions is . . . more pernicious than the judge who is occasionally corrupt."[43]

Class privilege may also manifest as the presumption that all persons have similar experiences, exemplified by Justice Blackmun's assumption in *Kras* that all persons could afford the price of a movie.[44] Unlike ordinary citizens, judges have a duty to receive information, fairly assess it, and incorporate it into their judgments without bias.[45] A judge who adjudicates cases based on the implicit assumption that all persons are situated similarly to that judge is not properly assessing or investigating the facts of a given case. Treating all parties as though they were socioeconomically identical rises beyond privilege to the level of bias, precisely because judges have a duty to consider the unique facts of every case.

C. The Challenge of Identifying Socioeconomic Bias

1. The ABA Model Code of Judicial Conduct's Prohibition of Socioeconomic Bias

The American Bar Association's Model Code of Judicial Conduct is intended to provide disciplinary guidance to all full-time judges, as well as "anyone who is authorized to perform judicial functions," including a "justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary."[46] Although the first Canons of Judicial Ethics (Canons) were released by the ABA in 1924, the specific prohibition of bias based on socioeconomic status was not added until 1990. During the 1974 revisions to the Code of Judicial Conduct, language was proposed that would have prohibited judges from treating indigent or welfare litigants differently from their nonindigent counterparts.[47] The Committee revising the Code rejected this proposal, believing that such a specific standard was not required when a judge was already directed to be "faithful to the law."[48] Since this standard applied regardless of a litigant's status

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[41] Theodore Schroeder, *Social Justice and the Courts*, 22 YALE L. J. 19, 25 (1912).

[42] *Id.*

[43] *Id.*

[44] United States v. Kras, 409 U.S. 434, 449 (1973).

[45] MODEL CODE OF JUDICIAL CONDUCT R. 2.2 and R. 2.3 (2011).

[46] MODEL CODE OF JUDICIAL CONDUCT § I(B) (2011).

[47] E. WAYNE THODE, THE REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 51 (1973).

[48] *Id.*

as an indigent or otherwise, further elaboration of the standard was deemed "counter-productive."[49]

A different view prevailed during the 1990 revisions to the Code, when the Committee chose to include a list of specific classes of prohibited biases on the premise "that a specific listing of examples of prohibited bias or prejudice would provide needed strength to the rule."[50] Thus, by 1990, the rule prohibiting judicial bias changed from a general guideline concerning a judge's general obligation to remain impartial into a specific rule with clear examples of the types of biases prohibited by the Code.

The most recent version of the ABA Model Code of Judicial Conduct, released in 2007, retained the list of examples of bias and added the categories of gender, ethnicity, marital status, and political affiliation.[51] Thus, Rule 2.3 now provides that judges shall not "manifest bias or prejudice," including but not limited to biases based on "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."[52] This enumerated list is not meant to be exclusive; the language "included but not limited to" indicates that the list of prohibited biases provides illustrative examples.[53]

The inclusion of socioeconomic bias as one of the specific examples of bias in the 1990 Code and subsequent revisions may certainly be seen as progress, since it brings judicial attention to the fact that this type of bias exists. However, this obscure form of bias is not clearly explained, leaving judges uncertain about what is meant by the phrase "socioeconomic bias."

The term "socioeconomic" is defined by *Webster's New International Dictionary* as "of, relating to, or involving a combination of social and economic factors."[54] Without any explanation of what these "factors" may be, this vague general definition is ambiguous. Yet the Code's drafters failed to define the term "socioeconomic" in the "Terminology" section of the Code, and it is not defined anywhere else in the Code.[55] The same is true for the term "bias," which is also not defined in the Code's "Terminology" section.[56]

The failure to define these key terms is problematic in a Code intended to provide guidance and serve as the basis for disciplinary procedures for judges. Assuming the Code's drafters intended to prohibit judicial bias against the poor and

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[49] *Id.*

[50] LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 18 (1992).

[51] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

[52] *Id.*

[53] MILORD, *supra* note 50, at 18. Judicial bias has been extensively studied in other contexts. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2011) (empirical study of judicial bias revealed that "[j]udges, it seems, are human. Like the rest of us, they use heuristics that can produce systematic errors in judgment.")

[54] WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed.1986).

[55] MODEL CODE OF JUDICIAL CONDUCT, Terminology (2011).

[56] A definition of the term "bias" was proposed, but rejected. Am. Bar Ass'n (ABA) Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Summary of Teleconference Minutes (Nov. 17, 2003). The Code does list examples of manifestations of bias. MODEL CODE OF JUDICIAL CONDUCT R. 2.3, cmt. 2 (2011).

disadvantaged economic classes as well as the wealthy and privileged classes, it is unclear how these groups should be characterized. As a term, "the poor" can include "all races, colors, ethnicities, regions, and ages of people, although it is heavy on women and children . . . . in short, those who at some period of time populate the low end of the income distribution scale in the United States are indescribably varied and multifaceted."[57] Yet, the Code makes no mention of how the term "socioeconomic" should be considered in this context. Thus, judges are prohibited from engaging in a type of bias that is undefined in the Code, raising concerns about the enforceability of the Code's prohibition against socioeconomic bias.

2. The Unique Nature of Socioeconomic Bias

Socioeconomic bias is different from other forms of bias. First, this type of bias is distinctive because American law treats socioeconomic status differently than other identities. There is no fundamental right to be wealthy or "free of poverty,"[58] and the Constitution does not protect socioeconomic rights by assuring all Americans economic stability.[59] Unlike race or gender, poverty is not a classification deserving strict or intermediate scrutiny, and the federal government does not ensure full participation in the economic life of the nation.[60] Thus, there is no constitutional provision requiring judges to stop and carefully deliberate the impact of their decisions on poor people.[61] In addition, the focus of most legal scholars and activists on race, gender, and other bases for bias has "shifted attention away from socioeconomic class."[62] For example, judicial ethics scholars have extensively considered racial and gender bias, but have placed little to no emphasis on socioeconomic bias in courtrooms.[63] In light of our country's historical oppression of women and minority populations, this focus makes sense. However, the growing gap between rich and poor people in the United States demands renewed attention to the problem of judicial bias against the poor.[64]

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[57] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 358 (2010) (citing JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 20-21 (2001)).

[58] Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 111 (2009).

[59] *Id.*

[60] *Id.* at 112-13.

[61] Similarly, there is no constitutional or statutory requirement for employers, government agencies, landlords, etc., to consider socioeconomic status in the same way as race or gender.

[62] Barnes & Chemerinsky, *supra* note 58, at 124.

[63] Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994) ("There is little research on the issue of poverty bias.").

