Item number: 01

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: CEQA Actions: New Projects and Fees for Expedited Review

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705

Committee or other entity submitting the proposal:
Appellate Advisory Committee and Civil and Small Claims Advisory Committee

*Staff contact (*name, phone and e-mail*): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov; James Barolo, 415-865-8928, james.barolo@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021
Project description from annual agenda: This is a joint project with Civil and Small Claims Advisory Committee. This year, new statutes require streamlined CEQA review for Environmental Leadership projects and Environmental Leadership Transit projects (Senate Bill 7, Senate Bill 44). In recent years, the Legislature added Old Town Center Redevelopment in the City of San Diego, additional State Capitol Building Annex projects, the "Oakland Sports and Mixed-Use Projects" related to a new baseball stadium, and projects in Ingleside related to a new NBA arena to the list of projects to be provided with expedited CEQA review, requiring amendments to the rules of court, including rules 3.2200 et seq. for the trial court and rules 8.700–8.705 for the appellate courts. (Public Resources Code sections 21168.6.7, 21168.6.8, 21168.6.9, 21178, 21189.50, 21189.70.) The statutes for the Environmental Leadership, Environmental Leadership Transit, Oakland ballpark, and Inglewood arena projects also require the council to adopt rules regarding costs that must be paid by a project applicant/developer to the court for expedited handling of the case. This project is legislatively mandated.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on September 19–20, 2022

Title
CEQA Actions: New Projects and Fees for Expedited Review

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair
Civil and Small Claims Advisory Committee
Hon. Tamara L. Wood, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
June 16, 2022

Contact
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James Barolo, 415-865-8928
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Executive Summary

As mandated by the Legislature, the Judicial Council previously adopted rules and established procedures that implemented a statutory scheme for the expedited resolution of actions and proceedings brought under the California Environmental Quality Act (CEQA) challenging certain projects that qualified for such streamlined procedures. The Appellate Advisory Committee and the Civil and Small Claims Advisory Committee recommend amending several California Rules of Court to implement new and reenacted legislation requiring inclusion of additional projects for streamlined review. The committees also recommend rule amendments to implement statutory provisions requiring that, in cases under two of the statutes, the council, by rule of court, establish fees to be paid by those project applicants to the trial court and Court of Appeal for the costs of streamlined CEQA review.

Recommendation

The Appellate Advisory Committee and the Civil and Small Claims Advisory Committee recommend that the Judicial Council, effective January 1, 2023:

1. Amend California Rules of Court, rules 3.2200, 3.2220, 3.2221, 3.2223, 8.700, 8.702, and 8.703 to add "environmental leadership transit projects" as a "streamlined CEQA project"; and

2. Amend rules 3.2240 and 8.705 to implement statutory provisions requiring the payment of trial court and appellate court costs for review of cases concerning "environmental leadership development projects" and "environmental leadership transit projects."

The proposed amended rules are attached at pages 7–14.

Relevant Previous Council Action

Since 2011, the Legislature has enacted numerous bills providing expedited judicial review for legal challenges brought under the California Environmental Quality Act (CEQA) for specified projects. Initially, the Legislature enacted the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, which provided for expedited review of CEQA challenges to so-called environmental leadership projects and required that these cases be brought directly to the Court of Appeal for judicial review and that project applicants pay the costs of adjudicating the cases. (See Assem. Bill 900; Stats. 2011, ch. 354.) To implement the required appellate court fees in AB 900, the council adopted the predecessor to rule 8.705.

In 2013, the Legislature amended several statutes pertaining to environmental leadership projects to remove the requirement of judicial review directly in the Court of Appeal and to require that actions or proceedings involving CEQA challenges, including any appeals, be resolved within 270 days of certification of the record of proceedings. (See Sen. Bill 743; Stats. 2013, ch. 386.) SB 743 also included a new statute providing for expedited review of CEQA challenges to projects related to a new Sacramento basketball arena. To implement SB 743, the council adopted rules 3.2220–3.2231 and 8.700–8.705, which in addition to providing expedited review for the specified projects also set out certain pleading and service requirements and incentives to help streamline judicial review.

In 2016, Senate Bill 836 (Stats. 2016, ch. 31) added another set of projects to receive expedited CEQA review, "capitol building annex projects." Thereafter, the council amended the trial court and appellate rules governing expedited CEQA review to include such projects.

In 2018 and 2020, the Legislature enacted four more bills adding additional projects to receive expedited CEQA review: Assembly Bill 734 (Stats. 2018, ch. 959), Oakland ballpark projects; Assembly Bill 987 (Stats. 2018, ch. 961), Inglewood arena projects; Assembly Bill 1826 (Stats. 2018, ch. 40), expanded capitol building annex projects; and Assembly Bill 2731 (Stats. 2020, ch. 291), San Diego Old Town Center projects. Two of the bills, AB 734 and AB 987, also provided that the person or entity that applied for certification of an Oakland ballpark or an Inglewood arena project must pay for "any additional costs incurred by the courts in hearing and deciding any [CEQA] case." (Pub. Resources Code, §§ 21168.6.7(d)(6), 21168.6.8(b)(6).) Accordingly, in March of this year the council amended rules governing expedited CEQA review to (1) include the four new projects to receive expedited CEQA review, (2) require applicants of

Oakland ballpark and Inglewood arena projects to pay trial and appellate court fees based on "additional" court costs, and (3) make other conforming changes.

Analysis/Rationale

In 2021, the Legislature enacted two bills related to expedited CEQA review. First, Senate Bill 7 (Stats. 2021, ch. 19)[1] reenacted with certain changes the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (initially enacted by AB 900), which was repealed by its own terms January 1, 2021. Both the prior and reenacted law provide for certification and expedited CEQA review of certain large projects that replace old facilities, reduce pollution, and generate jobs. (See Pub. Resources Code, § 21178 et seq.) Such projects are now referred to as "environmental leadership development projects" rather than "environmental leadership projects" to distinguish them from "environmental leadership transit projects," which are discussed next.

Second, Senate Bill 44 (Stats. 2021, ch. 633)[2] added sustainable public transit projects in Los Angeles in preparation for the 2028 Summer Olympic and Paralympic Games to the list of projects to receive expedited CEQA review. (See Pub. Resources Code, § 21168.6.9.) These projects are referred to as "environmental leadership transit projects." Both bills require project applicants to pay trial and appellate court costs for expedited adjudication of CEQA challenges.

The amended rules implement SB 44 by adding "environmental leadership transit projects" to the list of projects to which the existing rules for expedited CEQA review apply. As required by SB 7 and SB 44, the rules also now include new fees for trial court and appellate court costs for review of "environmental leadership transit projects" and new fees for trial court review of "environmental leadership development projects." The existing fee for appellate review of "environmental leadership development projects" has also been updated.

Amendments to add environmental leadership transit projects

Several of the rule amendments add statutory citations and the phrase "environmental leadership transit project" to existing rules to implement SB 44's provision that such projects receive expedited CEQA review. (See, e.g., proposed rules 3.2200, 3.2220, 8.700.) Other than referring to "environmental leadership *development* projects" rather than "environmental leadership projects," no amendments are needed to include environmental leadership development projects (SB 7) in the type of projects that receive expedited CEQA review. Such projects were added to the rules in 2012 to implement the original environmental leadership act, AB 900.

New fees for trial and appellate courts

Existing rule 8.705(1) requires the person or entity that applied for certification of a project as an environmental leadership development project to pay a fee to the Court of Appeal. The rule is based on former Public Resources Code section 21183(e) (in effect until December 31, 2020),

[1] SB 7 may be viewed at *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB7*.

[2] SB 44 may be viewed at *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB44*.

which provided that such persons or entities agree to "pay the costs of the Court of Appeal in hearing and deciding any [CEQA] case" and did not provide any such fee for trial courts.

Amended Public Resources Code section 21183(f) now provides that the person or entity that applied for certification of a project as an environmental leadership development project must "pay the costs of the *trial court and the court of appeal* in hearing and deciding any case challenging" the project under CEQA (italics added). Similarly, newly added section 21168.6.9 provides an identical requirement for environmental leadership transit project applicants.

Accordingly, amended rule 8.705 requires environmental leadership transit project applicants to pay a fee to the Court of Appeal. Similarly, amended rule 3.2240[3] requires the payment of a fee to the trial court by the person or entity that applied for certification of a project as an environmental leadership development project and requires the payment of a fee to the trial court by the project applicant of an environmental leadership transit project.

New and amended fee amounts

New Public Resources Code sections 21183(f) and 21168.6.9(b)(3) require the person or entity that applied for certification of an environmental leadership development project and environmental leadership transit project applicants, respectively, to pay the costs of the trial court and the Court of Appeal in "a form and manner specified by the Judicial Council, as provided in the California Rules of Court." To implement these statutory requirements, the amended rules include new fees for trial court costs for both types of projects, a new fee for appellate court costs for environmental leadership transit projects, and an updated fee for appellate court costs for environmental leadership development projects.

In March 2022, the council amended the rules of court to set court fees for expedited CEQA review for Oakland ballpark and Inglewood arena projects as required by statute.[4] Specifically, Public Resources Code sections 21168.6.7(d)(6) (Oakland ballpark) and 21168.6.8(b)(6) (Inglewood arena) require the project applicants to pay a fee for the "additional costs" to the courts for expedited review. As described in the March 2022 report, those fees were derived from the estimate that the amount of time to adjudicate expedited CEQA cases is 91 full-time working days of a judicial officer and a research attorney in each of the courts. The fees did not include estimates for benefits, overhead, clerical time, and the time of other appellate justices assigned to the panel because those costs are already incurred by the courts in processing their cases, including expedited CEQA cases.

Public Resources Code sections 21168.6.9(b)(3) and 21183(f), which govern environmental leadership transit and environmental leadership development projects, require project applicants to pay "the cost" to the courts without any limitation of such costs to "additional costs."

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[3] For clarity, amended rule 3.2240 has been added to a new article 3 titled "Trial Court Costs."

[4] Judicial Council of Cal., Advisory Com. Rep., *CEQA Actions: New Projects and Fees for Expedited Review* (Mar. 2, 2022), *https://jcc.legistar.com/View.ashx?M=F&ID=10565631&GUID=6D8B30CC-D416-44C2-A4F0-D857024D2730*.

Accordingly, the new and updated fee amounts for environmental leadership development and environmental leadership transit projects are based on the fees set in March 2022 for Oakland ballpark and Inglewood arena projects, but also include estimates for benefits, overhead, clerical time, and the time of other appellate justices assigned to the panel.

The committees recommend that the trial court fee for expedited review of an environmental leadership transit or environmental leadership development project CEQA case be set at $180,000, which was calculated with the following components:

- The estimated cost of salary and benefits for 91 full-time working days for a trial court judge;
- The estimated cost of salary and benefits for 91 full-time working days for a trial court research attorney; and
- An estimate for overhead and clerical time in the trial court.

The committees also recommend that the Court of Appeal fee for expedited review of an environmental leadership transit or environmental leadership development project CEQA case be set at $215,000, which was calculated with the following components:

- The estimated cost of salary and benefits for 91 full-time working days for the appellate justice primarily assigned to the case;
- The estimated cost of salary and benefits for 20 hours for each of the other two appellate justices assigned to the case;
- The estimated cost of salary and benefits for 91 full-time working days for an appellate court research attorney; and
- An estimate for overhead and clerical time in the Court of Appeal.

As permitted by the statutes, the rules also allow for costs for any special master required for the matter to be charged directly to the project developer, as is currently provided in the environmental leadership development cases as well as those concerning Oakland ballpark or Inglewood arena projects.

Policy implications

The committees recommend the amended rules to implement legislation and to ensure that the rules conform to law. The policy choices have been made by the Legislature.

Comments

The proposal circulated for public comment from April 1, 2022, until May 13, 2022. The committees received a single comment supporting the proposed rule amendments from the

Orange County Bar Association. A chart setting forth the comment and committees' response is attached at page 15.

Alternatives considered

Because the amended rules and fees are mandated by the Legislature, the committees did not consider the alternative of not amending the rules.

Fiscal and Operational Impacts

Implementing the new legislation requiring expedited review of CEQA challenges to new project types will certainly generate costs and operational impacts for both the trial court and the Court of Appeal in which the proceedings governed by these statutes are held. In particular, the legislation requires that courts prioritize these cases and devote considerable concentrated resources to resolve them, to the extent feasible, within the prescribed time. The primary operational impact is expected to be the additional time that other cases will have to wait while these cases move to the front of the line. The committees do not anticipate that this rule proposal will result in additional costs to other courts.

Attachments and Links

1. Cal. Rules of Court, rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705, at pages 7–14
2. Chart of comments, at page 15
3. Link A: Senate Bill 7, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB7*
4. Link B: Senate Bill 44, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB44*

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court are amended, effective January 1, 2023, to read:

Rule 3.2200. Application

Except as otherwise provided in chapter 2 of the rules in this division, which govern actions under Public Resources Code sections 21168.6.6–~~21168.6.8~~21168.6.9, 21178–21189.3, 21189.50–21189.57, and 21189.70–21189.70.10, the rules in this chapter apply to all actions brought under the California Environmental Quality Act (CEQA) as stated in division 13 of the Public Resources Code.

