

# LEGISLATION COMMITTEE ACTION REQUEST FORM

Legislation Committee Meeting: September 24, 2020

<b>Title:</b> Judicial Council–Sponsored Legislation: Notification of Reduced or Dismissed Convictions for Probation Transfer Cases	<b>Code Section(s):</b> Amend Pen. Code, §§ 1203.425, 1203.9, and 13151
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<b>Advisory Committee or other entity submitting the proposal:</b> Criminal Law Advisory Committee Hon. J. Richard Couzens, Chair	<b>Advisory Committee Staff:</b> Sarah Fleischer-Ihn, 415-865-7702 Sarah.Fleischer-Ihn@jud.ca.gov
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<b>OGA Staff Recommendation:</b> Approve Judicial Council–Sponsorship	<b>OGA Staff:</b> Sharon Reilly, 916-323-3121 Sharon.Reilly@jud.ca.gov
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<b>Additional Information for Legislation Committee:</b>  None.
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## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.:*

For business meeting on November 13, 2020

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**Title**

Judicial Council–Sponsored Legislation:  
Notification of Reduced or Dismissed  
Convictions for Probation Transfer Cases

**Rules, Forms, Standards, or Statutes Affected**

Amend Pen. Code, §§ 1203.425, 1203.9, and  
13151

**Recommended by**

Legislation Committee  
Hon. Marla O. Anderson, Chair  
Criminal Law Advisory Committee  
Hon. J. Richard Couzens, Chair

**Agenda Item Type**

Action Required

**Effective Date**

November 13, 2020

**Date of Report**

September 17, 2020

**Contact**

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### Executive Summary

The Legislation Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code sections 1203.425, 1203.9, and 13151 to require notification of reductions of felonies to misdemeanors and dismissals of convictions in probation transfer cases between receiving courts and transferring courts.

### Recommendation

The Legislation Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code sections 1203.425, 1203.9, and 13151, effective January 1, 2022, to require notification of reductions of felonies to misdemeanors and dismissals of convictions in probation transfer cases between receiving courts and transferring courts.

The text of the proposed legislation is attached at pages 6–8.

### **Relevant Previous Council Action**

Since the enactment of the Criminal Justice Realignment Act in 2009, the Judicial Council has sponsored or supported several legislative measures relating to intercounty transfers. Most recently, in 2014, the Judicial Council sponsored Assembly Bill 2645 (Dababneh; Stats. 2014, ch. 111), which modified intercounty transfer procedures to require transferring courts to determine the amount of any victim restitution before transfer unless the court is unable to determine the amount within a reasonable time.

In 2013, the Judicial Council supported AB 492 (Quirk; Stats. 2013, ch. 13), which explicitly requires transferring courts to make the determination of the probationer’s county of residence for Proposition 36 probation cases. In doing so, the council noted that the Criminal Law Advisory Committee had developed a legislative proposal to eliminate the separate transfer requirements for Prop. 36 probation cases, which was scheduled to circulate for public comment that spring. Because AB 492 sought to accomplish the same goal as the committee’s proposal, the council supported AB 492.

In 2009, the Judicial Council supported Senate Bill 431 (Benoit; Stats. 2009, ch. 588), which required a court, when granting probation to an individual who permanently resides in a county other than the county of conviction, to transfer jurisdiction of the case to the county in which that person permanently resides, unless the court determines on the record that the transfer would be inappropriate. The bill also required the court in the county of the probationer’s residence to accept jurisdiction over the case and required the council to adopt rules of court providing factors for the court’s consideration when determining the appropriateness of a transfer (see Cal. Rules of Court, rule 4.530). The Judicial Council supported SB 431 because it addressed issues and concerns that have been raised over the years about the disparate transfer practices around the state.

### **Analysis/Rationale**

Under California law, when probation is transferred from one jurisdiction to another within California, the receiving court accepts “the entire jurisdiction over the case effective the date that the transferring court orders the transfer.” (Pen. Code, § 1203.9(b).) This includes jurisdiction to adjudicate petitions to reduce a felony to a misdemeanor, or dismiss a conviction under Penal Code section 1203.4 and multiple other statutes. However, no statutes or rules of court address these issues: (1) Limits by the transferring court on access to the transferred case file; (2) Reports of probation transfers to the Department of Justice (DOJ); (3) Notification by the receiving court to the transferring court when a reduction or dismissal occurs; or (4) Updates by the transferring court of its records upon receipt of notice of a reduction or dismissal from the receiving court. If a receiving court reduces or dismisses a conviction but does not notify the transferring court, publicly accessible conviction documents in a transferring court’s case file may be inaccurate.

Due to the absence of statutory authority, there is no consistency among transferring and receiving courts on how records are maintained or updated when a reduction or dismissal occurs.

In 2018 and 2019, the Legislature passed two significant automated record relief bills, which removed the burden of seeking record relief from a defendant-petitioner, and, instead, made it the responsibility of government agencies. Assembly Bill 1793 (Stats. 2018, ch. 993) enacted Health and Safety Code section 11361.9 providing automated relief for marijuana convictions under Proposition 64, which reduced or repealed designated marijuana-related offenses. Assembly Bill 1076 (Stats. 2019, ch. 578) requires the DOJ, in relevant part, to grant automatic record relief to individuals meeting specified criteria, including completing probation without revocation and not currently serving a sentence for any offense. A court may not disclose information concerning a conviction granted automatic record relief or a dismissal under Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42, except in limited circumstances.

Automatic marijuana conviction relief would likely be addressed by the transferring court, not the receiving court.<sup>1</sup> Under section 11361.9, the Department of Justice (DOJ) is responsible for identifying marijuana convictions that may be eligible for relief under Prop. 64 and notifying the prosecuting agency of all eligible cases in its jurisdiction. The prosecuting agency is then required to inform the court whether it is challenging the resentencing. For any case in which the court grants relief, the court must notify DOJ, which in turn modifies the state summary criminal history information database. (Health & Saf. Code, § 11361.9.)

Procedurally, because DOJ has disposition information only from the county of conviction (the transferring court), it would likely contact the prosecuting agency in that county, leading to proceedings for automated relief in the transferring court, not the receiving court. If a probation transfer case is granted automated relief in the transferring court and the receiving court is not notified, the receiving court may have inaccurate publicly accessible conviction documents in its case file.

Similarly, automatic record relief would also likely be addressed by the transferring court. Under AB 1076, DOJ is directed to review records in the statewide criminal justice databases for eligible cases and to notify “the superior court having jurisdiction over the criminal case, informing the court of all cases for which a complaint was filed in that jurisdiction and for which relief was granted pursuant to this section.” (Pen. Code, § 1203.425(c).) Arguably, the receiving court has jurisdiction over the transferred criminal case, but DOJ would likely notify the

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<sup>1</sup> In *People v. Thor Sinthavong Chanthasone* (July 11, 2018, E068935 [nonpub. opn.]), the Fourth Appellate District held that requests for relief under Health and Safety Code section 11361.8 (resentencing or dismissal of marijuana conviction under Proposition 64) should be filed in the sentencing court, even in the case of a probation transfer, based on the statutory language directing petitions to go “before the trial court that entered the judgment of conviction.” (Health & Saf. Code, § 11361.8(a).) The court relied on the Supreme Court’s ruling in *People v. Adelmann* (2018) 4 Cal.5th 1071, which held that a defendant is required to file a Proposition 47 petition in the court in which the defendant was sentenced, regardless of whether the matter was later transferred to another superior court.

transferring court because probation transfers are not reported to the DOJ and because the complaint was filed in the transferring court's jurisdiction.

The requirement in section 1203.425 that a court not disclose information concerning a conviction granted automated record relief or dismissal under Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42 may be problematic to apply in probation transfer cases with court files across multiple jurisdictions. For example, a receiving court may dismiss a case under section 1203.4 and not disclose information as required under the new law, but if the transferring court does not receive any notice of this changed disposition, its court file would not be similarly restricted. Although AB 1076 does not address probation transfer scenarios, the intent appears to be for all courts to similarly restrict the release of conviction information after designated relief has been granted. Amending Penal Code sections 1203.425, 1203.9, and 13151 to require notification of reductions of felonies to misdemeanors and dismissals of convictions in probation transfer cases between receiving courts and transferring courts will address this issue.

### **Policy implications**

Since the enactment of the Criminal Justice Realignment Act in 2009, the Judicial Council has sponsored or supported several measures relating to intercounty transfers to address issues that have arisen for courts since that act became law. This proposal addresses gaps in the law regarding the updating of publicly accessible court records across multiple jurisdictions when a case is dismissed or reduced, promoting consistency across courts in restricting the release of conviction information after designated relief has been granted.

### **Comments**

This proposal circulated for comment from April 10 to June 9, 2020, and received three comments. All commenters agreed with the proposal, and none provided any substantive comments.

### **Alternatives considered**

The committee discussed amending Rule of Court 4.530, Intercounty transfer of probation and mandatory supervision cases, at length. Part of the discussion focused on how to avoid additional court workload by leveraging existing court procedures and how DOJ could play a role in managing the notification between courts. The committee concluded that a rule of court was limited in its ability to fully address the issue and that a legislative proposal provided a more robust solution.

### **Fiscal and Operational Impacts**

The major fiscal and operational impacts of this proposal fall on DOJ, which, to comply with new reporting and notification requirements, will need to add probation transfer disposition codes to the criminal disposition reports and create a mechanism to provide electronic notice to all involved courts of subsequent reductions or dismissals.

The fiscal and operational impacts to the courts result from (1) requiring transferring courts to report the transfer to DOJ; (2) requiring receiving courts to notify transferring courts of the new case numbers, if any; and (3) requiring all courts to update their records if notified by DOJ of a reduction or dismissal affecting the case. However, the proposal adds minor additions to existing court procedures and seeks to lessen the burden on courts by shifting notification duties to DOJ.

### **Attachments and Links**

1. Pen. Code, §§ 1203.425, 1203.9, and 13151, at pages 6–8
2. Chart of comments, at page 9

DRAFT

Penal Code sections 1203.425, 1203.9, and 13151 would be amended, effective January 1, 2022, to read:

1 **§ 1203.425.**

2  
3 (a)–(b) \* \* \*

4  
5 (c)

6  
7 (1) On a monthly basis, the department shall electronically submit a notice to the  
8 superior court having jurisdiction over the criminal case, informing the court  
9 of all cases for which a complaint was filed in that jurisdiction and for which  
10 relief was granted pursuant to this section. Commencing on February 1, 2021,  
11 for any record retained by the court pursuant to Section 68152 of the  
12 Government Code, except as provided in subdivision (d), the court shall not  
13 disclose information concerning a conviction granted relief pursuant to this  
14 section or Section 1203.4, 1203.4a, 1203.41, or 1203.42, to any person or  
15 entity, in any format, except to the person whose conviction was granted  
16 relief or a criminal justice agency, as defined in Section 851.92.

17  
18 (2)

19  
20 (A) If probation is transferred pursuant to Section 1203.9, the department  
21 shall electronically submit a notice as provided in paragraph (1) to both  
22 the transferring court and any subsequent receiving court. The  
23 electronic notice shall be in a mutually agreed upon format.

24  
25 (B) If a receiving court reduces a felony to a misdemeanor pursuant to  
26 section 17(b), or dismisses a conviction pursuant to law—including,  
27 but not limited to, sections 1203.4, 1203.4a, 1203.41, 1203.42,  
28 1203.43, or 1203.49—it shall furnish a disposition report to the  
29 department with the original case number and CII number from the  
30 transferring court, and the department shall electronically submit a  
31 notice to the superior court that sentenced the defendant. If probation is  
32 transferred multiple times, the department shall electronically submit a  
33 notice to all other involved courts. The electronic notice shall be in a  
34 mutually agreed upon format.

35  
36 (C) If a court receives notification from the department pursuant to  
37 subparagraph (B), the court shall update its records to reflect the  
38 reduction or dismissal. If a court receives notification that a case was  
39 dismissed pursuant to this section or Section 1203.4, 1203.4a, 1203.41,  
40 or 1203.42, the court shall update its records to reflect the dismissal and  
41 shall not disclose information concerning a conviction granted relief to  
42 any person or entity, in any format, except to the person whose

Penal Code sections 1203.425, 1203.9, and 13151 would be amended, effective January 1, 2022, to read:

1                   conviction was granted relief or a criminal justice agency, as defined in  
2                   Section 851.92.

3  
4 (d)–(g) \* \* \*

5  
6 (h)

7  
8           (1) The prosecuting attorney or probation department may, no later than 90  
9           calendar days before the date of a person’s eligibility for relief pursuant to  
10           this section, file a petition to prohibit the department from granting automatic  
11           relief pursuant to this section, based on a showing that granting such relief  
12           would pose a substantial threat to the public safety. If probation was  
13           transferred pursuant to Section 1203.9, the prosecuting attorney or probation  
14           department in either the receiving county or the transferring county shall file  
15           the petition in the county of current jurisdiction.

16  
17 (2)–(5) \* \* \*

18  
19           (6) If the court grants a petition pursuant to this subdivision, the court shall  
20           furnish a disposition report to the Department of Justice pursuant to Section  
21           13151, stating that relief pursuant to this section was denied, and the  
22           department shall not grant relief pursuant to this section. If probation was  
23           transferred pursuant to section 1203.9, the department shall electronically  
24           submit a notice that relief pursuant to this section was denied to the  
25           transferring court, and, if probation was transferred multiple times, to all  
26           other involved courts.

27  
28           (7) A person denied relief pursuant to this section may continue to be eligible for  
29           relief pursuant to Section 1203.4 or 1203.4a. If the court subsequently grants  
30           relief pursuant to one of those sections, the court shall furnish a disposition  
31           report to the Department of Justice pursuant to Section 13151, stating that  
32           relief was granted pursuant to the applicable section, and the department shall  
33           grant relief pursuant to that section. If probation was transferred pursuant to  
34           section 1203.9, the department shall electronically submit a notice that relief  
35           was granted pursuant to the applicable section to the transferring court and, if  
36           probation was transferred multiple times, to all other involved courts.

37  
38 (i) \* \* \*

39  
40 **§ 1203.9.**

41



Penal Code sections 1203.425, 1203.9, and 13151 would be amended, effective January 1, 2022, to read:

1 (a)

2  
3 (1)–(3) \* \* \*

4  
5 (4) The receipt of records from the receiving court to the transferring court shall  
6 include the new case number, if any.

7  
8 (5) Pursuant to section 13151, the transferring court shall report to the  
9 Department of Justice that probation was transferred, once the receiving court  
10 accepts the transfer. A probation transfer report shall identify the receiving  
11 court and the new case number, if any.

12  
13  
14 (b)–(g) \* \* \*

15  
16 **§ 13151.**

17  
18 (a) The superior court that disposes of a case for which an arrest was required to be  
19 reported to the Department of Justice pursuant to Section 13150 or for which  
20 fingerprints were taken and submitted to the Department of Justice by order of the  
21 court shall ensure that a disposition report of a case containing the applicable data  
22 elements enumerated in Section 13125, including the CII number and the court  
23 docket number, or Section 13151.1 if the disposition is one of dismissal, is  
24 furnished to the Department of Justice within 30 days according to the procedures  
25 and in a format prescribed by the department. The court shall also furnish a copy of  
26 the disposition report to the law enforcement agency having primary jurisdiction to  
27 investigate the offense alleged in the complaint or accusation. When a court orders  
28 an action subsequent to the initial disposition of a case, the court shall similarly  
29 report the proceedings to the department, including a transfer of probation pursuant  
30 to Section 1203.9 by the transferring court, once the case is accepted by the  
31 receiving court. A probation transfer report shall identify the receiving superior  
32 court and the new case number, if any. When filing a case with the court, the  
33 criminal justice agency shall include the CII number in the filing.