[64] The economic gap between rich and poor persons is rising in the United States. From 1973 to 2008, the top 1% of Americans saw their share of national income more than double, from 8% to 18%. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118(1) Q. J. OF ECON. (Feb. 2003) (updated to include the years 1998-2008). The 2008 financial crisis had a significant effect on the share of total net worth for American households: In 2010, the wealthiest 1% held 34.5% of the nation's wealth, while the bottom

Second, and more problematic, is the fact that class bias is "much more elusive to define" than other forms of bias.[65] Poor populations are disproportionately people of color, and the "line between poverty and racial bias is very blurred." [66] Judges rarely display explicit bias against poor litigants in courtrooms, and statements about poverty are deemed less inflammatory than racist or sexist comments made by a judge.[67]

Moreover, although a person may be born into poverty, the concept of the "American dream" implies that "unlike race and gender, poverty is not immutable."[68] As a result, many members of society view poor people as responsible for their socioeconomic status.[69] This viewpoint has historical roots in the early American conception of poor people as lazy or immoral.[70] The poor have traditionally been stereotyped as "welfare queens" whose behavior merits the "reasonable suspicion and disdain of broader society."[71] Poor persons who apply for welfare benefits may be viewed as "presumptive liars, cheaters, and thieves."[72]

This stereotype has severe implications for the fate of poor people in the United States: If an individual's laziness or immorality is responsible for making someone poor, why should society (and by extension the justice system) not treat poor people accordingly? The President's Crime Commission issued a report in 1972

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half of American households held only 1% of all American wealth. Dan Froomkin, *Half of American Households Hold 1 Percent of Wealth*, HUFFINGTON POST, July 19, 2012.

[65] Barnes & Chemerinsky, *supra* note 58, at 125 (2009). Other types of biases, such as gender bias, may be more readily identifiable in the courtroom. For example, a New York judge's statement in 1997 that "[E]very woman needs a good pounding now and then" is a clear manifestation of gender bias. *In re* Roberts*,* 689 N.E.2d 911, 913 (N.Y. 1997).

[66] Nugent, *supra* note 63, at 49.

[67] Manifestations of bias against the poor may be overlooked or unnoticed. For example, California Municipal Court Judge Stephen Drew was publicly admonished in 1995 for a number of improper judicial actions. Among the facts giving rise to Judge Drew's admonishment was his failure to appoint counsel for an unemployed defendant, stating that he was potentially employable. Judge Drew ordered the defendant to apply for work to afford private counsel. This action demonstrated socioeconomic bias, but it alone did not result in disciplinary action; it was considered as only one of numerous improprieties committed by Judge Drew on the bench. Comm'n on Judicial Performance, Judicial Performance Commission Issues Public Admonishment of Judge Stephen Drew (July 29, 1995) (public admonishment release for Judge Stephen Drew of the Tulane County Municipal Court, Dinuba Division), *available at* http://cjp.ca.gov/res/docs/Public_Admon/Drew_07-96.pdf.

[68] Barnes & Chemerinsky, *supra* note 58, at 122 ("The American Dream is that, through hard work, a person can rise from even a seriously disadvantaged background.").

[69] *Id.* at 125.

[70] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 407 (2010) (this viewpoint "has animated public discourse since the European settlement of North America and served to exclude the poor from equal participation in our civic life for over two centuries.").

[71] Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment,* 19 WM. & MARY BILL RTS. J. 751, 772-73 (2011).

[72] Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009).

recognizing the dangers of a system in which wealthy judges adjudicate criminal cases brought against poor litigants:

> [M]any defendants are not understood by and seem threatening to the court and its officers. Even such simple matters as dress, speech, and manners may be misinterpreted. Most city prosecutors and judges have middle class backgrounds and a high degree of education. When they are confronted with a poor, uneducated defendant, they may have difficulty judging how he fits into his own society of culture. They can easily mistake a certain manner of dress or speech, [as] alien or repugnant to them, but ordinary enough in the defendant's world as an index of moral worthlessness. They can mistake ignorance or fear of the law as indifference to it. They can mistake the defendant's resentment against social evils with which he lives as evidence of criminality.[73]

Thus, judges are not immune from the influence of this stereotype.[74] In some cases, the fact that poor people are different than lawyers and judges may serve as the basis for socioeconomic bias in courtrooms. Judges, lawyers, and other officers of the court are perceived by themselves as hardworking, and they act in expected ways. Poor people may act or appear differently, which can be interpreted by judges as a failure to exhibit some of the admirable qualities of the members of the legal profession. Because the experiences of poor litigants are unfamiliar to judges, socioeconomic bias may infect a judge's own decision-making processes.[75]

For example, a study commissioned by the Georgia Supreme Court in the mid-1990's concluded that the justice system is biased against the poor.[76] According to an assistant district attorney who participated in the Georgia study, poor people were more likely to end up in court, notwithstanding their skin color, because "the problems lie not directly with race but rather with financial and social problems."[77] The study included "attitude surveys" of judicial officers, court clerks, and lawyers. Survey comments suggested that "[t]he real evil is not racial bias but lack of empowerment for the poor; [p]oor people of little education are victims of bias; [t]his is also a class/money problem; i.e.—the better dressed, educated, and wealthier litigants are treated better by everyone in the court system."[78] As the study noted, socioeconomic bias in courtrooms affects minority populations more seriously, since these populations are a "greater portion of the economically and educationally

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[73] Ochi, *supra* note 30, at 8 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 50 (1967)).

[74] Budd, *supra* note 71, at 773 ("This conception of the indigent influences judicial perceptions as well.").

[75] Nugent, *supra* note 63, at 49.

[76] Ga. Supreme Court Comm'n on Racial & Ethnic Bias in the Court Sys., *Let Justice be Done: Equally, Fairly, and Impartially*, 42 GA. ST. U. L. REV. 687, 700 (1996).

[77] *Id.*

[78] *Id.*

disadvantaged."[79] To compound the problem, persons living in poverty are increasingly marginalized and alienated from other members of society.[80]

Thus, those seeking to quantify socioeconomic bias on the part of judges face a daunting challenge: The elusive nature of socioeconomic bias, and the fact that it is often obscured by racial or gender bias, make it difficult bias to recognize. In fact, the more insidious form of socioeconomic bias is likely to be implicit—an unconscious bias against the poor on the part of the judges.[81]

Of course, many judges are sympathetic to the plight of the economically disadvantaged, and actively work to be aware of their own personal biases.[82] As discussed in Part II.C *infra,* this awareness may work to reduce the prevalence of biases against poor litigants in courtrooms.[83] However, not all biases are overtly recognized and consciously reduced; unconscious beliefs about poor people may play a larger role in judicial decision-making than has been previously acknowledged.

3. The Challenge of Identifying Implicit Bias

Any type of bias can be explicit or implicit. The term "explicit bias" is used to indicate that a person recognizes his or her bias against a particular group, believes that bias to be appropriate, and acts on it.[84] This is the type of bias that "people knowingly—and sometimes openly—embrace." [85]

Explicit bias on the basis of race or ethnicity has declined significantly over time, and is now mostly viewed as "unacceptable" in society.[86] As discussed above, judges are prohibited by the ABA Model Code of Judicial Conduct from displaying such bias on the bench.[87]

Implicit bias is a more subtle form of bias. It is unintentional,[88] representing "unconscious mental processes based on implicit attitudes or implicit stereotypes which play an often unnoticed role in day to day decision-making."[89] An individual

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[79] *Id.* at 701.

[80] Budd, *supra* note 71, at 772.

[81] *See supra* Part II.C.