Chapter 2. California Environmental Quality Act Proceedings Involving Streamlined CEQA Projects

Article 1. General Provisions

Rule 3.2220. Definitions and application

(a) Definitions

As used in this chapter:

(1) A "streamlined CEQA project" means any project within the definitions stated in (2) through ~~(7)~~(8).

(2) An "environmental leadership development project" or "leadership project" means a project certified by the Governor under Public Resources Code sections 21182–21184.

(3) The "Sacramento entertainment and sports center project" or "Sacramento arena project" means an entertainment and sports center project as defined by Public Resources Code section 21168.6.6, for which the proponent provided notice of election to proceed under that statute described in section 21168.6.6(j)(1).

(4) An "Oakland sports and mixed-use project" or "Oakland ballpark project" means a project as defined in Public Resources Code section 21168.6.7 and certified by the Governor under that section.

(5) An "Inglewood arena project" means a project as defined in Public Resources Code section 21168.6.8 and certified by the Governor under that section.

(6) An "expanded capitol building annex project" means a state capitol building annex project, annex project–related work, or state office building project as defined by Public Resources Code section 21189.50.

(7) An "Old Town Center transit and transportation facilities project" or "Old Town Center project" means a project as defined in Public Resources Code section 21189.70.

(8) An "environmental leadership transit project" means a project as defined in Public Resources Code section 21168.6.9.

(b) Proceedings governed

The rules in this chapter govern actions or proceedings brought to attack, review, set aside, void, or annul the certification of the environmental impact report or the grant of any project approvals for a streamlined CEQA project. Except as otherwise provided in Public Resources Code sections 21168.6.6– ~~21168.6. 8~~21168.6.9, 21178–21189.3, 21189.50–21189.57, and 21189.70–21189.70.10 and these rules, the provisions of the Public Resources Code and the CEQA Guidelines adopted by the Natural Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq.) governing judicial actions or proceedings to attack, review, set aside, void, or annul acts or decisions of a public agency on the grounds of noncompliance with the California Environmental Quality Act and the rules of court generally apply in proceedings governed by this rule.

(c) Complex case rules

* * *

Rule 3.2221. Time

(a) Extensions of time

* * *

(b) Extensions of time by parties

If the parties stipulate to extend the time for performing any acts in actions governed by these rules, they are deemed to have agreed that the statutorily prescribed time for resolving the action may be extended by the stipulated number of days ~~by which the performance of the act has been stipulated to be extended~~ of the extension, and to that extent to have waived any objection to noncompliance with the deadlines for completing review stated in Public Resources Code sections 21168.6.6– ~~21168.6. 8~~21168.6.9, 21185, 21189.51, and 21189.70.3. Any such stipulation must be approved by the court.

(c) Sanctions for failure to comply with rules

If a party fails to comply with any time requirements provided in these rules or ordered by the court, the court may issue an order to show cause as to why one of the following sanctions should not be imposed:

(1)–(2) * * *

(3) If the failure to comply is by respondent or a real party in interest, removal of the action from the expedited procedures provided under Public Resources Code sections 21168.6.6–~~21168.6.8~~21168.6.9, 21185, 21189.51, and 21189.70.3, and these rules; or

(4) * * *

Rule 3.2223. Petition

In addition to any other applicable requirements, the petition must:

(1) On the first page, directly below the case number, indicate that the matter is a "Streamlined CEQA Project";

(2) State one of the following:

(A) The proponent of the project at issue provided notice to the lead agency that it was proceeding under Public Resources Code section 21168.6.6, 21168.6.7, ~~or~~ 21168.6.8, or 21168.6.9 (whichever is applicable) and is subject to this rule; or

(B) The project at issue was certified by the Governor as an environmental leadership development project under Public Resources Code sections 21182–21184 and is subject to this rule; or

(C) The project at issue is an expanded capitol building annex project as defined by Public Resources Code section 21189.50 and is subject to this rule; or

(D) The project at issue is an Old Town Center project as defined by Public Resources Code section 21189.70 and is subject to this rule.

(3) If an environmental leadership development, Oakland ballpark, or Inglewood arena project, provide notice that the person or entity that applied for certification of the project as such a ~~leadership~~ project must make the

payments required by rule 3.2240 and, if the matter goes to the Court of Appeal, ~~make~~ the payments required by rule 8.705;

(4) If an ~~Oakland ballpark or Inglewood arena project~~ environmental leadership transit project, provide notice that the ~~person or entity that applied for certification of the project as an Oakland ballpark or Inglewood arena~~ project applicant must make the payments required by rule 3.2240 and, if the matter goes to the Court of Appeal, the payments required by rule 8.705; and

(5) * * *

Article 3. Trial Court Costs

Rule 3.2240. Trial court costs in ~~Oakland Ballpark and Inglewood Arena~~ certain streamlined CEQA projects

In fulfillment of the provisions in Public Resources Code sections 21168.6.7, ~~and~~ 21168.6.8, 21168.6.9, and 21183 regarding payment of trial court costs with respect to cases concerning ~~certain streamlined CEQA~~ environmental leadership development, environmental leadership transit, Oakland ballpark, and Inglewood arena projects:

(1) Within 10 days after service of the petition or complaint in a case concerning an environmental leadership development project, the person or entity that applied for certification of the project as an environmental leadership development project must pay a fee of $180,000 to the court.

(2) Within 10 days after service of the petition or complaint in a case concerning an environmental leadership transit project, the project applicant must pay a fee of $180,000 to the court.

~~(1)~~(3) Within 10 days after service of the petition or complaint in a case concerning an Oakland ballpark project or an Inglewood arena project, the person or entity that applied for certification of the project as a streamlined CEQA project must pay a fee of $120,000 to the court.

~~(2)~~(4) If the court incurs the costs of any special master appointed by the court in the case or of any contract personnel retained by the court to work on the case, the person or entity that applied for certification of the project or the project applicant must also pay, within 10 days of being ordered by the court, those incurred or estimated costs.

~~(3)~~(5) If the party fails to timely pay the fee or costs specified in this rule, the court may impose sanctions that the court finds appropriate after notifying the party and providing the party with an opportunity to pay the required fee or costs.

~~(4)~~(6) Any fee or cost paid under this rule is not recoverable.

Chapter 1. Review of California Environmental Quality Act Cases Involving Streamlined CEQA Projects

Rule 8.700. Definitions and application

(a) Definitions

As used in this chapter:

(1) A "streamlined CEQA project" means any project within the definitions stated in (2) through ~~(7)~~(8).

(2) An "environmental leadership development project" or "leadership project" means a project certified by the Governor under Public Resources Code sections 21182–21184.

(3) The "Sacramento entertainment and sports center project" or "Sacramento arena project" means an entertainment and sports center project as defined by Public Resources Code section 21168.6.6, for which the proponent provided notice of election to proceed under that statute described in section 21168.6.6(j)(1).

(4) An "Oakland sports and mixed-use project" or "Oakland ballpark project" means a project as defined in Public Resources Code section 21168.6.7 and certified by the Governor under that section.

(5) An "Inglewood arena project" means a project as defined in Public Resources Code section 21168.6.8 and certified by the Governor under that section.

(6) An "expanded capitol building annex project" means a state capitol building annex project, annex project–related work, or state office building project as defined by Public Resources Code section 21189.50.

(7) An "Old Town Center transit and transportation facilities project" or "Old Town Center project" means a project as defined in Public Resources Code section 21189.70.

(8) An "environmental leadership transit project" means a project as defined in Public Resources Code section 21168.6.9.

(b) * * *

Rule 8.702. Appeals

(a) * * *

(b) Notice of appeal

(1) * * *

(2) *Contents of notice of appeal*

The notice of appeal must:

(A) State that the superior court judgment or order being appealed is governed by the rules in this chapter;

(B) Indicate whether the judgment or order pertains to a streamlined CEQA project; ~~and~~

(C) If the judgment or order being appealed pertains to an environmental leadership development project, an Oakland ballpark project, or an Inglewood arena project, provide notice that the person or entity that applied for certification or approval of the project as such a project must make the payments required by rule 8.705~~.~~; and

(D) If the judgment or order being appealed pertains to an environmental leadership transit project, provide notice that the project applicant must make the payments required by rule 8.705.

(c)–(e) * * *

(f) Briefing

(1)–(3) * * *

(4) *Extensions of time to file briefs*

If the parties stipulate to extend the time to file a brief under rule 8.212(b), they are deemed to have agreed that the statutorily prescribed time for resolving the action may be extended by the stipulated number of days ~~by which the parties stipulated to extend the time~~ of the extension for filing the

brief and, to that extent, to have waived any objection to noncompliance with the deadlines for completing review stated in Public Resources Code sections 21168.6.6 ~~21168.6.8~~21168.6.9, 21185, 21189.51, and 21189.70.3 for the duration of the stipulated extension.

(5) * * *

(g) * * *

Advisory Committee Comment

Subdivision (b). It is very important to note that the time period to file a notice of appeal under this rule is the same time period for filing most postjudgment motions in a case regarding the Sacramento arena project, and in a case regarding any other streamlined CEQA project, the deadline for filing a notice of appeal may be earlier than the deadline for filing a motion for a new trial, a motion for reconsideration, or a motion to vacate the judgment.

Rule 8.703. Writ proceedings

(a) * * *

(b) Petition

(1) * * *

(2) *Contents of petition*

In addition to any other applicable requirements, the petition must:

(A) State that the superior court judgment or order being challenged is governed by the rules in this chapter;

(B) Indicate whether the judgment or order pertains to a streamlined CEQA project; ~~and~~

(C) If the judgment or order pertains to an environmental leadership development project, an Oakland ballpark project, or an Inglewood arena project, provide notice that the person or entity that applied for certification of the project as such a project must make the payments required by rule 8.705~~.~~; and

(D) If the judgment or order pertains to an environmental leadership transit project, provide notice that the project applicant must make the payments required by rule 8.705.

Rule 8.705. Court of Appeal costs in certain streamlined CEQA projects

In fulfillment of the provisions in Public Resources Code sections 21168.6.7, 21168.6.8, ~~and~~ 21168.6.9, and 21183 regarding payment of the Court of Appeal's costs with respect to cases concerning environmental leadership development, environmental leadership transit, Oakland ballpark, and Inglewood arena projects:

(1) Within 10 days after service of the notice of appeal or petition in a case concerning an environmental leadership development project, the person or entity that applied for certification of the project as an environmental leadership development project must pay a fee of ~~$100,000~~ $215,000 to the Court of Appeal.

(2) Within 10 days after service of the notice of appeal or petition in a case concerning an environmental leadership transit project, the project applicant must pay a fee of $215,000 to the Court of Appeal.

~~(2)~~(3) Within 10 days after service of the notice of appeal or petition in a case concerning an Oakland ballpark project or Inglewood arena project, the person or entity that applied for certification of the project as an Oakland ballpark project or Inglewood arena project must pay a fee of $140,000 to the Court of Appeal.

~~(3)~~(4) If the Court of Appeal incurs the costs of any special master appointed by the Court of Appeal in the case or of any contract personnel retained by the Court of Appeal to work on the case, the person or entity that applied for certification of the project or the project applicant ~~as a leadership project, an Oakland ballpark project, or an Inglewood arena project~~ must also pay, within 10 days of being ordered by the court, those incurred or estimated costs.

~~(4)~~(5) If the party fails to timely pay the fee or costs specified in this rule, the court may impose sanctions that the court finds appropriate after notifying the party and providing the party with an opportunity to pay the required fee or costs.

~~(5)~~(6) Any fee or cost paid under this rule is not a recoverable cost.

SPR22-01

CEQA Actions: New Projects and Fees for Expedited Review (Amend Cal. Rules of Court, rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705)

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

	Commenter	Position	Comment	DRAFT Committees Response
1.	Orange County Bar Association by Daniel S. Robinson President	A	We agree with the proposed rule amendments and agree that the language of the proposed amendments appropriately address the stated purpose.	The committees appreciate the feedback and support for the proposal.

Item number: 02

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Language Referring to Persons with Disabilities

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 8.482, 8.483, and 8.631; revise form APP-060

Committee or other entity submitting the proposal:
Appellate Advisory Committee

*Staff contact (*name, phone and e-mail*): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021
Project description from annual agenda: Amend rule 8.483 (the record in civil commitment appeals) and revise form APP-060 (notice of appeal—civil commitment) to use preferred terminology under the Americans with Disabilities Act.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 19–20, 2022

Title
Rules and Forms: Language Referring to Persons with Disabilities

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.482, 8.483, and 8.631; revise form APP-060

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 29, 2022

Contact
Christy Simons, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary

The Appellate Advisory Committee recommends updating language in several rules and a form to reflect guidelines for referring to persons with disabilities, preferences within the disability community, and terminology changes in California statutes. The committee also recommends correcting several subdivision headings in one of the rule's advisory committee comments.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2023:

1. Amend California Rules of Court, rules 8.482, 8.483, and 8.631 to replace outdated language describing persons with disabilities with updated "person-first" language; and

2. Revise form APP-060, *Notice of Appeal—Civil Commitment/Mental Health Proceedings*, to update the language describing persons in civil commitment proceedings, reflecting the amendments to rule 8.483.

