JUDICIAL COUNCIL OF CALIFORNIA

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# MEMORANDUM

Date
October 9, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Cory T. Jasperson, Director
Office of Governmental Affairs

Subject
Judicial Council Legislative Policy Summary: 2014

Action Requested
Recommend for Judicial Council adoption

Deadline
N/A

Contact
Laura Speed, 916-323-3121
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## Executive Summary

Governmental Affairs recommends that the Judicial Council adopt the updated Legislative Policy Summary reflecting actions through the 2014 legislative year. Adoption of this updated summary of positions taken on court-related legislation will assist the council in making decisions about future legislation, consistent with strategic plan goals.

## Recommendation

Governmental Affairs recommends that the Judicial Council adopt the updated Legislative Policy Summary reflecting actions through the 2014 legislative year.

The text of the proposed summary is attached under separate cover.

## Previous Council Action

The Judicial Council most recently adopted the Legislative Policy Summary (reflecting actions through the 2013 legislative year) in December 2013.

## Rationale for Recommendation

On behalf of the Judicial Council, the Policy Coordination and Liaison Committee (PCLC) takes positions on more than 50 bills each legislative session and monitors more than 1,000 bills. Governmental Affairs (GA) updates the council's Legislative Policy Summary annually, setting forth the council's historical policies on key legislative issues.

GA monitors legislative activity and represents the council before the Legislature and the Governor's Office. GA provides information and advice to advisory committees and PCLC on pending legislation to assist the council in formulating its positions. The Legislative Policy Summary helps ensure that council members, advisory committee members, and staff have a common understanding of council policy on issues presented in proposed legislation. The updated document reflects the council's most recent positions on legislative issues and identifies how those positions are derived from the Judicial Council's strategic plan. The Legislative Policy Summary also defines the Judicial Council's limited purview when considering pending legislation. The document is not a history of every bill on which the council has taken a position, but rather is a sampling of bills that reflect council positions on various types of legislative proposals.

## Comments, Alternatives Considered, and Policy Implications

This document was not circulated for public comment.

## Implementation Requirements, Costs, and Operational Impacts

There are no costs, implementation requirements, or operational implications related to the adoption of the summary.

## Relevant Strategic Plan Goals and Operational Plan Objectives

N/A

## Attachment

1. 2014 Legislative Policy Summary

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# MEMORANDUM

Date
September 5, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Criminal Procedure—Appeals of the Imposition or Calculation of Fines and Fees under Penal Code section 1237

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
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## Executive Summary

The Criminal Law Advisory Committee proposes adding Penal Code section 1237.2[1] and amending section 1237 to prohibit appeals in felony cases based solely on the grounds of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim to the trial court. This proposal was developed at the request of courts to reduce the burdens associated with formal appeals and resentencing proceedings stemming from a common sentencing error.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to:

[1] All subsequent statutory references are to the Penal Code.

1. Add section 1237.2 to prohibit appeals based solely on the grounds of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or, if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court; and

2. Amend section 1237 to include new section 1237.2 in the list of statutory exceptions to the appellate procedure set forth in that section.

The text of the proposed amendment to section 1237 and new section 1237.2 is attached at page 12.

## Previous Council Action

As part of the Judicial Council's legislative priorities for 2012, the council directed the Policy Coordination and Liaison Committee (PCLC) to consider various legislative proposals developed by court representatives to advance judicial branch cost savings, new revenue, and operational efficiencies. This proposal was originally developed by the Joint Legislation Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees but referred to the Criminal Law Advisory Committee by PCLC for consideration with the benefit of appropriate subject matter expertise and public comment.

## Rationale for Recommendation

The statutory scheme that governs the imposition and calculation of fines and other monetary penalties in California criminal cases is vast, complex, and frequently modified by the Legislature. As a result, appellate courts are often called upon to correct the erroneous imposition or calculation of fines and other monetary penalties on appeal. (See, e.g., *People v. Hamed* (2013) 221 Cal.App.4th 928, 939.)

When this sentencing error is the sole issue on appeal, trial and appellate courts incur significant costs and burdens associated with preparation of the formal record on appeal and resulting resentencing proceedings. By requiring that this sentencing error be first raised in the trial court, which has ready access to the court records and other information necessary to review and resolve such issues, this proposal would promote judicial economies and efficiencies by avoiding the costs and burdens associated with a formal appeal.

Because those economies would not be achieved if the defendant also raises other issues on appeal, this proposal is limited to instances in which this sentencing error is the *sole* issue on appeal. The proposal is modeled after section 1237.1, which similarly limits appeals based on errors in the calculation of presentence custody credits. Although not expressly stated in section 1237.1, the appeal limitations of that section apply only to cases in which a claim of an error concerning a custody credit calculation is the sole issue on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 426-27 [Limiting section 1237.1 to cases in which a custody credits calculation is the sole issue on appeal makes "sound economic sense" and limits unwarranted expenditures of public money].)

On October 2, 2014, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee's Joint Legislation Working Group voted to recommend sponsorship of this proposal.

## Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment during the spring 2014 cycle, yielding a total of seven comments. Of those, five agreed with the proposal, including the Superior Courts of Los Angeles, Riverside, and San Diego Counties, as well as the Court of Appeal, Second Appellate District; one agreed with the proposal if modified; and one did not agree with the proposal. A chart with all comments received and committee responses is attached at pages 13–14.

In addition, the Appellate Advisory Committee (AAC) reviewed the proposal and provided informal feedback as explained below. Generally, the AAC expressed support for providing trial courts the opportunity to initially correct this type of sentencing error, both because of the trial court's familiarity with its cases and because it would save the resources otherwise required to prepare the record on appeal.

### Notable alternatives considered

The committee considered the following notable alternatives:

- ***Discovery of error after sentencing.*** As explained above, the proposal includes a provision that would allow the defendant to raise the issue after sentencing if the error was not discovered until later. One commentator and a member of the AAC expressed concern that this provision could be interpreted as requiring litigation to establish the circumstances surrounding the defendant's discovery of the error. The proposal is not intended to condition a defendant's ability to raise a claim of an erroneous imposition of a fine or other monetary penalty post-sentencing on any showing about the circumstances surrounding the discovery of the error. The committee declined to modify the proposal as the commentator suggested to avoid confusion and promote consistency with section 1237.1, which includes an identical provision that has not been interpreted as requiring any special showing about the discovery of the error.

- ***Inclusion of "forfeitures" in the proposal.*** On its own accord and as suggested by a member of the AAC, the committee considered but declined to include "forfeitures" in the list of monetary penalties included in proposed section 1237.2. In the felony context, "forfeitures" often involve the seizure of property involved in the commission of a crime, which can trigger complicated procedural requirements, including appellate issues more complex than those pertaining to the miscalculation or erroneous imposition of fines and other monetary penalties that the proposal is intended to address.

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are expected. As described above, the proposal is designed to reduce the costs and burdens associated with appeals and resentencing proceedings by promoting resolution of minor sentencing disputes in the sentencing courts.

## Attachments

1. Proposed amendment to Penal Code section 1237 and new section 1237.2, at page 12
2. Chart of comments, LEG14-05, at pages 13–14

Add Penal Code section 1237.2, effective January 1, 2016, to read:

§ 1237.2. Imposition or calculation of fines, penalty assessments, surcharges, fees, or costs

No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or, if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court. This section shall only apply in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs is the sole issue on appeal.

*Amend Penal Code section 1237, effective January 1, 2016, to read:*

An appeal may be taken by the defendant:

(a) From a final judgment of conviction except as provided in Section 1237.1, Section 1237.2, and Section 1237.5. A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.

(b) From any order made after judgment, affecting the substantial rights of the party.

## LEG14–05

Proposed Legislation: Criminal Procedure: Appeals of the Imposition or Calculation of Fines and Fees (amend Penal Code section 1237.2; amend Penal Code section 1237)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | California Court of Appeal, Second Appellate District | A | This proposed statute would provide that there is no appeal from the imposition of a fine or fee, *if that is the only appellate issue*, unless the matter was first raised in the trial court.<br><br>**Comments**<br>1. We strongly support this proposal.<br><br>2. We agree with the Committee that there will be no implementation requirements or costs as a result of this proposal. It will, however, promote efficiency by giving the trial court an opportunity to correct any errors and it will eliminate unnecessary appeals. | No response required. |
| 2. | Orange County Bar Association by Thomas Bienert, Jr., President | N | The Proposed change would deprive defendants of an additional venue for appealing sentencing errors. | The committee disagrees. The proposal requires only that defendants first provide the trial court—at sentencing or post-sentencing—the opportunity to correct the alleged error, when the error is the sole issue on appeal. The proposal does not prohibit defendants from raising the issue *after* the trial court's disposition of the claim, nor limit the ability of defendants to initially raise the issue on appeal in conjunction with other issues. |
| 3. | Mr. Ronald L. Porter | AM | This is a good idea, except the provision as to when it was discovered. It should only require a motion be filed before the trial court for correction before an appeal is filed. Requiring it be brought up to the trial court at sentencing will only cause numerous possible claims to [be] presented unnecessarily at sentencing to protect the possible need for a challenge in the future and will do nothing to cure the stated problem. | The committee believes the language of the proposal as drafted is sufficient and declines to make any changes suggested by this comment.<br><br>First, the proposal does not *require* that claims of an error in the imposition or calculation of fines, etc., be raised at the time of sentencing — although that is encouraged. Rather, it directs that this type of error may be raised in the trial court post-sentencing if it was not discovered at the |

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

## LEG14–05

Proposed Legislation: Criminal Procedure: Appeals of the Imposition or Calculation of Fines and Fees (amend Penal Code section 1237.2; amend Penal Code section 1237)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | Eliminating the question of when it was discovered and requiring only a motion before the trial court before [filing] an appeal will make the correction sought without creating the possibility of unnecessary litigation over the question as to when it was discovered. | time of sentencing, when it is the sole issue on appeal.<br><br>Second, the proposal is not intended to condition a defendant's ability to raise a claim of an erroneous imposition of a fine or other monetary penalty post-sentencing on any showing about the circumstances surrounding the discovery of the error. The committee, however, declined to modify the proposal to avoid confusion and promote consistency with section 1237.1, which includes an identical provision that has not been interpreted as requiring any special showing about the discovery of the error. |
| 4. | Superior Court of Los Angeles County | A | | No response required. |
| 5. | Superior Court of Riverside County<br>by Daniel Wolfe, Managing Attorney | A | Agree with proposal. | No response required. |
| 6. | Superior Court of San Diego County<br>by Mike Roddy, Executive Officer | A | No additional comments. | No response required. |
| 7. | Hon. Peter B. Twede<br>Superior Court of Glenn County | A | Leg 14-04, 05, 06 and 07 appear to be appropriate changes that are necessitated by the circumstances outlined in those proposals. | No response required. |

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

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# MEMORANDUM

Date
October 2, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Evidentiary Objections in Summary Judgment Proceedings

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
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## Executive Summary

The Civil and Small Claims Advisory Committee (CSCAC) and the Appellate Advisory Committee (AAC) (collectively "advisory committees") recommend that the Judicial Council sponsor legislation to amend Code of Civil Procedure section 437c to provide that in deciding a motion for summary judgment, the court need rule only on objections to evidence that is material to the disposition of the summary judgment motion and that objections not ruled on are preserved on appeal.

## Recommendation

The Civil and Small Claims Advisory Committee (CSCAC) and the Appellate Advisory Committee (AAC) recommend amending Code of Civil Procedure section 437c to limit the

requirement that the court rule on objections to evidence and to provide that objections not ruled on are preserved on appeal.

The text of the proposed amendment to section 437c is attached at page 22.

## Previous Council Action

The Judicial Council has adopted several rules addressing summary judgment motions. (Cal. Rules of Court, rules 3.1350–3.1354.). Rules 3.1352 and 3.1354 govern written objections to evidence in summary judgment motions and were adopted by the council effective January 1, 1984.

## Rationale for Recommendation

### Background

This proposal originated with the Ad Hoc Advisory Committee on Court Efficiencies, Cost Savings, and New Revenue (Ad Hoc Committee). In spring 2012, the Ad Hoc Committee proposed amending section 437c of the Code of Civil Procedure to limit the requirement that the court rule on objections to evidence. That proposal, which was intended to reduce the time and expense of court proceedings, would have added the following to subdivision (g) of that section: "The court need rule only on those objections to evidence, if any, on which the court relies in determining whether a triable issue exists." In support of this amendment, the Ad Hoc Committee stated:

> Motions for summary judgment are some of the most time-consuming pretrial matters that civil courts handle. Judges may spend hours ruling on evidentiary objections for a single summary judgment motion. Frequently, the number of objections that pertain to evidence on which a court relies in determining whether a triable issue of fact exists is a small subset of the total number of objections made by the parties. Substantial research attorney and judicial time would be saved by the proposed amendment, thus allowing the trial courts to handle other motions more promptly.

The proposal was referred to the CSCAC, which determined that it would be helpful to work with the AAC on this issue. Through a joint subcommittee, the advisory committees developed this legislative proposal.