34  
35 (b) \* \* \*

**LEG20-01**

Proposal for Judicial Council–Sponsored Legislation: Notification of Reduced or Dismissed Convictions for Probation Transfer Cases (Amend Pen. Code, §§ 1203.425, 1203.9, and 13151)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Child Support Directors Association by Terrie Hardy-Porter, Director	A	The proposal aims to create a framework for notification of reduced or dismissed cases between receiving and transferring courts through existing court procedures and by adding elements addressing probation transfers to the automated record cleaning statute. As written, it appears that the aim is accomplished by the proposal.	No response required.
2.	Orange County Bar Association by Scott B. Garner, President	A	No specific comment	No response required.
3.	Superior Court of San Diego County by Mike Roddy, Executive Officer	A	No specific comment	No response required.

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

# LEGISLATION COMMITTEE ACTION REQUEST FORM

Legislation Committee Meeting: September 24, 2020

<b>Title:</b> Judicial Council–Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets	<b>Code Section(s):</b> Add Code Civ. Proc., § 1733.1; Amend Code Civ. Proc., §§ 1731(b)(2), 1731(b)(3), 1733(b), 1735(a), 1736(b), and 1737(a); Add Fam. Code, § 2611; and, Amend Gov. Code, § 70603
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<b>Advisory Committee or other entity submitting the proposal:</b> California Tribal Court–State Court Forum Hon. Abby Abinanti, Cochair Hon. Suzanne M. Kingsbury, Cochair Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack, Cochair Hon. Mark A. Juhas, Cochair	<b>Advisory Committee Staff:</b> Ann Gilmour, 415-865-4207 Ann.Gilmour@jud.ca.gov
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<b>OGA Staff Recommendation:</b> Approve Judicial Council–Sponsorship	<b>OGA Staff:</b> Andi Liebenbaum, 916-323-3121 andi.liebenbaum@jud.ca.gov
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<b>Additional Information for Legislation Committee:</b>  None.
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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: November 13, 2020

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**Title**

Judicial Council–Sponsored Legislation  
(Family Law): Recognition of Tribal Court  
Orders Relating to the Division of Marital  
Assets

**Rules, Forms, Standards, or Statutes Affected**

Add Code Civ. Proc., § 1733.1; Amend Code  
Civ. Proc., §§ 1731(b)(2), 1731(b)(3),  
1733(b), 1735(a), 1736(b), and 1737(a); Add  
Fam. Code, § 2611; and, Amend Gov. Code,  
§ 70603

**Recommended by**

Legislation Committee  
Hon. Marla O. Anderson, Chair  
California Tribal Court–State Court Forum  
Hon. Abby Abinanti, Cochair  
Hon. Suzanne M. Kingsbury, Cochair  
Family and Juvenile Law Advisory  
Committee  
Hon. Jerilyn L. Borack, Cochair  
Hon. Mark A. Juhas, Cochair

**Agenda Item Type**

Action Required

**Effective Date**

November 13, 2020

**Date of Report**

September 17, 2020

**Contact**

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Andi Liebenbaum, 916-323-3121  
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### Executive Summary

The Legislation Committee of the Judicial Council, the California Tribal Court–State Court Forum (Forum), and the Family and Juvenile Law Advisory Committee (Committee) recommend that the Judicial Council, effective January 1, 2022, sponsor legislation to add section 1733.1 to the Code of Civil Procedure, amend sections 1731(b)(2) and (3), 1733(b), 1735(a), 1736(b), and 1737(a), add section 2611 to the Family Code, and amend section 70603 of the Government Code to ensure that valid divorce or dissolution judgments issued by tribal

courts that include division of pension or other deferred compensation assets are effective and, in particular, are recognized as meeting the requirements of the Employee Retirement Income Security Act of 1974 (ERISA) (Public Law 93-406; 88 Stat. 829) and other similar statutes that restrict the transfer or division of such assets.

## **Recommendation**

The Legislation Committee of the Judicial Council, the California Tribal Court–State Court Forum (Forum), and the Family and Juvenile Law Advisory Committee (Committee) recommend that the Judicial Council, effective January 1, 2022, sponsor legislation to add section 1733.1 to the Code of Civil Procedure, amend sections 1731(b)(2) and (3), 1733(b), 1735(a), 1736(b), and 1737(a), add section 2611 to the Family Code, and amend section 70603 of the Government Code to ensure that valid divorce or dissolution judgments issued by tribal courts that include division of pension and other deferred compensation assets are effective and, in particular, are recognized as meeting the requirements of ERISA and similar legislation that restrict the division and transfer of such assets. This statutory change will address an ongoing gap in the law by creating a simplified process to file in California state court an otherwise valid order of a tribal court—dividing pension and other similar deferred compensation assets—so as to have that order recognized for purposes of legislation such as ERISA that restrict the division and transfer of such assets.

The proposal requires that the Judicial Council:

1. Sponsor legislation to amend sections 1731, 1733, 1735, 1736, and 1737, and to add section 1733.1 to the Code of Civil Procedure to establish a process for the filing of a tribal court order that relates to the provision of child support, spousal support payments, or marital property rights to a spouse, former spouse, or child, or other dependent from a pension plan or other form of deferred compensation covered by ERISA or other similar legislation that limits or restricts the division or transfer of such assets; and
2. Sponsor legislation to add section 2611 to the Family Code specifying that an order filed and recognized pursuant to the above amended and added sections is a domestic relations order made pursuant to the domestic relations laws of this state for the purposes of legislation that restricts or limits the division and transfer of such assets.
3. Sponsor legislation to amend section 70603 of the Government Code to align the fee provisions of this section with the proposed \$100.00 filing fee for a joint application filed pursuant to proposed Code of Civil Procedure section 1733.1.

Assuming enactment of these statutes, the Judicial Council will create rules and forms to implement the legislation. Consistent with the legislation, any such rules and forms will require the filing of a joint petition that would avoid the problem of a potential collateral attack on the orders.

The text of the proposed statutes is attached at pages 7–12.

## Relevant Previous Council Action

In 2012, the Judicial Council proposed legislation that eventually became the Tribal Court Civil Money Judgment Act (Sen. Bill 406 (Evans); Stats. 2014, ch. 243). This legislation added sections 1730–1741 to the Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil judgments consistent with the mandate set out in rule 10.60(b) of the California Rules of Court regarding recommendations concerning the recognition and enforcement of court orders that cross jurisdictional lines.

## Analysis/Rationale

Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and, civil harassment protective orders.

Some tribal courts in California issue domestic relations orders, including divorce and dissolution decrees. For these domestic relations orders to be thorough and effective, tribal courts must be able to address division of assets, including pension benefits and other forms of deferred compensation governed by ERISA and other similar legislation that limits or restricts the division or transfer of these assets. In 2011, the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a “judgment, decree or order . . . made pursuant to a State domestic relations law within the meaning of federal law.”<sup>1</sup> That guidance concluded that:

In the Department’s view, a tribal court order may constitute a “judgment, decree or order . . . made pursuant to State domestic relations law” for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

Section 206(d)(3)(B)(ii) of ERISA is codified as 29 U.S.C. § 1056(d)(3)(B)(ii).

The practical effect of the guidance issued by the U.S. Department of Labor is that for a tribal court divorce or dissolution order to effectively distribute pension benefits governed by ERISA, state law must recognize the order as a judgment, decree, or order made pursuant to state domestic relations law. The Department of Labor specifically approved of the model that had been incorporated into Oregon statute at Oregon Revised Statutes section 24.115(4).<sup>2</sup>

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<sup>1</sup> Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2011-03a>.

<sup>2</sup> Available at <https://www.oregonlaws.org/ors/24.115>.

Currently, California law does not explicitly recognize judgments or orders from tribal courts (or foreign courts for that matter) that divide pension assets as judgments or orders made pursuant to state domestic relations law as mandated by ERISA. Further, current California law has no mechanism to simply “recognize” a tribal court order. Therefore, under current law, for a party in tribal court to have an ERISA Domestic Relations Order (DRO) accepted, that party must “register” the order. Registration creates a multitude of additional issues both for the litigant as well as the court, in addition to being financially burdensome.

Specifically, litigants seeking to register their orders are required to: (1) pay for the two first-appearance fees (currently \$870); (2) pay for a certified copy (currently \$20); and (3) pay the fee for a bench officer’s signature (currently \$20).

Litigants are also required to complete the necessary registration paperwork.

Once registration is complete, the California court then becomes responsible for that order, requiring court and staff time.

The Family Code contemplates recognition and enforcement of foreign custody orders under the Uniform Child Custody Jurisdiction Act (UCCJA), and foreign support orders and paternity judgments under the Uniform Interstate Family Support Act (UIFSA).<sup>3</sup> The Foreign-Country Money Judgments Act<sup>4</sup> excludes from its coverage any judgment arising from a divorce, support, or maintenance judgment rendered in connection with domestic relations. The Tribal Court Civil Money Judgment Act<sup>5</sup> does not have a blanket exclusion for domestic relations judgments but does exclude judgments for which federal or state law already provides for recognition, including the Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B), and the Uniform Interstate Family Support Act.<sup>6</sup> Registration of these orders can be inconsistent, cumbersome, and expensive, and is not required by federal law. By adding section 2611 to the Family Code, amending sections 1731(b)(2) and (3), 1733(b), 1735(a), 1736(b), and 1737(a), and adding section 1733.1 to the Code of Civil Procedure, the proposal will ensure that valid divorce or dissolution judgments issued by tribal courts that include division of pension or other deferred compensation assets are effective and, in particular, are recognized as meeting the requirements of ERISA and other similar statutes that restrict the transfer or division of such assets.

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<sup>3</sup> The Uniform Child Custody and Jurisdiction Act is incorporated into the Family Code at sections 3400 et seq. The Uniform Interstate Family Support Act is found at sections 5700.101 et seq.

<sup>4</sup> Code Civ. Proc., §§ 1713–1725.

<sup>5</sup> For an overview of these issues, see “Making Foreign Divorce Judgments, Orders, and Decrees Valid and Enforceable California Court Orders,” Divorcesource.com, Peter M. Walzer, Esq., available at <https://www.divorcesource.com/ds/california/making-foreign-divorce-judgments-orders-and-decrees-valid-and-enforceable-california-court-orders-4276.shtml>.

<sup>6</sup> Part 6 (commencing with § 5700.101), Fam. Code, Div. 9.

### **Policy implications**

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the state of Alaska. Each tribe is sovereign, with powers of internal self-governance, including the authority to develop and operate a court system. At least 20 tribal courts currently operate in California, and several other courts are under development. This proposal will address an ongoing gap in the law by creating a simplified process to file in California state court an otherwise valid order of a tribal court—dividing pension assets—so as to have that order recognized for ERISA purposes, thereby helping tribal families properly divide marital assets, avoid the existing cumbersome and costly registration process, and be in compliance with guidance issued by the U.S. Department of Labor.

### **Comments**

The proposal circulated for public comment from April 10 through June 9, 2020, as part of the spring 2020 invitation to comment cycle. It was sent to the standard mailing list for family and juvenile law proposals that includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. It was also sent to tribal leaders, tribal advocates, and tribal attorneys, distributed through the monthly newsletter distributed by the Tribal Court–State Court Forum, and sent to the California Department of Social Services Office of Tribal Affairs listserv to reach those with an interest in the Indian Child Welfare Act and tribal issues.

The proposal received six formal comments. The commenters were the Executive Committee of the Family Law Section of the California Lawyers Association, California Indian Legal Services, the Child Support Directors Association, the Orange County Bar Association, and two Superior Courts. None of the commenters opposed the proposal. Three of the commenters agreed with the proposal, one agreed if amended, and two did not indicate whether or not they agreed but the general tenor of their comments indicated support for the proposal with amendments suggested.

The comments raised two main substantive concerns: 1) As circulated for public comment the proposal was targeted at pension plans governed by ERISA. Commenters uniformly suggested expanding the proposal to include not only pensions, but other forms of deferred compensation such as 401(k) plans that may also be governed by ERISA, and also to encompass such pension and deferred compensation assets that are subject to similar legislative restrictions on division and transfer under statutes other than ERISA; and, 2) The commenters stated that access to the streamlined process created by this proposal should not be limited to situations where both parties agree to file a joint petition.



Forum, Committee and Legislation Committee members agreed with both of these recommendations, and the proposal was substantially revised following the comment period to incorporate these concerns.

### **Alternatives considered**

The Forum and Committee initially considered adding language to the Tribal Court Civil Money Judgement Act, which would have made it similar to that found in Oregon Revised Statute 24.115(4), referenced by the U.S. Department of Labor in advisory opinion 2011-03A.<sup>7</sup> After much discussion, the Forum and Committee concluded that registration of the order under the Tribal Court Civil Money Judgment Act was unnecessarily cumbersome and expensive to achieve the goal of having the tribal court orders recognized under ERISA, and determined to develop a simplified filing process as a better way of achieving this goal with less expense on litigants and less burden on the state courts.

### **Fiscal and Operational Impacts**

No implementation costs are anticipated. It is expected that the proposal will improve efficiencies by ensuring that parties can effectively resolve dissolution issues in tribal court and not have to take pension issues to a different venue. While the simplified filing process contemplates that there will be no filing fee and may require adjustments to court processes, it should avoid the state court having to engage in protracted hearings and enforcement of the orders, and thus ultimately reduce the burdens on the state courts.

### **Attachments and Links**

1. Code Civ. Proc., §§1731–1741 at pages 7–9
2. Fam. Code, § 2611, at page 10
3. Gov. Code, §70603 at pages 11–12
4. Comment Chart, at pages 13–28

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<sup>7</sup> Oregon Revised Statute 24.115(4) is available at: <https://www.oregonlaws.org/ors/24.115>.

Section 1731 through 1741 of Chapter 3 of Title 11 of Part 3 of the Code of Civil Procedure would be amended, effective January 1, 2022, to read:

1 **1730. \* \* \***

2

3 **1731. (a) \* \* \***

4

5 (b) This chapter does not apply to any of the following tribal court money judgments:

6 (1) For taxes, fines, or other penalties.

7 (2) For which federal law requires that states grant full faith and credit recognition,  
8 including child support orders under the Full Faith and Credit for Child Support Orders  
9 Act (28 U.S.C. Sec. 1738B), except for the purposes of recognizing a tribal court order  
10 establishing the right of a child, or other dependent of a participant in a retirement plan or  
11 other plan of deferred compensation to an assignment of all or a portion of the benefits  
12 payable.

13 (3) For which state law provides for recognition, including child support orders  
14 recognized under the Uniform Child Custody Jurisdiction and Enforcement Act (Part 3  
15 commencing with Section 3400) of Division 8 of the Family Code), other forms of  
16 family support orders under the Uniform Interstate Family Support Act (Part 6  
17 commencing with Section 5700.101) of Division 9 of the Family Code), except for the  
18 purposes of recognizing a tribal court order establishing the right of a spouse, former  
19 spouse, child, or other dependent of a participant in a retirement plan or other plan of  
20 deferred compensation to an assignment of all or a portion of the benefits payable.

21

22 (4) \* \* \*

23

24 (c) \* \* \*

25

26 **1732. \* \* \***

27

28 **1733. (a) \* \* \***

29

30 (b) Subject to the power of the court to transfer proceedings under this chapter pursuant  
31 to Title 4 (commencing with Section 392) of Part 2, and except as provided in section  
32 1733.1, the proper county for the filing of an application is either of the following:

33 (1)-(2) \* \* \*

34

35 (c) \* \* \*

36

37 1733.1 (a) Where the parties to the underlying tribal court proceeding agree, the parties  
38 may file a joint application for the recognition of a tribal court order that establishes a  
39 right to child support, spousal support payments, or marital property rights to such  
40 spouse, former spouse, child, or other dependent of a participant in a retirement plan or

Section 1731 through 1741 of Chapter 3 of Title 11 of Part 3 of the Code of Civil Procedure would be amended, effective January 1, 2022, to read:

1 other plan of deferred compensation, which order assigns all or a portion of the benefits  
2 payable with respect to such participant to an alternate payee.