The proposed amended rules and revised form are attached at pages 6–9.

Relevant Previous Council Action

Rule 8.482, Appeal from judgment authorizing conservator to consent to sterilization of conservatee, was adopted in 2005 as rule 39.1. It was amended and renumbered as rule 8.482 in 2007. It was amended again effective January 1, 2016, as part of a rules modernization project. The amendments have no bearing on this proposal.

Rule 8.483, Appeal from an order of civil commitment, was adopted, and form APP-060, *Notice of Appeal—Civil Commitment/Mental Health Proceedings*, was approved for optional use, effective January 1, 2020, to assist litigants and the courts in civil commitment appeals. The rule and form have not been modified since their effective date.

Rule 8.631, Applications to file overlength briefs in appeals from a judgment of death, was adopted in 2008. It has not previously been amended.

Analysis/Rationale

In 1990, the federal government passed the Americans with Disabilities Act (ADA),[1] which prohibits discrimination against individuals with disabilities in all areas of public life. The ADA National Network (ADANN) consists of 10 regional centers that provide information, guidance, and training on implementing the ADA.[2] The ADANN has published *Guidelines for Writing About People With Disabilities*,[3] which encourages the use of language consistent with the principles of the ADA, including "portraying individuals with disabilities in a respectful and balanced way by using language that is accurate, neutral and objective."[4]

The guidelines provide that, generally, the person should be referred to first and the disability second: "People with disabilities are, first and foremost, people. Labeling a person equates the person with a condition and can be disrespectful and dehumanizing. A person isn't a disability, condition or diagnosis; a person *has* a disability, condition or diagnosis. This is called Person-First Language."[5] For example, instead of writing that a person is "mentally ill," write that a person "has a mental health condition"; instead of "[t]he disabled," write "[p]eople with disabilities."[6] The committee notes that, as described in the guidelines and discussed in the Comments section of this report, "person-first" language is not the only approach, but is appropriate for the proposed updates herein.

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[1] 42 U.S.C. § 12101 et seq.

[2] See ADA National Network, *https://adata.org/national-network*.

[3] The guidelines may be accessed at *https://adata.org/factsheet/ADANN-writing*.

[4] ADA National Network, *Guidelines for Writing About People With Disabilities*, p. 1.

[5] *Ibid*.

[6] See Kathie Snow, *To Ensure Inclusion, Freedom, and Respect for All, It's Time to Embrace People First Language* (2009), p. 4, *www.inclusioncollaborative.org/docs/Person-First-Language-Article_Kathie_Snow.pdf*.

Over time, the California Legislature has updated the state's codes to remove "offensive or stigmatizing language referring to mental health disorders."[7] In 2019, the Legislature replaced terms used in the Penal Code to describe mental health conditions and individuals with mental health conditions.[8] Specifically, references to a person as a "mentally disordered offender"[9] were changed to "offender with a mental health disorder."[10] Also, the phrase "a person who is incompetent as a result of a mental disorder, but is also developmentally disabled" was changed to "a person who is incompetent as a result of a mental disorder, but also has a developmental disability."[11] In 2012, references to "a mentally retarded person" were replaced with "a person with an intellectual disability."[12]

The committee recommends removing outdated and disfavored terms in several rules and a form and replacing them with current and more respectful terms. Modernizing the language of these rules and the form is also consistent with *The Strategic Plan for California's Judicial Branch*, specifically the goals of Access, Fairness, and Diversity (Goal I) and Quality of Justice and Service to the Public (Goal IV).[13]

Rule 8.482, which governs appeals from a judgment authorizing a conservator to consent to sterilization of a conservatee, contains the term "developmentally disabled adult conservatee." This would be replaced with "adult conservatee with a developmental disability."

Rule 8.483, regarding appeals from an order of civil commitment, contains the term "mentally disordered offenders." This would be replaced with "offenders with mental health disorders." The rule also refers to "developmentally disabled persons," citing Welfare and Institutions Code section 6500. The committee proposes replacing this term with "dangerous persons with developmental disabilities" to update the language and track the statutory commitment criteria.[14] The same changes would be made to form APP-060, *Notice of Appeal—Civil Commitment/Mental Health Proceedings*.

An advisory committee comment to rule 8.631, which addresses applications to file overlength briefs in appeals from a judgment of death, includes "whether the defendant is mentally retarded" as an example of unusual, factually intensive, or legally complex hearings. The

[7] Assem. Jud. Com., Analysis of Assem. Bill No. 46 (2019–2020 Reg. Sess.) as amended Mar. 21, 2019, p. 1.

[8] See Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Assem. Bill No. 46 (2019–2020 Reg. Sess.) as amended Apr. 24, 2019, p. 1.

[9] See former Pen. Code, § 2960 et seq.

[10] Pen. Code, § 2962(d)(3), eff. Jan. 1, 2020 (Stats. 2019, ch. 9, § 7).

[11] Pen. Code, § 1367(b), eff. Jan. 1, 2020 (Stats. 2019, ch. 9, § 4).

[12] Pen. Code, § 2962(a)(2) (Stats. 2012, ch. 448, § 43); Welf. & Inst. Code, § 6513 (Stats. 2012, ch. 457, § 55).

[13] The strategic plan may be accessed at www.courts.ca.gov/3045.htm.

[14] See Welf. & Inst. Code, § 6500(b)(1).

committee proposes replacing this language with "whether the defendant has an intellectual disability."[15]

In addition, the committee proposes correcting several subdivision headings in the advisory committee comment to rule 8.631 that are labeled incorrectly:

- "Subdivision (c)(1)(A)" would be corrected to "Subdivision (c)(1)."
- "Subdivision (c)(1)(E)" would be corrected to "Subdivision (c)(5)."
- "Subdivision (c)(1)(E)–(I)" would be corrected to "Subdivision (c)(5)–(8)."
- "Subdivision (c)(1)(I)" would be corrected to "Subdivision (c)(7)," and the phrase "whether the defendant may represent himself or herself" would be replaced with "whether the defendant may be self-represented" to remove gendered pronouns.

Policy implications

As noted above, removing outdated and disfavored terms in several rules and a form and replacing them with current and more respectful terms is consistent with *The Strategic Plan for California's Judicial Branch*, specifically the goals of Access, Fairness, and Diversity (Goal I) and Quality of Justice and Service to the Public (Goal IV). The proposed changes were not controversial or the subject of debate within the committee.

Comments

This proposal circulated for public comment between April 1 and May 13, 2022, as part of the regular spring comment cycle. The committee received three comments from the Superior Court of Orange County, the California Lawyers Association Committee on Appellate Courts, Litigation Section (CAC), and the Disability Rights Education & Defense Fund (DREDF), all in support of the proposed changes. A chart with the full text of the comments received and the committee's responses is attached at pages 10–13.

The CAC agreed that the proposal "appropriately addresse[d] its stated purpose of portraying individuals with disabilities in a more respectful way by using 'Person First Language' that recognizes a person is not a disability, condition, or diagnosis." The Superior Court of Orange County agreed with the proposed changes but did not provide further comment.

In supporting the proposal, DREDF noted that, although generally preferred, "person-first" disability language is not universally preferred by the individuals and disability groups comprising the disability community. Rather, "identity-first" language is an increasingly popular alternative, particularly for certain disability groups. Disability communities that prefer "identity-

[15] As noted above, "intellectual disability" replaced the outdated term "mental retardation." (Stats. 2012, ch. 457, § 1.) This is distinguished from a developmental disability, which is both broader, in that it includes other disabilities such as autism spectrum disorders and epilepsy, and narrower, in that it must have begun before the person reached 18 years of age. (Welf. & Inst. Code, § 4512(a)(1).)

first" language include blind people (not "individuals with blindness" or "individuals with visual impairments"), Deaf people or Deaf/deaf and hard of hearing people, and autistic and neurodivergent people. DREDF also pointed out that "many emerging and younger leaders in the disability movement prefer the identity-first 'disabled person' over the person-first 'person with a disability.' " In addition to providing information on current language trends and alternatives, DREDF agreed that the amended language is appropriate and meets the goals of the proposal.

Alternatives considered

The committee did not consider taking no action because the language in these rules and the form is outdated and inconsistent with the guidelines, statutory language, and judicial branch goals.

The committee noted that the Legislature has not updated or revised the term "mentally disordered sex offender." Because this term is still used in the Penal Code and other laws, the committee does not propose changing it in the rules.

Fiscal and Operational Impacts

Fiscal or operational impacts, if any, are expected to be minimal. There are no apparent barriers to implementation. The benefits of the proposal, including using respectful language in rules and forms, likely outweigh any potential cost.

Attachments and Links

1. Cal. Rules of Court, rules 8.482, 8.483, and 8.631, at pages 6–8
2. Form APP-060, at page 9
3. Chart of comments, at pages 10–13

Rules 8.482, 8.483, and 8.631 of the California Rules of Court are amended, effective January 1, 2023, to read:

Rule 8.482. Appeal from judgment authorizing conservator to consent to sterilization of conservatee

(a) Application

Except as otherwise provided in this rule, rules 8.304–8.368 and 8.508 govern appeals from judgments authorizing a conservator to consent to the sterilization of ~~a developmentally disabled~~ an adult conservatee with a developmental disability.

(b) When appeal is taken automatically

An appeal from a judgment authorizing a conservator to consent to the sterilization of ~~a developmentally disabled~~ an adult conservatee with a developmental disability is taken automatically, without any action by the conservatee, when the judgment is rendered.

(c)–(i) * * *

Rule 8.483. Appeal from order of civil commitment

(a) Application and contents

(1) *Application*

Except as otherwise provided in this rule, rules 8.300–8.368 and 8.508 govern appeals from civil commitment orders under Penal Code sections 1026 et seq. (not guilty by reason of insanity), 1370 et seq. (incompetent to stand trial), 1600 et seq. (outpatient placement and revocation), and 2962 et seq. (~~mentally disordered~~ offenders with mental health disorders); Welfare and Institutions Code sections 1800 et seq. (extended detention of dangerous persons), 6500 et seq. (~~developmentally disabled~~ dangerous persons with developmental disabilities), and 6600 et seq. (sexually violent predators); and former Welfare and Institutions Code section 6300 et seq. (mentally disordered sex offenders).

(2) *Contents*

* * *

(b)–(e) * * *

Rule 8.631. Applications to file overlength briefs in appeals from a judgment of death

(a)–(b) * * *

(c) Factors considered

The court will consider the following factors in determining whether good cause exists to grant an application to file a brief that exceeds the limit set by rule 8.630:

(1) The unusual length of the record. A party relying on this factor must specify the length of each of the following components of the record:

(A) The reporter's transcript;

(B) The clerk's transcript; and

(C) The portion of the clerk's transcript that is made up of juror questionnaires.

(2) The number of codefendants in the case and whether they were tried separately from the appellant;

(3) The number of homicide victims in the case and whether the homicides occurred in more than one incident;

(4) The number of other crimes in the case and whether they occurred in more than one incident;

(5) The number of rulings by the trial court on unusual, factually intensive, or legally complex motions that the party may assert are erroneous and prejudicial. A party relying on this factor must briefly describe the nature of these motions;

(6) The number of rulings on objections by the trial court that the party may assert are erroneous and prejudicial;

(7) The number and nature of unusual, factually intensive, or legally complex hearings held in the trial court that the party may assert raise issues on appeal; and

(8) Any other factor that is likely to contribute to an unusually high number of issues or unusually complex issues on appeal. A party relying on this factor must briefly specify those issues.

(d) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (c)(1)~~(A)~~. As in guideline 8 of the Supreme Court's Guidelines for Fixed Fee Appointments, juror questionnaires generally will not be taken into account in considering whether the length of the record is unusual unless these questionnaires are relevant to an issue on appeal. A record of 10,000 pages or less, excluding juror questionnaires, is not considered a record of unusual length; 70 percent of the records in capital appeals filed between 2001 and 2004 were 10,000 pages or less, excluding juror questionnaires.

Subdivision ~~(e)(1)(E)~~(c)(5). Examples of unusual, factually intensive, or legally complex motions include motions to change venue, admit scientific evidence, or determine competency.

Subdivisions ~~(e)(1)(E)–(I)~~(c)(5)–(8). Because an application must be filed before briefing is completed, the issues identified in the application will be those that the party anticipates *may* be raised on appeal. If the party does not ultimately raise all of these issues on appeal, the party is expected to have reduced the length of the brief accordingly.

Subdivision ~~(e)(1)(I)~~(c)(7). Examples of unusual, factually intensive, or legally complex hearings include jury composition proceedings and hearings to determine the defendant's competency or sanity, whether the defendant ~~is mentally retarded~~ has an intellectual disability, and whether the defendant may ~~represent himself or herself~~ be self-represented.