This proposal is intended to reduce burdens on trial courts associated with evidentiary objections in summary judgment proceedings without resulting in a corresponding negative impact on the appellate courts. Although the courts have not collected comprehensive data on the time and resources expended in ruling on objections to evidence offered in support of or opposition to summary judgment motions, anecdotal reports from advisory committee members (both judges and attorneys) indicate that they are substantial. Some advisory committee members state that many objections are unnecessary, and that there is no need for rulings on those objections. Published opinions illustrate the large number of objections made in summary judgment papers and the huge volume of motion papers overall. "We recognize that it has become common

practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical [footnote omitted]." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.) In one reported case, the moving papers in support of summary judgment totaled 1,056 pages, plaintiff's opposition was nearly three times as long and included 47 objections to evidence, and the defendants' reply included 764 objections to evidence. (*Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 249, 250–251, and 254.)

Until the Supreme Court issued its opinion in *Reid,* the effect of a trial court's failure to rule on evidentiary objections that were properly presented was unclear. Some Courts of Appeal had held that objections made in writing were waived if not raised by the objector at the hearing and ruled on by the court.[2] In *Reid,* at pages 531–532, the court disapproved this prior case law as well as its own prior opinions[3] to the extent they held that the failure of the trial court to rule on objections to summary judgment evidence waived those objections on appeal.

The court also held that the trial court must expressly rule on properly presented evidentiary objections, disapproving a contrary procedure outlined in *Biljac Assocs. v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419–1420. Thus, under *Reid,* evidentiary objections made in writing or orally at the hearing are deemed "made at the hearing" under sections 437c(b)(5) and (d) must be ruled on by the trial court, and if not ruled on by the trial court are presumed to have been overruled and are preserved for appeal. "[I]f the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid, supra,* 50 Cal.4th at p. 534.) The Supreme Court declined to address the standard of review that would apply to objections that were presumed to have been overruled, stating, "[W]e need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." (*Id.,* at p. 535.)

Trial courts are often faced with "innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become." [Citation omitted.] (*Reid v. Google, Inc.*, *supra,* 50 Cal.4th at p. 532.) The Supreme Court proposed a solution: "To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices." (*Ibid*.)

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[2]See e.g., *Charisma R. v. Kristina S*. (2009) 175 Cal.App.4th 361, 369; *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 711.

[3]*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn.1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn.1.

### This proposal

To reduce the burden on trial courts in ruling on numerous objections to evidence in summary judgment proceedings, Code of Civil Procedure section 437c would be amended by adding a sentence to subdivision (c) providing that a court need rule only on objections to evidence that is material to the disposition of the summary judgment motion. Subdivision (c) currently states that in determining whether there is no triable issue as to any material fact, "the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court." With the proposed amendment, a court would no longer need to rule on all evidentiary objections.

On October 2, 2014, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee's Joint Legislation Working Group voted to recommend sponsorship of this proposal.

## Comments, Alternatives Considered, and Policy Implications

The proposal circulated for public comment from April 18 to June 18, 2014. Eight commentators submitted comments; six agreed with the proposal and two agreed with the proposal if it were modified in ways suggested by the commentator. Commentators included a Court of Appeal, superior courts, a superior court research attorney, and three committees of the State Bar of California.

### Commentators that agreed without modifications

The Court of Appeal, Second Appellate District stated that the primary effect of this change will be to curb the excesses in objections noted in *Reid v. Google, Inc., supra,* and other appellate decisions. It commented that a decision on whether an objection is "pertinent" [and therefore decided by the trial court] will have no effect on the handling of the appeal by the reviewing court because under *Reid* if the trial court failed to rule on an objection, it is preserved for appeal.

A research attorney at the Superior Court of Alameda County commented that the proposal reaffirms that only material facts are at issue and only evidence tending to prove or disprove material facts should be made. She went on to state that the court is overwhelmed with work even without having to rule on objections to evidence that, even if sustained, would have no impact on the court's decision. The proposed amendment would reduce this burden on courts.

Two superior courts commented favorably on the time savings that are expected to result from the proposal. After describing a summary judgment motion filed in the Superior Court of San Diego County that included 113 pages of evidentiary objections by one side, that court stated "Quite often it only takes a few documents for the Court to find a triable issue of fact. Ruling on objections to evidence not needed to make that determination is a waste of judicial resources." The Superior Court of Riverside County similarly commented on the significant time and resources to be saved in preparing for the hearing on the summary judgment motion if the proposal were adopted.

**Commentators that suggested modifications**

The three State Bar committees, though agreeing with the proposal, suggested some changes.[4] All suggested changing the word "pertinent" to "material" in reference to evidence and making clear that objections not ruled on are preserved for appeal. The Committee on Administration of Justice (CAJ) was concerned that the proposed language may create confusion because:

1. It may be unclear whether the amendment is intended to preserve the balance of the *Reid* opinion concerning no-waiver principles;

2. Parties may ascribe different meanings to the phrase "evidence that is pertinent to the disposition of the summary judgment motion" and references to evidence that is intended to establish the presence or absence of a material fact currently in section 437c;

3. The amendment could be read to conflict with the current requirement in section 437c, subdivision (c) that "the court shall consider all of the evidence set forth in the papers" except that to which an evidentiary objection was sustained; and

4. The amendment's reference to the word "court" could potentially be construed as either the trial or appellate court, thereby suggesting the appellate court need not rule on all evidentiary objections in direct contradiction of *Reid*'s no-waiver principles.

CAJ suggested the following underlined changes:

> "(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the <u>trial</u> court <u>as described herein</u>, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. <u>The trial court need only rule on those objections to evidence supporting or opposing those facts that the court determines are material to its determination of the motion. Objections not ruled upon by the trial court will be deemed overruled and thereby preserved for purposes of appeal</u>."

The Committee on Appellate Courts suggested certain changes to avoid ambiguity, track the language of section 437c by using "material" rather than "pertinent," and provide that objections not ruled on are preserved on appeal. With these changes, underlined in the following, the proposal would read:

[4]Two of the committees responded that they agreed with the proposal if modified in certain ways. The Rules and Legislation Committee of the Litigation Section stated its agreement with the proposal but also suggested changes.

> The court need rule only on those objections directed to evidence that is ~~pertinent~~ material to the disposition of the summary judgment motion, and any other objections not ruled on are preserved on appeal.

The Rules and Legislation Committee of the Litigation Section similarly suggested that the amendment include a statement that objections not ruled on by the trial court are preserved for appellate review. Some members of the committee suggested that "pertinent" be replaced with "material," as the latter is already used in section 437c and is a common and understood standard in summary judgment. Others thought use of "pertinent" was appropriate.

In response to these comments, the advisory committees modified the proposal to use "material" rather than "pertinent"; the addition to subdivision (c) would therefore read: "The court need rule only on those objections to evidence that is material to its disposition of the summary judgment motion." The committees concluded that using the term "material" in this proposed statutory provision, as suggested by some commentators, rather than "pertinent," would be consistent with the policy goal and intent of the amendment—narrowing the scope of those objections to evidence on which the court must rule—and would rely on a familiar and well-settled standard. In considering this aspect of the proposal, one member of the Civil and Small Claims Committee (CSCAC) was concerned that the change would have unintended consequences by allowing a court to rule only on objection to evidence that is material to its disposition of the motion, without identifying what the court found to be material to the disposition. He suggested that the proposal require a tentative ruling or identification of what the court determined to be material to its disposition of the motion in advance of the hearing on the motion. Other members noted that neither section 437c nor the rules of court currently require any advance notice and to require this would increase a court's workload. The one member who suggested adding a requirement that a court identify what it determined to be material did not approve the proposal as drafted; the rest of the CSCAC members approved it, as did all members of the Appellate Advisory Committee.

The advisory committees modified the proposal to add a sentence stating that objections not ruled on are preserved on appeal. The advisory committees acknowledge that the proposed amendment providing that the court need not rule on all objections modifies existing law, as current section 437c, subdivision (c) states that "the court shall consider all of the evidence set forth in the papers" except that to which an evidentiary objection was sustained.

The advisory committees decline to add "trial" before "court" in reference to objections that were made and sustained by the court. The committees believe that it is clear that the statute refers to the trial court in all references to "court."

**Comments on specific questions**

In response to a specific question, one commentator stated that it did not see a need for education of the bar to realize the benefits of the proposal. Another commentator stated that judicial education will alert trial and appellate courts to the change. All commentators that addressed the question answered that two months' time was sufficient to implement the proposal.

## Relevant Strategic Plan Goals and Operational Plan Objectives

The recommendations in this report support Strategic Plan Goal III (Modernization of Management and Administration) and Goal IV (Quality of Justice and Service to the Public).

## Attachments

1. Proposed amendments to Code Civ. Proc. § 437c, at page 22
2. Chart of comments, LEG14-02, at pages 23–39

Code of Civil Procedure section 437c would be amended, effective January 1, 2016, to read:

**(a)–(b) * * ***

**(c)** The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

The court need rule only on those objections to evidence that is material to its disposition of the summary judgment motion. Objections not ruled on are preserved on appeal.

**(d)–(u) * * ***

## LEG14-02

Proposed Legislation (Civil Practice and Procedure): Evidentiary Objections in Summary Judgment Proceedings (amend Code Civ. Proc., § 437c)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | Court of Appeal, Second Appellate District | A | Subdivision (c) of Code of Civil Procedure section 437c would be amended to provide that, in ruling on a motion for summary judgment, the trial court need to rule only on those objections to the evidence that are "pertinent to the disposition of the summary judgment motion."<br><br>**Comments**<br><br>1. We support this proposal.<br><br>2. This will not create a new "appellate issue" because under *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, the objection is preserved for appeal if the trial court failed to rule on the objection. A difference of opinion about an objection being "pertinent" will have no effect on the handling of the appeal by the reviewing court. Thus, the primary effect of this change will be to curb the excesses in objections noted in *Reid v. Google, Inc., supra,* and other appellate decisions.<br><br>3. The proposal would result in cost savings to litigants by decreasing the amount of time billed framing the objections and then dealing with them. The amount of such savings is unknown and unknowable.<br><br>4. Judicial education will alert trial and appellate courts to the rule.<br><br>5. 2 months is sufficient time for the | The committees note the agreement with the proposal; no further response is needed. |

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

## LEG14-02

Proposed Legislation (Civil Practice and Procedure): Evidentiary Objections in Summary Judgment Proceedings (amend Code Civ. Proc., § 437c)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | implementation of this statutory change. | |
| 2. | Monique G. Morales<br>Research Attorney<br>Superior Court California, County of Alameda | A | Thank you for the opportunity to respond.<br><br>In my current position as a trial court research attorney, I regularly see 100+ pages of objections to evidence that have no bearing on the motion at issue.<br><br>I welcome the proposed change because it reaffirms that only material facts are at issue and only [objections to]* evidence tending to prove or disprove material facts should be made.<br><br>The court is overwhelmed with the amount of work without having to consider objections to evidence that, even if taken as true, would have no impact on the ruling.<br><br>In making changes to CCP 437c, please also consider making the filing deadline for reply papers five COURT days before the hearing, rather than five calendar days. The current deadline overburdens the court and staff. The deadline for filing oppositions could be extended 2-3 days to offset the new deadline for reply. | This suggestion is beyond the scope of the proposal. The committees will consider it at a future meeting. |
| 3. | Superior Court of California, County of Los Angeles | A | No specific comment. | No response is needed. |
| 4. | Superior Court of California, County of San Diego<br>by Mike Roddy, Executive Officer | A | This change is needed and our court strongly supports the proposal. Our court has had cases where one side alone in a single motion presented ***113 pages*** of evidentiary objections. | The committees note the agreement with the proposal; no further response is needed. |

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

| | Commentator | Position | Comment | Committee Response |
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| | | | The objection-abuse practice has become so common place at least one of our courts has added a standardized statement when ruling on motions with pages of evidentiary objections:<br><br>The Court invites counsel to consider the advice provided by the California Supreme Court:<br><br>"We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with "innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become." (Citation omitted) Indeed, the Biljac procedure itself was designed to ease the extreme burden on trial courts when all "too often" "litigants file blunderbuss objections to virtually every item of evidence submitted." (Citations omitted) To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or | |

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| | | | formal sanctions for engaging in abusive practices. ….” [Reid v. Google, Inc. (2010) 50 Cal.4th 512, 532-33]<br><br>In another ruling, the following was included: “Instead of making a serious attempt to obtain rulings on meritorious objections, defendant asserts so many non-meritorious objections (e.g., foundation, undue prejudice, confusion, misleading), it calls into question whether defendant is truly interested in evidentiary rulings or if this is an exercise in make-work.”<br><br>Quite often it only takes a few documents for the Court to find a triable issue of fact. Ruling on objections to evidence not needed to make that determination is a waste of judicial resources. | |
| 5. | Superior Court of Riverside County | A | Strongly agree with proposal.<br><br>In addition to the comments of the advisory committees in the Invitation to Comment, it should be noted that while the Supreme Court in Reid stated that objections that are not expressly ruled on are deemed overruled, the Court also stated that the trial court had a duty to examine all objections on their merits: “[W]ritten evidentiary objections made before the hearing, as well as oral objections made at the hearing are deemed made “at the hearing” under section 437c, subdivisions (b)(5) and (d). The trial court must rule expressly on those objections. (See Vineyard Springs Estates v. Superior Court, supra, 120 Cal. App. 4th at pp. 642-643 | |