3 (1) The application shall be on a form adopted by the Judicial Council, executed under  
4 penalty of perjury by both parties to the proceeding.

5 (2) The application shall include the name, current address, telephone number and email  
6 address of each party, the name and mailing address of the issuing tribal court and attach  
7 a certified copy of the order to be recognized.

8 (3) The filing fee for a joint application filed under this section is \$100.00.

9 (4) The proper county for the filing of an application is the county in which either one of  
10 the parties resides.

11 (5) Entry of the tribal court order under this section does not confer any jurisdiction on a  
12 court of this state to modify or enforce the tribal court order.

13 (b) Where one of the parties to order described in subsection (a) does not agree to join in  
14 the application, the other party may proceed by having the tribal court execute a  
15 certificate in a format to be developed by the Judicial Council in lieu of the signature of  
16 the other party.

17  
18 **1734. \* \* \***

19  
20 **1735.** (a) Promptly upon the filing of the application, under section 1734, the applicant  
21 shall serve upon the respondent a notice of filing of the application to recognize and enter  
22 the tribal court money judgment, together with a copy of the application and any  
23 documents filed with the application. The notice of filing shall be in a form that shall be  
24 prescribed by the Judicial Council, and shall inform the respondent that the respondent  
25 has 30 days from service of the notice of filing to file objections to the enforcement of the  
26 tribal court money judgment. The notice shall include the name and address of the  
27 applicant and the applicant's attorney, if any, and the text of Sections 1736 and 1737.  
28

29 **1736.** (a) \* \* \*

30  
31 (b) The judgment entered by the superior court shall be based on and contain the  
32 provisions and terms of the tribal court money judgment. The judgment shall be entered  
33 in the same manner, have the same effect, and be enforceable in the same manner as any  
34 civil judgment, order, or decree of a court of this state, except as provided in section  
35 1733.1.  
36

37 **1737.** (a) Any objection to the recognition and entry of the tribal court money judgment  
38 sought under section 1734 shall be served and filed within 30 days of service of the  
39 notice of filing. If any objection is filed within this time period, the superior court shall  
40 set a time period for replies and set the matter for a hearing. The hearing shall be held by  
41 the superior court within 45 days from the date the objection is filed unless good cause  
42 exists for a later hearing. The only grounds for objecting to the recognition or

Section 1731 through 1741 of Chapter 3 of Title 11 of Part 3 of the Code of Civil Procedure would be amended, effective January 1, 2022, to read:

1 enforcement of a tribal court money judgment are the grounds set forth in subdivisions  
2 (b), (c), and (d).

3

4 (b) – (e) \* \* \*

5

6 **1738. –1741. \* \* \***

Part 5 of Division 7 of the Family Code would be amended, effective January 1, 2022, to read:

1 **2610. \* \* \***

2

3 **2611. (a)** A final order of a tribal court that creates or recognizes the existence of the  
4 right of a spouse, former spouse, child or other dependent of a participant in a retirement  
5 plan or other plan of deferred compensation to receive all or a portion of the benefits  
6 payable with respect to such plan participant, and that relates to the provision of child  
7 support, spousal support payments, or marital property rights of the spouse, former  
8 spouse, child, or other dependent, that is filed in accordance with section 1733.1 of the  
9 California Code of Civil Procedure, shall be recognized as an order made pursuant to the  
10 domestic relations laws of this state.

11

12 (b) The filing of the tribal court order does not confer any jurisdiction on a court of this  
13 state to modify or enforce the tribal court order.

Section 70603 of Chapter 5.8 of Title 8 of the Government Code would be amended, effective January 1, 2022, to read:

1 **70600. \*\*\***

2

3 **70601. \*\*\***

4

5 **70602.5 \*\*\***

6

7 **70602.6 \*\*\***

8

9 **70603.** (a) Except as provided in this section, the fees charged for filings and services under this  
10 chapter are intended to be uniform statewide and to be the only allowable fees for those services  
11 and filings. The only charges that may be added to the fees in this chapter are the following:

12 (1) In a complex case, the fee provided for in Section 70616 may be added to the first paper and  
13 first responsive paper filing fees in Sections 70611, 70612, 70613, and 70614.

14 (2) In an unlawful detainer action subject to Section 1161.2 of the Code of Civil Procedure, a  
15 charge of fifteen dollars (\$15) as provided under that section may be added to the fee in Section  
16 70613 for filing a first appearance by a plaintiff.

17 (3) In Riverside County, a surcharge as provided in Section 70622 may be added to the first  
18 paper and first responsive paper filing fees in Sections 70611, 70612, 70613, 70614, 70650,  
19 70651, 70652, 70653, 70655, and 70670.

20 (4) In San Bernardino County, a surcharge as provided in Section 70624 may be added to the  
21 first paper and first responsive paper filing fees in Sections 70611, 70612, 70613, 70614, 70650,  
22 70651, 70652, 70653, 70655, and 70670. This paragraph applies to fees collected under Sections  
23 70611, 70612, 70613, 70614, 70650, 70651, 70652, 70653, 70655, and 70670, beginning  
24 January 1, 2006.

25 (5) In the City and County of San Francisco, a surcharge as provided in Section 70625 may be  
26 added to the first paper and first responsive paper filing fees in Sections 70611, 70612, 70613,  
27 70614, 70650, 70651, 70652, 70653, 70655, and 70670.

28 (b) Notwithstanding paragraph (1) of subdivision (c) of Section 68085.3 and paragraph (1) of  
29 subdivision (c) of Section 68085.4, when a charge for courthouse construction in the City and  
30 County of San Francisco or in the Counties of Riverside or San Bernardino is added to the  
31 uniform filing fee as provided under paragraph (3), (4), or (5) of subdivision (a), the amount  
32 distributed to the State Court Facilities Construction Fund under Section 68085.3 or 68085.4  
33 shall be reduced by an amount equal to the charge added under paragraph (3), (4), or (5) of  
34 subdivision (a), up to the amount that would otherwise be distributed to the State Court Facilities  
35 Construction Fund. If the amount added under paragraph (3), (4), or (5) of subdivision (a) is  
36 greater than the amount that would be distributed to the State Court Facilities Construction Fund  
37 under Section 68085.3 or 68085.4, no distribution shall be made to the State Court Facilities  
38 Construction Fund, but the amount charged to the party may be greater than the amount of the  
39 uniform fee otherwise allowed, in order to collect the surcharge under paragraph (3), (4), or (5)  
40 of subdivision (a).

41 (c) If a filing fee is reduced by twenty-four dollars (\$24) under subdivision (c) of Section 6322.1  
42 of the Business and Professions Code, and a courthouse construction surcharge is added to the  
43 filing fee as provided under paragraph (3), (4), or (5) of subdivision (a), the amount distributed to  
44 the State Court Facilities Construction Fund under Section 68085.4 shall be reduced as provided  
45 in subdivision (b). If the amount added under paragraph (3), (4), or (5) of subdivision (a) is  
46 greater than the amount that would be distributed to the State Court Facilities Construction Fund

Section 70603 of Chapter 5.8 of Title 8 of the Government Code would be amended, effective January 1, 2022, to read:

1 under Section 68085.4, no distribution shall be made to the State Court Facilities Construction  
2 Fund, but the amount charged to the party may be greater than one hundred eighty-one dollars  
3 (\$181), in order to collect the surcharge under paragraph (3), (4), or (5) of subdivision (a).

4 (d) This section shall become operative on July 1, 2013.

5 (e) The filing fee for a joint application filed under section 1733.1 of the Code of Civil  
6 Procedure shall be \$100.00.

7

8 **70611. – 70640. \*\*\***

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**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	California Indian Legal Services  By Dorothy Alther, Executive Director	NI	<p>This letter is in response to the Judicial Council of California’s invitation for comments to the proposed amendment to Family Code § 2611 and amendment to Code of Civil Procedure § 1736(c).</p> <p>Founded in 1967, California Indian Legal Services (CILS) is the oldest public interest Indian rights law firm in the country, promoting the fundamental rights of California tribes and Indians through litigation, legislative and administrative advocacy, community development, and other strategies for systemic change. CILS provides a full range of legal representation to California Indian tribes and Indian organizations, advocates for the rights of California Indians at the local, state, and national levels, and provides direct services and community education to low-income Indian individuals on issues related to federal Indian law.</p> <p><b><u>Comments:</u></b></p> <p><u>Family Code 2611</u></p> <p>We strongly recommend legislative language recognizing all of the types of orders issued by tribal courts in California,</p>	



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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>and not just tribal domestic relations orders. The model implemented in Minnesota for recognition of all tribal court orders may provide useful. That being said, the proposed language is useful for addressing the problems CILS has encountered when enforcing tribal domestic relation orders with entities that administer pensions for state employers. In our experience, the pension administrator simply requested that we forward a California law that stated that the state would recognize the tribal domestic relations order under state law to enforce the tribal order. We could not do that and instead had to file a petition for comity to accomplish the same purpose. This petition was costly to the litigant in the state court. With the proposed law, the litigant will not need to file any petition in the state court and instead forward this California law for enforcement purposes.</p> <p>The proposed law will also provide useful for title IV-D tribal child support agencies that need to enforce a tribal domestic relations order to collect against a non-custodial parent's pension. The Title IV-D agency will be able to directly enforce the</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>order rather than request a county title IV-D agency to do the work for them.</p> <p><u>Code of Civil Procedure 1736(c)</u></p> <p>We strongly encourage a process where a tribal court litigant is not required to file in state court for recognition. Such a process is unduly cumbersome on a tribal court litigant who will need to file a petition in state court after having completed the process and theoretically received a final court order. In instances where a tribal court litigant is utilizing tribal court for cost-saving measures, having to expend additional finances for filing fees could be a significant deterrent for tribal court litigant(s) to use tribal courts. The burdensome nature of filing a petition for recognition in state court may ultimately serve as a deterrent for tribal litigants using tribal courts for domestic relation cases.</p> <p>We recommend that any process adopted is not commenced via “joint petition.” While a tribal court will need to determine jurisdiction over the litigants, if a party is displeased with the final tribal court domestic relations order, that party could withhold their consent from the joint</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			petition. This would unfairly prevent the other party from enforcing the domestic relations order and require that party to relitigate the domestic relations issue in state court again.	
2.	<p>Child Support Directors Association</p> <p>By Terrie Hardy-Porter, Director</p>	A	<p>The proposed legislation is appropriate and necessary in order to minimize the time and expense currently imposed upon alternate payees seeking to enforce their otherwise valid tribal court domestic relation orders against ERISA retirement plans.</p> <p>Request for Specific Comments</p> <p>Is the proposal broad enough to encompass all kinds of pensions?</p> <p>ERISA protection is exclusive to employer sponsored retirement plans, whether combined benefit plans, such as pensions, or combined contribution plans, such as 401(k) plans. The proposal intends to create a simplified process</p> <p>by which tribal domestic orders can be recognized as domestic relations orders by the state and in so doing allow them to qualify as an exception to the protection</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>from creditors otherwise afforded the plan participant's benefit.</p> <p>The proposal would accomplish this purpose for ERISA pensions only. To ensure equal application, it is recommended that "pension plan covered by ERISA" be replaced with "employer sponsored retirement plan covered by ERISA."</p> <p>Should the proposal be broader to encompass different kinds of pension plans such as those in the CalPERS system?</p> <p>Public retirement plans are exempt from ERISA. They are, however, governed by various state laws. It would be beneficial to address public retirement plans in addition to ERISA retirement plans within the proposed legislation.</p> <p>Should the proposal be broader to encompass orders from foreign countries or sister states?</p> <p>Is it a problem if the orders can only be recognized through a joint petition? Do we need to have a process for recognition if one party refuses to join the petition?</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>ERISA § 206(d)(3)(B)(ii) defines a domestic relations order as any judgment, decree, or order made pursuant to a State domestic relations law. So long as the order was made pursuant to any sister state’s domestic relations law, there is no need to encompass the registration of that order in CA as part of this proposal. That order is already</p> <p>enforceable against the ERISA protected plan so long as it creates or recognizes the existence of an alternate payee’s right to receive all or a portion of the benefits payable with respect to a participant under a plan. Tribal court orders require the proposed legislative changes because they are not currently recognized as being made pursuant to State</p> <p>domestic relations law. The simplified process of filing the order in state court will more easily afford tribal orders the recognition required to qualify as a domestic relations order as defined by ERISA. A process for recognition if one party refuses to join the petition is required since only state recognition will allow the alternate payee to receive the benefit assigned to him/her within the tribal</p>	

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**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>domestic relations order. Otherwise, any unwilling plan participant would be able to delay an alternate payee’s right to collect by QDRO by refusing to join the petition.</p> <p>That stated, we request that the proposal be expanded to permit the Department of Child Support Services (DCSS) to utilize this proposed simplified process to file a tribal court order in the state court whenever DCSS is providing child support services. DCSS has an interest in being included in this process in order to expedite the enforcement of existing tribal court child support orders. While enforcing these orders, DCSS may likewise require a state recognized domestic relations order for purposes of enforcing support balances against ERISA protected retirement plans.</p>	
3.	<p>The Executive Committee of the Family Law Section of the California Lawyers Association</p> <p>By Justin M. O’Connell, Legislation Chair and Saul Bercovitch, Director of Governmental Affairs</p>	A	<p>FLEXCOM agrees with this proposal. As to specific request for comment, FLEXCOM responds as follows:</p> <ul style="list-style-type: none"> <li>• Is the proposal broad enough to encompass all kinds of pensions? No.</li> <li>• Should the proposal be broader to encompass different kinds of pension plans such as those in the CalPERS system? Yes.</li> </ul>	

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	Commenter	Position	Comment	Committee Response
			<ul style="list-style-type: none"> <li>• Should the proposal be broader to encompass orders from foreign countries or sister states? Yes.</li>   <li>• Is it a problem if the orders can only be recognized through a joint petition? Yes.</li>   <li>• Do we need to have a process for recognition if one party refuses to join the petition? Yes. There are situations where a party might need to obtain a superior court order but is not able to obtain the other party’s signature. The superior court is not the proper court to litigate the issue (e.g. obtaining a superior court order to accept without a party’s signature, or appointment of a clerk to sign). A possible solution to explore might be to allow for a party to file non-joint petition if they also filed an order from a tribal court authorizing them to file without the other party (e.g. filing as an exhibit). This would place the tribal court in the position of first adjudicating the right of a party to file in superior court without the other party, thereby preventing overlapping jurisdictional issues.</li> </ul>	
4.	<p>Orange County Bar Association</p> <p>By Scott B. Garner, President</p>	AM	<p><b>Comments:</b> The proposal needs to be modified to include “all kinds of pensions” if the last sentence in Section 2611 reads “is a domestic relations order made pursuant to</p>	

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**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>the domestic relations laws of this state <i>AND</i> for the purposes of 29 U.S.C. §1056.” In addition, the proposal needs to modify CCP 1736 to allow for default or single-party registration of the Tribal Judgment/Order.</p> <ul style="list-style-type: none"><li>• The proposal as modified (so that the registration creates a Domestic Relations Order, or DRO, as well as a Qualified Domestic Relations Order, or QDRO).</li><li>• The proposal should NOT be broader or encompass foreign/sister state Judgments/orders because there is an entire body of law on the process for registration of those Judgments/orders that does not provide for “automatic” recognition in the way Tribal Judgments/orders would be recognized.</li><li>• Assuming Tribal jurisprudence provides allows for default or single-party proceedings (including for recognition/enforcement purposes), the proposal has a problem because it does not allow only one of the parties to seek registration of the Tribal Judgment/Order.</li></ul>	