[82] Torres, *supra* note 35, at 854 (" . . . it is important to think about the way in which working-class Chicana/o defendants, law students, and lawyers will be experienced by judges, juries, professors, and opposing council [sic] who may be of a different class, ethnic, or racial background.").

[83] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 963-64 (2006).

[84] Irene V. Blair et al., *Unconscious (Implicit) Bias and Health Disparities: Where do We Go from Here?*, 15 PERMANENTE 71, 71 (2011).

[85] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

[86] Blair et al., *supra* note 84, at 71.

[87] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(b) (2011).

[88] Blair et al., *supra* note 84, at 71.

[89] John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 3 (2010).

who is careful not to display explicit bias against a particular group may nonetheless be influenced by "situational cues," such as a person's accent or race, which are feeding unconscious stereotypes.[90] This type of bias is "largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly . . . that people have no time to deliberate."[91]

Even those persons who diligently and consciously combat their own explicit biases may be influenced to act on the basis of unconscious prejudices.[92] This raises a particular problem for judges, who are directed by the Code to act free of bias and risk being accused of judicial misconduct if they make decisions in favor of one group over another. This also raises concerns for litigants in courtrooms, who may be disadvantaged by a judge's prejudice without the litigants—or even the judge—being aware of it. For example, well-meaning judges may not intend to adjudicate cases in accordance with social stereotypes regarding the poor. However, the "caricature of the poor" may influence a judge's decision "whether or not the courts consciously acknowledge the connection."[93]

Thus, it is critical to recognize the role that implicit bias may play in judicial decision-making. But given the unconscious and automatic nature of implicit bias, how can its existence be identified or measured? Simply asking survey questions, as did the Georgia Supreme Court in the study referenced in Part II.C.2., may expose explicit bias but will not reveal the presence of implicit bias.

i. The Implicit Association Test

Recognizing this problem, a psychologist from the University of Washington developed the "Implicit Association Test" (IAT) in 1995 to measure unconscious biases.[94] The computerized test "seeks to measure implicit attitudes by measuring their underlying automatic evaluation."[95]

The IAT can take different forms, and has been used in hundreds of studies spanning many disciplines.[96] The most common test "consists of a computer-based sorting task in which study participants pair words and faces."[97] The test presumes

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[90] Blair et al., *supra* note 84, at 71; Mahzarin R. Banaji et al., *How (Un)ethical are You?*, 81 HARV. BUS. REV. 56, 57 (2003).

[91] Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006); *see also* Anthony G. Greenwald, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998) ("Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer's awareness of that causation.").

[92] Banaji et al., *supra* note 90, at 57 (implicit bias "is distinct from conscious forms of prejudice, such as overt racism or sexism.").

[93] Budd, *supra* note 71, at 774.

[94] Banaji et al., *supra* note 90, at 57; Blair et al., *supra* note 84, at 71. For access to the IAT, see *Project Implicit*, https://implicit.harvard.edu/implicit/demo/takeatest.html (last visited Jan. 23, 2013)

[95] Greenwald, *supra* note 91, at 1464.

[96] Blair et al., *supra* note 84, at 72 ("including psychology, health, political science, and market research.").

[97] Rachlinski et al., *supra* note 85, at 1198.

that participants will respond more quickly to a concept that has a stronger association for that particular individual.[98] Subjects are asked "to rapidly classify words or images displayed on a computer monitor as 'good' or 'bad.'"[99] The speed with which the participants respond demonstrates the "well-practiced associations" they hold between a particular object and attribute, which essentially measures their implicit beliefs.[100] In other words, the researchers infer that "the larger the performance difference, the stronger the implicit association or bias for a particular person."[101]

There is some scholarly dispute about the usefulness of IAT results in predicting actual behavior.[102] For example, some scholars argue that the IAT may not be a measure of unconscious bias, but rather a "subtle measure of conscious bias that study participants are unable to conceal."[103]

Despite this debate about the IAT's limitations, legal scholars have used IAT results over the last decade to examine implicit biases in antidiscrimination law,[104] including employment discrimination law,[105] and bias in jury selection.[106] One study, conducted in 2009, analyzed IAT results from a large sample of trial judges nationwide.[107]

Led by Jeffrey Rachlinski, a professor at Cornell Law, the study sought to understand why racial disparities persist in the criminal justice system. Judges were asked to complete the IAT in a form "comparable to the race IAT taken by millions

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[98] Blair et al., *supra* note 84, at 72.

[99] Irwin & Real, *supra* note 89, at 3. For example, in tests measuring implicit racial bias, white respondents tend to respond faster "when 'black and bad' items require the same response and the 'white' and 'good' items require another response, compared to when 'black' and 'good' responses are the same and 'white' and 'bad' responses are the same." *Id.* at 72.

[100] IMPLICIT RACIAL BIAS ACROSS THE LAW 17 (Justin D. Levinson & Robert J. Smith eds., 2012).

[101] Blair et al., *supra* note 84, at 72.

[102] *See, e.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?*, 58 EMORY L.J. 1053, 1064 (2009) ("In IAT results, 'levels of implicit bias consistently diverge from levels of conscious bias, but it is difficult to know whether that apparent divergence reflects a real underlying difference or is merely an artifact of the systematic understatement of levels of conscious bias. Conscious bias might well be underreported.'"); *see also* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons From "Big Judge Davis*,*"* 99 KY. L.J. 259, 321 (2010-2011).

[103] Banks & Ford, *supra* note 102, at 1111.

[104] Jolls & Sunstein, *supra* note 91.

[105] Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

[106] Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010). For a comprehensive look at implicit racial bias in various areas of law, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100.

[107] Rachlinski et al., *supra* note 85, at 1232.

of study participants around the world."[108] The study found that implicit biases on the basis of race were "widespread" among judges.[109] In addition, "these biases can influence their judgment."[110] On a positive note, the study's authors noticed that judges were aware of potential biases and, if motivated to do so, could compensate for implicit bias and avoid its influence.[111]

It is perhaps no surprise that "judges, like the rest of us, possess implicit biases."[112] However, the results of the Rachlinski study present significant implications for judicial ethics guidelines, and the dialogue must be broadened in scope. If judges are found to harbor implicit biases based on race, it is reasonable to assume that implicit biases based on other factors, including socioeconomic status, may also subtly influence judicial decision-making. [113]

ii. How Can We Measure Implicit Socioeconomic Bias?

The IAT has not yet been used to analyze implicit *judicial* bias based on socioeconomic status. However, two recent studies used the IAT to analyze socioeconomic bias in other contexts.

The first study, published by the American Medical Association (AMA) in 2011, analyzed IAT scores in order to "estimate unconscious race and social class bias among first-year medical students" at the Johns Hopkins School of Medicine in Baltimore.[114] The IAT portion of the study used a race test and a "novel" social class IAT to identify implicit prejudices based on membership in upper or lower social classes.[115] The study included clinical vignettes based on race and social class, in order to analyze the "relationship between unconscious bias and clinical assessments and decision making."[116]

The study produced striking results: 86% of the first-year medical students displayed "IAT scores consistent with implicit preferences toward members of the upper class."[117] These results were "significantly different" from the student's stated preferences, meaning that implicit bias was prevalent in a majority of the medical

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[108] *Id.* at 1209.