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| | | | [trial courts have a duty to rule on evidentiary objections presented in prop form].) If the trial court fails to rule, the objections are preserved on appeal." Reid, 50 Cal. App. 4th 512, 531-532 (italics in original, boldface added, footnotes omitted).<br><br>Many trial court judges thus interpret Reid (and its citation to Vineyard Springs Estates) as holding that each objection must be evaluated on its merits and the trial court judge has an ethical duty to consider and rule on every evidentiary objection made, regardless of whether the evidence is pertinent to the resolution of the motion or not. The holding in Reid that the objections not explicitly ruled on may be presumed to have been overruled (Reid, 50 Cal. App. 4th 512, 534), under this interpretation of Reid, only saves the time at the hearing that would otherwise have been spent expressly stating that the objections are overruled; the preparation of the summary judgment motion before the hearing, and the reviewing the objections and determining whether or not each objection should be sustained or overruled, regardless of whether the evidence is pertinent to the ruling on the motion or not, remains the same. This proposal, by amending §437c to make explicit that a trial court need not consider objections to evidence when the evidence objected to has no bearing on the outcome of the motion, will save significant time and resources in the preparation for the hearing on the summary judgment motion. | |

## LEG14-02

Proposed Legislation (Civil Practice and Procedure): Evidentiary Objections in Summary Judgment Proceedings (amend Code Civ. Proc., § 437c)

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

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| 6. | The State Bar of California – Committee on Administration of Justice by Saul Bercovitch, Legislative Counsel | AM | CAJ generally supports an amendment to Code of Civil Procedure section 437c designed to alleviate the burden on trial courts resulting from the directive in *Reid v. Google* (2010) 50 Cal.4th 512, 516, providing that "[a]fter a party objects to evidence, the trial court must then rule on those objections." CAJ remains concerned, however that the language of the proposed amendment that "[t]he court need only rule on those objections to evidence that is pertinent to the disposition of the summary judgment motion" has the potential to create confusion for several reasons. First, while the proposed amendment purports to overrule *Reid* in one respect, it may be unclear whether the amendment is intended to preserve the balance of the opinion concerning no-waiver principles. | The proposal is intended to address the problem of innumerable objections to evidence by providing that those not material to disposition of the motion need not be decided and to be consistent with the *Reid* holding that objections not ruled on are preserved for appeal. |
| | | | Second, parties may ascribe, or attempt to ascribe, different meanings to the phrase "evidence that is pertinent to the disposition of the summary judgment motion" and references to evidence that is intended to establish the presence or absence of a material fact currently in section 437c. | The committees have modified the proposal to state that "The court need rule only on those objections to evidence that is material to its disposition of the summary judgment motion." The committees concluded that using the term "material" in this proposed statutory provision, rather than "pertinent," would be consistent with the policy goal and intent of the amendment—narrowing the scope of those objections to evidence on which the court must rule—and would rely on a familiar and well-settled standard. |

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

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| | | | Third, the amendment could be read to conflict with the current requirement in section 437c, subdivision (c) that "the court shall consider all of the evidence set forth in the papers" except that to which an evidentiary objection was sustained. The amendment presumes the court has made a pertinence determination before making evidentiary rulings. Such a determination may not be the type of consideration that is contemplated by the statute. | The committees agree that the proposed amendment modifies the obligation of a trial court to rule on all objections. |
| | | | Finally, the amendment's reference to the word "court" could potentially be construed as either the trial or appellate court, thereby suggesting the appellate court need not rule on all evidentiary objections in direct contradiction of *Reid*'s no-waiver principles. | The committees believe that it is clear that the statute refers to the trial court in all references to "court." |
| | | | For these reasons, the CAJ proposes that section 437c, subdivision (c), be amended as follows:<br><br>"(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to | The committees modified the proposal to use the word "material" and to provide that objections not ruled on are preserved on appeal. The committees do not believe it necessary to add "trial" before "court." |

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

| | Commentator | Position | Comment | Committee Response |
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| | | | any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the trial court as described herein, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. The trial court need only rule on those objections to evidence supporting or opposing those facts that the court determines are material to its determination of the motion. Objections not ruled upon by the trial court will be deemed overruled and thereby preserved for purposes of appeal."<br><br>CAJ would also support consideration of a corresponding amendment to the California | The committees will consider this at a future meeting. |

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| | | | Rules of Court to address the concern raised in *Reid* regarding "'innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become'" and "'blunderbuss objections to virtually every item of evidence submitted.'" (*Reid, supra,* 50 Cal.4th at p. 532.) *Reid* further "encourage[d] parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count." (*Ibid*.) While the proposed statutory amendment will reduce the burden on trial courts to a certain extent, limiting the ability of parties to make objections to evidence that does not relate to whether a triable issue exists will significantly reduce the trial court's workload in determining a summary judgment motion. | |
| 7. | The State Bar of California – Committee on Appellate Courts by Kira L. Klatchko, Chair | AM | The Committee on Appellate Courts supports the proposed legislation, with modifications to the proposed new sentence that would be added to the end of Code of Civil Procedure Section 437c(c).<br><br>We understand the proposed amendment is intended to reduce burdens on trial courts associated with evidentiary objections in | |

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| | Commentator | Position | Comment | Committee Response |
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| | | | summary judgment proceedings without resulting in a corresponding negative impact on the appellate courts. We agree the burden on the trial courts in ruling on objections to evidence offered in support of or opposition to summary judgment motions can be substantial.<br><br>We also recognize that in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, the Supreme Court disapproved prior Court of Appeal decisions that had held that objections made in writing were waived if not raised by the objector at the hearing and ruled on by the court. In addition, the Court disapproved a procedure affirmed in *Biljac Assocs. v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419–1420, whereby the trial court simply stated that it was "disregarding all inadmissible or incompetent evidence," without specifically ruling on any objections.<br><br>Instead, the Supreme Court held in *Reid* that evidentiary objections made in writing or orally at the hearing are deemed "made at the hearing" under section 437c(b)(5) and (d), must be ruled on by the trial court, and if not ruled on by the trial court are presumed to have been overruled and are preserved for appeal. "[I]f the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid, supra,* 50 | |

| | Commentator | Position | Comment | Committee Response |
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| | | | Cal.4th at p. 534.)<br><br>We view LEG14-02 as effectively a proposal to codify the *Biljac* approach and legislatively overrule that portion of *Reid* that disapproved *Biljac* and imposed an obligation on trial courts to rule on all evidentiary objections. With that in mind, we propose three modifications to LEG14-02**:** (1) Add "directed" following objections, to avoid the current ambiguity in the proposed language as to whether it is the "objections" or the "evidence" that must be "pertinent to the disposition of the summary judgment motion." (2) Replace "pertinent" with "material" to better track the language of Section 437c. (3) Add "and any other objections not ruled on are preserved on appeal" at the end, to make clear that objections not ruled on are not waived, consistent with the holding in *Reid, supra,* 50 Cal.4th at p. 534. With these modifications, the proposed new sentence would provide:<br><br>The court need rule only on those objections directed to evidence that is ~~pertinent~~ material to the disposition of the summary judgment motion, and any other objections not ruled on are preserved on appeal.<br><br>The Committee considered adding the further underlined statement to the clause at the end, to | The committees believe the sentence is clear without the addition of "directed" and decline to make this change. The committees modified the proposal to use the word "material" and to provide that objections not ruled on are preserved on appeal. |

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| | | | further track the holding in *Reid*: "and any other objections not ruled on are presumptively overruled and preserved on appeal." After discussion, the addition was not recommended because, under the proposal, the objections not ruled upon are not deemed overruled, but simply not addressed by the trial court, because the evidence to which they are directed is not considered material to the disposition of the motion.<br><br>In response to the specific questions that are asked, the Committee responds as follows:<br><br>**Does the proposal appropriately address the stated purpose?** It does address the identified problem of trial courts that are overburdened by voluminous objections, because it relieves the trial court of the obligation under *Reid* to rule on every objection. Our proposed changes are designed to clarify that objections not ruled upon are preserved.<br><br>**Would education of the bar be useful in fully realizing the benefits of this proposal?** We do not see a strong need for education on the amendment. The need for tighter and more focused objections already exists, even without the proposed change, and good advocates should avoid blunderbuss objections.<br><br>Thank you for your consideration of our comments. | The committee appreciates the comments on specific questions. |

## LEG14-02

Proposed Legislation (Civil Practice and Procedure): Evidentiary Objections in Summary Judgment Proceedings (amend Code Civ. Proc., § 437c)

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

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| 8. | The State Bar of California – Litigation Section, Rules and Legislation Committee by Reuben A. Ginsburg, Chair | A | The Rules and Legislation Committee of the State Bar of California's Litigation Section (the Committee) has reviewed Invitation to Comment LEG14-02 on Evidentiary Objections in Summary Judgment Proceedings and appreciates the opportunity to submit these comments.<br><br>1. *Proposed Revision to Code of Civil Procedure Section 437c, Subdivision (c)*<br><br>The Committee supports the proposed statutory revision and believes that it appropriately addresses the stated purpose of relieving the trial court of the burden of ruling on all evidentiary objections without increasing the burden on the Court of Appeal. Ruling on all evidentiary objections, as required under current law, can be an onerous, time-consuming task. Relieving the trial court of the burden of ruling on objections to evidence not impacting the granting or denial of the motion will reduce the time required to dispose of a summary judgment motion without impacting the disposition of the motion. The rule from *Reid v. Google* (2010) 50 Cal.4th 512 (*Reid*) allowing the objector to renew evidentiary objections on appeal for de novo review by the appellate court if the trial court failed to expressly rule on them ensures that the objector will not be prejudiced by the trial court's failure to rule, and we believe that the trial court's failure to rule will not significantly increase the burden on the Court of | |

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| | | | Appeal.<br><br>Some members of the Committee are concerned that the language "pertinent to the disposition of the motion" is unfamiliar and may be somewhat uncertain, and would prefer to use some other language. Other members believe that the quoted language is appropriate.<br><br>2. *Suggested Additional Revisions*<br><br>a. *Objections Not Ruled on by the Trial Court Are Preserved for Appellate Review*<br><br>We would add the following sentence at the end of Code of Civil Procedure section 437c, subdivision (c), after the sentence to be added by the proposal, to explain what happens when the trial court declines to rule on some evidentiary objections as allowed under the proposal:<br><br>"Objections not ruled on by the trial court are preserved for appellate review."<br><br>We believe that objections not ruled on by the trial court should be preserved for appellate review. This is the rule from *Reid*, but part of the explanation given for this rule in *Reid* does not fit the situation where the statute authorizes the trial court to decline to rule on some objections. So a clear statement of the rule in the statute seems appropriate. | The committees modified the proposal to use the word "material" and to provide that objections not ruled on are preserved on appeal. |

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| | | | *Reid* stated, "if the trial court fails to expressly rule on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (50 Cal.4th at p. 534.) But if the revised statute authorizes the trial court to decline to rule on objections to evidence not impacting the disposition of the motion, there will be no reason to presume that the objections were overruled or that the trial court considered the evidence in ruling on the merits. Still, the rule that the objections are preserved for appellate review seems appropriate to avoid any prejudice to the objecting party.<br><br>b. *The Trial Court Should Specify the Grounds on Which Evidentiary Objections Are Sustained*<br><br>The Committee would like to suggest consideration of another change in the law regarding rulings on evidentiary objections on summary judgment motions. We suggest that the trial court be required to specify the ground, or grounds, on which an evidentiary objection is sustained.<br><br>A trial court sustaining an objection to evidence on a summary judgment motion currently need not specify the ground(s) on which the objection | The committee will consider this at a future meeting. |

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| | | | is sustained. The two alternative formats of the proposed order required by rule 3.1354(c) of the California Rules of Court provide for the trial court to indicate "Sustained" or "Overruled" as to an objection to a particular item of evidence, but provide no means for the court to indicate the particular ground on which an objection is sustained when an objection is made on multiple grounds. If the trial court does not specify the ground on which an objection is sustained, the appellate court and the parties on appeal have no way of knowing on which of several grounds asserted for a particular objection the trial court sustained the objection. This makes it necessary for the objecting party to argue on appeal against all grounds asserted, even though the trial court actually might have overruled the objection on some of those grounds or failed to rule on some of those grounds.<br><br>We believe that it would be appropriate and not burdensome for the trial court to expressly specify the ground(s) on which an evidentiary objection is sustained. Particularly if the court is relieved of the burden of ruling on all evidentiary objections, requiring the court to specify the grounds for sustaining any objections that it sustains does not seem onerous and may reduce the burden on the parties on appeal and the Court of Appeal. This requirement could be imposed by (1) modifying the two alternative formats for the required proposed order so as to provide for a ruling on each ground asserted and (2) amending the | |

## LEG14-02

Proposed Legislation (Civil Practice and Procedure): Evidentiary Objections in Summary Judgment Proceedings (amend Code Civ. Proc., § 437c)

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

| | Commentator | Position | Comment | Committee Response |
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| | | | summary judgment statute and/or the Rules of Court to make it mandatory for the trial court to expressly specify the ground(s) on which an evidentiary ruling is sustained and to use the proposed order or some other written order that so specifies. | |

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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# MEMORANDUM

Date
October 27, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Cory T. Jasperson, Director
Governmental Affairs

Subject
Judicial Council Legislative Priorities: 2015

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Cory T. Jasperson, 916-323-3121
cory.jasperson@jud.ca.gov
Laura E. Speed, 916-323-3121
laura.speed@jud.ca.gov

## Executive Summary

Each year, the Judicial Council authorizes sponsorship of legislation to further key council objectives and establishes priorities for the upcoming legislative year. For the 2014 legislative year, the council's legislative priorities focused on reinvestment in the judicial branch, securing critically needed judgeships and expanding access to interpreters in civil cases.