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**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
5.	<p>Superior Court of California, County of Orange</p> <p>By Vivian Tran, Administrative Analyst</p>	NI	<ul style="list-style-type: none"> <li>• <b>Amend Family Code 2611</b> No comments.</li>   <li>▪ <b>Amend Code of Civil Procedure 1736]</b> No comments.</li>   <li>• <b>Comments on the proposal as a whole:</b> This is a welcomed proposal so that parties can resolve all their dissolution issues in tribal court and not have to specifically go to a different court to resolve their pension issues. This can be effective if jurisdiction can remain with the tribal court, and not with the state court, for any modifications or enforcements.</li>   <li>• <b>Is the proposal broad enough to encompass all kinds of pensions?</b> The proposal appears broad enough as 29 U.S. Code § 1056 does states that the term “<a href="#">domestic relations order</a>” means <i>any</i> judgment, decree, or order that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a <a href="#">participant</a>, and is made pursuant to a <a href="#">State</a> domestic relations law (including a community</li> </ul>	

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	Commenter	Position	Comment	Committee Response
			<p>property law). This is clearly stated in the proposal.</p> <ul style="list-style-type: none"> <li>• <b>Should the proposal be broader to encompass different kinds of pension plans such as those in the CalPERS system?</b>                      No the proposal does not need to be broader as Family Code § 2610 (b) states that "... the court shall make whatever orders necessary or appropriate to ensure that each party receives the party's full community property in any retirement plan, <u>whether public or private</u>, including all survivor and death benefits...". If this can be said for all tribal domestic relations orders as well, it would not have to be broader. There appears to be no specific plan names in the other family codes re retirement plans.</li> <li>• <b>Should the proposal be broader to encompass orders from foreign countries or sister states?</b>                      It seems the orders from foreign countries or sister states would have to be registered in California and filed as a registration in the state court.</li> <li>▪ <b>Is it a problem if the orders can only be recognized through a joint</b></li> </ul>	

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	Commenter	Position	Comment	Committee Response
			<p><b>petition? Do we need to have a process for recognition if one party refuses to join the petition?</b></p> <p>There may be an issue as to having the tribal court’s order submitted to the state court through a joint petition only. There should be a process in effect if the other party does not want to join in the petition. For example, if the other party is defaulted against or cannot be located for joining in the petition (refuses to sign or is deceased). Typically, with Qualified Domestic Relations Orders (QDROs) submitted to Orange County, it is rare that we do not get both signatures on the QDROs, but we did/still do have a process in place just in case there is only one signature approving it. All objections to the Domestic Relations Order from the tribal court, should have gone through the appropriate waiting period before being submitted to the state court. So, it may be rare that this happens as well with the tribal court orders, but a process should be in place in case this issue does comes up.</p> <ul style="list-style-type: none"><li>• <b>Would the proposal provide cost savings? If so, please quantify.</b></li></ul>	

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**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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

	Commenter	Position	Comment	Committee Response
			<p>The proposal appears it will provide cost savings as there will be minimal court involvement in the process. Staff would only be filing the joint petition as there will be no modification or enforcement of the tribal court’s order. The proposal would provide cost saving to the parties involved if it would not be required to register the order with the state court and pay the first appearance fees and other appropriate fees.</p> <ul style="list-style-type: none"> <li> <p><b>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?</b></p> <p>The implementation requirements as stated in this proposal would be minimal. Clerk’s office staff would be trained as to the filing of the joint petition. Entering docket codes or modifying our case management system would also be minimal if the proposal can stay at the joint petition level only with no modification or enforcement by the state court. A procedure would need</p> </li> </ul>	

**LEG20-03**

**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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

	Commenter	Position	Comment	Committee Response
			<p>to be created and the case management system would need to be updated to capture the filing of the petition and provide a case number.</p> <ul style="list-style-type: none"> <li>• <b>Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</b> Yes, 6 months would be sufficient time.</li> <li>• <b>How well would this proposal work in courts of different sizes?</b> It would depend on the number of filings that may be connected to this proposal. Some smaller state courts may receive more tribal court filings than larger ones and may be more impacted by the volume.</li> </ul>	
6.	<p>Superior Court of California, County of San Diego</p> <p>By Mike Roddy, Executive Officer</p>	NI	<p>Is the proposal broad enough to encompass all kinds of pensions? Yes.</p> <p>Should the proposal be broader to encompass different kinds of pension plans such as those in the CalPERS system? No, the current proposal appears sufficient.</p> <p>Should the proposal be broader to encompass orders from foreign countries or</p>	

**LEG20-03**

**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>sister states? Yes, the proposal should be broadened to encompass sister states.</p> <p>Is it a problem if the orders can only be recognized through a joint petition?</p> <p>Yes, it can be a problem because one party may not or refuse to participate. This often happens with QDROs and the party seeking the QDRO may need to request that an elisor be ordered to sign on behalf of the non-cooperating party.</p> <p>Do we need to have a process for recognition if one party refuses to join the petition? Yes.</p> <p>Would the proposal provide cost savings? If so, please quantify. No.</p> <p>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?</p>	

**LEG20-03**

**Proposal for Judicial Council Sponsored Legislation (Family Law): Recognition of Tribal Court Orders Relating to the Division of Marital Assets**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>Develop procedures, create case type in case management system, and train staff.</p> <p>Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</p> <p>How well would this proposal work in courts of different sizes?</p> <p>It appears that the proposal will work for courts of various sizes.</p>	

# LEGISLATION COMMITTEE ACTION REQUEST FORM

Legislation Committee Meeting: September 24, 2020

<b>Title:</b> Judicial Council–Sponsored Legislation: Video Appearances in All Civil Actions and Proceedings	<b>Code Section(s):</b> Sponsor Code Civ. Proc., § 367.7
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<b>Advisory Committee or other entity submitting the proposal:</b> Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack, Co-chair Hon. Mark A. Juhas, Co-chair Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	<b>Advisory Committee Staff:</b> Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov
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<b>OGA Staff Recommendation:</b> Approve Judicial Council–Sponsorship	<b>OGA Staff:</b> Andi Liebenbaum, 916-323-3121 andi.liebenbaum@jud.ca.gov
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<b>Additional Information for Legislation Committee:</b> The proposal originates with recommendations included in reports from the Commission on the Future of California’s Court System and the Information Technology Advisory Committee’s Remote Video Appearances Workstream. It also would codify, as it pertains to video remote participation of persons in non-criminal proceedings, Emergency Rule 3. Use of technology for remote appearances, which became effective on April 6, 2020, and shall remain in effect until 90 days after the Governor declares the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council. Emergency rule 3 reads, in pertinent part, as follows:  Emergency rule 3. Use of technology for remote appearances (a) Remote appearances  Notwithstanding any other law, in order to protect the health and safety of the public, including court users, both in custody and out of custody defendants, witnesses, court personnel, judicial officers, and others, courts must conduct judicial proceedings and court operations as follows:
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(1) Courts may require that judicial proceedings and court operations be conducted remotely.

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(b) Sunset of rule

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



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.:*

For business meeting on: November 13, 2020

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**Title**

Judicial Council–Sponsored Legislation:  
Video Appearances in All Civil Actions and  
Proceedings

**Agenda Item Type**

Action Required

**Effective Date**

November 13, 2020

**Rules, Forms, Standards, or Statutes Affected**

Sponsor Code Civ. Proc., § 367.7

**Date of Report**

September 17, 2020

**Recommended by**

Legislation Committee  
Hon. Marla O. Anderson, Chair  
Civil and Small Claims Advisory Committee  
Hon. Ann I. Jones, Chair  
Family and Juvenile Law Advisory  
Committee  
Hon. Jerilyn L. Borack, Co-chair  
Hon. Mark A. Juhas, Co-chair  
Information Technology Advisory  
Committee  
Hon. Sheila F. Hanson, Chair

**Contact**

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### Executive Summary

The Legislation Committee, Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, and Information Technology Advisory Committee recommend the Judicial Council sponsor legislation to provide statutory authority for courts to permit video appearances in any civil actions or proceedings including trials and evidentiary hearings. The proposal originates with recommendations included in reports from the Commission on the Future of California's Court System and the Information Technology Advisory Committee's Remote Video Appearances Workstream.

## **Recommendation**

The Legislation Committee, Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, and Information Technology Advisory Committee recommend the Judicial Council sponsor Code of Civil Procedure section 367.7 (section 367.7) effective January 1, 2022. Section 367.7 would provide statutory authority for courts to permit video appearances in any civil actions or proceedings including trials and evidentiary hearings.

The text of the proposed legislation is attached at page 7.

## **Relevant Previous Council Action**

On April 6, 2020, in response to the COVID-19 pandemic, the Judicial Council enacted Emergency rule 3. Use of technology for remote appearances. This rule permits courts to require that judicial proceedings and court operations be conducted remotely. The rule is more expansive than this legislative proposal in that it includes court operations and criminal proceedings in addition to civil proceedings. Emergency rule 3 will remain in effect until 90 days after the Governor declared that the state of emergency related to the COVID-19 pandemic is lifted, or until it is amended or repealed by the Judicial Council.

In 2018, the Information Technology Advisory Committee formed the Remote Video Appearances Workstream (the workstream), which analyzed the state of video and digital appearances in California courts, and made recommendations to “broaden the adoption of this emerging model for court appearances.”<sup>1</sup> The workstream made several recommendations that legislative and rule proposals be developed to facilitate the use of video appearances in most civil proceedings.

Following the workstream’s report, the Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, and Information Technology Advisory Committee formed a joint ad hoc subcommittee to move forward with development of legislative and rule proposals.

In 2014, Chief Justice Tani G. Cantil-Sakauye established the Commission on the Future of California’s Court System (Futures Commission) to examine the work of the trial courts and consider how court operations could be improved and streamlined. The Futures Commission released its final report in 2017 and noted that, “the option to attend court proceedings remotely

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

should ultimately be available for all noncriminal case types and appearances, and for all witnesses, parties, and attorneys in courts across the state.”<sup>2</sup>

## **Analysis/Rationale**

Proposed section 367.7 would provide statutory authority for courts to permit video appearances in any civil action or proceeding, including trials and evidentiary hearings. The scope is broad. Examples of actions and proceedings include civil and small claims, unlawful detainers, juvenile dependency, family law, petitions for gun violence restraining orders, and petitions for name changes. The proposal makes the authority to permit video appearances subject to rules adopted by the Judicial Council. If the Judicial Council votes to sponsor this legislation, the committees will turn to rule development.

## **Policy implications**

The proposed legislation provides clear statutory authority for the courts to give litigants and other court stakeholders the option of appearing in court by video instead of in person. In doing so, it would advance the judicial branch’s technology goals of (1) promoting the digital court to improve access to the courts and (2) promoting legislative changes to facilitate the use of technology in court operations and the delivery of court services.<sup>3</sup>

## **Comments**

Eighteen commenters responded to the invitation to comment including courts, legal services organizations, bar associations, and a state agency. Overall, the commenters were supportive of the proposal. Several commenters made suggestions for rules when they are in development, which the committees will take into consideration when that time comes. The suggested modifications to the proposal are addressed in more detail below. In addition to the formal public comments, the Criminal Law Advisory Committee (CLAC) suggested a modification to how the statute should relate to the rules of court, which is also discussed below.<sup>4</sup>

Several commenters suggested modifications to the proposal that the committees considered, but determined could best be addressed in rulemaking. These included:

- Modify the proposal to state parties must consent to allow a witness to appear in sexually violent predator and juvenile dependency cases. Because the authority granted by the proposal would be subject to the rules of court, the committees decided against the modification in statute. Instead, identifying proceedings that require consent of the parties for a court to allow a witness to appear by video can be addressed in rulemaking.

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<sup>2</sup> Judicial Council of Cal., Futures Commission Rep. (2017), pp. 221–222. (Recommendation 5.1), available online at <https://www.courts.ca.gov/documents/futures-commission-final-report.pdf>.

<sup>3</sup> Judicial Council of Cal., *Strategic Plan for Technology 2019–2022* (2019), pp. 8–9, 14–15, available online at <https://www.courts.ca.gov/documents/jtc-Court-Technology-Strategic-Plan.pdf>.

<sup>4</sup> This comment was part of broader informal input from that advisory committee on the potential for legislation authorizing video appearances in criminal proceedings in a future proposal.

- Eliminate fees, especially for parties with fee waivers. Elimination of all fees would require another proposal and statutory change because an existing statute, Government Code section 70630, authorizes courts to charge fees for videoconferencing. However, the Judicial Council has authority to address the applicability of fee waivers by rule.
- Specify real-time video. The proposal is intended to cover live, real-time video of proceedings. The committees do not recommend altering the proposal, but if necessary, may address the issue in rules.
- Avoid defaulting parties because of technical difficulties. The committees determined they could consider this issue in rulemaking.

In addition, some commenters suggested modifications to the proposal that would not be suitable for rulemaking, but that would, if adopted, require a change in the language of the proposal. These included:

- Modify the proposal to strengthen the language in subdivision (c). The suggestion came from informal comments by the Criminal Law Advisory Committee. Subdivision (c) of the proposal as- circulated stated in, “The Judicial Council may adopt rules effectuating this section.” CLAC suggested modifying the language to state, “The exercise of the authority granted the court in subdivision (b) shall be subject to rules of court adopted by the Judicial Council to effectuate this section.” The committees discussed this recommendation and agreed the suggested modification was preferable and incorporated it into the proposal.
- Change “practical” to “practicable” in subdivision (a). “Practical” means something that is “capable of or suitable to being used or put into effect; useful”<sup>5</sup> and has a subtle distinction from “practicable,” which means “capable of being effected, done, or put into practice; feasible.”<sup>6</sup> The committees discussed and determined the intent was to cover the use of video when it is both useful and feasible, and, accordingly modified the proposal to add “practicable” to subdivision (a).
- Ensure subdivisions (a) and (b) are consistent in their use of “party” and “person.” Subdivision (a) states the intent of the provision is to allow courts to “permit parties to appear in court by video” while subdivision (b) states a court may “permit a person to appear by video...” The committees discussed this issue, and concluded that their intention was for the scope to be broad and apply to “persons” as expressed in subdivision (b). It was an oversight that the wording in subdivision (a) was not made the

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<sup>5</sup> American Heritage Dict. (5th ed. 2020), <https://ahdictionary.com/word/search.html?q=practical>, (as of July 7, 2020).

<sup>6</sup> American Heritage Dict. (5th ed. 2020), <https://ahdictionary.com/word/search.html?q=practicable>, (as of July 7, 2020).

same. For this reason, and to ensure alignment between subdivisions (a) and (b), the committees modified the proposal to use “person” in subdivision (a) rather than “parties.”

- Add “Notwithstanding any provision of law to the contrary...” to the proposal. A commenter noted that there are statutes that require a person to appear in person. The commenter recommended adding “notwithstanding” language in the proposal to override such statutes so they would not have to be individually amended. The committees discussed this issue, but determined the proposal was not the proper mechanism to override any existing statutes requiring an in-person appearance. The committees did not examine statutes requiring in-person appearances, and did not discuss substituting this proposal over any other law as a part of the internal or public comment process. The committees concluded that such statutes would need to be considered individually for full understanding as to why in-person appearances have been required and whether that should change. Accordingly, the committees decided against modifying the proposal to override other statutes.

The committees sought specific feedback on whether any type of civil action or proceeding should be excluded from the scope of the proposal. The committees received four suggestions for exclusions, but ultimately decided against recommending any. One commenter suggested excluding confidential proceedings but did not explain why. The committees agreed on the importance of confidentiality, but confidentiality can be addressed in rulemaking or implementation. Two commenters suggested excluding the use of video appearances in jury trials over concerns that video participation would be detrimental to juror morale. The committees rejected this concern on the basis that it is speculative, and one of the stated goals of the proposal is to permit the use of video participation in trials. Moreover, because remote video participation is discretionary, the proposal does not obligate courts to offer it in a jury trial if a court determined it was not appropriate. Finally, a court suggested excluding judgment debtor exam hearings because of concerns with technical difficulties with video. This court also suggested excluding property abatement warrant proceedings, which the court stated should be conducted in-person. Again, because of the discretionary nature of the authority granted under the proposal, a court is not obligated to offer video remote participation for those proceedings. Accordingly, the committees did not recommend excluding these proceedings.