Subdivision (d)(1)(A)(ii). To allow the deadline for an application to file an overlength brief to be appropriately tied to the deadline for filing that brief, if counsel requests an extension of time to file a brief, the court will specify in its order regarding the request to extend the time to file the brief, when any application to file an overlength brief is due. Although the order will specify the deadline by which an application must be filed, counsel are encouraged to file such applications sooner, if possible.

Subdivision (d)(3). * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME:	DRAFT
FIRM NAME:	
STREET ADDRESS:	03/08/2022
CITY: STATE: ZIP CODE:	
TELEPHONE NO.: FAX NO.:	Not Approved by the Judicial Council
EMAIL ADDRESS:	
ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
CASE NAME:	
DEFENDANT/RESPONDENT:	
NOTICE OF APPEAL—CIVIL COMMITMENT/ MENTAL HEALTH PROCEEDINGS	CASE NUMBER:

NOTICE

You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.

1. Defendant/Respondent (the person subject to the civil commitment) appeals from a judgment rendered or an order of commitment or conservatorship made by the superior court.
   NAME of Defendant/Respondent:
   DATE of the order or judgment:

2. This appeal is (*check one*):
   a. ☐ after a jury or court trial.
   b. ☐ after a contested hearing.
   c. ☐ after an admission, stipulation, or submission.
   d. ☐ other (*specify*):

3. Defendant/Respondent is currently being held under:
   ☐ Penal Code, § 1026 et seq. (not guilty by reason of insanity)
   ☐ Penal Code, § 1370 et seq. (incompetent to stand trial)
   ☐ Penal Code, § 1600 et seq. (return to confinement)
   ☐ Penal Code, § 2962 et seq. (offenders with mental health disorders)
   ☐ Welfare & Institutions Code, § 1800 et seq. (extended detention of dangerous persons)
   ☐ Welfare & Institutions Code, § 5300 et seq. (LPS Act commitments)
   ☐ Welfare & Institutions Code, § 5350 et seq. (LPS Act conservatorships)
   ☐ Former Welfare & Institutions Code, § 6300 et seq. (MDSO)
   ☐ Welfare & Institutions Code, § 6500 et seq. (dangerous persons with developmental disabilities)
   ☐ Welfare & Institutions Code, § 6600 et seq. (sexually violent predators)
   ☐ Other *(specify):* _____

4. ☐ Defendant/Respondent requests that the court appoint an attorney for this appeal. Defendant/Respondent:
   ☐ was ☐ was not represented by an appointed attorney in the superior court.

5. Defendant/Respondent's mailing address is ☐ same as in ATTORNEY OR PARTY WITHOUT ATTORNEY box above.
   ☐ as follows:

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT/RESPONDENT OR ATTORNEY)

SPR22-02

Rules and Forms: Update Language Referring to Persons with Disabilities (Amend Cal. Rules of Court, rules 8.482, 8.483, and 8.631; revise form APP-060)

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

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association by Dean A. Bochner, Chair Committee on Appellate Courts	NI	I write on behalf of the Committee on Appellate Courts of the California Lawyers Association's Litigation Section ("CAC") to offer the following comments on the Appellate Advisory Committee's recent proposals (1) to update language referring to persons with disabilities in several court rules and in a form (SPR22–02) and (2) to extend the time the Court of Appeal must retain the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years (SPR22–03). CAC consists of appellate practitioners and court staff, drawn from a wide range of practice areas, from across the state. As part of its mission, CAC frequently shares its views regarding proposals to change rules that govern appellate practice. CAC supports SPR22-02, which would remove from several court rules and a Judicial Council form outdated and disfavored terms that refer to persons with disabilities and replace them with more respectful terms. We believe that this proposal appropriately addresses its stated purpose of portraying individuals with disabilities in a more respectful way by using "Person First Language" that recognizes a person is not a disability, condition, or diagnosis. [See comment on proposal SPR22-03.]	The committee appreciates these comments and notes the commenter's support for the proposal. The committee thanks the commenter for this feedback confirming that the amended language is appropriate and respectful.

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

SPR22-02

Rules and Forms: Update Language Referring to Persons with Disabilities (Amend Cal. Rules of Court, rules 8.482, 8.483, and 8.631; revise form APP-060)

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

	Commenter	Position	Comment	Committee Response
			Thank you for giving us the opportunity to comment on these proposals.	
2.	Disability Rights Education & Defense Fund by Claudia Center Legal Director	A	The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities. DREDF has extensive experience with the portrayal of disability, including the use of language regarding disability. In 2008, DREDF launched the Disability & Media Alliance Project (DMAP). The goal of DMAP is to change the focus from sensational, cloying and misinformed disability coverage that undermines the public policy and legal advances of the last 25 years to coverage that raises public awareness and helps to end disability discrimination. DMAP monitors and informs disability coverage in news reports, dramatic representations, and the Internet with the goal to advance accurate reporting of disability issues	The committee notes the commenter's support for the proposal and appreciates receiving feedback from an organization with legal and policy expertise in advocating for and protecting the rights of people with disabilities. The committee appreciates the commenter's perspective and experience in this area.

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

	Commenter	Position	Comment	Committee Response
			and promote positive images of people with disabilities. DREDF supports the proposed changes to Cal. Rules of Court, rules 8.482, 8.483, and 8.631, and to form APP-060. The proposed changes are consistent with the generally preferred "person first" terminology for people with intellectual, developmental, and mental health disabilities. However, DREDF writes to provide additional important context. Contrary to the explanation set out in the background material to the proposed language changes, the "person first" approach to disability language is ***not*** universally preferred by the individuals and disability groups comprising the disability community. Rather, "identity first" language is an increasingly popular alternative, particularly for certain disability groups. The style guide cited is on this point incomplete and outdated (as are several other prominent style guides on this point). To provide some examples, the following disability groups currently prefer "identity first" language: blind people (not "individuals with blindness" or "individuals with visual impairments"); Deaf people or D/deaf and hard of hearing people; and autistic and neurodivergent people. Similarly, many emerging and younger leaders in the disability	The committee appreciates the support for the proposal and feedback that the amended language is appropriate and respectful. This information on the "identity first" approach to disability language is very helpful. The committee has included this information in the Judicial Council report to avoid suggesting that "person first" language is universally preferred. The committee notes that the Guidelines promulgated by ADANN, as discussed in the report, include the "identity first" approach. The committee thanks the commenter for these examples and how to access more information.

SPR22-02

Rules and Forms: Update Language Referring to Persons with Disabilities (Amend Cal. Rules of Court, rules 8.482, 8.483, and 8.631; revise form APP-060)

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

	Commenter	Position	Comment	Committee Response
			movement prefer the identity-first "disabled person" over the person-first "person with a disability." You can read about this on social media, including under the hashtag #SayTheWord. Again, the proposed changes are appropriate, and DREDF supports them. However, we urge you not to adopt a blanket "person first" approach to disability language, as this will not be appropriate in all contexts. See article written by several disability and legal scholars that review the language preferences at issue in the proposed rule. Citation: E.E. Andrews, R.M. Powell and K. Ayers, The evolution of disability language: Choosing terms to describe disability, Disability and Health Journal, https://doi.org/10.1016/j.dhjo.2022.101328.	The committee agrees with the commenter's approach to disability language. The committee appreciates this additional source on language preferences.
3.	Superior Court of Orange County by Iyana Doherty Courtroom Operations Supervisor	A	No specific comment.	The committee notes the commenter's support for the proposal.

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

Item number: 03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Court Records: Retention of Reporters' Transcripts in Felony Appeals

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 10.1028

Committee or other entity submitting the proposal:
Appellate Advisory Committee

*Staff contact (*name, phone and e-mail*): Christy Simons, 415-865-7694*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021
Project description from annual agenda: Amend rule 10.1028 to extend the time for keeping reporters' transcripts in appeals affirming felony convictions. The rule currently requires that the original reporter's transcript be kept by the Court of Appeal for 20 years. However, this is not long enough to account for longer sentences and defendants' potential need for the reporter's transcript to avail themselves of changes in the law. Considerations will include the requirements of Code of Civil Procedure section 271, which will require all courts to accept electronic reporter's transcripts by January 1, 2023, thereby impacting transcript storage and storage costs. The AAC circulated a proposal in Spring 2019 but deferred the project in order to gather more information and revise the proposal. The project was deferred last year due to impacts on the judicial branch relating to the COVID-19 pandemic. Origin: Supreme Court attorney and retired Clerk/Executive Officer of a District Court of Appeal.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
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- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 03
For business meeting on September 19–20, 2022

Title
Court Records: Retention of Reporters' Transcripts in Felony Appeals

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 10.1028

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 14, 2022

Contact
Christy Simons, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary

To better align the length of time reporters' transcripts must be kept with the length of time they may be needed and to conform to a recent statutory change, the Appellate Advisory Committee recommends amending the rule regarding retention of Court of Appeal records. The amendments would extend the time the Court of Appeal must keep the original or an electronic copy of the reporter's transcript from 20 years to 75 years in cases affirming a felony conviction. The amendments would also reflect the statutory presumption that an original reporter's transcript is in electronic form, not paper form.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2023:

1. Amend rule 10.1028(d) of the California Rules of Court to add new paragraph (3) to require the Court of Appeal to retain the original or an electronic copy of the reporter's transcript in cases affirming a felony conviction for 75 years; and

2. Amend rule 10.1028(d)(2) and the Advisory Committee comment to reflect the statutory requirement that an original reporter's transcript must be in electronic form unless a specified exception allows for an original paper transcript.

The proposed amended rule is attached at pages 7–8.

Relevant Previous Council Action

Rule 10.1028 was originally adopted as rule 55 in 1975. It was renumbered as rule 70 effective January 1, 2005, and renumbered again as rule 10.1028 in 2007. Its provisions have been amended over the years, but none of those changes has bearing on this proposal. The 20-year retention time for reporters' transcripts in criminal cases has not changed since adoption.

Analysis/Rationale

This proposal is intended to achieve two main goals: improving access to justice for defendants who may need to obtain the reporter's transcript in their case more than 20 years after the conviction was upheld, and conforming the rule to Code of Civil Procedure section 271(a),[1] which no longer requires that the original transcript be in paper form.

Background

Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Under subdivision (c), the court must permanently keep the court's minutes and a register of appeals and original proceedings. Under subdivision (d), all other records, with one exception, may be destroyed 10 years after the decision becomes final. The exception is for original reporters' transcripts in cases affirming a criminal conviction; these must be kept for 20 years after the decision becomes final.

This rule's current 20-year retention period is insufficient because it does not account for longer sentences or changes in felony sentencing laws. Sentences for the most serious felony convictions often exceed 20 years, as does the actual time served under these sentences. Certain writ proceedings may be filed at any time during service of a prison sentence, and reporter's transcripts may be important to the issues raised. In addition, changes in felony sentencing laws (such as Senate Bill 1437,[2] which changed the law of felony murder and allows for resentencing, and Proposition 47,[3] which reduced penalties for certain offenses and allows for resentencing) warrant keeping reporters' transcripts in cases affirming felony convictions longer than 20 years so defendants can access opportunities for resentencing or other relief. This is not a theoretical problem. The committee understands from the California Department of Justice, which has a longer retention schedule for reporter's transcripts, that litigants frequently request copies of

[1] All further statutory references are to the Code of Civil Procedure.

[2] Stats. 2018, ch. 1015.

[3] Voters passed Prop. 47, "The Safe Neighborhoods and Schools Act," on November 14, 2014; it went into effect the next day.

reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

In spring 2020, the committee circulated for public comment a similar proposal that would have extended the retention period for felony appeals from 20 to 100 years. The feedback was overwhelmingly positive but a Court of Appeal suggested modifications based on concerns about the practicality and cost of extending the retention time to 100 years for all felonies. The court noted that it is a minority of cases in which the reporter's transcript may be needed beyond 20 years and recommended that the committee reconsider the alternative of a tiered retention schedule in which the length of retention would be based on the length of the sentence. The court's cost concerns were based on the additional costs of storing paper transcripts for 80 more years. The committee withdrew the proposal to further consider these issues.

Time to keep reporters' transcripts

Having considered the court's concerns, the committee circulated a revised proposal and now recommends adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript from 20 years to 75 years in cases affirming a felony conviction. This single retention time of 75 years would make transcripts available for the lifetime of most felony defendants and reduce the costs of the original 100-year proposal. The cost of storage, particularly of paper records, is still an area of concern, but the committee understands from the courts that electronic records have become much more common in the last couple of years and that this trend is expected to continue. In addition, courts have expressed interest in converting paper records to electronic form to reduce the amount of off-site storage space that is needed.