Governmental Affairs recommends a similar approach for the 2015 legislative year, following the Chief Justice's Access 3D framework. Staff recommends that the Policy Coordination and Liaison Committee adopt the following as Judicial Council legislative priorities in 2015: 1) Advocate for a robust reinvestment in our justice system to avoid further reductions and to preserve access to justice for all Californians, including a method to provide stable and reliable funding, including growth funding; 2) Advocate to secure new judgeships and ratify the authority of the council to convert vacant subordinate judicial officer positions to judgeships in eligible courts; and 3) Advocate for legislation to expand access to interpreters.

These legislative priorities support the Chief Justice's Access 3D framework for increased access to the courts and the Three-year Blueprint for a Fully Functioning Judicial Branch (Blueprint).

Access 3D seeks to ensure access to the justice system through:

- Improved physical access by keeping courts open and operating during hours that benefit the public.
- Increased remote access by increasing the ability of court users to conduct branch business online.
- Enhanced equal access by serving people of all languages, abilities and needs, reflecting California's diversity.

The Blueprint outlines a plan to restore and improve access to justice in California by focusing on four core elements:

1. Implementing Access 3D
2. Closing the trial court funding gap
3. Providing critically needed judgeships
4. Modernizing court technology

## Recommendation

Staff recommends that the Policy Coordination and Liaison Committee (PCLC) consider the following as legislative priorities for the Judicial Council in 2015:

Advocate budget stability for the judicial branch based on the Three-Year Blueprint for a Fully Functioning Judicial Branch, including advocating for sufficient fund balances allowing courts to manage cash flow challenges, a method for stable and reliable growth funding for courts to address annual cost increases in baseline operations, sufficient additional resources to allow courts to improve physical access to the courts by keeping courts open, to expand access by increasing the ability of court users to conduct branch business online, and to restore programs and services that were reduced or eliminated in the past few years. This advocacy includes sponsorship or support of proposals that provide operational efficiencies, cost recovery, or new revenue. This includes seeking the extension of sunset date on increased fees implemented in the FY 2012–2013 budget. The sunset date is July 1, 2015 unless noted otherwise.

- $40 increase to first paper filing fees for unlimited civil cases where the amount in dispute is more than $25K (GC 70602.6)
- $40 increase to various probate and family law fees (GC 70602.6)
- $20 increase to various motion fees (GC 70617, GC 70657, GC 70677)
- $450 increase to the complex case fee. (GC 70616)
- $15 or $20 fee for various services to be distributed to the Trial Court Trust Fund (Sargent Shriver project). Sunset expires on 7/1/17. (GC 68085.1)
- $40 probate fee enacted in 2013, sunsets on 1/1/19. (GC 70662)

(see recommendation section for details regarding revenues from the listed fees).

Judgeships and Subordinate Judicial Officers

a) Secure funding for critically needed judgeships. Seek funding for 10 of the remaining 50 unfunded judgeships that will be assigned to the courts with the greatest need based on the most recently approved Judicial Needs Assessment. (See alternatives in the comments section.)
b) Secure funding for two additional justices in Division Two of the Fourth Appellate District (Riverside/San Bernardino). Seek funding for one additional justice in FY 2015–2016 and the second additional justice in FY 2016–2017.
c) Advocate, as is done each year, for legislative ratification of the Judicial Council's authority to convert 16 subordinate judicial officer (SJO) positions in eligible courts to judgeships, and sponsor legislation for legislative ratification of the council's authority to convert up to 10 additional SJO positions to judgeships if the conversion will result in an additional judge sitting in a family or juvenile law assignment that was previously presided over by an SJO.

Support legislation to increase access, fairness, and diversity, as well as the quality of justice and service to the public, by allowing courts to provide services for litigants who face challenges accessing the courts due to language barriers and the lack of interpreter services. Support or sponsor legislation to implement the recommendations of the statewide Language Access Plan.

## Previous Council Action

The council has taken a variety of actions over the past years related to the above recommendations. Recent key actions in these areas include:

Budget: In 2009 and 2010, the council adopted as a key legislative priority for the following year, advocate to secure sufficient funding for the judicial branch to allow the courts to meet their constitutional and statutory obligations and provide appropriate and necessary services to the public. In December 2011, the council adopted as a key legislative priority for 2012, advocating against further budget reductions and for sufficient resources to allow courts to be in a position to re-open closed courts and restore critical staff, programs, and services that were reduced or eliminated in the past several years. A key legislative priority adopted for 2012 also included advocating for a combination of solutions to provide funding restorations for a portion of the funding eliminated from the branch budget since 2008. The combination of solutions included general fund restoration, legislation to implement cost savings and efficiencies, new revenues, and the use of existing revenues, to be able to restore services to the public and keep courts open.

Additionally, in 2012, the council approved sponsorship of 17 proposals for trial court operational efficiencies, cost savings, and new revenue measures. An additional 6 efficiency proposals were approved for sponsorship in the first quarter of 2013.

In 2013, the council adopted a key legislative priority of advocating to achieve budget stability for the judicial branch, including advocating against further budget reductions and for sufficient resources to allow courts to be in a position to re-open closed courts, restore court facilities construction and maintenance projects, and restore critical staff, programs and services that were reduced or eliminated in the past four years. Again in 2014, the council has a similar priority to advocate budget stability for the judicial branch, including advocating for sufficient fund balances allowing courts to manage cash flow challenges, a method for stable and reliable growth funding for courts to address annual cost increases in baseline operations, sufficient additional resources to allow courts to improve physical access to the courts by keeping courts open, to expand access by increasing the ability of court users to conduct branch business online, and to restore programs and services that were reduced or eliminated in the past few years. This advocacy also included continued sponsorship of the remaining proposals for operational efficiencies, cost savings and new revenue that were approved for sponsorship in 2012 and 2013.

Judgeships and SJO conversions: The council has consistently sponsored legislation in recent years to secure the 150 most critically needed judgeships. In December 2011, the council authorized continued sponsorship of AB 1405 (Assembly Judiciary Comm.), to establish the third set of 50 new judgeships. In 2012, however, the council chose not to sponsor legislation seeking the additional judgeships, and instead chose to focus on other more urgent budgetary concerns for 2013. In 2014, the Judicial Council again sponsored legislation (SB 1190, Jackson) to secure funding for the second set of 50 new judgeships, which was approved in 2007 (AB 159 [Jones]; Stats. 2007, ch. 722), but has yet to be funded and to authorize a third set of 50 new judgeships to be allocated consistent with the council's most recent Judicial Needs Assessment.

The council also has annually directed staff to take action to secure legislative ratification of 16 SJO conversions to judgeships, as authorized by Government Code section 69615. In December 2013, the council additionally directed staff to pursue legislation to secure ratification of the authority to convert 10 additional vacant SJO positions to judgeships. Such legislation, similar to the efforts for the 16 conversions, must be pursued annually.

Increasing access, fairness, and diversity: the council's strategic plan Goal I provides "California's courts will treat everyone in a fair and just manner. All persons will have equal access to the courts and court proceedings and programs. Court procedures will be fair and understandable to court users. Members of the judicial branch community will strive to understand and be responsive to the needs of court users from diverse cultural backgrounds." In 2014, the council adopted a legislative priority to sponsor legislation to increase access, fairness, and diversity, as well as the quality of justice and service to the public, by allowing courts to provide interpreters in civil cases for litigants who face challenges accessing the courts due to language barriers and the lack of interpreter services. (SB 1657, Stats. 2014, ch. 721).

## Rationale for Recommendation

The mission of the Judicial Council includes providing the leadership for improving the quality, and advancing consistent, independent, impartial, and accessible administration of justice. Among the guiding principles underlying this mission is a commitment to meet the needs of the public, which includes the reinvestment in our justice system to avoid further reductions and to preserve access to justice that Californians expect and deserve.

Further, the Chief Justice has proposed a framework to increase public access to the courts. Her vision, entitled Access 3D, combines strategies from the courts—actions that will ensure greater public access—with a reasonable reliance on reinvested funds to the judicial branch. Access 3D is a multi-dimensional approach to ensuring Californians have access to the justice system they demand and deserve. The three dimensions of access are:

- Improved physical access by keeping courts open and operating during hours that benefit the public.
- Increased remote access by increasing the ability of court users to conduct branch business online.
- Enhanced equal access by serving people of all languages, abilities and needs, reflecting California's diversity.

The key to the success of the Blueprint and Access 3D is a robust reinvestment in the courts. The proposed 2015 legislative priorities support the goals of Access 3D and the Blueprint.

### Budget

State General Fund support for the judicial branch has been reduced significantly, from a high of 56 percent of the total branch budget in 2008–09, to just 36 percent in the current year (2014–15). Over this same period, to prevent debilitating impacts on public access to justice, user fees and fines were increased, local court fund balances were swept, and statewide project funds as well as $1.7 billion in courthouse construction funds, were diverted to court operations or to the General Fund. The council has spent considerable time over the past several years addressing the impacts of budget cuts on the branch, redirecting resources to provide much needed support to trial court operations, advocating for new revenues and other permanent solutions, and looking inward at cost savings and efficiencies that could be implemented to allow the courts to serve the public effectively with fewer resources.

The $63 million reinvestment in the judicial branch in FY 2013–14 and the $136 million baseline adjustment in current year FY 2014–15 are important steps that enable the courts to begin to address service impacts resulting from past budget cuts. Nevertheless, in its budget analysis, the Legislative Analyst indicated that budget reductions will increase by more than $200 million in the current year, given that there will be fewer resources available to the courts (such as trial court reserves) to offset them. As a result, courts are being closed, services curtailed, and staff levels reduced.

In an effort to address the budget crisis faced by the branch, in April 2012, the Judicial Council approved for sponsorship 17 legislative proposals for trial court operational efficiencies, cost recovery, and new revenue. An additional six efficiency proposals were approved for sponsorship in April 2013. Several non-controversial and relatively minor measures were successful as the following efficiency measures were enacted into law.

In FY 2012–2013 temporary fee increases were approved by the Legislature (SB 1021, Stats. 2012, ch. 41) to help address some of the fiscal issues faced by the courts. Given that the courts are not fully-funded, it is necessary to seek an extension on the temporary fee increases. See table below for actual and projected revenues from the SB 1021 fees.

| Description | FY 2012-13 Actual | FY 2013-14 Actual | FY 2014-15 (10R for Gov's May Budget) Projected |
|---|---|---|---|
| $40 increase to first paper filing fees for unlimited civil cases where the amount in dispute is more than $25K (GC 70602.6) | $12,646,017 | $ 12,399,908 | $11,813,955 |
| $40 increase to various probate and family law fees (GC 70602.6) | $ 7,788,795 | $ 7,745,554 | $ 7,515,262 |
| $20 increase to various motion fees (GC 70617, GC 70657, GC 70677) | $ 7,641,569 | $ 7,332,651 | $ 6,907,267 |
| $450 increase to the complex case fee (GC 70616) | $11,253,455 | $ 11,830,217 | $11,830,217 |
| **Total** | **$39,329,837** | **$ 39,308,330** | **$38,066,700** |

**Other Fees that will Sunset on 7/1/17 or 1/1/19**

| Description | FY 2012-13 Actual | FY 2013-14 Actual | FY 2014-15 (10R for Gov's May Budget) Projected |
|---|---|---|---|
| **July 1, 2017 sunset -- Sargent Shriver Project** | | | |
| $10 increase to GC 70626(a) - miscellaneous post-judgment fee | $ 8,655,059 | $ 8,692,493 | $ 8,391,323 |
| $10 increase to GC 70626(b) - miscellaneous post-judgment fee | $ 253,422 | $ 315,743 | $ 304,803 |
| | | | |
| **January 1, 2019 sunset** | | | |
| New $40 probate fee (GC 70662) -- effective 1/1/14 | n/a | $ 57,740 | $ 190,000 |
| **Total** | **$ 8,908,480** | **$ 9,065,976** | **$ 8,886,126** |

SB 75 (Stats. 2013, ch. 31), the Courts Trailer Bill of the Budget Act of 2013, contained the following efficiency proposals:

- Increases the statutory fee from $10 to $15 for a clerk mailing service of a claim and order on a defendant in small claims actions.
- Prohibits the Franchise Tax Board (FTB) and the State Controller from conditioning submission of court-ordered debt to the Tax Intercept Program on the court or county

providing the defendant's social security number, while still allowing the social security number if FTB believes it would be necessary to provide accurate information.
- Increases the fee from $20 to $50 for exemplification of a record or other paper on file with the court.
- Modifies the process for evaluating the ability of a parent or guardian to reimburse the court for the cost of court-appointed counsel in dependency matters.