### **Alternatives considered**

The committees considered the alternatives of recommending no action, recommending rules in place of a statutory provision, or recommending something other than legislation or rules of court (e.g., guidance documents or best practices). Ultimately the committees determined that legislation providing statutory authority to courts to permit video appearances is an important first step to facilitate the use of video appearances in the courts. The committees determined that a legislative proposal will ensure courts have clear authority to proceed with video appearances in all civil actions for all types of proceedings, including trials and evidentiary hearings. While the committees did not develop a rule proposal, they anticipate doing so if the Judicial Council decides to sponsor the legislation.

Additionally, the committees considered amending existing Code of Civil Procedure section 367.5, which governs telephonic appearances, to include video, but determined that a separate code section would be clearer given that the overall scope of the case types and proceedings for video are generally broader than for telephone.

At one point, the committees considered excluding juvenile cases from the proposal. As referenced above, the Information Technology Advisory Committee's Remote Video Appearances Workstream report noted that juvenile cases may require special attention and different rules than other civil proceedings, but it made no juvenile-specific recommendations, recognizing instead that the use of video remote technology in juvenile cases would benefit from further discussion. Interestingly, the ad hoc subcommittee members discussed the matter and learned that courts already use video remote technology in juvenile cases. For example, the Superior Court of Placer County allows juveniles to appear by video from a courtroom in one location to a courtroom in another location. With this information in mind, the committees did not want this proposal to stand as a potential obstacle to existing video appearance efforts by the courts, or create conflicts with other statutes on the subject. As a result, the committees determined it is preferable to keep the proposed code section broad.

### **Fiscal and Operational Impacts**

The committees sought specific comments from courts on fiscal and operation impacts. One court commented that high-speed internet for video may be a challenge for courts in remote areas. That court further noted that indigent litigants may be unable to access a video option due to lack of access to internet or proper equipment. Another court commented that the biggest challenges for courts are access to technology, connectivity and the variability of litigant knowledge on using technology.

One court commenter noted that there would be an increase in costs for equipment and software expenses as well as staff training. However, the costs for the public, litigants, and justice partners could be reduced because they would not need to travel to the court.

### **Attachments and Links**

1. Code of Civ. Proc., § 367.7, at page 7
2. Chart of comments, at pages 8–59
3. Link A: Judicial Council of Cal., Futures Commission Report (2017), <https://www.courts.ca.gov/documents/futures-commission-final-report.pdf>
4. Link B: Remote Video Appearances Workstream, Remote Video Appearances for Most Noncriminal Hearings 2018–2019: Workstream Phase 1 Report, Final (Nov. 20, 2019), <https://www.courts.ca.gov/documents/jctc-20191125-materials.pdf>
5. Link C: Judicial Council of Cal., Strategic Plan for Technology 2019–2022 (2019), <https://www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf>  
Link D: Gov. Code, § 70630, [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=70630](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=70630)

Section 367.7 of the Code of Civil Procedure would be enacted, effective January 1, 2022, to read:

1 **§ 367.7**

2  
3 (a) It is the intent of this section to improve access to the courts and reduce litigation  
4 costs by providing that a court may, as appropriate, practical, and practicable, permit a  
5 person to appear in court by video in all civil actions and proceedings including trials and  
6 evidentiary hearings.

7  
8 (b) A court may permit a person to appear by video in any civil action or proceeding.

9  
10 (c) The exercise of the authority granted the court in subdivision (b) shall be subject to  
11 rules of court adopted by the Judicial Council to effectuate this section.

DRAFT



**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings** (Enact Code Civ. Proc. § 367.7)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
1.	Alliance for Children’s Rights by Kristin Power, Government Relations Director Los Angeles, CA	NI	<p>As evidenced by the massive court disruption caused by the current pandemic situation and need to provide safe access to courts for claimants and court personnel, and by the increasing use of remote appearances taking advantage of advances in technology, it is very timely to consider legislation allowing for remote video appearances in all civil actions and proceedings.</p> <p>The Alliance for Children’s Rights protects the rights of impoverished, abused and neglected children and youth. By providing free legal services, advocacy, and programs that create pathways to jobs and education, the Alliance levels the playing field and ensures that children who have experienced foster care are able to fulfill their potential.</p> <p>Support for Voluntary and Fee-free Remote Access</p> <p>Many of our attorneys have participated in remote appearances and appreciate the flexibility and inclusive nature of allowing for remote appearances. In fact, the Alliance co-sponsored AB 686 (Chapter 434, Statutes of 2019) to require the Judicial Council to establish a rule of court that authorizes the use of telephonic or other remote access by an Indian child’s tribe in</p>	The committees appreciate the comments and perspective of the commenter.

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

**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings** (Enact Code Civ. Proc. § 367.7)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>proceedings where the Indian Child Welfare Act (ICWA) applies, to ensure that Indian tribes can fully participate in ICWA cases and preventing resource issues from negatively impacting Indian tribes' participation in ICWA proceedings.</p> <p>In considering legislation, the Alliance urges Judicial Council to maintain flexibility for courts by making remote appearances voluntary to promote access to justice for claimants who do not have access to technology allowing for a video appearance.</p> <p>In addition, to ensure access, we urge that remote appearances are provided at no cost/fee to claimants and their counsel as well as experts and witnesses, particularly those who have qualified for a fee waiver. In recent actions, in order to appropriately provide counsel to clients, our attorneys would have had to pay a fee to participate in remote hearings.</p> <p>Ensuring Fair Outcomes</p> <p>Given the relatively new nature of remote appearances, we urge Judicial Council to collect data on the outcomes of remote hearings to analyze whether remote appearances result in less favorable outcomes for claimants. In this way, we can consider such data and develop appropriate</p>	<p>The proposal is written to be permissive, allowing courts to permit video appearances, but does not require them.</p> <p>There would need to be separate proposal to address existing Government Code section 70630, which authorizes courts to charge fees for video. However, the Judicial Council has authority to specify the applicability of fee waivers in rules of court. If the proposal is approved the committees will next develop rules for video appearances and will consider fee waivers as a part of that.</p> <p>The committees appreciate the suggestion on data collection and analysis and have referred the suggestion to Judicial Council staff.</p>

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

**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>training and other resources to promote equal access and outcomes.</p> <p>Finally, we caution Judicial Council to carefully consider confidentiality during remote hearings. It is in the best interests of all involved to protect confidentiality. For example, if certain parties such as a birth parent were excluded during some portion of a dependency hearing because the court ruled it was in the best interest of the child, would the court be able to exclude that person from the call or prevent access to a portion of the hearing? If confidential documents are being entered as exhibits, would attendees be able to see those documents through the web-based platform? These issues may be best considered in implementation, however we wished to express the need for careful consideration.</p>	<p>The committees agree confidentiality is an important consideration and will discuss the issue in future development of rules for video appearances.</p>
2.	Andrew Jablon Attorney	NI	<p>I am concerned that presents an inequitable access to the judicial system, as some litigants may not have the financial ability to provide witnesses with internet/computer capabilities to appear via video conference. Additionally, what are we saying to juries if they have to be in court but witnesses don't? At most, video appearances by witnesses should, without good cause, be allowed only for bench trials and evidentiary hearings to minimize issues of bias.</p>	<p>The committees understand the concern, but the proposal does not impose and obligation on litigants to use video appearances.</p>

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

**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			I do think, however, that all depositions should be allowed to be taken via video conference, including not requiring a specific "location" for notice purposes if the deposition is going to be taken remotely.	
3.	California Commission on Access to Justice by Hon. Mark Juhas, Chair Oakland, CA	A	<p>The California Commission on Access to Justice appreciates the opportunity to comment to the Civil and Small Claims, Family and Juvenile Law, and Information Technology Advisory Committees on the proposed legislation adding Section 367.7 to the Code of Civil Procedure. The Access Commission supports the new Section with the recommendation that, once enacted, it be accompanied by rules for implementation in ways that augment, not impede, fair and effective use of technology for remotely conducted hearings by self-represented litigants.</p> <p>For 23 years, the Access Commission has worked to advance access to justice for all Californians using broad-based strategies informed by diverse stakeholders. The Access Commission proposes innovative solutions and oversees efforts to increase resources and improve methods of helping the poor, those of moderate-income, and others struggling to address legal problems and vindicate legal rights.</p>	The committees appreciate the comment and perspective offered by the commission.

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

**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	Commenter	Position	Comment	Committee Responses
			<p>Proceedings conducted remotely with video technology can be used in ways that would enhance access to the courts on the part of litigants in remote areas, self-represented litigants, persons with disabilities or limited literacy, as well as others. For this to be the outcome of enactment and use of Section 367.7, however, it must be practiced in ways that avoid creating obstacles to low income Californians, non-English speakers, persons with disabilities, and those lacking technology or connectivity because of the digital divide.</p> <p>Proposed Section 367.7 provides that the Judicial Council may adopt rules for its implementation. Both in new rules and in best practices that courts should adopt voluntarily, there are a number of considerations that should be observed by courts using remote video appearances in civil actions. To assist courts in connection with access issues related to remote proceedings currently being done pursuant to the Judicial Council’s Emergency Rule 3 as well as continuing after expiration of the emergency rule, the Access Commission recently compiled a guide on “Remote Hearings and Access to Justice During COVID-19 and Beyond,” <a href="https://www.calatj.org/news">https://www.calatj.org/news</a> (copy attached). The guide lists and discusses many of these concerns and issues. When the time comes to promulgate</p>	<p>The committees agree video may be beneficial and improve access for many litigants. The committees also agree that video should not create obstacles to access.</p> <p>The committees appreciate the commission sharing the guide and it will be helpful for the committees to consider the guide during rule development.</p>

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

**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>rules implementing Section 367.7, we will be happy to assist and comment on them.</p> <p>One caution that courts should observe is that a substantial fraction of self-represented litigants do not possess the technology needed for remote video appearances. To avoid procedural inequity, courts will need to ensure their implementation rules enhance access to the courts for all individuals and communities, including the most disadvantaged, and do not create or compound inequities.</p> <p>Responding to the advisory committee’s specific questions, we note that proposed Section 367.7 does address its stated purpose appropriately, although, once enacted, it must be accompanied by rules and practices to enhance effective access to the courts for all.</p> <p>Considerations that might render some proceedings appropriate for remote appearances and others not will generally vary in ways that are not amenable to listing in Section 367.7 and may change over time. To allow flexibility, we believe the code section should allow the Judicial Council to provide for exclusion of particular civil actions or proceedings by rule.</p>	<p>The committees agree with this point and will consider it further when developing rules, if the proposal is approved.</p>

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

**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>In short, the Access Commission considers the use of video technology for remote appearances to be a useful tool that courts should use with attention to the impact on those who may face greater obstacles than others in seeking justice in California’s courts.</p>	
4.	<p>California Department of Child Support Services by Yolanda Peneda, Attorney I Rancho Cordova, CA</p>	NI	<p>The California Department of Child Support Services (department) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies, and our case participants. Specific feedback related to the proposal for judicial council sponsored legislation with potential impacts to the department and its stakeholders follows.</p> <p>The department applauds efforts to provide statutory authority that allows courts to expand remote video appearances to civil proceedings including trials and evidentiary hearings. This legislation would provide child support case participants greater access to the courts. Proposed Code of Civil Procedure section 367.7 appropriately addresses the stated purpose of providing courts with statutory authority permitting remote video appearances without requiring every court to allow video court appearances.</p>	<p>The committees appreciate the comment and agree video appearances may improve access to the courts.</p>

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

**LEG20-02****Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings** (Enact Code Civ. Proc. § 367.7)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>In order for Title IV-D child support case participants to benefit from legislation expanding the court’s authority to permit remote video court appearances in contested hearings, the department requests the Judicial Council amend California Rule of Court, Rule 5.324 (recommended language is included below). The rule allows for the use of remote telephone, videoconferencing and other digital court appearances in select Title IV-D child support court hearings and conferences, but currently excludes contested trials. Permitting the use of remote video appearances in contested child support hearings would grant parents greater access to the courts by reducing the time and financial costs of travel, childcare, and missed workdays.</p> <p>Additionally, the Committee requested comments regarding civil actions or proceedings that should be excluded from the scope of the proposed section. In this regard, the department requests that contempt hearings continue to be excluded from the list of permissible remote video court appearances in Rule 5.324. While contempt hearings are used sparingly in child support cases, there are circumstances in which requiring a party to appear in person for a contempt hearing is necessary.</p>	<p>The committees appreciate the inclusion of proposed rule language and will consider it during rule development. Rule 5.324 falls within the purview of the Family and Juvenile Law Advisory Committee, which is one of the committees involved in developing the proposed legislation and will also be working on rule development.</p>

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



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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>The department requests California Rule of Court, Rule 5.324 be amended as follows:</p> <p>...</p> <p>(c) Permissibility of telephone appearances Upon request, the court, in its discretion, may permit a telephone appearance in any hearing, contested hearing, or conference related to an action for child support when the local child support agency is providing services under title IV-D of the Social Security Act.</p> <p>(d) Exceptions A telephone appearance is not permitted for any of the following except as permitted by Family Code section 5700.316:</p> <p>(1) Contested trials, Contempt hearings, orders of examination, and any matters in which the party or witness has been subpoenaed to appear in person; and</p> <p>(2) Any hearing or conference for which the court, in its discretion on a case-by-case basis, decides that a personal appearance would materially assist in a determination of the proceeding or in resolution of the case.</p>	
5.	California Lawyers Association, Executive Committee of the Family Law Section (FLEXCOM)	A	FLEXCOM agrees with this proposal.	No response required.

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

**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
	by Justin M. O’Connell, Legislation Chair Sacramento, CA			
6.	California Lawyers Association, Litigation Section, Committee on Administration of Justice by Christopher Fredrich Stroock  Sacramento, CA	A	The Committee on Administration of Justice agrees with this proposal.	No response required.
7.	California Lawyers Association, Executive Committee of the Trusts and Estates Section (TEXCOM) by Mark S. Poochigian, Chair Sacramento, CA	A	The Executive Committee of the Trusts and Estates Section of the California Lawyers Association (TEXCOM) agrees with this proposal.  TEXCOM responds as follows to the Request for Specific Comments:  • Does the proposal appropriately address the stated purpose? TEXCOM’s view is that the proposed statute does appropriately address the stated purpose.  • Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule?  TEXCOM’s view is that there are no proceedings arising under the Probate Code that should be	The committees discussed TEXCOM’s suggestion to add “notwithstanding” language to the proposal, but does not recommend adding the language. The committees determined the proposal was not the proper mechanism to override any existing statutes requiring an in-person appearance. The committees did not examine statutes requiring and in-person appearance and did not discuss overriding any such statutes at meeting or as a part of the public comment process. The committees concluded that such statutes should be considered individually for full consideration why in-person has been required and why that should change.

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>automatically excluded from the proposed legislation. However, we note that there are several Probate Code statutes that require a physical appearance, such as Probate Code section 1825, which provides that a proposed conservatee “shall be produced at the hearing” except if out-of-state when served and not the petitioner or unable to attend for medical inability. There is a potential conflict between this and other similar statutes that could be resolved in the language of CCP 367.7, rather than having to amend potentially dozens of statues throughout the various California codes, including the Probate Code. In order to avoid ambiguity – and consistent with TEXCOM’s view that there are no proceedings arising under the Probate Code that should be automatically excluded – we recommend that the permissive language in the proposed statute be prefaced with the following: “Notwithstanding any provision of law to the contrary . . .”</p> <p>Although beyond the scope of the proposed legislation itself, if it is enacted, TEXCOM recommends that the Judicial Council consider, for due process reasons, promulgating specific rules for proceedings where deprivation of liberty is involved, including guardianships and conservatorships (particularly LPS conservatorships).</p>	<p>The committees appreciate the suggestion and will consider this issue in rule development.</p>

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
8.	Child Support Directors Association by Terrie Hardy-Porter, Director Sacramento, CA	A	<p>In order to ensure access to justice that is fair and safe, video and telephonic hearings for child support hearings should continue to be encouraged so that all parties can participate without fear of compromising their health and welfare by attending in person. We also urge the courts to make information available about how to access video and telephonic court hearings to participants, the public, and stakeholders so that all parties can participate at the lowest cost possible in an effort to assure fair access to all. Judicial staff should also be trained and supported to conduct these hearings.</p> <p>Request for Specific Comments</p> <p>Does the proposal appropriately address the stated purpose?</p> <p>The proposal is to increase the use of technology in the courtroom by authorizing courts to elect the option of video hearings in all civil actions, reserving the right to later create exceptions and specific procedures through rule making rather than statutory change. This proposal aligns perfectly with the Futures Commission's recommendation to increase use of technology in creating greater efficiency and streamlining court proceedings.</p>	The committees appreciate the comments.