Statutory change

Prior to 2018, rule 10.1028 required the court to keep an original reporter's transcript, which, under the version of section 271 in effect at the time, had to be in paper form.[4] Effective January 1, 2018, rule 10.1028(d) was amended to allow the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original. An advisory committee comment was added to explain that, "[a]lthough subdivision (a) allows the Court of Appeal to maintain its records in any [form] that satisfies the otherwise applicable standards for maintenance of court records, including electronic [forms], the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a). Subdivision (d) therefore specifies that an electronic copy may be kept, to clarify that the paper original need not be kept by the court."

Legislation repealing and replacing section 271 also took effect January 1, 2018. Among other changes, new section 271 requires that the reporter's transcript be delivered in electronic form unless any of the specified exceptions apply and provides that an electronic transcript is deemed to be an original for all purposes unless a paper transcript is delivered under any of the exceptions. In light of the statutory change, the committee recommends amending rule 10.1028 to reflect the presumption that an original reporter's transcript is in electronic form and, if a

[4] Former section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."

statutory exception applies and the original transcript is on paper, to provide that the court may continue to keep either the paper original or a true and correct electronic copy.

The committee also recommends changing the word "format" in the advisory committee comment to "form" to be consistent with the language of section 271.

Policy implications

This proposal furthers the Judicial Council's constitutional mandate to improve the administration of justice and, more specifically, its mission to increase access to justice, by ensuring that felony defendants can obtain a copy of the reporter's transcript in their case for as long as it might reasonably be required. It also implements a legislative change that reflects the ongoing modernization of the courts.

Comments

This proposal was circulated for public comment from April 1 to May 13, 2022, as part of the regular spring comment cycle. Four organizations and courts submitted comments on this proposal. Two commenters agreed with the proposal; one agreed if the proposal was modified and one did not take a position but supported the proposal while cautioning that care be taken in storing electronic copies. A chart with the full text of the comments received and the committee's responses is attached at pages 9–15.

The Committee on Appellate Courts of the California Lawyers Association's Litigation Section (CAC) expressed support for extending the current 20-year retention period, but voiced concerns about courts' ability to retain reporters' transcripts for 75 years in an accessible electronic form. CAC described instances in which a trial court was unable to locate an electronic copy of a reporter's transcript, but (fortunately) had retained the paper copy. It also expressed concern about electronic files becoming corrupt over time. CAC recommended that before paper copies of the reporter's transcript are purged, the court should ensure that an electronic copy is being properly and accurately maintained in an accessible format.

The Orange County Bar Association, the Superior Court of Orange County, and the Superior Court of San Diego County responded to requests for specific comments on the proposed text of the rule. In response to whether the rule should use the term "certified" electronic copies rather than "original" and "copy," both superior courts supported that change while the bar association felt there was no need to change the text because the proposed language makes clear that the retained transcript in either form is true and correct. To remain consistent with the language of section 271 and to avoid confusion about whether courts may convert paper originals to electronic copies, the committee declined to use the descriptor "certified" in the rule.

The invitation to comment also requested comments on the language in subdivisions (d)(2) and (d)(3): "in which the court affirms a judgment of conviction." New subdivision (d)(3) is modeled on subdivision (d)(2), which has included the language "[i]n a criminal case in which the court affirms a judgment of conviction," since the rule was adopted. The new language in (d)(3) narrows "criminal case" to "felony case." To account for various possible dispositional orders

and situations in which the appellate court does not "affirm" a judgment of conviction but the defendant may need that reporter's transcript in the future, the committee requested comments on whether this language should be deleted, modified in some way (e.g., to state "in which the court affirms a judgment of conviction, in whole or in part"), or retained as is.

The bar association responded that no change is necessary; the current language is sufficient to trigger retention. The Superior Court of San Diego County approved of including "in whole or in part," and suggested deleting the word "judgment" as unnecessary. The Superior Court of Orange County opined that the language, whether modified or not, should be the same in subdivisions (d)(2) and (d)(3).

The committee concluded that adding "in whole or in part" to subdivisions (d)(2) and (d)(3) would likely be helpful to clarify that various dispositional orders trigger retention. For consistency and clarity, the committee does not recommend changing the phrase "judgment of conviction" to simply "conviction" because the change would not be substantive, the phrase is used in the appellate rules of court, and changing the phrase could cause confusion.

Alternatives considered

The committee considered several alternatives. As in 2020, it rejected the option of taking no action because portions of the rule are based on a former version of section 271, and it is undisputed that a 20-year retention period is insufficient.

Originally, the committee considered proposing a retention time of 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases. Upon reconsideration, the committee again concluded that 50 years was not enough time to ensure that all defendants who might need the reporter's transcript in their case would be able to access it.

The committee considered whether to propose extending the time for keeping the reporter's transcript only in cases involving certain sentences, such as a sentence of life or life without the possibility of parole. The committee rejected this option because it is too narrow and would not include many cases in which a reporter's transcript might be needed more than 20 years after a felony conviction is affirmed.

Also in 2020, the committee considered a graduated retention schedule, such as the retention schedule adopted by the California Department of Justice, in which documents are retained for different time periods depending on the type of document or the circumstances. In addition, the committee considered other possible amendments, including whether any reporters' transcripts should be retained permanently and whether the rule should provide that the reporter's transcript must be kept for a certain number of years (such as 10) following the death of the defendant. The committee rejected these options in favor of a rule that would be simple and straightforward for the courts to implement but welcomed comments on these and other options.

Upon reconsideration of a graduated or tiered retention schedule for this proposal, including obtaining input from the courts, the committee again concluded that a single retention period for

reporter's transcripts in all cases affirming a felony conviction would be preferable. A defendant's future need for a reporter's transcript does not necessarily align with the crime committed or the sentence imposed. Administering the retention and destruction of records, particularly paper transcripts, based on such a retention schedule would be complex and might not yield significant savings. The committee also considered the courts' interest in digitizing paper records to reduce storage costs.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures for reporters' transcripts in the identified cases. Education and training of staff would also be required. As of January 1, 2023, all reporter's transcripts are required by section 271 to be in electronic form unless a party requests paper, and courts report that electronic filing has become much more prevalent in recent years. The cost of storage of electronic records is a fraction of the cost of storing paper, and courts are looking into converting existing paper records to electronic form to reduce storage costs going forward. Despite the fiscal impacts, the committee believes that the benefits of the proposal—safeguarding defendants' rights to avail themselves of changes in the law or other remedies, and thereby improving access to justice—outweigh its potential cost to the courts.

The Superior Court of Orange County addressed implementation issues, observing that the workload would appear to fall primarily to certain groups of staff including Records Management. The court also noted that ensuring data storage space, indexing, and auditing of images would be of primary concern if transcripts are to be kept separate from the electronic case file.

Attachments and Links

1. Cal. Rules of Court, rule 10.1028, at pages 7–8
2. Chart of comments, at pages 9–15

Rule 10.1028 of the California Rules of Court is amended, effective January 1, 2023, to read:

Rule 10.1028. Preservation and destruction of Court of Appeal records

(a) Form or forms in which records may be preserved

(1) Court of Appeal records may be created, maintained, and preserved in any form or forms of communication or representation, including paper or optical, electronic, magnetic, micrographic, or photographic media or other technology, if the form or forms of representation or communication satisfy the standards or guidelines for the creation, maintenance, reproduction, and preservation of court records established under rule 10.854.

(2) If records are preserved in a medium other than paper, the following provisions of Government Code section 68150 apply: subdivisions (c)–(*l*), excluding subdivision (i)(1).

(b) Methods for signing, subscribing, or verifying documents

Any notice, order, ruling, decision, opinion, memorandum, certificate of service, or similar document issued by an appellate court or by a judicial officer of an appellate court may be signed, subscribed, or verified using a computer or other technology in accordance with procedures, standards, and guidelines established by the Judicial Council. Notwithstanding any other provision of law, all notices, orders, rulings, decisions, opinions, memoranda, certificates of service, or similar documents that are signed, subscribed, or verified by computer or other technological means under this subdivision shall have the same validity, and the same legal force and effect, as paper documents signed, subscribed, or verified by an appellate court or a judicial officer of the court.

(c) Permanent records

The clerk/executive officer of the Court of Appeal must permanently keep the court's minutes and a register of appeals and original proceedings.

(d) Time to keep other records

(1) Except as provided in (2) and (3), the clerk/executive officer may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, by the presiding justice.

(2) Except as provided in (3), in a criminal case in which the court affirms a judgment of conviction in whole or in part, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy of the transcript, for 20 years after the decision becomes final.

(3) In a felony case in which the court affirms a judgment of conviction in whole or in part, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy of the transcript, for 75 years after the decision becomes final.

Advisory Committee Comment

Subdivision (d). Subdivision (d) permits the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original if the original transcript is in paper. Although subdivision (a) allows the Court of Appeal to maintain its records in any ~~format~~ form that satisfies the otherwise applicable standards for maintenance of court records, including electronic ~~formats,~~ forms ~~the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a)~~. Code of Civil Procedure section 271 provides that an original reporter's transcript must be in electronic form unless a specified exception allows for an original paper transcript. Subdivision (d) therefore specifies that an electronic copy may be kept if the original transcript is in paper, to clarify that the paper original need not be kept by the court.

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association by Dean A. Bochner, Chair Committee on Appellate Courts	NI	I write on behalf of the Committee on Appellate Courts of the California Lawyers Association's Litigation Section ("CAC") to offer the following comments on the Appellate Advisory Committee's recent proposals (1) to update language referring to persons with disabilities in several court rules and in a form (SPR22–02) and (2) to extend the time the Court of Appeal must retain the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years (SPR22–03). CAC consists of appellate practitioners and court staff, drawn from a wide range of practice areas, from across the state. As part of its mission, CAC frequently shares its views regarding proposals to change rules that govern appellate practice. …. [Comments on proposal SPR22–02] CAC also supports SPR22-03, which would extend the time the Court of Appeal must retain the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years. We agree that the current 20-year retention period is insufficient in cases involving serious felony convictions and longer sentences, and we believe that this proposal will improve access to justice for those defendants who may need to obtain the reporter's transcript in their case more than 20 years after their conviction was affirmed.	The committee notes the commenter's support for the proposal and appreciates the information on CAC's perspective and role in the legal community. The committee appreciates these comments in support of the rule amendment.

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

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	Committee Response
			We have concerns, however, about the ability of courts to retain accessible electronic copies of the reporter's transcript for 75 years. Some of our members have seen instances in which a trial court was unable to locate an electronic copy of a reporter's transcript, but fortunately the court had retained the paper copy. We are also concerned that some electronic files could become corrupt over time. Retaining these transcripts in an accessible format is critical for preserving the appellate rights of criminal defendants. Before paper copies of the reporter's transcript are purged, the court should ensure that an electronic copy is being properly and accurately maintained in an accessible format. Thank you for giving us the opportunity to comment on these proposals.	The committee appreciates the commenter's concerns about ensuring that courts maintain an accessible version of a reporter's transcript, whether in paper or electronic form, and particularly that an electronic copy of a transcript is properly maintained and accessible before a paper transcript is purged. This feedback is noted in the report to the Judicial Council.
2.	Orange County Bar Association by Daniel S. Robinson President	A	**In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:** **• Does the proposal appropriately address the stated purpose?** The proposal does appropriately address the stated purpose. **• Should reporters' transcripts in particular types of cases (e.g., conviction of first- degree murder or sentence of life without the possibility of parole) be retained permanently?** No, the proposed 75 year retention period realistically should be sufficient even for LWOP	The committee notes the commenter's support for the proposal and appreciates the responses to its request for specific comments. No response required. The committee agrees with the commenter.

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

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	Committee Response
			cases. Permanent retention makes sense only for future historical review after the death of an individual. **• Should the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy"?** No need to change the text as the current proffered language makes clear that the retained transcript in either form is true and accurate. **• Should the subdivision (d)(3) language, "in which the court affirms a judgment of conviction," be deleted or modified (e.g., to state "in which the court affirms a judgment of conviction, in whole or in part")? Should the same language in subdivision (d)(2) be modified?** No, the current language is sufficient to trigger retention.	For consistency with the statutory language and to avoid requiring that courts obtain a certified electronic copy if they choose not to retain an original paper transcript, the committee agrees with making no change. The committee received positive and negative responses to this question and decided to modify the language in an effort to ensure that transcripts that may be needed in the future are retained.
3.	Superior Court of Orange County by Iyana Doherty Courtroom Operations Supervisor	A	Transcripts should be retained permanently on all transcripts. California's laws are constantly revised, and new laws are created. A party should be able to request transcripts to assist them in their motion/petition at any time. The search for transcripts will no longer take countless hours.	The committee notes the commenter's support for the proposal, but disagrees with requiring permanent retention of all transcripts. The committee believes that a 75-year retention time balances defendants' need for a transcript and courts' cost concerns.