AB 619 (Stats. 2013, ch. 452) – Court facilities: Revises the formula for assessing interest and penalties for delinquent payments to the State Court Facilities Construction Fund to conform to existing statute governing interest and penalties for late payments to the Trial Court Trust Fund by utilizing the Local Agency Investment Fund (LAIF) rate.

AB 648 (Stats. 2013, ch. 454) – Court reporter fee clean-up: Clarifies language from the prior year that created a new $30 fee for court reporters in civil proceedings lasting one hour or less.

AB 1004 (Stats. 2013, ch. 460) – Electronic signatures on arrest warrants: Allows magistrates' signatures on arrest warrants to be in the form of digital signatures.

AB 1293 (Stats. 2013, ch. 382) – Special notice fee in probate: A new $40 probate fee for filing a request for special notice in certain proceedings.

AB 1352 (Stats. 2013, ch. 274) – Court records retention: Streamlines court record retention provisions.

SB 378 (Stats. 2013, ch. 150) – Official record of conviction: admissibility of electronically digitized copy: Provides that an electronically digitized copy of an official record of conviction is admissible to prove a prior criminal act.

The remaining two dozen efficiency proposals, that are more substantial, and consequently, more controversial, were rejected by the Legislature in both 2013 and 2014 (see attachment).

**Judgeships and SJO conversions**

In 2005, the Judicial Council sponsored Senate Bill 56 (Dunn; Stats. 2006, ch. 390), which authorized the first 50 of the 150 critically needed judgeships. Full funding was provided in the 2007 Budget Act, and judges were appointed to each of the 50 judgeships created by SB 56.

In 2007, the council secured the second set of 50 new judgeships of the 150 critically needed judgeships. (AB 159 [Jones]; Stats 2007, ch. 722.) Initially, funding for the second set of new judgeships would have allowed appointments to begin in June 2008. However, due to budget constraints the funding was delayed until July 2009. The delay allowed the state to move the fiscal impact from FY 2007–2008 to FY 2009–2010. The Governor included funding for the second set of judgeships in the proposed 2009 Budget Act, but the funding ultimately was made subject to what has been called the "federal stimulus trigger." This trigger was "pulled" and the

funding for the new judgeships and the various other items made contingent on the trigger was not provided.

In 2008, the council sponsored SB 1150 (Corbett) to authorize the third set of new judgeships. With the delay of the funding for the second set of judgeships and the state's worsening fiscal condition, SB 1150 was held in the Senate Appropriations Committee. At its October 25, 2008, meeting, the council approved the 2008 update of the Judicial Needs Assessment. At the same time, the council confirmed the need for the Legislature to create the third set of 50 judgeships, completing the initial request for 150 new judgeships, based on the allocation list approved by the Judicial Council in 2007. The council also sponsored SB 377 (Corbett) in 2009 to authorize the third set of judgeships to become effective when funding was provided for that purpose. That legislation was also held in the Senate Appropriations Committee.

In 2011 and 2012, the council sponsored AB 1405 to establish the third set of 50 judgeships. Even though the legislation did not provide funding for those positions, the state's continuing fiscal crisis, and the fact that the second set of 50 judgeships had yet to be appointed due to lack of funding, resulted in the legislation not moving forward. The Judicial Council chose not to sponsor similar legislation in 2012 and, instead, chose to focus on other critical budgetary concerns.

In 2014, the council sponsored SB 1190 (Jackson) which sought to secure funding for the second set of 50 new judgeships approved in 2007 but not yet funded and to authorize a third set of 50 new judgeships to be allocated consistent with the council's most recent Judicial Needs Assessment. This bill also would have authorized the two additional justices in Division Two of the Fourth Appellate District. The bill was held on the Senate Appropriations Committee.

With regard to subordinate judicial officer conversions, existing law allows the Judicial Council to convert a total of 162 subordinate judicial officer positions, upon vacancy, to judgeships. The statute caps the number that may be converted each year at 16 and requires the council to seek legislative ratification to exercise its authority to convert positions in any given year. For the past five years, that legislative ratification took the form of language included in the annual budget act.

The council converted the maximum 16 positions in 2007–2008, 2008–2009, 2009–2010, 2010–2011, and 2011–12, 13 in 2012–13, and 11 in 2013–2014. For FY 2014–2015, as of October 2, 2014, seven SJO positions have been converted.

Additionally, legislation enacted in 2010 (AB 2763, Stats. 2010, ch. 690), expedites conversions by authorizing up to 10 additional conversions per year, if the conversion results in a judge being assigned to a family or juvenile law assignment previously presided over by an SJO. This legislation requires that the ratification for these additional 10 positions be secured through legislation separate from the budget. In 2011, the council sponsored SB 405 (Stats. 2011, ch. 745) to secure legislative ratification of these additional SJO conversions, and 4 additional SJO

positions were converted. In 2013, AB 1403 (Stats. 2013, ch. 510) included the ratification of the council's authority to convert ten subordinate judicial officer positions to judgeships in the 2013–14 fiscal year. In 2014, the council sponsored AB 2745 (Stats. 2014, ch. 311) which again provided the ratification for the conversion of the additional 10 SJOs.

In total, 115 SJO positions have been converted, leaving only 47 of the total 162 positions still needing to be converted.

### Expanding Language Access

In accordance with Access 3D, expanding access to interpreter services will increase access, fairness, and diversity in the California courts. This will also improve the quality of justice and service to the public by aiding all Californians, regardless of language barriers, to interact directly with the courts.

In 2014, the council sponsored AB 1657 (Stats. 2014, ch. 721) which clarifies the ability of courts to provide foreign language interpreters in all cases, regardless of the income of the parties involved.

### Comments, Alternatives Considered, and Policy Implications

The council has consistently sponsored legislation in recent years to secure the most critically needed judgeships. In December 2011, the council authorized continued sponsorship of AB 1405 (Assembly Judiciary Comm.), to establish the third set of 50 new judgeships. In 2012, however, the council chose not to sponsor legislation seeking the additional judgeships, and instead chose to focus on other more urgent budgetary concerns for 2013.

For 2015, there are multiple options in pursuing funding for the second set of 50 judgeships.

- Considered not pursuing funding for this year. The lack of judicial resources, however, is continuing to significantly impair the ability to deliver justice, and failure to move forward will only further deny Californians access to justice.

- Continuing recent requests and pursuing funding for the 50 judgeships already authorized. This is the highest cost option and has not been successful with the Legislature or the Governor.

- Request funding over multiple years. The costs for each option are outlined below.
    - Request the funding of new judgeships over two years, with 25 judgeships being funded each year.
    - Request the funding over three years, with 10 the first year, 15 the second year, and 25 the third year. This is the recommended option.
    - Request the funding over five years, with ten judgeships funded each year.

| (dollars in thousands) | Year 1 | Year 2 | Year 3 | Year 4 | Year 5 | On-Going |
|---|---|---|---|---|---|---|
| 50 Judgeships | $ 111,774 | $ 75,421 | $ 75,421 | $ 75,421 | $ 75,421 | $ 75,421 |
| 2-Year Phase-In 25/25 | $ 55,887 | $ 111,774 | $ 75,421 | $ 75,421 | $ 75,421 | $ 75,421 |
| 3-Year Phase-In 10/15/25 | $ 14,813 | $ 37,303 | $ 74,742 | $ 75,421 | $ 75,421 | $ 75,421 |
| 5-Year Phase-In 10/10/10/10/10 | $ 14,813 | $ 29, 897 | $ 44,981 | $ 66,065 | $ 75,421 | $ 75,421 |
| | | | | | | |
| | 50 Judges | Per Judge | | | | |
| One-Time Costs (estimate)* | $ 36,353 | $ 727 | | | | |
| On-Going Costs | $ 75,421 | $ 1,508 | | | | |

Initial costs in year one may vary depending on the amount of time it takes to fill each new judgeship position. Additionally, one-time costs are an estimate and may vary from court to court.

## Implementation Requirements, Costs, and Operational Impacts

The public expects and deserves access to the California Courts. Providing high quality and timely access to justice is the cornerstone of the judicial branch Blueprint and Access 3D. The key to the success of Access 3D is a robust reinvestment in the courts. Adoption of the proposed legislative priorities will allow Judicial Council staff to support the goals of Access 3D and the Blueprint for reinvesting in our justice system.

## Relevant Strategic Plan Goals and Operational Plan Objectives

The recommendations support many of the council's strategic plan goals, including Goal I, Access, Fairness, and Diversity, by seeking to secure funding to provide access to the courts for all Californians; Goal II, Independence and Accountability, by seeking to secure sufficient judicial branch resources to ensure accessible, safe, efficient, and effective services to the public; and Goal IV, Quality of Justice and Service to the Public, by seeking funding to continue critical programs to meet the needs of court users.

## Attachment

1. Efficiency and Cost-Recovery Proposals Rejected by the Legislature in 2013 and 2014, at page 50

**Efficiency and Cost-Recovery Proposals Rejected by the Legislature in 2013 and 2014**

- **Administrative assessment for maintaining records of convictions under the Vehicle Code:** Clarifies that courts are required to impose the $10 administrative assessment for each conviction of a violation of the Vehicle Code, not just upon a "subsequent" violation.
- **Audits**: Defers 2011 required audit until trial courts and the Judicial Council receive specified funding to cover the cost of the audits.
- **Bail bond reinstatement**: Authorizes courts to charge a $65 administrative fee to reinstate a bail bond after it has been revoked.
- **Collections**: Allows courts to retain and distribute collections rather than transferring collected funds to county treasuries with distribution instructions.
- **Court costs for deferred entry of judgment**: Clarifies that the court can recoup its costs in processing a request or application for diversion or DEJ.
- **Court reporter requirement in non-mandated case types**: Repeals Government Code sections 70045.1, 70045.2, 70045.4, 70045.6, 70045.75, 70045.77, 70045.8, 70045.10, 70046.4, 70050.6, 70056.7, 70059.8, 70059.9, and 70063 to eliminate the unfunded mandate that the enumerated courts (Trinity, Modoc, Merced, Kern, Nevada, El Dorado, Butte, Tehama, Lake, Tuolumne, Monterey, Solano, San Luis Obispo, and Mendocino) use court reporters in specified non-mandated case types.
- **Destruction of records relating to possession or transportation of marijuana**: Eliminates the requirement that courts destroy infraction records relating to possession or transport of marijuana.
- **File search fee for commercial purposes**: Allows courts to charge a $10 fee to commercial enterprises, except media outlets that use the information for media purposes, for any file, name, or information search request.
- **Marijuana possession infractions**: Amends Penal Code section 1000(a) to exclude marijuana possession, per Health and Safety Code section 11357(b), from eligibility for deferred entry of judgment.
- **Notice of mediation**: Amends Family Code section 3176 to eliminate the requirement for service by certified, return receipt postage prepaid mail for notice of mediation and clarifies that the court is responsible for sending the notice.
- **Notice of subsequent DUI**: Repeals Vehicle Code section 23622(c) to eliminate the court's responsibility to provide notification of a subsequent DUI to courts that previously convicted the defendant of a DUI.
- **Penalty Assessments**: Revises and redirects the $7 penalty assessment from court construction funds to State Court Facilities Trust Fund.
- **Preliminary hearing transcripts**: Clarifies that preliminary hearing transcripts must be produced only when a defendant is held to answer the charge of homicide.
- **Trial by written declaration**: Eliminates the trial de novo option when the defendant in a Vehicle Code violation has not prevailed on his or her trial by written declaration.

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# MEMORANDUM

Date
October 2, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Criminal and Civil Procedure—Monetary Sanctions under Code of Civil Procedure section 177.5

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Arturo Castro, 415-865-7702
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## Executive Summary

The Criminal Law Advisory Committee proposes amending Code of Civil Procedure section 177.5 to expressly include jurors in the category of persons subject to sanctions for violating a lawful court order under that section. The proposal was developed at the request of judges to eliminate any ambiguity about whether courts are authorized to sanction jurors.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend section 177.5 to add jurors to the list of persons subject to sanctions under that section.

The text of the proposed amendment to section 177.5 is attached at page 54.

## Previous Council Action

None

## Rationale for Recommendation

Section 177.5 authorizes courts to impose monetary sanctions upon persons for violations of lawful court orders "done without good cause or substantial justification" in both criminal and civil cases. (*People v. Tabb* (1991) 228 Cal.App.3d 1300, 1310.) Section 177.5 states "the term 'person' includes a witness, a party, a party's attorney, or both." As such, the section does not expressly apply to jurors.

Sanctions under this section may be made on the court's own motion after notice and opportunity to be heard. An order imposing sanctions must be made in writing and recite in detail the conduct or circumstances justifying the order.

Expressly adding jurors to the list of persons subject to monetary sanctions under section 177.5 will remove any ambiguity about whether courts have the discretion to impose these sanctions against jurors under that section. This authority will provide courts with a less burdensome alternative to formal contempt proceedings for purposes of controlling the proceedings. Ensuring that courts are vested with this discretion will facilitate the orderly and efficient administration of justice by empowering courts with a less disruptive and time consuming alternative for preserving the integrity of the proceedings.

On October 2, 2014, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee's Joint Legislation Working Group voted to recommend sponsorship of this proposal.

## Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment during the spring 2014 cycle, yielding a total of six comments. Of those, four agreed with the proposal, including the Superior Courts of Los Angeles and San Diego Counties, one made "no comment," and one did not agree with the proposal. A chart with all comments received and committee responses is attached at pages 55-57.