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>It is presumed that the Commission’s recommendation for increased use of video hearings intended improved efficiency for the court as well as improved access for the public. The proposal acknowledges that use of increased technology will result in additional expense to the court but addresses it only by citing CA Gov’t Code 70630, which permits the additional expense to be collected in the form of fees to the public. Additional fees would be contrary to the objective of using technology to increase access for the public. Consideration should be given to alternatives that would allow a greater percentage of civil litigants to benefit from the convenience and safety provided by video hearings without incurring additional fees. It is recommended that the proposal include a provision permitting fee waivers. Also, the use of video hearings in juvenile proceedings in Placer County could serve as a model. Allowing a litigant to appear by video without fee from a different court location or even a court partner location, such as a self-help center or legal aid, would provide those litigants without transportation or personal access to the necessary technology greater access. Lastly, telephone appearances should continue to be available to those members of the public who do not have access to the equipment required for video hearings.</p>	<p>There would need to be separate proposal to address existing Government Code section 70630, which authorizes courts to charge fees for video. However, the Judicial Council has authority to specify the applicability of fee waivers in rules of court. The committees will next develop rules for video appearances and will consider fee waivers as a part of that.</p>

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule?</p> <p>We agree that a necessary first step in achieving the stated purpose is to authorize the optional use of video hearings in all civil matters. This broad authority is required prior to each individual court utilizing the technology in the manner most appropriate for their jurisdiction. We can think of no reason to exclude any type of civil action or proceeding initially. As each Court begins to expand their use of video hearings, regular reassessment will be required to ensure that the use remains in furtherance of the stated purpose. Where court access or service is found to be compromised by this process, limitations should be created in an expeditious manner. We believe allowing the Judicial Council to address any concerns as they arise by implementing specifically tailored rules is appropriate and necessary.</p>	
9.	Child Support Directors Association, Judicial Council Forms Committee by Ronal Ladage, Chair Sacramento, CA	A	The Committee has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies, our judicial partner, and our case participants. The Committee is in support of the proposed Code of Civil Procedure section 367.7	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>as it appropriately addresses the goal of LEG20-02 by providing statutory authority for courts to permit, but not mandate, remote video appearances in any civil (family law included) action or proceeding, including trials and evidentiary hearings.</p> <p>In addition to supporting LEG20-02, the Committee recommends an amendment to California Rule of Court, Rule 5.324. Rule 5.324 currently allows video appearances participation in IV-D hearings except in contested trials and contempt matters. In order for the IV-D program to fully benefit from the proposed legislation, the Committee recommends Rule 5.324 be amended to expand the court’s authority to allow remote videoconferencing in contested hearings and trials (except when the court in its discretion, deems personal appearance would material assist in the resolution of the case). This amendment would benefit IV-D participants by granting them greater access to the courts. The amendment would allow easier access to the court for parties with mobility barriers and vulnerability barriers, as well as those who live or work far from the courthouse. It would save time, cost of travel, missed work, and decrease childcare arrangements. Potential barriers to the IV-D program of remote video appearances include reduced line items, as</p>	<p>The committees appreciate the suggestion and inclusion of proposed rule language and will consider it during rule development. Rule 5.324 falls within the purview of the Family and Juvenile Law Advisory Committee, which is one of the committees involved in developing the proposed legislation and will also be working on rule development.</p>

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**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings** (Enact Code Civ. Proc. § 367.7)

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			<p>remote hearings take longer than in-person hearings, and any potential court cost for the video conferencing hardware and software.</p> <p>The Committee recommends that contempt hearings continue to be excluded from the list of permissible remote video court appearances in Rule 5.324.</p> <p>The Committee recommends California Rule of Court, Rule 5.324 be amended as follows:</p> <p>(c) Permissibility of telephone appearances Upon request, the court, in its discretion, may permit a telephone appearance in any hearing, contested hearing, or conference related to an action for child support when the local child support agency is providing services under title IV-D of the Social Security Act.</p> <p>(d) Exceptions A telephone appearance is not permitted for any of the following except as permitted by Family Code section 5700.316:</p> <p>(1) Contested trials, Contempt hearings, orders of examination, and any matters in which the party or witness has been subpoenaed to appear in person; and</p> <p>(2) Any hearing or conference for which the court, in its discretion on a case-by-case basis,</p>	

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## LEG20-02

### Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)

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			decides that a personal appearance would materially assist in a determination of the proceeding or in resolution of the case.	
10.	Legal Aid Association of California by Salena Copeland, Executive Director Oakland, CA	A	<p>I am writing on behalf of the Legal Aid Association of California (LAAC) to express our support for LEG20-02 (Enact Code Civ. Proc., § 367.7). We <b>support</b> LEG20-02 because it would result in the expanded use of remote video appearances, which has the potential to increase access to justice.<sup>1</sup> There are, however, a number of critical access to justice and accessibility issues with remote video appearances. Acknowledging that the rule-making phase will take place later, we wanted to take this opportunity to highlight some of those issues here.</p> <p>LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California's unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a</p>	The committees appreciate the perspective and suggestions on rules and implementation from the Legal Aid Association of California. The committees will consider the important issues raised in the comment when developing rules.

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	Commenter	Position	Comment	Committee Responses
			<p>statewide level regarding funding and access to justice.</p> <p>We <b>support</b> the enactment of Code Civ. Proc., § 367.7, which would provide statutory authority for courts to permit remote video appearances in any civil action or proceeding, including trials and evidentiary hearings, and would also specify that the Judicial Council may adopt rules effectuating the new code section. These changes would help the court system build out a remote infrastructure that is critical for disasters, like the current pandemic, as well as for the administration of justice generally. Specifically, in terms of the advisory committee’s request, the proposal addresses the stated purpose; however, we note herein the aspects of rulemaking that ought to be considered to ensure enhanced access for low-income Californians and others who may be marginalized without conscious recognition of barriers.</p> <p>1. <u>Remote Hearings During COVID-19 (and Beyond)</u></p> <p><b>As we have seen with COVID-19, a robust remote hearings infrastructure is essential.</b> The critical civil legal issues that low-income Californians, self-represented litigants (SRLs), and other court users face go on and, in many</p>	

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			<p>ways, are exacerbated in the midst of the pandemic. People facing unjust evictions, domestic violence, public benefits and unemployment insurance denials, and myriad other issues have needed the courts to assist them in reaching resolutions that can help them stay housed, reach safety from an abuser, and receive the benefits they need to get by. Consequently, we have seen how massively critical this remote hearing infrastructure is in this time of crisis.</p> <p>Moreover, increasing the use of remote hearings <b>also has the potential to increase access beyond crisis moments to the everyday administration of justice</b> for SRLs, low-income Californians, and rural communities who could benefit from a system that helps them avoid long trips to the court that otherwise can result in the disruption of responsibilities like caring for children or parents or getting on the bus to reach multiple jobs. Further, it could allow for streamlined, efficient systems that offer cost- and time-saving potential for courts, lawyers, and other justice stakeholders.<sup>2</sup> Increasing the viability, sophistication, and—most critically—the accessibility of remote appearance technologies in courts is more than a stopgap measure during a crisis, and has the potential to offer much more in terms of access to justice, so long as that element is emphasized.<sup>3</sup></p>	

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			<p>2. <u>Avoid Replicating Preexisting Barriers when Designing Remote Hearings Process</u></p> <p>a. <i>The Digital Divide</i></p> <p>While technology has the potential to increase access to justice, <b>we must ensure we avoid replicating preexisting systemic barriers to low-income Californians and other disadvantaged groups when designing and implementing tech-based systems.</b> First, in designing a statewide system of remote hearings, consciousness of the “digital divide” is imperative: There is an entrenched socioeconomic and geographic digital divide that will, until resolved, make it difficult or impossible for many Californians to participate.<sup>4</sup> While this should not dissuade courts to increase the use of remote technologies, it is essential to note that there is inequitable access to technology and courts must be willing to work with litigants to allow them to participate. Specifically, where a litigant does not have access to the necessary videoconferencing platform, section 367.5 (telephonic hearings) can still function to ensure that the participant can utilize a telephone to participate.</p>	

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			<p><i>b. Limited English Proficiency and Disability Access</i></p> <p><b>Access for limited English proficient (LEP) individuals and people with disabilities is paramount as well.</b><sup>5</sup> Interpretation of court proceedings as well as documents and webpages is critical to ensure LEP participants can understand both processes and substance. Remote translation using video is generally preferred because it provides visual cues to the interpreter.<sup>6</sup> In terms of disability access, remote technology can cause dizziness, nausea, and other feelings of illness. Essential videoconferencing accessibility features are closed captioning, keyboard accessibility, automatic transcripts, and screen reader support, as a minimum.<sup>7</sup> It is also vital for documents, presentations, and other materials to be compliant with the Web Content Accessibility Guidelines (WCAG) 2.1,<sup>8</sup> and that the platform further comply with the 21st Century Communications and Video Accessibility Act (CVAA).<sup>9</sup> Altogether, remote hearings have incredible potential to increase access to justice by allowing easier participation, but we must build a system cognizant of the accessibility issues that could arise.</p> <p>3. <u>Access and Accessibility Issues to be Considered When Promulgating Rules</u></p>	

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			<p><b>It will be paramount what rules the Judicial Council ultimately decides to adopt to effectuate this code section. During rule-making, we highly encourage special attention be paid to access to justice issues to uplift access to courts and legal protections while avoiding the abridgement of due process rights.</b> As noted by the Judicial Council: “Potential areas for rule making include the notice to be given by a person requesting a video appearance, the manner in which video appearances are to be conducted, the conditions required for a person to be permitted to appear by video, and provisions relating to the courts’ use of private vendors to provide video appearance services.”<sup>10</sup> These are all prime examples of the important details of such a system.<sup>11</sup> Elsewhere in the country where remote hearings are being utilized, there can be serious due process issues, including situations where a defendant might participate via telephone while the judge and lawyers videoconference; a lack of clear process for bringing in exhibits and evidence; and illegal judgments, along with the issues noted below. An additional issue is a concern around cost, such that some hearings that usually have no fees now require the filling out of a fee waiver that might only cover the client, and it might be unclear for a self-represented litigant to know to seek a fee</p>	

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			<p>waiver for such fees. While this rule-making process will be in the future, there are a few aspects of this that we would like to highlight now.</p> <p><i>a. Notice Should Be Clear and Thorough</i></p> <p>Notice is an important aspect of the remote hearings process. Having direct, thorough notices will help avoid unnecessary delays and miscommunications between courts and litigants. We advise always using plain language and avoiding legalese and technical terms to help ensure that litigants understand what they are being asked to do.<sup>12</sup> Some aspects of designing the remote hearings notification process should include consideration of: how hearings are scheduled<sup>13</sup> (moving to individualized scheduling with time-certain proceedings); ensuring clear notification<sup>14</sup> (plainly stating in the notice that the litigant will be using remote hearings software and how to go about doing so); the provision of extra notice of hearings<sup>15</sup> (email, text, and/or calling the litigation to determine receipt); and displaying daily dockets on the court’s remote hearings webpage that includes notification of whether the hearing is virtual or in-person.<sup>16</sup> It is essential to avoid punitive measures when addressing non-attendance or other matters.</p>	

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			<p><i>b. Complete, Helpful, and Accessible Webpages</i></p> <p><b>In addition to notice documents, webpages become ever-more important as places to provide litigants with the information they need.</b> It will be essential to maintain clear, concise, and accessible<sup>17</sup> remote hearings webpages that give litigants all of the information they need to participate,<sup>18</sup> and do so meaningfully, including the basics of whichever platform is being used as well as how to best prepare for their hearing.<sup>19</sup> These pages should presume that the user is navigating both these technological systems as well as the legal system for the first time. Therefore, they should provide the universe of information necessary for all, including those with less exposure to technology, to navigate these systems. This will increase accessibility, while also increasing court efficiency by avoiding delays and impediments to the hearing process.</p> <p><i>c. Support Ongoing Dialogue with Litigants and Advocates to Ensure Access, Produce a Verbatim Record, and Acknowledge Privacy Concerns</i></p> <p>Apart from the form of notice, <b>before the hearing</b> the court should request information</p>	

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			<p>from the litigant regarding their technological capacity to ensure they have Internet access and can download the videoconferencing platform. The court can also find out if there are any ADA accommodations or language access needs. The court can provide a list of legal aid organizations in the area for the relevant issue if the litigant is self-represented. There might be privacy concerns for sensitive matters—such as domestic violence cases—where a litigant may be unable to avoid using technology located in public areas of the home, and the court should recognize and address such concerns. The court should further determine how a record of the proceedings will be created for litigants to use to appeal, whether through the videoconferencing platform or an official court reporter, and notify the litigant of how to access such a record for this purpose.<sup>20</sup></p> <p><b>During the hearing</b>, while the judge must remain impartial, she can still make reasonable accommodations to ensure all participants can be heard.<sup>21</sup></p> <p><b>In sum, we support LEG20-02 because it offers the potential to increase access, so long as viewed through an access and accessibility lens.</b> Connecting self- and unrepresented litigants with legal aid and self-help centers; ensuring disability and language access and clear, thorough webpages and notices; and, overall,</p>	

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			<p>creating inclusive, accessibility-centered design throughout the remote hearings process—from notice to judgment to appeal—are some of the myriad essential aspects of respecting due process, protecting rights, and ensuring meaningful access to courts through virtual technologies. We must be sure not to replicate barriers that already impede low-income Californians, SRLs, and other disadvantaged court users and instead take this opportunity to optimize for access.</p> <p><b>Footnotes:</b>  <sup>1</sup> See CALIFORNIA COMMISSION ON ACCESS TO JUSTICE (CALATJ), REMOTE HEARINGS AND ACCESS TO JUSTICE DURING COVID-19 AND BEYOND, <a href="https://laaconline.egnyte.com/fl/3prDsUYnuA#folder-link/">https://laaconline.egnyte.com/fl/3prDsUYnuA#folder-link/</a> (CalATJ, in collaboration with LAAC, produced this guide recently to aid courts, judges, and court staff in ensuring their remote hearings systems were accessible).  <sup>2</sup> See generally SELF-REPRESENTED LITIGATION NETWORK (SRLN), SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE <a href="https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf">https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf</a> (“Providing services in a way that does not require the public to visit a courthouse or office is advantageous in terms of time and cost savings both for self-represented litigants and for the organizations that serve them.”).  <sup>3</sup> See, e.g., NATIONAL CONSUMER LAW CENTER, REMOTE COURT APPEARANCES IN THE COVID-19 ERA: PROTECTING CONSUMERS IN COLLECTION LAWSUITS (June 2020),</p>	