[109] *Id.* at 1225.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1232.

[113] Banaji et al., *supra* note 90, at 56 (2003) (at least 75% of IAT test takers show implicit biases "favoring the young, the rich and whites."); *id.* at 58.

[114] Adil H. Haider et al., *Association of Unconscious Race and Social Class Bias with Vignette-Based Clinical Assessments by Medical Students*, 306 J. AM. MED. ASS'N 942 (2011).

[115] *Id.* at 942. The social class IAT used terms such as "wealthy," "well-to-do," "poor," and "disadvantaged." *Id.* at 943. This social class portion of the IAT has not yet been completely validated. *Id.*

[116] *Id.* at 944. The high and low socioeconomic class determinations were completed using patient occupations. *Id.*

[117] *Id.* at 949. 69% of the students displayed implicit preferences toward white people. *Id.*

students despite their spoken beliefs that they did not hold such prejudices.[118] These findings have important implications for the medical profession, since implicit social class biases held by physicians may be a contributing factor to disparities in the health care system.[119]

The second study, conducted by Irish professors from University College Dublin and the University of Limerick, was also published in 2011. This study sought to "establish the presence of prejudice against people from disadvantaged areas" in the context of social attitudes in Ireland, in order to examine how such prejudice creates "further social exclusion."[120] The study's authors created an IAT using pleasant and unpleasant words with pictures of Limerick city landmarks and disadvantaged areas.[121] Of the 214 Irish participants, 88 were residents of disadvantaged areas, while 126 were from other, more affluent areas.[122]

Like the AMA study, the Limerick study revealed significant implicit bias on the basis of socioeconomic status. In fact, all participants exhibited negative associations with persons from the disadvantaged parts of Limerick City.[123] Participants who themselves resided in disadvantaged areas were no less biased.[124] The portion of the study examining explicit bias found similar outcomes. All participants viewed persons from disadvantaged areas as "less concerned for others and less responsible" than individuals from non-disadvantaged areas.[125] The study's authors concluded that residents of poorer communities face prejudice not just on the part of outsiders, but also from within their own communities.[126]

Hence both studies examining implicit bias based on socioeconomic class identified the presence of such bias, one in a group of American medical students and the other in an economically diverse group of Irish residents. Together, these results offer evidence to support the theory that implicit socioeconomic bias exists in varied populations.

There is no reason to believe that judges are exempt from implicit bias against the poor and disadvantaged. In light of the extraordinary discretionary power granted to judges in the United States, and the potential impact of judicial determinations on the lives of individual litigants, this possibility could hold

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[118] *Id.* The discrepancy between results showing implicit bias and self-reported explicit attitudes is a common feature of IAT tests. *See* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 17-18

[119] Haider et al., *supra* note 114, at 949.

[120] Niamh McNamara et al., *Citizenship Attributes as the Basis for Intergroup Differentiation: Implicit and Explicit Intergroup Evaluations*, 21 J. CMTY. APPLIED SOC. PSYCH. 243, 246 (2011).

[121] *Id.* at 247.

[122] *Id.*

[123] *Id.* at 251.

[124] *Id.* Other IAT studies have also found individuals from "bias-affected groups" who "sometimes harbor implicit biases against their own group." IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 18.

[125] McNamara et al., *supra* note 120, at 251.

[126] *Id.* at 252.

significant consequences for the fairness of the judicial system. It is also crucial to identify implicit biases because recognition of such bias may enable judges to minimize its influence.[127]

How can we measure whether implicit bias on the basis of socioeconomic status exists in American courtrooms? In the absence of systematic empirical data, this Article will examine cases demonstrating the prevalence of implicit bias against the poor in American courtrooms.

III. IMPLICIT SOCIOECONOMIC BIAS IN FOURTH AMENDMENT AND CHILD CUSTODY CASES

A. Implicit Socioeconomic Bias in Fourth Amendment Cases

As the federal courts slowly chip away at the constitutional rights of poor people,[128] the implicit biases of federal judges who are removed from the realities of poor people are becoming increasingly apparent. This section will examine two recent Fourth Amendment cases through the lens of judicial socioeconomic bias. These cases reveal the failures of federal judges to appreciate the unique challenges faced by low-income populations.

The first case, *United States v. Pineda-Moreno*, is notable for the dissenting opinion written by Ninth Circuit Chief Judge Alex Kozinski.[129] The police came onto Mr. Pineda-Moreno's driveway in the middle of the night to attach a GPS tracking device to his car.[130] Using this device, police were able to track Mr. Pineda-Moreno's movements.[131] After he was charged with conspiracy to manufacture marijuana and manufacturing marijuana, Mr. Pineda-Moreno sought to suppress the evidence obtained from the GPS tracking device.[132]

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[127] Rachlinski et al., *supra* note 85, at 1225.

[128] *See, e.g.*, Sanchez v. Cnty of San Diego, 464 F.3d 916 (9th Cir. 2006); *see also* Budd, *supra* note 71, at 751; Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

[129] United States v. Pineda-Moreno, 617 F.3d 1120, 1120 (9th Cir. 2010). Eighteen months after the opinion discussed in this Article was published, the United States Supreme Court held in *United States v. Jones* that attachment of a GPS tracking device to a vehicle, and subsequent use of the GPS device to monitor the vehicle's movements on public streets, was a Fourth Amendment search. United States v. Jones, 132 S. Ct. 945, at Syllabus (2012). In light of the *Jones* decision, the Supreme Court vacated the judgment in *Pineda-Moreno* and remanded the case to the United States Courts of Appeals for the Ninth Circuit. The Ninth Circuit held on remand that the police's conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent, and suppression of the GPS evidence was not warranted. United States v. Pineda-Moreno, 688 F.3d 1087, 1091 (9th Cir. 2012). The Supreme Court denied a petition for writ of certiorari in the case on January 22, 2013. Pineda-Moreno v. United States, 133 S. Ct. 994 (2013). The ultimate disposition of this case does not impact the observations about socioeconomic bias made by Chief Judge Kozinski in his dissent to the denial of rehearing en banc. Nor does the Ninth Circuit's decision on remand affect the analysis described herein.

[130] *Pineda-Moreno*, 617 F.3d at 1121.

[131] *Id.*

[132] *Pineda-Moreno*, 591 F.3d at 1214, *vacated*, 132 S. Ct. 1533 (2012).

Pineda-Moreno claimed that the police actions on his property violated his Fourth Amendment search and seizure rights.[133] The court disagreed, reasoning that the driveway was "only a semi-private area," and that "'[i]n order to establish a reasonable expectation of privacy in [his] driveway, [Pineda-Moreno] must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it.'"[134]

Pineda-Moreno's petition for rehearing en banc was denied.[135] In his dissenting opinion, Chief Judge Kozinski noted the legal erosion of Fourth Amendment privacy protections. He specifically discussed the connection between poverty and diminished Fourth Amendment rights.[136] Recognizing that wealthy persons are able to protect their privacy with "the aid of electric gates, tall fences, security booths, remote cameras, motions sensors and roving patrols," Chief Judge Kozinski explained that those who are not able to afford such protections will be subject to police searches on their property.[137] In contrast, if Mr. Pineda-Moreno had been able to afford a gate, a garage, or some other method of shielding his car from the street, his privacy rights would have been protected.[138]

Chief Judge Kozinski was clearly frustrated by his fellow judges' failure to recognize how their ruling would impact poor people. The Ninth Circuit judges either did not understand or chose to ignore the fact that this decision created a two-tiered structure of privacy rights: Wealthy people with gates and garages would be protected from police incursion onto their properties, while poor people who parked on the street would be subject to police searches without Fourth Amendment protection. This is the crux of implicit socioeconomic bias: Judges without exposure to the lives of low-income people simply don't appreciate the realities faced by poor individuals. As a result, these judges make critical legal decisions from a place of privilege, detrimentally impacting people from lower economic classes.