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	Committee Response
			A certified electronic transcript is an excellent adjective, since court reporters certify that their record is true and accurate copy.	The committee decided not to make this change in terminology to remain consistent with Code of Civil Procedure section 271 and to avoid suggesting that courts must obtain a certified electronic copy if they choose not to retain paper originals.
			For consistency of the procedure and records retention, we suggest both subdivisions (d)(3) and (d)(2) read the same.	The committee agrees and has made the same revision to subdivisions (d)(2) and (d)(3).
			The reporters' transcripts in electronic form are cost savings. The average cost of a box of paper is $63.07, and the average price of a USB drive, ten pack, 32GB is $52.78. A reporter's transcript includes copy paper that must not exceed 300 pages, cardstock paper for the front and back of the book, and fastener prongs to hold the volume together. The cost-saving measure will also include less printer ink and wear and tear. Leaving the transcripts in an electronic form instead of making volumes would save time for the reporter. The Court of Appeals would not have to buy or lease storage space to retain the paper record. Resources would not have to be spent storing the transcripts, retrieving the transcripts, and making extra copies of the transcripts.	The committee appreciates this feedback on the savings in cost and time that can be realized from retaining electronic transcripts rather than paper transcripts.
			Implementing the workload would appear to fall primarily on CTS and Records Management staff. Unsure of the Appellate current imaging practices, but ensuring data storage space, indexing, and auditing of images would be of	The committee appreciates the commenter's feedback on implementation issues.

	Commenter	Position	Comment	Committee Response
			primary concern if transcripts are to be kept separate from the electronic case file. 3 months would be sufficient. It is easier to eliminate processes than to implement new ones. This might be a bigger challenge for courts that retain paper records.	 The committee appreciates this feedback.
4.	Superior Court of San Diego County by Mike Roddy Executive Officer	AM	• Does the proposal appropriately address the stated purpose? **Yes.** • Should reporters' transcripts in particular types of cases (e.g., conviction of first degree murder or sentence of life without the possibility of parole) be retained permanently? **No. It is highly unlikely these would be needed beyond the 75 years.** • Should the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy"? **Yes.** • Should the subdivision (d)(3) language, "in which the court affirms a judgment of conviction," be deleted or modified (e.g., to state "in which the court affirms a judgment of	The committee notes the commenter's support for the proposal if it is modified and appreciates the responses to the requests for specific comments. The committee agrees with the commenter. The committee decided not to make this change in terminology to maintain consistency with the language of Code of Civil Procedure section 271 and to avoid suggesting that courts must obtain a certified electronic copy if they choose not to retain paper originals.

	Commenter	Position	Comment	Committee Response
			conviction, in whole or in part")? Should the same language in subdivision (d)(2) be modified? **Yes. Including "in whole or in part" would be helpful. In addition, it may not be necessary to include the term "judgment." Since the terms "judgment" and "sentence" are generally considered "synonymous" "there is no 'judgment of conviction' without a sentence [Citation omitted]." (*People v. McKenzie* (2020) 9 Cal.5th 40, 46.) But, it would seem the rule is intended to apply anytime a conviction is affirmed (even if the sentence is vacated and the case remanded for re-sentencing). It seems unnecessary to include the term "judgment" in the rule.** The advisory committee also seeks comments from courts on the following cost and implementation matters: • Would the proposal provide cost savings? If so, please quantify. **No.** • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Unknown.**	The committee agrees that adding "in whole or in part" would be helpful and has made this change. The committee declines to change the term "judgment of conviction" because this term is also used in a number of appellate court rules and changing it could cause confusion. The committee notes the commenter's opinion that the rule change will not provide cost savings. No response required.

SPR22-03

Court Records: Retention of Reporters' Transcripts in Felony Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	Committee Response
			• Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Unknown.**	No response required.
			• How well would this proposal work in courts of different sizes? **Unknown.**	No response required.

Item number: 04

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Jury Instructions: Criminal Jury Instructions (2022 Supplement)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adoption of new CALCRIM Nos. 908 and 1704; and
Revisions to CALCRIM Nos. 207, 505, 506, 507, 521, 571, 580, 850, 1021, 1036, 1051, 1060, 1141, 1181, 1192, 1193, 1300, 1403, 2040, 2131, 2500, 2670, 2672, 3149, 3150, 3406, 3456, 3457, and 3472

Committee or other entity submitting the proposal:
Advisory Committee on Criminal Jury Instructions

*Staff contact (*name, phone and e-mail*): Kara Portnow, kara.portnow@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*):
Project description from annual agenda:

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-115
For business meeting on September 20, 2022

Title
Jury Instructions: Criminal Jury Instructions (2022 Supplement)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Criminal Jury Instructions

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Jeffrey S. Ross, Interim Chair

Agenda Item Type
Action Required

Effective Date
September 20, 2022

Date of Report
July 18, 2022

Contact
Kara Portnow, 415-865-4961
kara.portnow@jud.ca.gov

Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2022 supplement of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective September 20, 2022, approve the following changes to the criminal jury instructions prepared by the committee:

1. Adoption of new CALCRIM Nos. 908 and 1704; and

2. Revisions to CALCRIM Nos. 207, 505, 506, 507, 521, 571, 580, 850, 1021, 1036, 1051, 1060, 1141, 1181, 1192, 1193, 1300, 1403, 2040, 2131, 2500, 2670, 2672, 3149, 3150, 3406, 3456, 3457, and 3472.

The proposed jury instructions are attached at pages 15–149.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the Advisory Committee on Criminal Jury Instructions and its charge.[1] In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court.

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its March 2022 meeting.

Analysis/Rationale

The committee revised the instructions based on comments and suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law.

Below is an overview of some of the proposed changes.

CALCRIM Nos. 505 & 506, *Justifiable Homicide*

In *People v. Morales* (2021) 69 Cal.App.5th 978, 992 [284 Cal.Rptr.3d 693], the court held that a robbery triggers the right to use deadly force in self-defense if the circumstances give rise to a reasonable belief that the victim would suffer great bodily injury or death. Acknowledging that *People v. Ceballos* (1974) 12 Cal.3d 470 [116 Cal.Rptr. 233, 526 P.2d 241] had previously identified robbery as an example of a forcible and atrocious crime that always creates a fear of death or serious bodily harm, *Morales* explained that *Ceballos* involved a burglary, not a robbery, and only categorized robbery in this way because it contemplated the traditional common law robbery. In element 1 of No. 505, the committee added an option for noninherently forcible and atrocious crimes, such as robbery, and inserted the following language: "under circumstances in which (he/she) reasonably believed that (he/she) would suffer great bodily injury or death." In both Nos. 505 and 506, the committee also clarified the bench notes that discuss *Ceballos* and added *Morales* to the authority section.

CALCRIM No. 507, *Justifiable Homicide: By Peace Officer*

The Peace Officers Research Association of California and the California District Attorneys Association submitted proposals to clarify the totality-of-circumstances part of the instruction. The commenters' primary request was to incorporate factors identified in *Graham v. Connor* (1989) 490 U.S. 386, 396–397 [109 S.Ct. 1865, 104 L.Ed.2d 443] into the list. The committee considered expanding the list, but instead concluded that the bullet points should be removed

[1] Rule 10.59(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

because the applicable factors would vary depending on the specific case. The committee added a commentary about the *Graham* factors, noting that the *Graham* factors are not exclusive and may not all apply in every case. The committee also added the statutory definition of deadly force and made conforming changes to CALCRIM Nos. 2670 and 2672, *Lawful Performance*.

CALCRIM No. 521, *First Degree Murder*

A trial court judge alerted the committee to an error in the torture section of this instruction. He noted that the definition of premeditation, in the context of torture-murder, is not a decision to kill but a decision to inflict extreme and prolonged pain. The committee corrected the language in Section B and also removed a bench note that stated that the bracketed definitions of *deliberate* and *premeditated* for *torture* and *lying-in-wait* should be given unless the terms had not already been defined for the jury.

CALCRIM No. 580, *Involuntary Manslaughter: Lesser Included Offense*

The San Francisco Public Defender's Office proposed a revision to this instruction based on the theory of involuntary manslaughter articulated in *People v. Bryant* (2013) 56 Cal.4th 959 [157 Cal.Rptr.3d 522, 301 P.3d 1136] and *People v. Brothers* (2015) 236 Cal.App.4th 24 [186 Cal.Rptr.3d 98]. In *Bryant*, the California Supreme Court stated that "a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter." (*People v. Bryant, supra,* 56 Cal.4th at p. 970.) In a concurring opinion, Justice Kennard explained that a homicide committed under these circumstances is an involuntary manslaughter. (*Id.* at p. 971 (conc. opn. of Kennard, J.).) Justice Kennard's analysis was later endorsed in *Brothers*, which held that an unlawful killing without malice during the commission of an inherently dangerous assaultive felony is involuntary manslaughter. In response to this proposal, the committee added the category of "inherently dangerous assaultive (felony/felonies)" to the instructional prompts and updated the bench notes.

Proposed new CALCRIM No. 908, *Assault Under Color of Authority*

The Prosecutors Alliance of California requested that the committee draft a new instruction for Penal Code section 149. The committee adapted instructional language from CALCRIM Nos. 915, *Simple Assault*, and 960, *Simple Battery*, and crafted definitions of "lawful authority" and "under color of law" based on case law. The committee also incorporated sections of the *Lawful Performance* instructions (Nos. 2670 and 2672) that stated when a peace officer can lawfully use deadly force, under Penal Code section 835a. During the public comment period, the committee received a detailed comment from an attorney and incorporated several of the proposed changes to further refine the instruction.

CALCRIM No. 1060, *Lewd or Lascivious Act: Dependent Person*

In *People v. Montoya* (2021) 68 Cal.App.5th 980, 999–1001 [284 Cal.Rptr.3d 18], the court noted that this instruction incorrectly states that the defendant must be the *victim's* caretaker, as opposed to just generally being a caretaker, and also held that consent is not a defense. The committee removed the phrase "while serving as a caretaker" from element 2 and added an optional sentence that states "It is not a defense that the dependent person may have consented to

the act." The committee also modified the instructional duty and authority sections by adding *Montoya*'s holding.

CALCRIM No. 1181, *Sexual Abuse of Animal*
Assembly Bill 611 (Stats. 2019, ch. 613) repealed Penal Code section 286.5 and replaced it with a new statutory version. Two years later, Senate Bill 827 (Stats. 2021, ch. 434) repealed Penal Code section 597f (which had been referenced in the former version of Penal Code section 286.5). The new version of Penal Code section 286.5 required a complete overhaul of the instruction. Although the committee recognized that this offense rarely arises in jury trials, the committee decided to update the instruction instead of recommending that it be revoked.

CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome*
Two recent unpublished cases from the First Appellate District of the Court of Appeal addressed a challenge that this instruction is potentially misleading because it contains the instructional phrase "was not inconsistent with" and does not otherwise adequately state the permissible use of this type of expert testimony. Although the Court of Appeal concluded that the pattern instruction is a correct statement of the law, as other appellate courts have as well, both opinions suggested that the committee revisit the instruction to improve it. In response, the committee removed the double negative from the phrase and added language to clarify the distinction between the proper and improper use of the evidence. The committee made similar changes to CALCRIM Nos. 1192, *Testimony on Rape Trauma Syndrome*, and 850, *Testimony on Intimate Partner Battering and Its Effects*.

CALCRIM No. 1300, *Criminal Threat*
A trial court judge proposed that the committee eliminate the word "unconditional" from element 4 in light of *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374]. *Bolin* held that "the reference to an 'unconditional' threat in [Penal Code] section 422 is not absolute." *Id.* at 339. Instead of removing the statutory word "unconditional," the committee inserted the phrase "Under the circumstances" to element 4. The committee also added a commentary about *Bolin*.

Proposed new CALCRIM No. 1704, *Possession of Burglary Tools*
A prosecutor requested that the committee draft an instruction for Penal Code section 466. This statute describes three different bases of liability: (1) possessing burglary tools, (2) making or altering a key or instrument to insert into the lock of a structure to commit a burglary, or (3) making, altering, or repairing an instrument knowing that the instrument is intended to be used to commit a misdemeanor or felony. To avoid creating an overly complicated instruction, the committee decided to cover only the possession part, which is likely the most common basis of liability. A bench note explains that the statute encompasses additional conduct not covered by the instruction.

CALCRIM No. 2040, *Unauthorized Use of Personal Identifying Information*
In *People v. Zgurski* (2021) 73 Cal.App.5th 250, 263 [288 Cal.Rptr.3d 214], the court held that Penal Code section 530.5 does not require affirmative proof that the defendant knew that the

personal identifying information belonged to a real, instead of a fictitious, person. The committee added this case to the authority section.

CALCRIM Nos. 3149 & 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death*

Applying the reasoning of *People v. Flores* (2005) 129 Cal.App.4th 174 [28 Cal.Rptr.3d 232], *People v. Morales* (2021) 67 Cal.App.5th 326 [282 Cal.Rptr.3d 151] held that the trial court erred by omitting the optional accomplice language in CALCRIM No. 3149. In response, the committee expanded the instructional definition of accomplice in both instructions to include "the identical crime . . . intended by the defendant of which the intentional discharge of a firearm was a *natural and probable consequence*." The committee also added a bench note that states when to give the bracketed phrase "who was not an accomplice to the crime," citing *Flores* and *Morales*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*

The San Francisco Public Defender's Office requested that this instruction be updated to include language based on *People v. Ramirez* (2015) 233 Cal.App.4th 940, 952 [183 Cal.Rptr.3d 267]. In *Ramirez*, the court held that this instruction, along with the prosecutor's argument, "erroneously foreclosed defendants' imperfect self-defense claim." In response to this request, the committee added optional language adapted from CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*. The committee also modified the bench note that discusses *Ramirez*.