In addition, in March 2014, before the proposal circulated for public comment, the Joint Legislation Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees reviewed the proposal and voted unanimously to support it. The Civil and Small Claims Advisory Committee also reviewed the proposal and provided informal feedback, but did not take a formal position. Some members of that committee said that the proposal could have the positive effect of deterring misconduct. Other members expressed concerns that the proposal could create further disincentives for jury service and questioned the policy of encouraging courts to sanction jurors. Some members were of the opinion that this provision would rarely be invoked by judges.

### Notable alternatives considered

The Criminal Law Advisory Committee considered the following notable objections to the proposal:

- ***General concerns about sanctioning jurors, potential for improper judicial use, and distinguishing jurors from other "persons" in the system.*** A commentator opposed the proposal on several grounds, including that jurors should receive the highest level of protection in the judicial system; judges do not always properly perform their duties; judges could easily abuse their authority, and jurors do not fit within the definition of "persons" in the same manner as do parties or witnesses. The commentator also suggested that jurors should be entitled to separate jury trials, with judges subject to cross-examination, before sanctions may be imposed.

The committee declined to modify the proposal as suggested by this commentator. The committee believes that the proposal will sufficiently ensure due process and not invite abuse of discretion.

## Implementation Requirements, Costs, and Operational Impacts

No implementation requirements, costs, or operational impacts are expected. As described above, the proposal is designed to vest courts with broader authority to address juror misconduct during trials by providing a less burdensome alternative to formal contempt proceedings for purposes of controlling the proceedings.

## Attachments

1. Proposed amendments to Code of Civil Procedure section 177.5, at page 54
2. Chart of comments, LEG 14-04, at pages 55–57

Code of Civil Procedure section 177.5 would be amended, effective January 1, 2016, to read:

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a juror, a party, a party's attorney, or both.

Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

## LEG14–04

Proposed Legislation: Jurors: Monetary Sanctions under Code of Civil Procedure section 177.5 (amend Code of Civil Procedure section 177.5)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | Orange County Bar Association<br>by Thomas Bienert, Jr., President | A | The proposed change would achieve the purpose of deterring juror misconduct. No special training would be required and twelve months would be a sufficient amount of time for its implementation. | None needed. |
| 2. | Mr. Ronald L. Porter | N | The need to keep a court operating in a orderly fashion is not in question, however, any sanctions against a juror, should receive the highest scrutiny before imposition. Under our system of law and the function of juries, jurors should receive the highest protection. The system should protect them against any possibility of abuse. As we all know, even judges do not perform their duties in a proper manner at all times, and our jury system demands a juror receive the highest protect from any possibility of abuse. These are citizens, most of which have no idea of how the judicial system works and are there seeking truth and justice. A juror may ask questions that may irritate a judge or make demands they believe as a juror entitled to or should receive.<br><br>This change could also provide judges an excuse and/or justification not to answer proper questions presented to them by a juror or jurors. This proposed change is very dangerous and could easily be abused to improperly influence a jury decision, discourage jurors from performing their proper duties or to serve properly as a juror in the future.<br><br>I would suggest that if a judge believes a juror | Disagree. The committee believes that the proposal sufficiently ensures due process, that the reasoning behind and goals of the proposal are sound, and that judicial officers are presumed to fairly apply the law and execute their duties under the law. |

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | should be sanctioned, he should put it before the same jury that witnessed the incident for a decision at the end of the trial, with the judge presenting his case with cross examination and the juror being given the opportunity to present his position. Along with a universal statewide instruction to be given to the jury prior to the judge presenting his case. After a . . . jury decision, if rendered guilty, it should also be reviewed an independent judge with the primary purpose of ensure the decision protects the jury system from improper influence. The only other possible way to properly protect the jury function would be to hold a separate jury trial on the issue, with a universal state wide instruction to given to the jury with the judge as a witness.<br><br>The text of the statue was clearly misinterpreted beyond the intent in People v. Kwee (1995) 39 Cal.App.4th 1, 5, note: "the term 'person' includes a witness, a party, a party's attorney, or both.". The appellate court clearly went beyond the statue. It should have ruled within the narrow bounds of the statue and left it to the legislature to make any necessary changes to the law. The jury is not a party or a witness, they are the decision makers. To some degree the judge is there to serve [] the jury. The jury can not reasonably be placed into the definition of the word person in the statute. The appellate court should have narrowly interpreted the statue with the obvious fact that a juror did not | |

## LEG14–04

Proposed Legislation: Jurors: Monetary Sanctions under Code of Civil Procedure section 177.5 (amend Code of Civil Procedure section 177.5)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | fit into the scope of the statue, with a finding if the legislator wanted to include jurors it would have specifically included them. | |
| 3. | Superior Court of Los Angeles County | A | | None needed. |
| 4. | Superior Court of Riverside County<br>by Daniel Wolfe, Managing Attorney | NI | No comment. | None needed. |
| 5. | Superior Court of San Diego County<br>by Mike Roddy, Executive Officer | A | No additional comments. | None needed. |
| 6. | Hon. Peter B. Twede<br>Superior Court of Glenn County | A | Leg 14-04, 05, 06 and 07 appear to be appropriate changes that are necessitated by the circumstances outlined in those proposals. | None needed. |

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# MEMORANDUM

Date
October 15, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Criminal Justice Realignment—Parole Holds

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Eve Hershcopf, 415-865-7961
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Sharon Reilly, 916-323-3121
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## Executive Summary

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend Penal Code sections 1203.2(a), 3000.08(c), 3056(a), and 3455(b) and (c) to provide courts with discretion to order the release of supervised persons from custody, unless otherwise serving a period of flash incarceration, regardless of whether a petition has been filed or a parole hold has been issued. This proposal was developed at the request of criminal law judges to enhance judicial discretion to decide the custody status of supervised persons. To enhance public safety, this proposal would also empower courts to fashion any terms and conditions of release deemed appropriate.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to:

Amend Penal Code sections 1203.2(a), 3000.08(c), 3056(a), and 3455(b) and (c) to provide courts with discretion to order the release of supervised persons from custody, unless otherwise serving a period of flash incarceration, regardless of whether a petition has been filed or a parole hold has been issued.

The text of the proposed amendment to sections 1203.2(a), 3000.08(c), 3056(a), and 3455(b) and (c) is attached at pages 61–63.

## Previous Council Action

None

## Rationale for Recommendation

Before realignment, the California Department of Corrections and Rehabilitation was authorized to issue parole holds under Penal Code section 3056 and order warrants for the arrest of parolees without court involvement. Although the realignment legislation vested courts with sole authority to order and recall warrants for all supervised persons (Pen. Code, §§ 1203.2, 3455(b)(1), 3000(b)(9)(A)), the legislation did not authorize courts to recall parole holds under Penal Code section 3056.

Although courts are generally authorized to determine the custody status of supervised persons during court revocation proceedings, courts have no express statutory authority to order the release of persons supervised on post release community supervision or parole if detained by the supervising agency for purposes of imposing a period of flash incarceration, particularly if detained on a parole hold.

By authorizing courts to determine the custody status of all supervised persons not serving a period of flash incarceration, this proposal would enhance judicial discretion and eliminate uncertainties about court authority to lift parole holds and order the release of supervised persons, particularly in the absence of warrants and the filing of petitions to revoke supervision. To enhance public safety, this proposal would also empower courts to fashion any terms and conditions of release deemed appropriate.

On October 16, 2014, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee's Joint Legislation Working Group voted unanimously to support sponsorship of this proposal.

## Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment during the spring 2014 cycle, yielding a total of six comments. Of those, four agreed with the proposal, including the Superior Courts of Los Angeles, Riverside, San Diego, and Glenn Counties; one agreed with the proposal if modified; and one did not take a formal position.

At the time of circulation for public comment, the proposal also included amendments to Penal Code section 1203.2(b)(1) to require supervising agencies to file petitions to revoke supervision

within five court days of the arrest of the supervised person. After the comment period, however, the committee decided to table those amendments for further consideration. A chart with all comments received and committee responses is attached at pages 64–69.

### Notable alternatives considered

As originally circulated, the proposal would have limited court discretion to lift a parole hold "upon a finding of good cause." The California Attorney General's Office raised concerns regarding the costs and operational impacts on the courts if required to hold a "good cause" hearing before lifting a parole hold. Because the proposal was not intended to require courts to conduct formal hearings before lifting parole holds, the committee decided to delete the good cause requirement to eliminate confusion and avoid inadvertently imposing burdens on courts. In addition, deleting the good cause requirement enhances judicial discretion consistent with other custody and release decisions made by courts without formal good cause findings.

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are expected.

## Attachments

1. Proposed amendments to Pen. Code §§ 1203.2(a), 3000.08(c), 3056(a), and 3455(b) and (c), at pages 61–63
2. Chart of comments, LEG14-06, at pages 64–69

Penal Code sections 1203.2(a) and (b)(1), 3000.08(c), 3056(a), and 3455(b) and (c) would be amended to read:

**§ 1203.2**

(a) At any time during the period of supervision of a person (1) released on probation under the care of a probation officer pursuant to this chapter, (2) released on conditional sentence or summary probation not under the care of a probation officer, (3) placed on mandatory supervision pursuant to ~~subparagraph (B) of~~ paragraph (5) of subdivision (h) of Section 1170, (4) subject to revocation of postrelease community supervision pursuant to Section 3455, or (5) subject to revocation of parole supervision pursuant to Section 3000.08, if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. **Notwithstanding section 3056, and unless the supervised person is otherwise serving a period of flash incarceration, whenever a supervised person subject to this section is arrested, with or without a warrant or the filing of a petition for revocation as described in subdivision (b), the court may order the release of the supervised person from custody under any terms and conditions as the court deems appropriate.** Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. However, the court shall not terminate parole pursuant to this section. Supervision shall not be revoked for failure of a person to make restitution imposed as a condition of supervision unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay. The revocation, summary or otherwise, shall serve to toll the running of the period of supervision.

**§ 3000.08.**

(a) *** (b).

(c) At any time during the period of parole of a person subject to this section, if any parole agent or peace officer has probable cause to believe that the parolee is violating any term or condition of his or her parole, the agent or officer may, without warrant or other process and at any time until the final disposition of the case, arrest the person and bring him or her before the court, or the court may, in its discretion, issue a warrant for that person's arrest pursuant to Section 1203.2. **Notwithstanding section 3056, and unless the supervised person is otherwise serving a period of flash incarceration, whenever a supervised person subject to this section is arrested, with or without a warrant or the filing of a petition for revocation as described in subdivision (f), the court may order the release of the supervised person from custody under any terms and conditions as the court deems appropriate.**

(d) *** (m).

**§ 3056.**

(a) Prisoners on parole shall remain under the supervision of the department but shall not be returned to prison except as provided in subdivision (b) or as provided by subdivision (c) of Section 3000.09. A parolee awaiting a parole revocation hearing may be housed in a county jail while awaiting revocation proceedings. If a parolee is housed in a county jail, he or she shall be housed in the county in which he or she was arrested or the county in which a petition to revoke parole has been filed or, if there is no county jail in that county, in the housing facility with which that county has contracted to house jail inmates. Additionally, except as provided by subdivision (c) of Section 3000.09, upon revocation of parole, a parolee may be housed in a county jail for a maximum of 180 days per revocation. When housed in county facilities, parolees shall be under the sole legal custody and jurisdiction of local county facilities. A parolee shall remain under the sole legal custody and jurisdiction of the local county or local correctional administrator, even if placed in an alternative custody program in lieu of incarceration, including, but not limited to, work furlough and electronic home detention. When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of the department. **Unless otherwise serving a period of flash incarceration, whenever a parolee subject to this section has been arrested, with or without a warrant or the filing of a petition for revocation with the court, the court may order the release of the parolee from custody under any terms and conditions as the court deems appropriate.** When released from the county facility or county alternative custody program following a period of custody for revocation of parole or because no violation of parole is found, the parolee shall be returned to the parole supervision of the department for the duration of parole.

(b) *** (c).

**§ 3455.**

(a) ***

(b)(1) At any time during the period of postrelease community supervision, if any peace officer has probable cause to believe a person subject to postrelease community supervision is violating any term or condition of his or her release, the officer may, without a warrant or other process, arrest the person and bring him or her before the supervising county agency established by the county board of supervisors pursuant to subdivision (a) of Section 3451. Additionally, an officer employed by the supervising county agency may seek a warrant and a court or its designated hearing officer appointed pursuant to Section 71622.5 of the Government Code shall have the authority to issue a warrant for that person's arrest.

(2) The court or its designated hearing officer shall have the authority to issue a warrant for any person who is the subject of a petition filed under this section who has failed to appear for a

hearing on the petition or for any reason in the interests of justice, or to remand to custody a person who does appear at a hearing on the petition for any reason in the interests of justice. **Unless the supervised person is otherwise serving a period of flash incarceration, whenever a supervised person subject to this section is arrested, with or without a warrant or the filing of a petition for revocation, the court may order the release of the supervised person from custody under any terms and conditions as the court deems appropriate.**

(c) The revocation hearing shall be held within a reasonable time after the filing of the revocation petition. **Except as provided in paragraph (2) of subdivision (b), based** ~~Based~~ upon a showing of a preponderance of the evidence that a person under supervision poses an unreasonable risk to public safety, or the person may not appear if released from custody, or for any reason in the interests of justice, the supervising county agency shall have the authority to make a determination whether the person should remain in custody pending the first court appearance on a petition to revoke postrelease community supervision, and upon that determination, may order the person confined pending his or her first court appearance.