Similar implicit bias against the poor is apparent in *Sanchez v. County of San Diego,* another Fourth Amendment case.[139] San Diego County implemented a program in 1997 requiring all welfare applicants to consent to a warrantless home visit from an investigator.[140] This mandatory visit, which included an interview and a "walk through" the home by district attorney fraud investigators, was designed to ensure that applicants were not committing welfare fraud.[141] An applicant who

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[133] *Id.*

[134] *Id.* (quoting Maisano v. Welcher, 940 F.2d 499, 503 (9th Cir. 1991)).

[135] *Pineda-Moreno*, 591 F.3d at 1215.

[136] *Pineda-Moreno,* 617 F.3d at 1123; *see also* Budd, *supra* note 71, at 765.

[137] *Pineda-Moreno,* 617 F.3d at 1123.

[138] *Id.*

[139] Sanchez v. Cnty of San Diego, 464 F.3d 916, 916 (9th Cir. 2006). When the Ninth Circuit denied Rocio Sanchez's petition for rehearing en banc, Judge Harry Pregerson filed a dissenting opinion noting that, "This case is nothing less than an attack on the poor." *Id*. at 969 (Pregerson, J., dissenting).

[140] *Id.* at 918.

[141] *Id.* at 919.

refused the home visit would be deemed as failing to "cooperate" and would be denied benefits.[142]

Welfare applicants filed a class action lawsuit claiming that the home visit program violated the U.S. and California Constitutions and California welfare regulations. The U.S. District Court held the program constitutional, relying on the U.S. Supreme Court's determination in *Wyman v. James* that "rehabilitative" visits to welfare recipients' homes were constitutional.[143]

When the case reached the Ninth Circuit, a divided panel affirmed the lower court's decision. The majority opinion, written by Judge Tashima, equated San Diego County's home visits with the rehabilitative home visits at issue in *Wyman.* Since the visits were not related to a criminal investigation, and welfare applicants could deny consent to the home visits without incurring criminal consequences, the majority held that the home visits were reasonable.[144] Additionally, the majority held that the County's welfare system constitutes a "special need" beyond general law enforcement purposes, finding that, on balance, the government interests at stake justified the privacy intrusion of a home visit.[145] Judge Raymond C. Fisher dissented from the majority opinion, writing that the San Diego program in *Sanchez*, which allowed district attorney investigators with no social work training to enter welfare applicants' homes for the purposes of fraud detection, differed from the rehabilitative visits at issue in *Wyman.*[146]

The majority opinion in *Sanchez* has significant implications for the privacy rights of poor people, and the case has been thoroughly considered in that context by other scholars.[147] From a judicial ethics perspective, the majority's opinion exposes implicit socioeconomic bias and a profound disregard for the realities of poor people.

For example, explaining the court's justification for the premise that home visits are not searches under the Fourth Amendment, Judge Tashima wrote that "there is no penalty for refusing to consent to the home visit, *other than denial of benefits*."[148] But as the Supreme Court recognized in *Goldberg v. Kelly,* welfare aid represents "the very means by which to live" for poor people.[149] For many welfare applicants, receipt of benefits represents the difference between life and death. Yet in effect, the *Sanchez* court assumed that welfare applicants do not actually need benefits.[150] The

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[142] *Id.*

[143] *Id.* at 922-23; Wyman v. James, 400 U.S. 309, 320 (1971); *see also* Recent Cases, *Constitutional Law—Fourth Amendment—Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits*—Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006), 120 HARV. L. REV. 1996, 1997 (2007).

[144] *Sanchez*, 464 F.3d at 925.

[145] *Id.* at 927-928.

[146] *Id.* at 932 (Fisher, J., dissenting).

[147] *See* Budd, *supra* note 71, at 771 (2011); Recent Cases, *supra* note 143, at 1996.

[148] *Sanchez*, 464 F.3d at 921 (emphasis added).

[149] Goldberg v. Kelly, 297 U.S. 254, 264 (1970); *see also* Recent Cases, *supra* note 143, at 2002.

[150] Recent Cases, *supra* note 143, at 2002.

court's treatment of welfare aid as an option which can be easily denied "evinces a stark refusal to acknowledge the dire situation of welfare recipients."[151]

Judge Fisher's dissent, like Chief Judge Kozinski's in *Pineda-Moreno*, pointed out that the court's analysis would likely be different if it were the judges' own residences subject to intrusion by government investigators. Observing that the San Diego home visit program essentially permits "snooping" in "medicine cabinets, laundry baskets, closets and drawers for evidence of welfare fraud," Judge Fisher doubted "my colleagues in the majority would disagree that an IRS auditor's asking to look in such places within their own homes to verify the number of dependents living at home would constitute snooping."[152]

Judge Fisher's point highlights the implicit socioeconomic bias in this case. According to the majority, poor welfare recipients being forced to open their homes to government examination makes sense, since the government must ensure poor people are not committing fraud. But requiring wealthy individuals to do the same thing for purposes of detecting tax fraud would be unjustifiable.

Embedded in this line of reasoning is the unspoken belief that poor people are often dishonest and deserving of government inspection.[153] The *Sanchez* court, "while not confessing bias" in an explicit manner, demonstrated bias "without apology or pretense" and embraced "the stereotype of the immoral poor."[154] This is, of course, an unmistakable example of implicit socioeconomic bias.

Statements made during oral argument in *Sanchez* illuminate this point more clearly. Judge Kleinfeld, perhaps inadvertently, revealed a fundamental misconception of the lives of poor people:

> I mean, you walk in and you see the $5,000 widescreen TV, and the person says, "oh, I have all this trouble supporting my children 'cause I don't have a man to help me in the house, and there's obviously a man to help her in the house—and that's seeing if the charity is going where it's supposed to go . . . . And you open a closet and you see four suits . . . and the golf clubs of the person that doesn't live there, supposedly—same thing, isn't it?[155]

As Professor Jordan Budd explains, when a federal judge adjudicating a welfare case "suggests that the question plausibly turns on the prospect of welfare recipients cashing government checks to help cover the cost of greens fees, business attire, and in-home theatre systems, the reality of judicial bias is apparent."[156] Even Judge Kleinfeld's choice of words is revealing: According to Supreme Court precedent, welfare benefits are not considered to be "charity."[157] Much like the Supreme Court

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[151] *Id.*

[152] *Sanchez*, 464 F.3d at 936.

[153] For a discussion of stereotypes about the poor, see *supra* Part II.C.2.