Policy implications

Rule 2.1050 of the California Rules of Court requires the Advisory Committee on Criminal Jury Instructions to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from May 23 through July 1, 2022. The committee received responses from four commenters. The text of all comments received and the committee's responses are included in a chart of comments attached at pages 7–12.

Alternatives considered

The proposed changes are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

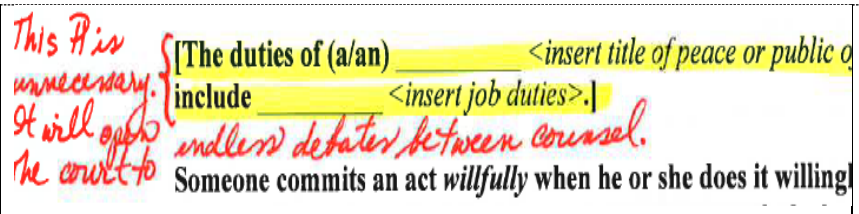
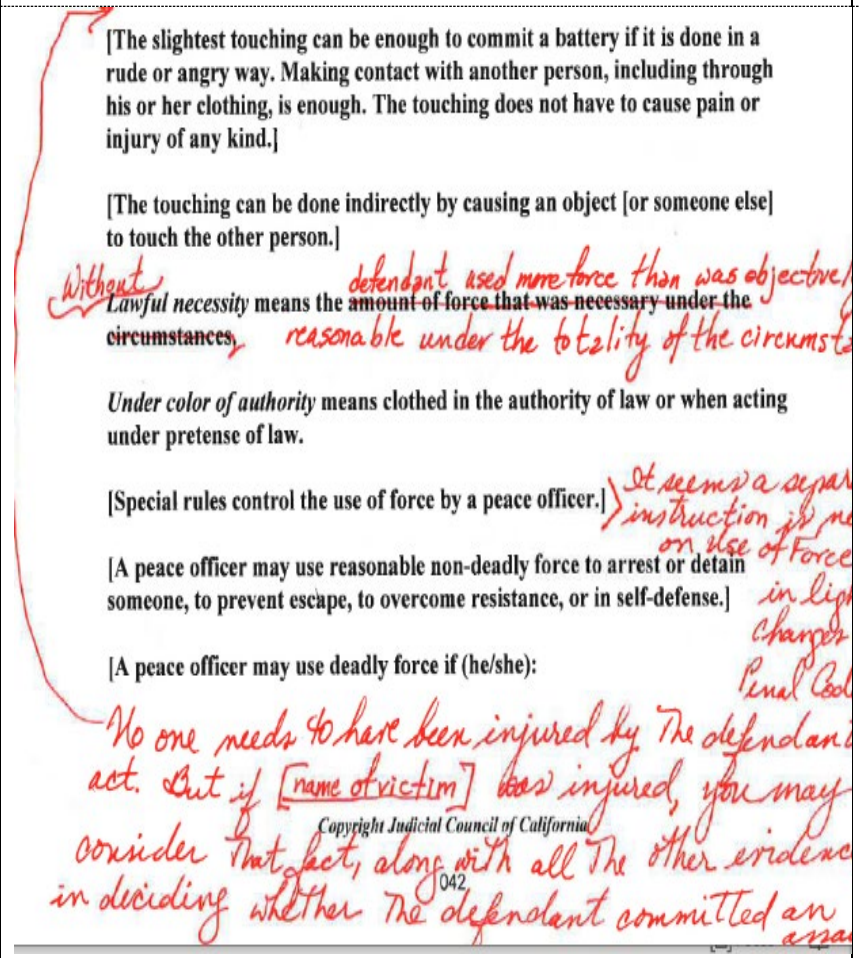
Attachments and Links

1. Chart of comments, at pages 7–12
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 13–149

Instruction No.	Commenter	Position	Comment	Committee Response
207, 505, 506, 507, 521, 571, 580, 850, 908, 1021, 1036, 1051, 1060, 1141, 1181, 1192, 1193, 1403, 1704, 2040, 2131, 2500, 2670, 2672, 3149, 3150, 3406, 3456, 3457, 3472	Orange County Bar Association, by Daniel S. Robinson, President.	A	The Orange County Bar Association agrees with the above referenced criminal jury instructions.	No response necessary.
223	William R. White, Attorney at Law		We on the defense side have been the victim of the worst jury instruction ever written: Calcrim 223 The example is this: **For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.** Well, what ELSE could it reasonably be? Dude. It's RAINING. There IS no other reasonable conclusion. I use this: "If a person cuts you off in traffic, it may support a conclusion that he is a bad driver, or did not see you, or had a mechanical defect, or a medical emergency, or any number of reasonable conclusions."	The committee does not currently have a proposed modification for this instruction and will consider this comment at its next meeting.

908	Rebecca Susan Fengyi Young, Assistant District Attorney, San Francisco District Attorney's Office	AM	This is a welcome addition to the CALCRIM. Having tried a police officer for excessive force this past March, I can assure you that the court and counsel for both sides struggled with crafting a legally adequate and fair jury instruction. Our jury instruction for Penal Code section 149 and for Use of Force consumed no less than 3-4 hours of debate. I offer the following comments and observations regarding proposed CALCRIM 908, Assault Under Color of Authority (Pen. Code §149): One, I have attached an edited PDF of the proposed instruction. My edits are in obvious red ink.**	
			When ~~The~~ acted s/he **1. The defendant was a *public officer*;**	The committee disagrees with this suggestion because it unnecessarily combines two elements. Element 3/5 already addresses the timing of the act.
			(4/6). When the defendant (did the act/touched _____ <*insert nam* *alleged victim*>), (he/she) ~~was not acting out of *lawful necessity*~~ acted without lawful necessi	The committee agrees and made the proposed change.
			[(5/7). When the defendant (did the act/touched _____ <*insert name of* *alleged victim*>), (he/she) ~~was not defending (himself/herself).~~] did not act in self-defense or defen another	The committee agrees with this suggestion and changed the language accordingly. The committee also added a related bench note.
			[An officer or employee of _____ <*insert name of state or local government agency that employs public officer*> is a *public officer*.] $149 applies "public offic don't believe applies to a employ a governm agen [name City or County] **[A ~~person employed as a~~ police officer by _____ <*insert name of agency that employs police officer*> ~~is a peace officer. A peace officer~~ is a public officer.]**	The committee agrees that the reference to "employee" would be overbroad and removed it. The committee, however, disagrees with the proposed changes to the definition of peace officer.

** The suggested edits from the PDF appear below.

				The committee disagrees. This is a necessary paragraph and should not be too difficult to modify to include specific duties as relevant to the case.
				The committee agrees with adding the sentence that begins "No one needs to have been injured" and made this change. The committee agrees in part with this suggestion. In response, the committee changed the phrase to "without lawful necessity" and modified the definition to "more force than was reasonably necessary under the circumstances." The committee disagrees that there is a need for a separate instruction.

			2. **Reasonably believed, based on the totality of the circumstances, that:** a. _____ <*insert name of fleeing felon*> **was fleeing;** The commissi a felony; b. **The force was necessary to arrest or detain** _____ <*insert name of fleeing felon* > **for the crime of** _____ <*insert name of felony* >; and	The committee disagrees with this proposed language. This additional language is unnecessary in light of the italicized words.
			The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title . . .* > include" on request. I think this opti creates a PANDORA for the court. **AUTHORITY**	The committee disagrees that this language is problematic. This language already appears in other CALCRIM instructions.
			• Color of Authority ▸ *People v. Plesinarski* (1971) 22 Cal.App.3d 108, 1 Cal.Rptr. 196]. • Reasonable Force to Effect Arrest Pen. C. § 835a	The committee agrees with this addition to the Authority Section and has added it, with the addition of the word "objectively."
			Two, by its language, section 149 applies to assaults and batteries, and does not apply to killings by law enforcement. Do you think a Use Note is needed to state that this instruction should not be given where the UOF results in a killing? Or is that too much stating the obvious?	The committee does not believe a use note of this type is necessary.
			Three, it might be good to consider adding an additional sentence regarding the officer's tactical decisions and whether those played a role in the officer resorting to intermediate force, i.e., baton, pepper spray, bean bag gun or take-downs. Most UOF experts now analyze tactical decisions, particularly in the context where time and distance are available to the officer(s). "It is conceptually and, we believe, constitutionally unsound for reviewers to overlook or ignore the extent to which officers contribute to the creation of a threat . . . ." that they then need to defend against. From, Evaluating Police Uses of Force; Stoughton, Noble & Alpert, New York University Press, 2020, P.55.	The committee previously considered adding language about tactical decisions but ultimately decided that such language would not be appropriate. It is, however, an argument that counsel can make in a particular case.

			I attach further reading on the topic by the same authors.[**]	
			To follow up on my previous email, I think a separate CALCRIM is needed defining/explaining the complex law around UOF. I am not sure the proposed 908, as it stands would suffice for officer-involved shootings resulting in death.	This proposed new instruction is not intended to cover a homicide that occurred because of an officer's use of deadly force. Instead, CALCRIM No. 507 (*Justifiable Homicide: By Peace Officer*) reflects the provisions set forth by Penal Code section 835a. Further, current proposed revisions to No. 2670 (*Lawful Performance: Peace Officer*) and No. 2672 (*Lawful Performance: Resisting Unlawful Arrest With Force*) would also include updated language for the use of deadly force.
1300	Orange County Bar Association, by Daniel S. Robinson, President.	N	The proposed revision is confusing and does not seem to provide more clarity on the scope of a true threat. It appears that the revision is intended to convey that a threat which may appear conditional on its face can be unconditional under the circumstances. (See *People v. Bolin* (1998) 18 Cal.4th 297, 340.) The proposed revision, however, does not accomplish this goal. Perhaps the authority section should simply state "a threat which may appear conditional on its face can be unconditional under the circumstances" with the statutory reference to *People v. Bolin* (1998) 18 Cal.4th 297, 339-340 instead of "threat not required to be unconditional on its face".	The committee disagrees with this comment. It believes the addition of the phrase "under the circumstances" assists the jury in determining whether the threat at issue satisfies the statutory element of the offense.
			Further, under the commentary section, the phrase "Because a threat need only be 'so'" appears to convey unnecessary partiality. If the instruction seeks to provide clarification of the use of the word "so", it should simply state that the use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity must be	The committee believes the new commentary language accurately reflects the Supreme Court's reasoning in *Bolin* and is therefore not unnecessarily partial.

[**] The article provided by the commenter can be found at:
https://nebula.wsimg.com/20d823e6d95bce3a33249cc565ef2e0c?AccessKeyId=60FF4035FAC52CC390C3&disposition=0&alloworigin=1

			sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim. (*People v. Bolin, supra,* 18 Cal.4th at p. 340.)	
1403	Hon. Kelvin Filer, Superior Court Judge, Los Angeles County	AM	At the beginning of Cal Crim 1403, I suggest ADDING the following language: "It is not against the law to be a member of a gang. You have heard evidence of gang activity in this case. "	The committee disagrees with adding the proposed language. CALCRIM No. 1403 is a limiting instruction for the use of evidence of gang activity and the proposed language is outside the scope.

CALCRIM Proposed Changes: Table of Contents

Instruction Number	Instruction Title
2040	Unauthorized Use of Personal Identifying Information
2131	Refusal—Enhancement
2500	Illegal Possession, etc., of Weapon
2670 & 2672	Lawful Performance
3149 & 3150	Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death
3406	Mistake of Fact
3456 & 3457	MDO: Initial Commitment and Extension of Commitment
3472	Right to Self-Defense: May Not Be Contrived

207. Proof Need Not Show Actual Date

It is alleged that the crime[s] occurred on [or about] _____ <*insert alleged date(s) or date ranges by count*>. The People are not required to prove that the crime[s] took place exactly on (that/those) day[s] but only that (it/they) happened reasonably close to (that/those) day[s].

New January 2006; Revised February 2014, February 2016, September 2022

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; or (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 [263 Cal.Rptr. 513, 781 P.2d 547]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].)

AUTHORITY

- Instructional Requirements. ▸ Pen. Code, § 955; *People v. Jennings, supra,* ~~(1991)~~ 53 Cal.3d at pp.~~334,~~ 358–359 ~~[279 Cal.Rptr. 780, 807 P.2d 1009]~~; *People v. Jones, supra,* ~~(1973)~~ 9 Cal.3d at p.~~546,~~ 557 ~~[108 Cal.Rptr. 345, 510 P.2d 705]~~; *People v. Barney, supra,* ~~(1983)~~ 143 Cal.App.3d at pp.~~490,~~ 497–498 ~~[192 Cal.Rptr. 172]~~; *People v. Gavin, supra,* ~~(1971)~~ 21 Cal.App.3d at pp.~~408,~~ 415–416 ~~[98 Cal.Rptr. 518]~~; *People v. Deletto, supra,* ~~(1983)~~ 147 Cal.App.3d at pp. ~~458,~~ 474–475 ~~[195 Cal.Rptr. 233]~~.
- This Instruction Correctly States the Law. ▸ *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 [188 Cal.Rptr.3d 811].