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**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	Commenter	Position	Comment	Committee Responses
			<p><a href="https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Remote_Court_Appearances.pdf">https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Remote_Court_Appearances.pdf</a> (noting the importance of clear notice, detailed instructions, avoiding issuing civil arrest warrants, and coordination with legal services).</p> <p><sup>4</sup> See, e.g., Monica Anderson &amp; Madhumitha Kumar, <i>Digital divide persists even as lower-income Americans make gains in tech adoption</i>, PEW RESEARCH (May 7, 2019), <a href="https://www.pewresearch.org/facttank/2019/05/07/digitaldivide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/">https://www.pewresearch.org/facttank/2019/05/07/digitaldivide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/</a>; Andrew Perrin, <i>Digital gap between rural and nonrural America persists</i>, PEW RESEARCH (May 31, 2019), <a href="https://www.pewresearch.org/facttank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/">https://www.pewresearch.org/facttank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/</a>; <i>The Digital Divide</i>, STANFORD CS, <a href="https://cs.stanford.edu/people/eroberts/cs181/projects/digital-divide/start.html">https://cs.stanford.edu/people/eroberts/cs181/projects/digital-divide/start.html</a>.</p> <p><sup>5</sup> NATIONAL CENTER FOR STATE COURTS, REMOTE COURT OPERATIONS INCORPORATING A2J PRINCIPLES (Mar. 27, 2020), <a href="https://www.ncsc.org/_data/assets/pdf_file/0016/14470/remote-court.pdf">https://www.ncsc.org/_data/assets/pdf_file/0016/14470/remote-court.pdf</a>.</p> <p><sup>6</sup> <i>Video Remote Interpreting (VRI)</i>, JUDICIAL COUNCIL, <a href="https://www.courts.ca.gov/VRI.htm">https://www.courts.ca.gov/VRI.htm</a>. See, e.g., <i>Remote Interpreting Best Practices during the COVID-19 Emergency</i>, WASH. COURTS, <a href="https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/Remote%20Interpreting%20Best%20Practices.pdf">https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/Remote%20Interpreting%20Best%20Practices.pdf</a>.</p> <p><sup>7</sup> These four accessibility features are included with Zoom and serve as an example. See <i>Accessibility Features, Zoom</i>, <a href="https://zoom.us/accessibility">https://zoom.us/accessibility</a>. BlueJeans features similar accessibility features. See <i>Accessibility Features for Meetings and Events</i>,</p>	

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**LEG20-02**

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	Commenter	Position	Comment	Committee Responses
			<p><a href="https://www.bluejeans.com/accessibility-video-conferencing-features">https://www.bluejeans.com/accessibility-video-conferencing-features</a>.</p> <p><sup>8</sup> <i>Web Content Accessibility Guidelines (WCAG) 2.1</i> (2018), <a href="https://www.w3.org/TR/WCAG21/">https://www.w3.org/TR/WCAG21/</a>.</p> <p><sup>9</sup> THE 21ST CENTURY COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT OF 2010, <a href="http://www.gpo.gov/fdsys/pkg/BILLS111hr3101pcs/pdf/BILLS-111hr3101pcs.pdf">http://www.gpo.gov/fdsys/pkg/BILLS111hr3101pcs/pdf/BILLS-111hr3101pcs.pdf</a>.</p> <p><sup>10</sup> JUDICIAL COUNCIL, <i>Proposal for Judicial Council–Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings</i>, <a href="https://www.courts.ca.gov/documents/leg20-02.pdf">https://www.courts.ca.gov/documents/leg20-02.pdf</a>.</p> <p><sup>11</sup> <i>See, e.g., CALATJ, supra</i> note 1.</p> <p><sup>12</sup> THE NATIONAL ASSOC. FOR COURT MANAGEMENT, 2019 PLAIN LANGUAGE GUIDE, <a href="https://nacmnet.org/wpcontent/uploads/NACM-Plain-Language-Guide-20190107.pdf">https://nacmnet.org/wpcontent/uploads/NACM-Plain-Language-Guide-20190107.pdf</a>. <i>See also</i> NATIONAL CENTER FOR STATE COURTS, PLAIN LANGUAGE RESOURCE GUIDE, <a href="https://www.ncsc.org/Topics/Access-and-Fairness/Plain-Language/Resource-Guide.aspx">https://www.ncsc.org/Topics/Access-and-Fairness/Plain-Language/Resource-Guide.aspx</a>.</p> <p><sup>13</sup> CAPACITY BUILDING CENTER FOR COURTS, CONDUCTING EFFECTIVE REMOTE HEARINGS IN CHILD WELFARE CASES (2020), <a href="https://www.americanbar.org/content/dam/aba/administrative/child_law/conducting-remotehearings.pdf">https://www.americanbar.org/content/dam/aba/administrative/child_law/conducting-remotehearings.pdf</a>. Additionally, this is especially important to SRLs and other court users who have issues spending half a day in court, such as those supporting the healthcare needs of parents or who cannot afford childcare. A discrete time to call-in helps with this.</p> <p><sup>14</sup> TEXAS ACCESS TO JUSTICE COMMISSION, BEST PRACTICES FOR COURTS IN ZOOM HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS, <a href="https://gato-docs.its.txstate.edu/jcr:27c725a8-4dbc-44f0-">https://gato-docs.its.txstate.edu/jcr:27c725a8-4dbc-44f0-</a></p>	

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			<p>a58a96a8b121e3d0/Best%20Practices%20for%20Courts%20in%20Zoom%20hearings%20Involving%20Self%20Represented%20Litigants.pdf.</p> <p><sup>15</sup> <i>Id.</i></p> <p><sup>16</sup> STATE COURT ADMINISTRATIVE OFFICE, <i>Michigan Trial Court Standards for Courtroom Technology</i> (2020), <a href="https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf">https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf</a>.</p> <p><sup>17</sup> NATIONAL CENTER FOR STATE COURTS, <i>supra</i> note 5.</p> <p><sup>18</sup> <i>See, e.g.</i>, THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER, <a href="http://www.placer.courts.ca.gov/RAS.shtml">http://www.placer.courts.ca.gov/RAS.shtml</a>.</p> <p><sup>19</sup> <i>See, e.g.</i>, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, <i>Preparing to Participate in a Zoom Video Conference</i>, <a href="https://www.cand.uscourts.gov/zoom/">https://www.cand.uscourts.gov/zoom/</a>.</p> <p><sup>20</sup> <i>See, e.g.</i>, Emergency Rule 3(a)(3) (2020) of the Judicial Council’s California COVID-19 Emergency Order permits “the use of remote reporting and electronic recording to make the official record of an action or proceeding.”</p> <p><sup>21</sup> TEXAS ACCESS TO JUSTICE COMMISSION, <i>supra</i> note 14.</p>	
11.	Orange County Bar Association by Scott B. Garner, President	A	<p>The proposal appropriately addresses the stated purpose of increasing availability of video appearances</p> <p>We recommend excluding jury trials in civil cases from the proposed code section.</p> <p>Requiring the public at large to travel to and from the courts to appear in person but allowing the attorneys to appear remotely will reduce jury morale and possibly erode confidence of, and opinions regarding, the courts and the practice of law.</p>	<p>The committees do not recommend excluding jury trials. The proposal will allow courts to exercise discretion in the use of video for proceedings and, accordingly, courts will be able to determine the appropriateness of using video in a jury trial.</p>

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
12.	Orange County Public Defender by Sara Ross Assistant Public Defender Santa Ana, CA	AM	<p>Statement of Interest</p> <p>The Orange County Public Defender’s Office is a public agency charged with representing the indigent in California’s third most populous county. The Public Defender’s Office consists of approximately 200 attorneys dedicated to the vigorous representation of criminal defendants in the Superior Court, Court of Appeal, and California Supreme Court. The Orange County Public Defender has been a statewide leader in litigating important issues in both Sexually Violent Predator and juvenile dependency cases, including <i>Orey v. Superior Court</i> (2013) 213 Cal.App.4th 1241 and <i>People v. Superior Court (Smith)</i> (2018) 6 Cal.5th 457; as well as <i>Renee J. v. Superior Court</i> (2001) 26 Cal.4th 735; <i>M.V. v. Superior Court</i> (2008) 167 Cal.App.4th 166; <i>In re Mark A.</i> (2007) 156 Cal.App.4th 1124; and <i>Jennifer A. v. Superior Court</i> (2004) 117 Cal.App.4th 1322.</p> <p>Comments</p> <p>As it is currently drafted, Section 367.7 applies to “any civil action or proceeding.” (Code Civ. Proc., § 367.7, subdivision (b).) As the Judicial Council noted, the scope of this section is broad and would apply to juvenile dependency matters and Sexually Violent Predator proceedings. While the language of the Judicial Council’s proposal suggests that video may be utilized in</p>	<p>The committees appreciate the comments and suggested modification offered by the Orange County Public Defender’s Office. The committees discussed the suggestion, but do not recommend changing the proposed legislation. Rather, whether certain proceedings require consent of the parties for a court to allow a witness to appear by video is a subject that the committees can be address in rulemaking.</p>

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			<p>evidentiary hearings and trial, the statute as currently written is vague as to whether a court can require a party or witness to appear via video. In other words, proposed Section 367.7 is silent as to whether this statute gives a court authority to <i>force</i> a party to appear via video or accept the appearance of a witness via video. Because parents in juvenile dependency and respondents in Sexually Violent Predator cases are uniquely situated and entitled to a variety of constitutional protections, the Judicial Council should revise this proposed legislation to reflect that courts cannot require parties and/or witnesses to appear by video in juvenile dependency and Sexually Violent Predator cases.</p> <p><u>Sexually Violent Predator Cases:</u> Sexually Violent Predator, or “SVP” cases, are considered special proceedings of a civil nature. (People v. Superior Court (Cheek) (2001) 94 Cal.App.4th 980 [holding SVP cases are subject to certain provisions of the Civil Discovery Act]; see also People v. Dixon (2007) 148 Cal.App.4th 412, 414.) Nevertheless, individuals prosecuted under the SVP law are entitled to constitutional rights largely consistent with those of criminal defendants. For instance, at trial, the alleged SVP is entitled to “the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and</p>	

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			<p>[to] have access to all relevant medical and psychological records and reports.” (Welf. &amp; Instit. Code, § 6603, subdivision (a).) Moreover, any party may demand and receive trial by jury. (Welf. &amp; Instit. Code, § 6603.) The prosecution has the burden of proving the case beyond a reasonable doubt, and any jury verdict must be unanimous. (Welf. &amp; Instit. Code, §§ 6604; 6603, subdivision (d).)</p> <p>The constitutional protections guaranteed to alleged SVPs are rooted in Due Process guarantees of liberty. Of course, “for the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection... The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.” (People v. Litmon (2008) 162 Cal.App.4th 383, 400.)</p> <p><u>Dependency Proceedings:</u>            Juvenile dependency proceedings are also civil proceedings, but courts have historically recognized that the consequences of these proceedings are more severe than many other civil proceedings. Certainly, “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” (M.L.B. v. S.L.J. (1996) 519 U.S. 102, 119.) Such decisions “involve the</p>	

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			<p>awesome authority of the State to destroy permanently all legal recognition of the parental relationship” and “are among the most severe forms of state action.” (M.L.B. v. S.L.J., supra, 519 U.S. at pp. 127–128, internal citations omitted.)</p> <p>Dependency cases also necessarily involve consideration of fundamental liberty interests. Indeed, the “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”(Santosky v. Kramer, (1982) 455 U.S. 745, 753.) “This Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. (Lassiter v. Department of Social Services (1981) 452 U.S. 18, 27, internal citations omitted.)</p> <p><i>The Right to Confrontation: SVP and Dependency Cases</i></p> <p>The right to confront and cross-examine accusers is a constitutional right belonging to criminal defendants. However, due process protections</p>	

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			<p>afford the right to confrontation to alleged SVPs and to parents in dependency matters.</p> <p>First, “[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.” (United States v. Yates (11th Cir. 2006) 438 F.3d 1307, 1315.) There are a number of reasons to approach the use of video in trials and evidentiary hearings with caution. For instance, some counties are not as technologically advanced as others, which could cause problems with the quality of the testimony or evidence presented. Further, practical problems could occur with respect to the angle and quality of the video screen used in courtrooms and the position of witnesses, parties, or jurors. (Carter, supra, 907 F.3d 1199.) Moreover, it would be nearly impossible to monitor the behavior of witnesses testifying remotely, which could result in witnesses surreptitiously reviewing documents, being coached off camera, or otherwise being improperly influenced. (Ibid.)</p> <p>Furthermore, “[t]he right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way, recollection, veracity, and communication are influenced by face-to-face challenge. This feature is part of the sixth</p>	

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			<p>amendment right additional to the right of cold, logical cross-examination by one's counsel.” (Herbert v. Superior Court (1981) 117 Cal.App.3d 661, 670, quoting United States v. Benfield (8th Cir. 1979) 593 F.2d 815.)</p> <p>Moreover, “[a]ny procedure that allows an adverse witness to testify remotely necessarily diminishes ‘the profound [truth-inducing] effect upon a witness of standing in the presence of the person the witness accuses.’” (United States v. Carter (9th Cir. 2018) 907 F.3d 1199, 1207 (Carter), quoting Coy v. Iowa (1988) 487 U.S. 1012, 1020.)</p> <p>For dependency matters, the right of confrontation ranks “among the essential ingredients of due process” in dependency proceedings. (In re Patricia T. (2001) 91 Cal.App.4th 400, 404.) Similarly, in SVP civil proceedings, “such a right does exist under the due process clause.” (People v. Otto (2001) 26 Cal.4th 200, 214; see also People v. Roa (2017) 11 Cal.App.5th 428, 455.)</p> <p>Proposed Revision:</p> <p>(a) It is the intent of this section to improve access to the courts and reduce litigation costs by providing that a court may, as appropriate and practical, and at the express</p>	

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			<p><u>request of either party in a Sexually Violent Predator case and any party in a juvenile dependency case, permit any party to appear in court by video in all civil actions and proceedings including trials and evidentiary hearings.</u></p> <p><u>(b) With the agreement of all parties in a Sexually Violent Predator proceeding and in a juvenile dependency proceeding, a A court may permit a <del>person</del> witness to appear by video in any civil action or proceeding.</u></p> <p><u>(c) The court may not permit a witness to appear by video for any trial or evidentiary hearing in a Sexually Violent Predator case or juvenile dependency case unless all parties consent to the witness appearing via video.</u></p> <p><u>(e) (d) The Judicial Council may adopt rules effectuating this section.</u></p> <p><b>Conclusion</b> By submitting this letter to the Judicial Council, the Public Defender’s Office does not mean to suggest that there will never be appropriate situations wherein the parties will seek to use</p>	

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			<p>video testimony or video appearances in an SVP or dependency trial or evidentiary hearing. However, as expressed above, the proposed legislation is vague and ambiguous with respect to whether the court may be permitted to order that this rule be imposed upon the parties, even in situations where the parties object or disagree. As such, the proposed legislation should be amended as provided above.</p>	
13.	<p>Public Law Center (PLC) By Leigh E. Ferrin, Director of Litigation and Pro Bono Santa Ana, CA</p>	AM	<p>PLC is a 501(c)(3) legal services organization that provides free civil legal services to low-income individuals and families across Orange County. Our services are provided across a range of substantive areas of law, including consumer, family, immigration, housing, veterans and health law. Additionally, PLC provides legal assistance to non-profits and low-income entrepreneurs. PLC works with hundreds of self-represented litigants and thousands of low-income clients every year. Through this work, PLC has seen the limited access to technology that is available, as well as the accessibility challenges even if the technology is technically available.</p> <p>The last few weeks have been a perfect example. As the courts begin to reopen, hearings are being set via video conference. However, a number of our clients do not have access to reliable internet where they could engage in a video call for any length of time. And, even if a client does have</p>	<p>The committees appreciate the comments and perspective from PLC.</p> <p>The proposed legislation is intended to be permissive for both the court and the person making the appearance. In this respect, the scope is different than current emergency rule 3 of the rules of court, which allows courts to require</p>