[154] Budd, *supra* note 57, at 406.

[155] *Id.* at 403.

[156] *Id.*

[157] Recent Cases, *supra* note 143, at 2001-02 ("The *Sanchez* majority, by dismissing the unconstitutional conditions doctrine—according to which 'government may not grant a

judges excoriated by Justice Marshall in *Kras* for their lack of awareness of the real challenges facing poor people, the majority in *Pineda-Moreno* and *Sanchez* came to their conclusions from mistaken assumptions about people who live in an economic class different from their own. These judicial assumptions have consequences; the implicit beliefs about poverty underlying these court opinions resulted in a substantial abrogation of the constitutional protections of poor persons.

B. Implicit Socioeconomic Bias and Child Custody Determinations

Federal judges are not the only members of the bench who exhibit implicit socioeconomic bias. In family court, child custody determinations may also be affected by implicit judicial bias against poor parents.

The general standard for determining which parents should take custody of a child is the "best interests of the child" test, which "asks judges to determine custody 'according to the best interests of the child' and to 'consider all relevant factors.'"[158] Most states and the District of Columbia provide statutory factors to be considered in such cases.[159] A handful of states draw the relevant factors from common law.[160]

Some states require judges to consider the capacity of a parent to provide a child with material needs, including food, clothing, and medical care.[161] It is certainly true that the ability to provide necessary resources should be considered in determining where to place a child.[162] But beyond these basic needs, most states do not include the wealth of either parent as a factor to consider in child custody cases. Indeed, a few states, such as California, prohibit judges from considering "the relative economic positions of two parents" as a "basis upon which to base a determination of child custody."[163]

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benefit on the condition that the beneficiary surrender a constitutional right'—reverted to a pre-*Goldberg* vision of welfare.").

[158] Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2075 (1993).

[159] *See, e.g.*, D.C. CODE § 16-914(a)(3)(A)-(Q) (2001); ALASKA STAT. ANN. § 25.24.150(C)(1)-(9) (West 2012); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(I)-(XI) (West 2012); CONN. GEN. STAT. ANN. § 46b-56(c)(1)-(16) (West 2012); DEL. CODE ANN. tit. 13, § 722(a)(1)-(8) (West 2012); FLA. STAT. ANN. § 61.13(3)(a)-(t) (West 2012); GA. CODE ANN. § 19-9-3(a)(3)(A)-(Q) (West 2012); IDAHO CODE ANN. § 32-717(1)(a)-(g) (West 2012); 750 ILL. COMP. STAT. ANN. 5/602(a)(1)-(10) (West 2012); IND. CODE ANN. § 31-17-2-8(1)-(8) (West 2012); NEV. REV. STAT. ANN. § 125.480(4)(a)-(l) (West 2012); VA. CODE ANN. § 20-124.3(1)-(10) (West 2012).

[160] *See, e.g.*, Martin v. Martin, 623 So. 2d 1167, 1169 (Ala. Civ. App. 1993); Wagner v. Wagner, 674 A.2d 1, 19 (Md. 1996); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983); Martin v. Martin, 846 N.Y.S.2d 696 (N.Y. App. Div. 2007); Johnson v. Johnson, 163 S.E.2d 229,232 (S.C. 1968); Wiedenfeld v. Wiedenfeld, 774 N.W.2d 288, 291 (S.D. 2009); Vazquez v. Vazquez, 292 S.W.3d 80, 85 (Tex. Ct. App. 2007).

[161] *See, e.g.*, LA. CIV. CODE ANN. art. 134(3) (2012); MICH. COMP. LAWS ANN. § 722.23(c) (West 2012); VT. STAT. ANN. tit. 15, § 665(b)(2) (West 2012).

[162] Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 220 (2000) ("The view that financial resources are not relevant to children's positive experience of life is rightly dismissed as 'idealistic.'").

[163] Burchard v. Garay, 724 P.2d 486 (Cal. 1986); *see also* R.I. GEN. LAWS ANN. § 15-5-16(d)(2) (West 2012) ("In regulating the custody and determining the best interest of children,

Despite these statutory and common law guidelines, child custody is an area of adjudication with a great deal of judicial discretion.[164] This discretion may give "free reign to . . . distorting unconscious biases, resulting in custody awards that are not necessarily in the best interests of a child."[165] Judicial discretion, coupled with the fact that most judges are economically privileged and may "exaggerate" the importance of wealth in a child's life, creates the potential for implicit socioeconomic bias in child custody cases.[166]

For example, the Supreme Court of North Dakota recently reversed a child custody determination in *Duff v. Kearns-Duff*, holding that the lower court impermissibly relied on wealth as a relevant factor.[167] North Dakota's statutory factors do not include the consideration of economic status,[168] and case precedent explicitly held that "money alone" does not signify a parent's inclination to provide for the children.[169] Even so, the lower court in *Duff,* faced with making a "difficult choice for custody between two apparently fit parents," resolved the case by relying on the parties' recent financial contributions to the marriage.[170] Since the mother in *Duff* was a radiologist earning $600,000 annually, while the father was enrolled in a doctoral program at North Dakota State University, the mother had supported the family "almost exclusively" for the last few years.[171] The lower court held that the mother's income should be viewed in her favor, and granted custody to her.[172]

The father appealed to the state Supreme Court, arguing the lower court's decision to award custody to the parent earning the most money was erroneous.[173] The Supreme Court agreed, rejecting the idea that a parent's financial contribution to a marriage is rationally related to the best interests of the children.[174] The Supreme

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the fact that a parent is receiving public assistance shall not be a factor in awarding custody."); OHIO REV. CODE ANN. § 3109.04(F)(3) (West 2012) ("When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition."); VT. STAT. ANN. tit. 15, § 665(c) (West 2012) ("The court shall not apply a preference for one parent over the other because of the financial . . . resources of a parent.").

[164] For an assessment of judicial ethics issues in juvenile courts, see Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court,* 24 GEO. J. LEGAL ETHICS 97 (2011).

[165] Frantz, *supra* note 162, at 227.

[166] *Id.*

[167] Duff v. Kearns-Duff, 792 N.W.2d 916 (N.D. 2010).

[168] N.D. CENT. CODE ANN. § 14-09-06.2(1) (West 2012).

[169] *Duff,* 792 N.W.2d at 920 (citing P.A. v. A.H.O., 757 N.W.2d 58 (N.D. 2008)).

[170] *Id.* at 921.

[171] *Id.* at 920.

[172] *Id.*

[173] *Id.* at 919.

[174] *Id.* at 920.

Court held that the lower court misapplied state law with its reliance on financial contributions, and remanded the case for reconsideration.[175]

The lower court's decision in *Duff* was clearly influenced by the belief that a wealthier parent is better able to raise her children. As the Supreme Court pointed out, this is not a legally correct assumption upon which to build a child custody determination. But the fact that the lower court defied case precedent to include wealth as a relevant factor indicates the presence of socioeconomic bias: The father was penalized solely for the fact that he made less money than his spouse.