(d) *** (e).

## LEG14–06

Proposed Legislation: Criminal Justice Realignment: Parole Holds and Deadline to File Petitions to Revoke Supervision (amend Penal Code sections 1203.2, 3000.08, 3056, and 3455)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | California Department of Justice, Office of the Attorney General by Melissa Whitaker, Legislative Coordinator | | The legislative proposal states, "No significant implementation requirements, costs, or operational impacts for courts are expected." However, the proposed legislation potentially requires the superior courts to hold a new good cause hearing for release in every case in addition to the probable cause hearings that are already held. A good cause hearing would require the presence of all parties and could potentially involve the presentation of witness testimony and other evidence relevant to the good cause determination. If such a hearing was held during every revocation proceeding, it seems that the costs and operational impacts for courts would not be insignificant. | The committee appreciates the concerns raised by the commentator. Because the proposal was not intended to require courts to conduct formal hearings before lifting parole holds, the committee has decided to delete the good cause requirement to eliminate confusion and avoid inadvertently imposing burdens on courts. In addition, deleting the good cause requirement enhances judicial discretion consistent with other custody and release decisions made by courts without formal good cause findings. |
| 2. | Los Angeles County Offices of the Public Defender and Alternate Public Defender by Ronald L. Brown, Public Defender, and Janice Y. Fukai, Alternate Public Defender | AM | *The two Public Defender agencies within the County of Los Angeles have collaborated in reviewing Proposed Legislations 14-06 and 14-03 and respectfully submit our comments. Our effort has been coordinated by Mr. Albert Menaster, the Head Deputy of the Appellate Branch of the Public Defender. If you have any questions regarding our comments, please contact him at 213-974-3058.*<br><br>The Los Angeles County Offices of the Public Defender and Alternate Public Defender agree with Proposed Legislation 14-06, which suggests 1) amending Penal Code section 1203.2, subdivision (b)(1), to require all supervising agencies to file petitions to revoke supervision within five court days of the arrest | |



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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | of the supervised person; and 2) amending Penal Code sections 1203.2, subdivision (a), 3000.08, subdivision (c), 3056, subdivision (a), and 3455, subdivisions (b) and (c), to give the courts discretion to release supervised persons from custody upon a showing of good cause, regardless of whether a petition to revoke has been filed or whether a parole hold has been issued, so long as the supervised person is not serving a period of flash incarceration.<br><br><u>Proposed Amendment to Penal Code section 1203.2(b)(1)</u>:<br><br>Currently, courts are required to conduct revocation hearings for persons being supervised under four different supervisory schemes: formal probation, post-release community supervision ("PRCS"), parole, and mandatory supervision (pursuant to Penal Code section 1170, subdivision (h)(5)). The procedures for litigating alleged violations of all four supervisory schemes are codified at Penal Code section 1203.2. Parole and PRCS have an additional procedure that allows the supervising agency to impose a period of "flash incarceration" of up to 10 days without any judicial involvement or review.<br><br>At present, supervising agencies are authorized to arrest supervised persons for alleged violations with or without a warrant, and those agencies can then initiate a court revocation | |

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | proceeding by filing a petition to revoke with the court. (Pen. Code § 1203.2, subds. (a) and (b).)<br><br>Unfortunately for supervised persons, Penal Code section 1203.2 does not currently include a deadline for when petitions to revoke supervision must be filed for a supervised person in custody, and every agency has its own internal procedures and timelines for filing petitions. In Los Angeles County, it is not uncommon for supervised persons on PRCS and parole to be in custody for 10 days or more before a petition is filed, and remain in custody for several more days until they are seen in court for the first time. This is a serious violation of due process that has heretofore gone unchecked.<br><br>The proposed legislation will go a long way towards eliminating unnecessary delays in the filing of revocation petitions and will get supervised persons to court faster and more efficiently, allowing courts to handle the matters more expeditiously. Our Offices support this legislation for that reason. However, while the proposed legislation creates a five-court-day deadline for the filing of the petition to revoke, the proposed legislation is silent about what happens when this time limit is violated. This lack of sanction creates a right without a remedy, and it is axiomatic that a right without a remedy is no right at all. | • The committee appreciates the concerns raised by the commentator. The committee has decided to table the proposed amendment addressed by this comment for further consideration. |

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | Therefore, while our Offices agree with the proposed legislation, our Offices do so with the following proposed modification: that Penal Code section 1203.2, subdivision (b)(1), be modified to state that "Petitions filed by the supervising agency shall be filed within five court days of the arrest of the supervised person; in the event that the petition is not filed in the time specified, the court shall order the immediate release of the supervised person on that matter only." Giving the court the authority to release a supervised person when the supervising agency fails to file the revocation petition in a timely manner creates a powerful incentive for the supervising agency to not delay decisions on which matters will be filed in court and which matters will be handled internally with intermediate sanctions. This sanction will further ensure that matters are brought to court quickly and efficiently.<br><br><u>Proposed Amendments to Penal Code sections 1203.2(a), 3000.08(c), 3056(a), 3455(b)&(c)</u><br><br>Prior to realignment, the California Department of Corrections and Rehabilitation ("CDCR") had been authorized to issue parole holds pursuant to Penal Code section 3056 and order warrants for the arrest of parolees without any court involvement. Although realignment gave courts the sole authority to issue and recall warrants, the legislation did not give the courts | • **No response required.** |

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | authority to override a parole hold pursuant to Penal Code section 3056. This leads to situations where supervised persons are in custody pursuant to a parole hold for several days before a petition is filed, which means that these parolees waiting in custody while parole agents decide what to do can exceed the flash incarceration period of 10 days in custody without ever seeing a courtroom<br><br>The proposed legislation will give the courts authority to lift parole holds and keep parolees from languishing in jail awaiting the potential filing of a petition to revoke. By allowing the courts to lift parole holds, parolees are placed on par with other supervised person in that the courts would have the ultimate authority to release them in the interests of justice regardless of whether a petition has been or will be filed. Therefore, our Offices agree with the proposed changes.<br><br><u>Conclusion</u><br><br>In order to further promote uniform and effective procedures for handling alleged violations of all four types of supervision, and to give courts the discretion and authority to authorize the release of any supervised person, including parolees, the Los Angeles County Offices of the Public Defender and Alternate Public Defender support the proposed legislation and agree with the proposed changes, | |

## LEG14–06

Proposed Legislation: Criminal Justice Realignment: Parole Holds and Deadline to File Petitions to Revoke Supervision (amend Penal Code sections 1203.2, 3000.08, 3056, and 3455)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | subject to the suggested modification of Penal Code section 1203.2, subdivision (b)(1). | |
| 3. | Superior Court of Los Angeles County | A | | No response required. |
| 4. | Superior Court of Riverside County<br>by Daniel Wolfe, Managing Attorney | NI | No comment. | No response required. |
| 5. | Superior Court of San Diego County<br>by Mike Roddy, Executive Officer | A | No additional comments. | No response required. |
| 6. | Hon. Peter B. Twede<br>Superior Court of Glenn County | A | Leg 14-04, 05, 06 and 07 appear to be appropriate changes that are necessitated by the circumstances outlined in those proposals. | No response required. |



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

JUDICIAL COUNCIL OF CALIFORNIA

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# MEMORANDUM

Date
October 2, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Criminal Justice Realignment—Recalling Sentences under Penal Code section 1170(d)(1)

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Arturo Castro, 415-865-7702
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Sharon Reilly, 916-323-3121
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## Executive Summary

The Criminal Law Advisory Committee proposes amending Penal Code section 1170(d)(1)[1] to apply existing court authority to recall felony prison sentences to sentences now served in county jail under section 1170(h). This proposal was developed at the request of criminal law judges to enhance judicial discretion by applying existing recall authority to a new category of felony sentences created by criminal justice realignment.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend section 1170(d)(1) to apply existing court authority to recall felony prison sentences to sentences now served in county jail under section 1170(h).

[1] All subsequent statutory amendments are to the Penal Code.

The text of the proposed amendment to section 1170(d)(1) is attached at page 73.

## Previous Council Action

No relevant previous Judicial Council action to report.

## Rationale for Recommendation

Section 1170(d)(1) authorizes courts to recall felony prison sentences on their own motion within 120 days of the defendant's commitment to prison or anytime upon recommendation of state prison officials. Section 1170(d)(1) is generally designed to vest courts with broad authority to resentence "for any reason rationally related to lawful sentencing." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) By its express terms, section 1170(d)(1) only applies to state prison sentences.

Legislation enacted as part of the Criminal Justice Realignment Act of 2011 implemented broad changes to felony sentencing laws, including replacing prison sentences for certain felony offenders with county jail sentences under section 1170(h). The legislation, however, did not also amend section 1170(d)(1) to apply existing court discretion to recall felony sentences to the sentences now served in county jail under section 1170(h).

The committee believes that the general purpose of section 1170(d)(1)—to authorize courts to resentence for any reason rationally related to lawful sentencing—applies equally to the recall of county jail sentences under section 1170(h). By expanding court discretion to recall sentences, this proposal is designed to enhance judicial discretion, promote uniform and effective sentencing practices, and update longstanding sentencing laws to reflect recent criminal justice realignment legislation.

## Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment during the spring 2014 cycle, yielding a total of seven comments. Of those, five agreed with the proposal, including the Superior Courts of Los Angeles, Riverside, and San Diego Counties, and the Public Defender and Alternate Public Defender of Los Angeles County; one agreed with the proposal if modified; and one did not take a formal position. A chart with all comments received and committee responses is attached at pages 74–77.

In addition, in April 2014, before the proposal circulated for public comment, the Joint Legislation Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees (JLWG) reviewed the proposal and voted unanimously to support. Additionally, on October 2, the JLWG reviewed the proposal again and voted unanimously to support it.

### Notable alternatives considered

The committee considered but declined a suggestion regarding providing notice of recalled sentences. The California Attorney General's Office (AG) recommended that the proposal include a provision requiring that, in the event a notice of appeal has been filed at the time of

recall and resentence, the sentencing court provide notice of the recall and resentence to the court of appeal and the parties, including the AG. The committee, however, declined the suggestion as unnecessary. Rule 8.340(a) of the California Rules of Court provides that if the trial court amends or recalls a judgment or makes any other order in the case following the certification of the record, the clerk must send a copy of the amended abstract of judgment to the reviewing court, the parties and others, including the AG if counsel for the prosecution on appeal.

In addition, to ensure that the proposal applies to *all* counties, including counties in which the county jail is operated by a corrections department, rather than a county sheriff, the committee modified the proposal to replace references to "county sheriff" with "county sheriff *or county director of corrections*."

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are expected.

## Attachments

1. Proposed amendments to Penal Code section 1170(d)(1), at page 73
2. Chart of comments, LEG14-03, at pages 74–77

Penal Code section 1170(d)(1) would be amended, effective January 1, 2016, to read:

When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail under subdivision (h) and has been committed to the custody of the secretary, county sheriff, or county director of corrections, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, county sheriff, or county director of corrections, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

## LEG14–03

Proposed Legislation: Criminal Justice Realignment: Recalling Sentences under Penal Code section 1170(d)(1) (amend Penal Code section 1170(d)(1))

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | Conference of California Bar Associations (CCBA)<br>by Larry Doyle, Legislative Representative | A | This recommendation essentially duplicates Resolution 09-01-2013 (http://larrydoylelaw.com/wp-content/uploads/2013/11/09-01-2013.pdf) adopted by the CCBA at its October 2013 meeting. The resolution notes that with little difference between these sentences other than the location of incarceration – prison as compared to county jail - treating the ability to recall these two types of sentences differently would otherwise raise state and federal constitutional equal protection problems, and leave the judiciary completely powerless to remedy all Penal Code section 1170 (h) sentences for any legitimate reason post judgment. Clarity in section 1170 (d)(1) will eliminate arbitrary results for all trial courts across California and give expressed guidance to all trial courts on how best to exercise its constitutional and statutory authority to effectuate post judgment section 1170 (h) (county jail) sentences. | No response required. |
| 2. | California Department of Justice, Office of the Attorney General<br>by Melissa Whitaker, Legislative Coordinator | AM | A trial court may recall a sentence and resentence a defendant under Penal Code section 1170(d)(1) even though a notice of appeal has already been filed. (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1835-1836; see *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204.) The proposed legislation does not provide a mechanism for the Attorney General's Office to receive notice of a | The committee declines the suggestion as unnecessary. Rule 8.340(a) of the California Rules of Court provides that if the trial court amends or recalls the judgment or makes any other order in the case following the certification of the record, the clerk must send a copy of the amended abstract of judgment to the parties, including the Attorney General if counsel for the prosecution on appeal, as well as the reviewing court. |