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			<p>access, many of our clients who are older adults, who are Limited English Proficient or who have limited education, are not capable of navigating even a relatively simple conference call-system. Even during the stay-at-home orders, while our offices are closed to the public, PLC has had to make accommodations with clients to bring them in to our office so that they can attend their court hearing. We can make those accommodations for our clients, but particularly in fields like family law, such a significant number of litigants are self-represented that it raises concerns.</p> <p>The additional complicating factor is that many of the resources that our client might typically use (libraries, community centers, etc.) are also closed right now. These resources might reopen, but we really do not know what the "new normal" will be, and whether or not access will be readily available. We are particularly concerned about what will happen if there are connectivity issues. We would encourage the court to not automatically default a party, particularly a self-represented party, based on their inability to connect due to technical difficulties, and at times allow exceptions so that litigants may be able to appear in person if needed (as well as a simple process to request the in-person appearance).</p>	<p>video as an emergency measure during the COVID-19 pandemic. Nonetheless, even during normal times, there may still be technical difficulties for a person who wants to appear by video. The committees will consider the issue of technical difficulties and defaults in the rulemaking process.</p>

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			<p>We appreciate the opportunity to comment. PLC recognizes that much of what we have learned in the last three months during the stay-at-home orders is that our world is moving in the direction of technological advancement, and for the most part, we support it. But we have seen very clearly the way that technology does not level the playing field and we believe the Judicial Council should take that into consideration when implementing these new rules.</p>	
14.	<p>Superior Court of Los Angeles County by Brian Borys</p>	AM	<ul style="list-style-type: none"> <li>- In proposed CCP 367.7, the word “practical” should be “practicable.”</li> <li>- The scope could be better defined. There are instances where “civil” does not include family law. See, e.g., CRC 1.6 that defines a “general civil case” to exclude family law and probate (and other) proceedings. Consider: “in all actions and proceedings brought under the Code of Civil Procedure, the Civil Code, the Family Code and the Probate Code”.</li> <li>- Section (a) refers to permitting “parties” to appear and section (b) refers to permitting a “person” to appear. They should be consistent unless it is intended for section (b) to include people such as witnesses and others.</li> </ul>	<p>The committees discussed the issue and determined both “practical” and “practicable” are appropriate and have revised the proposal language accordingly</p> <p>The committees intended to use “civil” rather than “general civil” to be broadly inclusive consistent with rule 1.6’s use of “civil” as opposed to “general civil.”</p> <p>The committees agree the subdivisions should be consistent. The proposal was intended to be broadly inclusive of “persons” as reflected in subdivision (b). The committees have revised subdivision (a) to ensure consistency with subdivision (b).</p>

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			<p>- The rule should make clear that appearance by “video” means real-time as opposed to videotaped.</p> <p>1. Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule? Answer: No.</p> <p>2. Would the proposal result in costs or savings to the court? If so, what costs or savings would be associated with implementing the proposal? Answer: There may be additional costs incurred by courts. This legislation must preserve the ability of courts and/or vendors to recover costs.</p> <p>3. Would this proposal impact the court’s current efforts to allow video appearances? Answer: We support the proposal as it would enhance our current efforts to provide for remote appearances.</p>	<p>The committees have noted in the Judicial Council report that live, real-time video is what the proposal contemplates. The committees will consider whether this point requires further clarification in rulemaking.</p> <p>The committees have noted there may be additional costs in the Judicial Council report. The proposal does not alter existing Government Code section 70630, which allows courts to charge fees to recover their actual costs.</p>
15.	Superior Court of Orange County, Family Law Division by Vivian Tran, Administrative Analyst	NI	<p>No comments on the proposal as a whole.</p> <p>Request for Specific Comments</p> <p><input type="checkbox"/> Does the proposal appropriately address the stated purpose?</p>	<p>The committees appreciate the comments from the court.</p>

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			<p>•Yes, it provides statutory authority for courts to permit remote video appearances in any civil action or proceeding including trials and evidentiary hearings. It also advances judicial branch’s technology goals of (1) promoting the digital court to improve access to the courts, and (2) promoting legislative changes to facilitate the use of technology in court operations and delivery of court services.</p> <p><input type="checkbox"/> Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule?</p> <p>•For the civil case type there may be challenges with Mandatory Settlement Conferences as outlined in OCSC Civil Invitation to Comment response. However, Family Law sees no other exclusions at this time. No, the committee did not want the proposal to stand as a potential obstacle to existing video appearance efforts by the courts or create conflict with other statues on the subject. The committee kept the proposed code section broad. The legislation provided courts with statutory authority to permit video appearances, but it would not require permitting video appearances.</p>	

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	Commenter	Position	Comment	Committee Responses
			<p><input type="checkbox"/> The advisory committees also seek comments from courts on the following cost and implementation matters: Would the proposal result in costs or savings to the court? If so, what costs or savings would be associated with implementing the proposal?</p> <p>•Courts that choose to proceed with permitting video appearances would have fiscal and operational impacts because they would need resources to run video appearances such as staff, training, equipment, and software. Government Code section 70630 authorizes courts to charge fees to recover costs of permitting parties to appear by video. Overall investment would become a cost savings to parties, stake holders, the Court, Justice Partners, etc.</p> <p><input type="checkbox"/> Would this proposal impact the court’s current efforts to allow video appearances?</p> <p>•No, the Court had been developing digital evidence presentation pilots with Criminal and is hoping to expand into Juvenile and Civil. This proposal is in line with Orange County Superior Court’s Strategic Plan FY 2018-2019 Through 2023-2024; Enhance access and improve delivery of services, Expand the Court’s operational, technological, and administrative support, and</p>	<p>The committees have noted there may be additional costs and operational impacts for technology and staff in the Judicial Council report. The committees have also noted that the public, litigants, and justice partners also may have cost savings.</p>

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

**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings (Enact Code Civ. Proc. § 367.7)**

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

	Commenter	Position	Comment	Committee Responses
			<p>Improve relationships within the community through outreach and transparency.</p> <p><input type="checkbox"/> How well would this proposal work in courts of different sizes?</p> <p>•According to the CCJ/ COSCA Pandemic Rapid Response Team, “Lights, Camera, Motion!” series, different Courts across the state and county of different sizes are operating with remote hearings. <a href="https://www.ncsc.org/">https://www.ncsc.org/</a></p> <p><input type="checkbox"/> What challenges, if any, does the court anticipate facing to allow video appearances?</p> <p>•Orange County Superior Court will have fiscal and operational impacts because we would need resources to run video appearances such as staff, training, equipment, and software. We are currently doing this in all Family Law Proceedings due to COVID-19. Such legislation, absent an Emergency Order, will require significant changes to the Evidence Code, Code of Civil Procedure, Family Code, California Rules of Court, and all Local Rules; i.e.: re receipt and authentication of documents, protocols re Subpoenas for Appearance at Trial, etc. It will additionally require expenditures for Courts to acquire the technology necessary to enable Remote Hearings, i.e.: technology for</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			Interpreter devices, Reporter Technology, large screens to be able to view all participants, technology to receive documents, etc.	
16.	Superior Court of Orange County, Juvenile Law Division by Linda Contreras, Administrative Analyst 1	NI	<p><b>Comments</b> With recent COVID-19 closures, the need for remote video appearances is needed now more than ever, so this proposal is much needed. It should be implemented with an urgency clause for courts to implement as soon as practicable</p> <p><i>Does the proposal appropriately address the stated purpose?</i></p> <p>Yes, it provides statutory authority for courts to permit remote video appearances in any civil action or proceeding including trials and evidentiary hearings. It also advances judicial branch’s technology goals of (1) promoting the digital court to improve access to the courts, and (2) promoting legislative changes to facilitate the use of technology in court operations and delivery of court services.</p> <p><input type="checkbox"/> <i>Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule?</i></p>	The committees appreciate the comments from the court.

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	Commenter	Position	Comment	Committee Responses
			<p>For the Civil case type there may be challenges with Mandatory Settlement Conferences as outlined in OCSC Civil Invitation to Comment response, however Juvenile sees no other exclusions identified at this time. The committee kept the proposed code section broad. The legislation provided courts with statutory authority to permit video appearances, but it would not require to permit video appearances.</p> <p><input type="checkbox"/> <i>The advisory committees also seek comments from courts on the following cost and implementation matters: Would the proposal result in costs or savings to the court? If so, what costs or savings would be associated with implementing the proposal?</i></p> <p>Orange County Superior Court will have fiscal and operational impacts because we would need resources to run video appearances such as staff, training, equipment, and software. We are currently doing this in all Family Law Proceedings due to COVID-19. Such legislation, absent an Emergency Order, will require significant changes to the Evidence Code, Code of Civil Procedure, Family Code, California Rules of Court, and all Local Rules; i.e.: re receipt and authentication of documents, protocols re Subpoenas for Appearance at Trial, etc. It will additionally require expenditures for</p>	<p>The committees have noted there may be additional costs and operational impacts for technology and staff in the Judicial Council report. The committees have also noted that the public, litigants, and justice partners also may have cost savings</p>

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	Commenter	Position	Comment	Committee Responses
			<p>Courts to acquire the technology necessary to enable Remote Hearings, i.e.: technology for Interpreter devices, Reporter Technology, large screens to be able to view all participants, technology to receive documents, etc.</p> <p>Government Code section 70630 authorizes courts to charge fees to recover costs of permitting parties to appear by video. Overall investment would become a cost savings to parties, stake holders, the Court, Justice Partners, etc. by reducing the number of in-person hearings.</p> <p><input type="checkbox"/> <i>Would this proposal impact the court’s current efforts to allow video appearances?</i></p> <p>No, the Court had been developing digital evidence presentation pilots with Criminal and is hoping to expand into Juvenile and Civil. This proposal is in line with Orange County Superior Court’s Strategic Plan FY 2018-2019 Through 2023-2024; Enhance access and improve delivery of services, Expand the Court’s operational, technological, and administrative support, and Improve relationships within the community through outreach and transparency.</p> <p><input type="checkbox"/> <i>How well would this proposal work in courts of different sizes?</i></p>	

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**LEG20-02**

**Proposal for Judicial Council-Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings** (Enact Code Civ. Proc. § 367.7)

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

	Commenter	Position	Comment	Committee Responses
			<p>According to the CCJ/ COSCA Pandemic Rapid Response Team, “Lights, Camera, Motion!” series, different Courts across the state and county of different sizes are operating with remote hearings. <a href="https://www.ncsc.org/">https://www.ncsc.org/</a></p> <p><input type="checkbox"/> <i>What challenges, if any, does the court anticipate facing to allow video appearances?</i></p> <p>Orange County Superior Court will have fiscal and operational impacts because of need for resources to run video appearances such as staff, training, equipment, and software. Some of it has already been completed due to COVID 19.</p> <p>Some potential challenges are connectivity issues, sound quality, public access to remote hearings, changes to processes, and training on additional tasks with current t workload (like managing and monitoring the remote hearings), which may involve labor engagement with represented units in regarding job duties and classifications.</p>	
17.	Superior Court of Orange County, Training and Analyst Group	NI	<p>General Comments</p> <p>With recent COVID-19 closures, the need for remote video appearances is needed now more than ever, so this proposal is much needed. It should be implemented with an urgency clause for courts to implement as soon as practicable.</p>	The committees appreciate the comments from the court.

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**LEG20-02**

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	Commenter	Position	Comment	Committee Responses
			<p>Request for Specific Comments</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <p>Yes</p> <p>2. Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by the rule?</p> <p>Yes, video remote appearances should be permitted as proposed. Mandatory settlement conferences may prove challenging as attorney client consultation would be offline prior to going online with opposing counsel to reach agreement, which may continue repeatedly throughout the process. This may provide more opportunity for discussions to fall apart, or technology issues to arise, or calendar management to become backed up. Also, consider excluding cases involving confidentiality, which should be heard in person or by remote teleconferencing, as appropriate.</p> <p>3. Would the proposal result in costs or savings to the court? If so, please what costs or</p>	

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>savings would be associated with implementing the proposal?</p> <p>Implementing video remote appearances would result in higher short term costs such as purchasing, installing and connecting the necessary equipment and desired applications as well as training staff on new protocols and tasks required to operate and monitor the appearances. In the long term, the number of in-person hearings may decrease, providing the potential for cost savings to the public in time and travel. However, there may be an increase in ongoing costs to the court as a result of changing the scope of work for the classification that will be in charge of monitoring remote hearings.</p> <p>4. Would this proposal impact the court's current effort to allow video appearances?</p> <p>This proposal would align the court's current efforts with statute.</p> <p>5. How well would this proposal work in courts of different sizes?</p> <p>This proposal should work well courts of all sizes. There are now many different solutions with an array of support options to accommodate</p>	<p>The committees have noted there may be additional costs and operational impacts for technology and staff in the Judicial Council report. The committees have also noted that the public, litigants, and justice partners also may have cost savings</p>

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Responses</b>
			<p>courts with and without significant in-house technology resources.</p> <p>6. What challenges, if any, does the court anticipate facing to allow video appearances?</p> <p>Access to technology and connectivity are the biggest challenge courts face. Additionally, user knowledge of the different solutions available varies considerably from expert user to novice. Of course, some court users do not have access to the internet either by choice or socioeconomic circumstances. Nevertheless, permitting remote video appearances in all civil cases, as specified, is not a mandate and courts must be agile enough to serve the public regardless of their experience, knowledge of or access to remote video technology. Finally, the same challenges described above are also present among the court staff who will be charged with this new duty to implement, manage and monitor on going video remote appearances. This will likely involve labor engagement with represented units regarding job duties and classification.</p>	The committees have noted these challenges in the Judicial Council report.
18.	Superior Court of San Diego County by Mike Roddy, Executive Officer	NI	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes, especially in light of the COVID-19 pandemic.</p>	The committees appreciate the comments from the court.

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	Commenter	Position	Comment	Committee Responses
			<p>Are there any civil actions or proceedings that should be excluded from the scope of the proposed code section? If so, should the code section allow the Judicial Council to provide for those actions and proceedings by rule?</p> <p>Judgment Debtor Exam (JDX) Hearings and Abatement Warrant Hearings. In JDX Hearings, after the judgment debtor is sworn, the judgment creditor and judgment debtor usually go to another location for the actual exam to take place and they only come back into court if a problem arises. It would be too cumbersome and difficult to somehow develop a system that can split off the parties to have their own question and answer session, but leave the ability for the parties to come back to the court to attempt to resolve any disputes that arise during the exam.</p> <p>Abatement warrants are obtained by municipalities to stop improper conduct from occurring at a property, i.e., stagnant water in swimming pools, trash on property, drug activity, etc.... All of these require the party to bring the warrant to the court for the judge's signature, similar to a criminal search warrant. Those proceedings should still be done in person due to the need to swear the officer and sign the warrant.</p>	<p>The proposed legislation is written to allow, but not require courts, to permit video appearances. For this reason, the court would not have to allow video in JDX hearings. The court would be discretion to decide whether a proceeding is suitable to conduct by video. Accordingly, the committees do not recommend excluding JDX hearings from the scope of the proposed legislation.</p> <p>The proposed legislation is written to allow, but not require courts, to permit video appearances. For this reason, the court would not have to allow video in abatement warrant proceedings. The court will have discretion to decide whether a proceeding is suitable for video. Accordingly, the committees do not recommend excluding abatement</p>

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	Commenter	Position	Comment	Committee Responses
			<p>*Any hearing in which evidence will be required to be identified by a witness would require thorough and detailed rules regarding the presentation of evidence.</p> <p>Would the proposal result in costs or savings to the court? If so, what costs or savings would be associated with implementing the proposal? No.</p> <p>Would this proposal impact the court’s current efforts to allow video appearances? No.</p> <p>How well would this proposal work in courts of different sizes? It appears that the proposal will work for courts of various size.</p> <p>What challenges, if any, does the court anticipate facing to allow video appearances? Indigent litigants may be unable to appear via video due to lack of access to a computer, smartphone, or the internet. Remote areas of the state may not have access to high-speed internet required for video conferencing.</p>	<p>warrant proceedings from the scope of the proposed legislation.</p> <p>The committee appreciates the comments and has noted these points in the Judicial Council report.</p>

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