This case exemplifies the complex nature of socioeconomic bias. The lower court arguably displayed explicit socioeconomic bias in his decision, since the mother's wealth was openly relied upon as the basis for the custody decision. However, neither the North Dakota Supreme Court nor any other observer has called for the lower court judge to be disciplined for socioeconomic bias. Thus, though the judge's assumptions about wealth were inaccurate, legally erroneous, and served as the basis for judicial bias, his assumptions were not questioned by judicial disciplinary authorities.

Yet, this is also a case of *implicit* socioeconomic bias; without any proof, the lower court judge presumed that wealth equaled the best interests of the children. Nothing in the case record would support this assumption. To reach this conclusion, the judge must have held an implicit belief that a wealthy parent is a better parent than a less wealthy parent.

A similar pattern of implicit socioeconomic bias is apparent in *West v. West,* a 2001 case.[176] In *West,* the Supreme Court of Alaska reversed a decision granting sole custody to a father on the ground that the father was going to remarry. [177] The mother relied on her parents to assist with caring for her child. She could not afford to stay home all day with her son, but instead needed to work for a living.

In a conclusory fashion, the lower court had accepted that living in a two-parent household, rather than with a less wealthy single working mother, would be in the best interest of the child. The Supreme Court vacated and remanded the case, holding that the lower court's "assumption that a divorced parent who remarries can provide a better home than an otherwise equally competent parent who remains single" is erroneous.[178]

The Supreme Court chastised the lower court judge for its "unexplained assumption that the added physical convenience of in-home care that [the child] might receive from his new second parent" outweighed the "less tangible, but potentially vital emotional benefits he might receive by maintaining his close and

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[175] *Id.* at 921.

[176] Some child custody cases demonstrate implicit socioeconomic bias with an erroneous emphasis on a parent's need to place a child in childcare while the parent works. *See, e.g.*, *In re* Marriage of Bryan and Shannan Loyd, 106 Cal. App. 4th 754 (2003) (finding that trial court's decision based on fact that mother could provide better care for children because she was home during the day, in contrast to father's need to place children in daycare while he worked, was an abuse of discretion); Ireland v. Smith, 214 Mich. App. 235, 246 (1995) ("[T]rial court committed legal error in considering the 'acceptability' of the parties' homes and child care arrangements"; media frenzy surrounding case created an appearance of bias requiring a different judge to hear the case on remand. *Id.* at 251.).

[177] West v. West, 21 P.3d 838 (Ala. 2001).

[178] *Id.* at 839.

already-established ties to [his mother] and his maternal grandparents."[179] The Supreme Court also found fault with the lower court for ignoring the potential stress that comes from living with a step-parent.[180]

The lower court judge in *West* manifested implicit bias based on socioeconomic grounds. The judge did not overtly cite financial considerations in his decision, and there was no evidence in the record that the child would receive superior care with his father and stepmother than with his single working mother.[181] Nevertheless inherent in the lower court's conclusion that the father's two-parent household "will be the better one for [the child]'s future"[182] is the implicit belief that a stay-at-home stepparent who could afford not to work would provide a better home than a working parent. If this belief were permitted to guide child custody determinations, the wealthier parent who could stay at home would always be deemed the better parent.

These cases raise troubling implications for family court adjudications. While some degree of judicial discretion is necessary in family court, judges should not be permitted to be influenced by stereotypes regarding the connection between economic wealth and one's fitness as a parent. In addition, there are fewer published appellate opinions from family courts than from federal district courts.[183] As a result, litigants may not even be aware that their financial status is being inappropriately considered by the judge deciding their case. These risks highlight the need for action to address implicit socioeconomic bias in judicial determinations.

IV. PROPOSED RECOMMENDATIONS

The problem of implicit socioeconomic bias on the part of judges is increasingly recognizable, raising significant concerns for judicial ethics observers. Litigants must be assured of fairness when they enter a courtroom, regardless of their economic status. Although this elusive problem may not be easily resolved, the proposals discussed herein represent low-cost ways to address these concerns.

A. Judicial Discipline: An Ineffective Solution

A deceptively simple solution to the problem of implicit socioeconomic bias on the bench would be judicial discipline: Reprimand or remove those judges who violate the Code's prohibition of socioeconomic bias. Unfortunately, judicial discipline under the Code in its current form would not succeed. Recognizing that most incidents of judicial socioeconomic bias are based on implicit (and therefore unconscious) biases, "judges may not be aware of the errors they are making. The result is still corruption and bias, but this explanation does not rely on some ethical

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[179] *Id.* at 843.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 842.

[183] In 2011, only twenty-two published appellate opinions originated from family courts. Westlaw search of database "California State Reported Cases" using search terms (DA(aft 12-31-2010 & bef 01-01-2012) & "family court")). In 2011, there were 422 published opinions from California District Courts alone. Westlaw search of database "California Federal District Court Reported Cases" using search terms DA(aft 12-31-2010 & bef 01-01-2012).

failing on the part of the judge."[184] Indeed, no observer has called for disciplining the Ninth Circuit judges who demonstrated implicit socioeconomic bias in the *Pineda-Moreno* or *Sanchez* cases, or the judges in the child custody cases discussed above. Thus, disciplining judges for unconscious biases is not a realistic solution.

But if "instead of worrying about crooked judges, we should worry about decent judges who are susceptible to the same sort of cognitive errors that affect the rest of us," how can the justice system (and judicial disciplinary systems) ensure that judicial decisions are fair and unbiased?[185] The natural place to implement more effective debiasing strategies is within the document designed to guide judicial behavior: The ABA Model Code of Judicial Conduct.

B. Clarifying the ABA Model Code of Judicial Conduct

Several changes in the Code would bring awareness of implicit socioeconomic bias on the bench. First, the Code must properly define the term "socioeconomic" in its Terminology section. The definition should be more specific than that offered by *Webster's New International Dictionary*,[186] and should include the following language:

> Socioeconomic: of, relating to, or involving a combination of social and economic factors, including living situation, employment status, financial net worth, and family circumstances.

This expanded definition would instruct judges about the varied factors within the term "socioeconomic," offering clear guidance to judges seeking to avoid socioeconomic bias on the bench. Moreover, because socioeconomic bias is often unconscious, expanding this definition would make judges more aware that this type of bias exists.

Second, the Code should bring much-needed focus to the problem of socioeconomic bias by removing this form of bias from the enumerated list of prohibited bias. Rather than being listed as the second-to-last form of prohibited biases, socioeconomic bias merits a separate sentence. A sentence should be included at the end of Rule 2.3(b) reading:

> A judge shall pay particular attention to avoid bias or prejudice on the basis of a litigant's socioeconomic status.

Singling out socioeconomic bias in this way would encourage judges to reflect on the possibility that their own economic status affects their judicial decision-making process. In addition, it would empower litigants by stressing the importance of the Code's prohibition of this form of bias. Litigants who believe their cases were inappropriately influenced by socioeconomic bias would likely feel empowered to challenge a judicial determination with this stronger Code language to support their claims.

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[184] W. Bradley Wendel, Symposium, *Judicial Ethics and Accountability: At Home and Abroad: The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 38-39 (2010).

[185] *Id.*

[186] *See supra* Part II.C.1.