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | recall and resentence in the event a notice of appeal has been filed. In the past, our office has often learned of such action through CDCR, but that connection will not benefit us in cases in which the defendant is sentenced locally pursuant to Penal Code section 1170(h)(5). Notice of such action is necessary for our office's proper and efficient handling of appeals.<br><br>It would be beneficial for the parties and the Court of Appeal for the proposal to include a provision stating that, in the event a notice of appeal has been filed at the time of recall and resentence, the sentencing court shall provide notice of the recall and resentence to the court of appeal and the parties, including the Attorney General's Office. | |
| 3. | Los Angeles County Offices of the Public Defender and Alternate Public Defender<br>by Ronald L. Brown, Public Defender, and Janice Y. Fukai, Alternate Public Defender | A | The Los Angeles County Offices of the Public Defender and Alternate Public Defender agree with Proposed Legislation 14-03, which will amend Penal Code section 1170, subdivision (d)(1), to apply existing court authority to recall felony prison sentences to new county jail sentences under Penal Code section 1170, subdivision (h)(5).<br><br>Penal Code section 1170, subdivision (d)(1), while designed to provide courts with broad authority to resentence defendants, clearly only applies to state prison sentences. However, since the implementation of criminal justice | No response required. |

## LEG14–03

Proposed Legislation: Criminal Justice Realignment: Recalling Sentences under Penal Code section 1170(d)(1) *(*amend Penal Code section 1170(d)(1))

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | realignment legislation in October of 2011, prison sentences for certain felony offenses have been replaced with county jail sentences pursuant to Penal Code section 1170, subdivision (h)(5). As a result, this major legislative change has now created two classes of felons: state prison felons and county jail felons.<br><br>Unfortunately for county jail felons, although felony sentences served in prison and felony sentences served in a county jail are considered identical for priorability purposes under Penal Code section 667.5, subdivision (b), only the state prison sentences are currently subject to recall under Penal Code section 1170, subdivision (d)(1). This creates a strange and counter-intuitive result; defendants who were sentenced to more serious offenses that mandated state prison sentences are allowed to have their sentences recalled, while defendants who committed less serious offenses which resulted in sentences served in county jail are denied any such relief. The stated purpose of the realignment legislation is to realign low-level felony offenders who have no prior convictions for serious, violent, or sex offenses to locally-run community-based corrections programs. (Pen. Code § 17.5, subd. (1)(5).) However, for those "realigned" prisoners, it is grossly unfair that they are not given the same opportunity for a sentence recall that more serious offenders are entitled to. | |

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

## LEG14–03

Proposed Legislation: Criminal Justice Realignment: Recalling Sentences under Penal Code section 1170(d)(1) *(*amend Penal Code section 1170(d)(1))

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | In order to further promote uniform and effective sentencing practices, and to give county jail felons the same access to the sentencing court for sentence corrections that are currently limited to state prison felons, the Los Angeles County Offices of the Public Defender and Alternate Public Defender support the proposed legislation. | |
| 4. | Superior Court of Los Angeles County | A | | No response required. |
| 5. | Superior Court of Riverside County<br>by Daniel Wolfe, Managing Attorney | A | Agree with proposal. | No response required. |
| 6. | Superior Court of San Diego County<br>by Mike Roddy, Executive Officer | A | No additional comments. | No response required. |
| 7. | Hon. Peter B. Twede<br>Superior Court of Glenn County | | Leg 14-03 1170(d)(1) Recall of sentence. The only issue I have with this particular legislation is the ability of the ***county sheriff*** to request the recall "at any time" after sentence is imposed. I envision petitions being filed on the basis of the good conduct of the defendant requesting a modification to decrease the sentence and therefore increase available space in the facility. | The committee appreciates this comment, and acknowledges the importance of issues involving prison and county jail overcrowding. The statute currently permits courts to recall felony prison sentences at the recommendation of state prison officials, made at any time. The court has the discretion to deny such recommendations. This proposal is simply designed to apply this existing court authority to the new county jail sentences under section 1170(h). The committee believes that the general purpose of section 1170(d)(1)—to authorize courts to resentence for any reason rationally related to lawful sentencing—applies equally to the recall of county jail sentences under section 1170(h). |

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

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# MEMORANDUM

Date
October 2, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Subject
Proposal for Judicial Council-sponsored Legislation: Sentencing Report Deadlines

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
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## Executive Summary

The Criminal Law Advisory Committee recommends amending Penal Code section 1203 to require courts to find good cause before continuing a sentencing hearing for failure by the probation department to provide a sentencing report by the required deadlines.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend Penal Code section 1203 to require courts to find good cause before continuing a sentencing hearing for failure by the probation department to provide a sentencing report by the required deadlines.

The text of the proposed legislation is attached at page 81.

## Previous Council Action

There has been no previous council action regarding this issue.

## Rationale for Recommendation

Under current law, probation sentencing reports must be provided to the parties at least five days before the sentencing hearing unless the deadline is waived by the parties either in writing or by oral stipulation in open court. (Pen. Code, §1203(b)(2)(E).) The purpose of the deadline is to afford defendants a "proper opportunity to comprehend, analyze, investigate and evaluate the report." (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 808–809; *People v. Leffel* (1987) 196 Cal.App.3d 1310, 1318.) If the probation department does not provide the report by the deadline and the defendant objects and requests a continuance, failure by the court to grant the continuance constitutes a denial of due process, entitling the defendant to a remand for sentencing. (*People v. Bohannon, supra,* 82 Cal.App.4th 798, 808–809.) Defendants need not show actual prejudice. (*Id*. at 809.)

Thus, defendants are entitled to automatic continuances whenever the deadline is missed, regardless of whether the missed deadline had any impact on the defendant's ability to review and investigate the probation report. As a result, courts are automatically required to conduct additional sentencing proceedings upon request, even when the proceedings may be unnecessary.

This proposal was developed at the request of criminal law judges to vest courts with discretion to decide on a case-by-case basis whether continuances due to noncompliance with the report deadline are justified, as opposed to the automatic continuances required by current law.

By requiring good cause for continuances, as opposed to the presumptive right to a continuance under current law, this proposal would vest courts with the discretion to decide whether the circumstances of a particular case warrant a continuance. Even if the deadline is missed, for example, a defendant may still have adequate time to review the report and raise concerns about the report's contents, obviating the need for an automatic continuance. This proposal would eliminate extraneous sentencing proceedings and ease the administrative burdens associated with unnecessary remands for sentencing, without compromising the defendant's right to have sufficient opportunity to evaluate the probation report.

## Comments, Alternatives Considered, and Policy Implications

The proposed amendment circulated for public comment in spring 2014. The comment period ended on June 18th. A total of five comments were received. Of those, three commentators agreed with the proposal. Two commentators did not agree with the proposal and one commentator did not indicate either agreement or disagreement. A chart providing all of the comments received and committee recommendations is attached at pages 82–83.

Notably, one commentator stated that defense counsel often waive the statutory time for sentencing yet probation reports are still filed late. Thus, he argues that courts should look to probation to ameliorate the problem rather than penalize the defense with this new burden to argue for good cause. The committee declined this suggestion because under the proposed amendment courts would have discretion to consider the burdens placed on the defendant by the tardiness of the report during their good cause determinations. In their discretion, courts will continue to grant these continuances when they are necessary on a case-by-case basis. A time

waiver would become a factor in the court's ultimate determination of whether the particular case merits a continuance.

On October 2, 2014, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee's Joint Legislation Working Group voted to recommend sponsorship of this proposal.

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts for courts are expected at the trial level.

## Attachments

1. Proposed amendment to Penal Code section 1203, at page 81
2. Comments chart, LEG14-07, at pages 82–83

Penal Code section 1203 would be amended, effective January 1, 2016, to read:

1203. (a) ***

(b) (1) Except as provided in subdivision (j), if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

(2) (A) The probation officer shall immediately investigate and make a written report to the court of his or her findings and recommendations, including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted.

(B) *** (D)

(E) The report shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney nine days, prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of the court as a record in the case at the time of the hearing. The time within which the report shall be made available and filed may be waived by written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court. Any request for a continuance of the hearing based upon a failure to make the report available to the parties within the deadlines specified above may only be granted by the court upon a finding of good cause.

***

## LEG14–07

Proposed Legislation: Criminal Justice Realignment: Sentencing Report Deadlines (amend Penal Code sections 1203)

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| 1. | Court of Appeal, Second Appellate District | A | The probation report must be made available five days (or nine if requested) prior to the hearing. This proposal would allow the trial court to continue the hearing on a showing of good cause. Currently, hearings must be automatically continued if the time limit cannot be met, even if the missed deadline has no effect on the defendant's ability to participate in the sentencing hearing.<br><br>**Comments**<br><br>1. We support this proposal, although it will lead to arguments on appeal that the trial court abused its discretion in ruling on the continuance motion. Efficiencies gained at the trial level will be paid for in the reviewing courts.<br><br>2. We agree with the Committee that, apart from minimal judicial education, no significant implementation requirements or costs may be anticipated. | No response required. |
| 2. | Orange County Bar Association by Thomas Bienert, Jr., President | N | In some counties, the P&S report only becomes available to the defense on the actual date of the sentencing due to the understaffing of probation departments. Defense counsel regularly waives the statutory time for sentencing so the probation department can prepare an appropriate P&S report yet the report is still not timely. The contents of the P&S report are often critical not only to defendant's sentence but to defendant's ultimate prison housing if sentenced to state | The committee declines this suggestion because under the proposed amendment courts consider the burdens placed on the defendant by the tardiness of the report during their good cause determination. In their discretion, courts will continue to grant these continuances when they are necessary on a case by case basis. A time waiver would become a factor in the court's ultimate determination of whether the particular case merits a continuance. |



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

## LEG14–07

**Proposed Legislation: Criminal Justice Realignment: Sentencing Report Deadlines** *(amend Penal Code sections 1203)*

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

| | Commentator | Position | Comment | Committee Response |
|---|---|---|---|---|
| | | | prison. Defense counsel is presently free to waive any defects in time in open court should the defense deem it appropriate to do so. There is no need to require a showing of good cause in this instance. Given what is at stake, the court need not substitute its judgment for that of defense counsel or the defendant when it is not counsel who has caused the delay. If there is a problem here, the court should take it up with the probation department – not the litigants. | |
| 3. | Superior Court of Los Angeles County | A | | No response required. |
| 4. | Superior Court of Riverside County<br>by Daniel Wolfe, Managing Attorney | NI | No comment. | No response required. |
| 5. | Superior Court of San Diego County<br>by Mike Roddy, Executive Officer | N | What specific "abuse" problems is this legislation trying to cure? It seems to impose an unnecessary extra step on the court (to make a finding of "good cause") because, in the majority of cases, good cause is going to exist (presuming the defense is only going to object and request a continuance if it is really necessary). | This proposal is designed to eliminate unnecessary continuances. Rather than placing an extra burden on courts, this proposal would lessen the burden on court resources required by automatic continuances, which require courts to expend additional resources. |
| 6. | Hon. Peter B. Twede<br>Superior Court of Glenn County | A | Leg 14-04, 05, 06 and 07 appear to be appropriate changes that are necessitated by the circumstances outlined in those proposals. | No response required. |



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

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# MEMORANDUM

Date
October 6, 2014

To
Members of the Policy Coordination and Liaison Committee

From
Laura Speed, Assistant Director

Subject
Proposal for Judicial Council-sponsored Legislation: State Court Facilities Construction Fund Report (GOV 70371.8)

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
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## Executive Summary

Government Code section 70371.8 requires the Judicial Council to report annually, by March 1, to the Joint Legislative Budget Committee and the Chairs of the Senate Committee on Budget and Fiscal Review and the Assembly Committee on Budget on the status of each project established by the State Public Works Board under Government Code section 70371.7 to be funded by the Immediate and Critical Needs Account of the State Court Facilities Construction Fund. The Report is required to include an accounting of the revenues generated and the expenditures made in the Immediate and Critical Needs Account.

In preparing this report for FY 13–14, the need to amend the due date in section 70371.8 for the report from March 1 to November 1 was raised. The actual expenditures per year-end Financial Statements for each fiscal year are not available until August. Staff recommends sponsoring legislation that will change the due date from March 1 to November 1 to allow the report to be

completed with the expenditure information as reported in year-end financial statements and to go through the Judicial Council review process before submission to the Legislature.

## Recommendation

Governmental Affairs recommends sponsoring legislation to amend Government Code section 70371.8 to allow the annual report on the Immediate and Critical Needs Account to be submitted to the Legislature by November 1 rather than March 1 each year.

## Previous Council Action

None

## Rationale for Recommendation

Staff recommends this change to allow the report to be complete and as accurate as possible for submission to the Legislature. In order to submit the report by the current due date of March 1, the expenditures are merely estimates that are subject to change. Submitting the report to the Legislature each November will allow staff to include expenditures as reported in year-end financial statements and for the report to go through the Judicial Council review process, culminating in Judicial Council approval at the annual October meeting.

## Comments, Alternatives Considered, and Policy Implications

No alternatives were considered given the technical nature of this amendment and the need to complete the report after actual expenditures are determined.

## Implementation Requirements, Costs, and Operational Impacts

Because the law requires this report be done annually, changing the due date will not increase costs or workload. In fact, by allowing the report to be prepared after year-end financial statements are completed will prevent staff from having to update the report for legislative staff to match expenditure information reflected in the annual Governor's Budget released every January.