Third, the Code must include some reference to the problem of implicit bias. This issue was raised during the public comment period for the 2007 revisions to the Code. In a statement submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Jennifer Juhler of the Iowa State Court Administrator's Office and Judge Mark Cady of the Iowa Supreme Court recommended the following additions:

> (1)Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice.
> (2)A judge should take part in activities designed to uncover subconscious bias and to learn as much about how to understand the role of such bias in decision-making. Each judge must be diligent to a process of self-examination to minimize the impact of personal bias in the administration of justice.[187]

These suggested comments were not adopted by the ABA Commission. In light of studies demonstrating the prevalence of implicit bias, as well as cases revealing implicit socioeconomic bias on the bench, the Commission's rejection of these comments was inappropriate. As the history of the Code of Judicial Conduct demonstrates, judicial standards should evolve with our new understanding of implicit bias.

Implicit bias may be difficult to identify, especially in the elusive form of socioeconomic bias, but the Code should bring awareness to judges that this type of bias may be pervasive. Inclusion of the comments above would pressure judges to consider implicit bias in all forms. Since many persons can overcome implicit biases with enough knowledge and intent to do so,[188] the Code's recognition of this problem would serve as a catalyst to persuade judges to minimize implicit bias on the bench.

C. Judicial Trainings

Clarifying the Code is not the only way to minimize implicit socioeconomic bias. Indeed, some would argue that the impact of the Code is limited, since "[j]udicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct."[189]

Although judges may not regularly review the Code of Judicial Conduct, all judges must attend regular educational trainings. For example, every new judge in California takes part in two ethics courses within the first year on the bench, one within the first few weeks of a judicial appointment and the second within the first year of appointment.[190] Federal judges are also thoroughly trained in their first

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[187] Jennifer Juhler, Domestic Abuse Coordinator, Iowa State Court Adm'r Office & Justice Mark Cady, Iowa Supreme Court, Morality, Decision-Making, and Judicial Ethics (not dated) (unpublished article submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_code_cady_undatedddt_summ.authcheckdam.pdf.

[188] Rachlinski et. al., *supra* note 85, 1225.

[189] Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

[190] Am. Bar Ass'n (ABA) Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Minutes of the Public Hearing and Meeting 180 (Mar. 26, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/meetings/transcript_

years on the bench, with week-long orientation programs offered to district judges and separate trainings for appellate judges.[191] The Federal Judicial Center, the education and research agency of the federal judicial system, conducts continuing education trainings for federal judges and court employees.[192] These trainings include updates on judicial ethics.[193]

The National Center for State Courts, recognizing the pervasive nature of implicit bias on the bench, produced a film and other resources about implicit bias as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts.[194] This campaign includes: (1) an implicit bias "tool box" with resource materials to raise awareness; (2) a video discussing "implicit bias in the justice system; and (3) a curriculum/ follow-up discussion outline that can be tailored to specific jurisdictions."[195] It is encouraging to note that implicit racial and gender biases on the part of judges are increasingly recognized by scholars and judicial training experts. However, these training materials must be expanded to include implicit socioeconomic bias.

Admittedly, not all forms of judicial training may be useful. Simply learning about unconscious bias generally may not change judicial behavior.[196] It would be more valuable to provide judges the opportunity to recognize and address their own implicit biases, since "making someone aware of potential biases, motivating them to check those biases, and holding them accountable should have some effect on the translation of bias to behavior."[197]

An effective training model would therefore include the presentation of an Implicit Association Test to judges, specifically designed to test implicit socioeconomic bias. The IAT test has been characterized as "a powerful and personalized starting point in educating about implicit bias."[198] Once judges discover that they may hold implicit biases against the poor, the training should provide explanatory hypotheticals to demonstrate how this implicit bias can affect

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032604.authcheckdam.pdf. Even a temporary judge in California must receive mandatory training in judicial ethics. CAL. RULES OF COURT GOVERNING TEMP. JUDGES R 2.812(c)(2) (2007),

[191] *The Federal Judicial Training Center Offers Training and Research*, FED. LAW., Oct. 2009, at 36-37, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/ $file/FedL1009.pdf.

[192] *About the Federal Judicial Center*, FED. JUD. CTR., http://www.fjc.gov/.

[193] FED. LAW., *supra* note 191, at 36-37.

[194] *Implicit Bias in the Judicial System,* AM. BAR ASS'N, http://www.americanbar.org/groups/litigation/initiatives/good_works/implicit_bias_in_the_judicial_system.html.

[195] *Id.*

[196] Banks & Ford, *supra* note 102, at 1100 ("[G]reater awareness of unconscious bias would not prompt courts to strike down practices that, for a variety of reasons, they don't want to strike down.").

[197] Sande L. Buhai et. al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, 185 (2011).

[198] McKoski, *supra* note 102, at 321.

judicial determinations. The cases discussed in Part III, *supra,* would provide glaring examples of this effect. Finally, rather than simply admonishing judges to avoid the influence of this bias, the judges should be asked to brainstorm about concrete ways to minimize implicit socioeconomic bias in their own decision-making processes. In this way, judges can create their own methods to combat implicit biases. The ideas generated during these brainstorming sessions could be shared with other judges in subsequent trainings. Regardless of the specific format, judges must be made aware of the prevalence of implicit socioeconomic bias on the bench.

Off-site visits represent another way for judges to combat implicit biases. Studies show that implicit biases are "malleable" and may be reduced through exposure to examples that go against stereotypes.[199] Federal judges visit federal prisons as part of their orientation programs, in order to "view firsthand the conditions that defendants they sentence will confront."[200] Similarly, judges could visit low-income neighborhoods to learn more about the struggles faced by poor persons in their jurisdictions. Housing court judges could visit housing projects and other low-income homes. The *Pineda-Moreno* majority may have benefited from visiting the home of Mr. Pineda-Moreno; seeing the street where Mr. Pineda-Moreno parked may have sparked an understanding of the differences between his life and theirs.

V. CONCLUSION

When Justice Marshall retired, one of his colleagues on the bench observed that Justice Marshall "characteristically would tell us things that we knew but would rather forget; and he told us that we did not know due to the limitations of our own experience."[201] Some judges need to be reminded that their own experiences are often limited to the world of the privileged elite. Without those reminders, the discrepancy between rich judges and poor litigants can result in socioeconomic bias.

Studies showing the pervasive nature of implicit bias highlight the need to devote more attention to identifying socioeconomic bias in its implicit form. Indeed, a review of Fourth Amendment and child custody cases reveals that this bias is indeed present in American courts. It falls squarely within the role of the ABA Model Code of Judicial Conduct to alert judges to the problem of implicit socioeconomic bias. However, without specifically defining the term "socioeconomic" or even addressing implicit bias, the Code in its current form is failing in this task. Revising the Code and requiring training would help to put the issue of implicit socioeconomic bias on the judicial agenda.

The widening social and economic gap between America's rich and poor must remain outside the doors of our courtrooms. Judges may enjoy the privileges of economic wealth in their personal lives, but they have an obligation on the bench to further the fact and appearance of fairness in their decision making.

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[199] Greenwald & Krieger, *supra* note 83, at 963-64.

[200] FED. LAW., *supra* note 191, at 36-37.

[201] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).