SECONDARY SOURCES

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[2] (Matthew Bender).

505. Justifiable Homicide: Self-Defense or Defense of Another

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The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being a victim of (~~raped/maimed/robbed/~~ _____ <*insert inherently~~other~~ forcible and atrocious crime such as rape or mayhem*>/~~)~~ _____ <*insert noninherently forcible and atrocious crime such as robbery*> under circumstances in which (he/she) reasonably believed that (he/she) would suffer great bodily injury or death)];**

2. **The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;**

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____<*insert name of decedent/victim*>** threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[If you find that the defendant knew that _____<*insert name of decedent/victim*>** had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____<*insert name of decedent/victim*>**, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]**

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/_____ <*insert forcible and atrocious crime*>**) has passed. This is so even if safety could have been achieved by retreating.]**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter).

New January 2006; Revised February 2012, August 2012, September 2020, March 2022, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when: "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra,* 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) In *Ceballos*, the court identified murder, mayhem, rape, and robbery as examples of forcible and atrocious crimes. ~~The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery.~~ (*Id.* at p. 478.) However, as noted in *People v. Morales* (2021) 69 Cal.App.5th 978, 992–993 [284 Cal.Rptr.3d 693], *Ceballos* involved a burglary, not a robbery, and contemplated the traditional common law robbery, which, unlike the modern understanding of robbery in California, did not include situations where very little force or threat of force is involved. *Morales* concluded that "[a] robbery therefore cannot trigger the right to use deadly force in self-defense unless the circumstances of the robbery gave rise to a reasonable belief that the victim would suffer great bodily injury or death." (*Id.* at p. 992.)

~~If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.~~

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

CALCRIM Nos. 3470–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another–Lesser Included Offense*.

AUTHORITY

- Justifiable Homicide. ▸ Pen. Code, §§ 197–199.

- Fear. ▸ Pen. Code, § 198.
- Lawful Resistance. ▸ Pen. Code, §§ 692–694.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. ▸ *People v. Ceballos, supra,* ~~(1974)~~ 12 Cal.3d at pp.~~470,~~ 478–479 ~~[116 Cal.Rptr. 233, 526 P.2d 241]~~; *People v. Morales, supra,* 69 Cal.App.5th at pp. 992–993.
- Imminence. ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey, supra,* ~~(1996)~~ 13 Cal.4th at p.~~1073,~~ 1089 ~~[56 Cal.Rptr.2d 142]~~.
- No Duty to Retreat. ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. ▸ *People v. Humphrey, supra,* ~~(1996)~~ 13 Cal.4th at p.~~1073,~~ 1082 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. ▸ Pen. Code, § 198.
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos, supra,* ~~(1974)~~ 12 Cal.3d at pp.~~470,~~ 477–479 ~~[116 Cal.Rptr. 233, 526 P.2d 241]~~, the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be: "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

Transferred Intent Applies

"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander." (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial

evidence supports it. (*People v. Mathews, supra,* 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

Definition of "Imminent"
In *People v. Aris*, *supra,* ~~(1989)~~ 215 Cal.App.3d at p.~~1178,~~ 1187 ~~[264 Cal.Rptr. 167]~~, overruled on other grounds in *People v. Humphrey*, *supra,* ~~(1996)~~ 13 Cal.4th at p.~~1073,~~ 1089 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~, the jury requested clarification of the term "imminent." In response, the trial court instructed:

> "Imminent peril," as used in these instructions, means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

(Ibid.)

The Court of Appeal agreed with this definition of "imminent." (*Id.* at pp. 1187–1190 [citing *People* v. *Scoggins* (1869) 37 Cal. 676, 683–684].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment
In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations
A defendant's physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 67–85.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

506. Justifiable Homicide: Defending Against Harm to Person Within Home or on Property

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The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) to defend (himself/herself) [or any other person] in the defendant's home. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant reasonably believed that (he/she) was defending a home against _____** *<insert name of decedent>*, **who (intended to or tried to commit _____** *<insert forcible and atrocious crime>*/ **[or] violently[[,] [or] riotously[,]/ [or] tumultuously] tried to enter that home intending to commit an act of violence against someone inside);**

2. **The defendant reasonably believed that the danger was imminent;**

3. **The defendant reasonably believed that the use of deadly force was necessary to defend against the danger;**

AND

4. **The defendant used no more force than was reasonably necessary to defend against the danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ <*insert forcible and atrocious crime*>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rtpr.2d 569, 906 P.2d 531]; *People v. Slater* (1943) 60 Cal.App.2d 358, 367–368 [140 P.2d 846] [error to refuse instruction based on Pen. Code, § 197, subd. 2 when substantial evidence supported inference that victim intended to enter the habitation].)

Penal Code section 197, subdivision 2 provides that "defense of habitation" may be used to resist someone who "intends or endeavors, by violence or surprise, to commit a felony . . . ." (Pen. Code, § 197, subd. 2.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that the felony feared must be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) Forcible and atrocious crimes are those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*Id*~~*People v. Ceballos, supra,* 12 Cal.3d at p. 479~~.) ~~The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.)~~ *Ceballos* specifically held that burglaries which "do not reasonably create a fear of great bodily harm" are not sufficient "cause for exaction of human life." (*Ibid*~~*. at p. 479~~.) Thus, although the statute refers to "defense of habitation," *Ceballos* requires that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide. (~~(~~*Ibid.*~~)~~) The instruction has been drafted accordingly.

If the defendant is asserting that he or she was resisting the commission of a forcible and atrocious crime, give the first option in element 1 and insert the name of the crime. If there is substantial evidence that the defendant was resisting a

violent entry into a residence for the general purpose of committing violence against someone inside, give the second option in element 1. (See Pen. Code, § 197, subd. 2.) The court may give the bracketed words "riotously" and "tumultuously" at its discretion.

Related Instructions
CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.

AUTHORITY

- Instructional Requirements. ▸ Pen. Code, § 197, subd. 2.
- Actual and Reasonable Fear. ▸ See Pen. Code, § 198; see *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361 [37 Cal.Rptr.2d 304].
- Burden of Proof. ▸ Pen. Code, § 189.5.
- Fear of Imminent Harm. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rtpr.2d 146, 921 P.2d 1]; *People v. Lucas* (1958) 160 Cal.App.2d 305, 310 [324 P.2d 933].
- Forcible and Atrocious Crimes. ▸ *People v. Ceballos*, *supra,* ~~(1974)~~ 12 Cal.3d ~~470,~~at pp. 478–479 ~~[116 Cal.Rptr. 233, 526 P.2d 241]~~; *People v. Morales* (2021) 69 Cal.App.5th 978, 992–993 [284 Cal.Rptr.3d 693].
- No Duty to Retreat. ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 88.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.13 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

507. Justifiable Homicide: By Peace Officer

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) someone while (acting as a peace officer/obeying a peace officer's command for aid and assistance). (A/An) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant was (a peace officer/obeying a peace officer's command for aid and assistance);**

AND

2. **The [attempted] killing was committed while the defendant either:**

   A. Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant or another person;

   OR

   B. Reasonably believed, based on the totality of the circumstances, that:

   B1. _____<*insert name of fleeing felon*> **was fleeing;**

   B2. The force was necessary to arrest or detain _____<*insert name of fleeing felon* **> for the crime of _____<***insert name of felony* **>;**

   B3. The commission of the crime of _____ <*insert name of felony*> **created a risk of or resulted in death or serious bodily injury to another person;**

   AND

   B4. _____<*insert name of fleeing felon* **> would cause death or serious bodily injury to another person unless immediately arrested or detained.**

[A s*erious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.]

[*Totality of the circumstances* means all facts known to the defendant at the time, including the conduct of the defendant and _____ *<insert name of decedent>* **leading up to the use of deadly force.]**

~~**[In considering the totality of circumstances, you may consider whether:**~~

- ~~**[● Prior to the use of force, the defendant [identified] [or] [attempted to identify] him or herself as a peace officer and [warned] [or] [attempted to warn] that deadly force may be used(;/.)]**~~
- ~~**[● Prior to the use of force, the defendant had objectively reasonable grounds to believe the person was aware that the defendant was a peace officer and that deadly force may be used(;/.)]**~~
- ~~**[● The defendant was able, under the circumstances, [[to [identify] [or] [attempt to identify]] him or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]**~~

[*Deadly force* means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm.]

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife">* **is a *peace officer* if _____** *<insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">*.]

The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006; Revised April 2011, February 2012, August 2012, April 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

Penal Code sections 196 and 835a, as amended by Statutes 2019, ch.170 (A.B. 392), became effective on January 1, 2020. If the defendant's act occurred before this date, the court should give the prior version of this instruction.

The jury must determine whether the defendant was a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury in the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the defendant was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the defendant is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the defendant is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

Related Instructions

CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer)*.

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace*.

AUTHORITY

- Justifiable Homicide by Peace Officer. ▸ Pen. Code, §§ 196, 199, 835a.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217]; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Peace Officer Defined. ▸ Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined. ▸ Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Deadly Force Defined. ▸ Pen. Code, § 835a(e).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham*, but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 95.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][b] (Matthew Bender).

521. First Degree Murder (Pen. Code, § 189)

<Select the appropriate section[s]. Give the final paragraph in every case.>

<Give if multiple theories alleged.>
[The defendant has been prosecuted for first degree murder under (two/__ *<insert number>*) theories: (1) _____ *<insert first theory, e.g., "the murder was willful, deliberate, and premeditated">* **[and] (2) _____** *<insert second theory, e.g., "the murder was committed by lying in wait">* **[and] [_____** *<insert additional theories>*].

[Each theory of first degree murder has different requirements, and I will instruct you on (both/all __ *<insert number>*).

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>
[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.]

<B. Torture>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. **(He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**

2. **(He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

3. **The acts causing death involved a high degree of probability of death;**

AND

4. **The torture was a cause of death.]**

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person commits an act *deliberately* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. A person commits an act with *premeditation* if (he/she) decided to inflict extreme and prolonged pain on a person before completing the act[s] that caused death.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed;**

2. **(He/She) waited and watched for an opportunity to act;**

AND

3. **Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully

weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive.*]**

[A *destructive device* is _____ *<insert definition supported by evidence from Pen. Code, § 16460>*.**]**

[_____ *<insert type of destructive device from Pen. Code, § 16460>* **is a *destructive device.*]**

<E. Weapon of Mass Destruction>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[_____ *<insert type of weapon from Pen. Code, § 11417(a)(1)>* **is a *weapon of mass destruction*.]**

[_____ *<insert type of agent from Pen. Code, § 11417(a)(2)>* **is a *chemical warfare agent*.]]**

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. **(He/She) shot a firearm from a motor vehicle;**

2. **(He/She) intentionally shot at a person who was outside the vehicle;**

AND

3. **(He/She) intended to kill that person.**

A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.

A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ *<insert other type of motor vehicle>*).]

<H. Poison>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

[_____ *<insert name of substance>* is a *poison*.]

[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have

not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 2015, August 2015, September 2017, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with "The defendant has been prosecuted for first degree murder under." If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

~~When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of "deliberate" and "premeditated" if those terms have not already been defined for the jury.~~

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, "_____ is a weapon of mass destruction" or "is a chemical warfare agent," only if the device used is listed in the code section noted in the instruction. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant, sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [73 Cal.Rptr. 550, 447 P.2d 942]. Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the

elements of first degree murder nor guide a jury's determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder. ‣ Pen. Code, § 189.
- Armor Piercing Ammunition Defined. ‣ Pen. Code, § 16660.
- Destructive Device Defined. ‣ Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death. ‣ *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice. ‣ *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined. ‣ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined. ‣ Pen. Code, § 11417.
- Discharge From Vehicle. ‣ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. ‣ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]*; People v. Poindexter* (2006) 144 Cal.App.4th 572, 582–585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined. ‣ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined. ‣ *People v. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *People v. Anderson, supra,* (1968) 70 Cal.2d at pp. 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements. ‣ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679];

People v. Wiley (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

LESSER INCLUDED OFFENSES

- Murder. ▸ Pen. Code, § 187.
- Voluntary Manslaughter. ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter. ▸ Pen. Code, § 192(b).
- Attempted First Degree Murder. ▸ Pen. Code, §§ 663, 189.
- Attempted Murder. ▸ Pen. Code, §§ 663, 187.
- Elements of Special Circumstances Not Considered in Lesser Included Offense Analysis. ▸ *People v. Boswell* (2016) 4 Cal.App.5th 55, 59–60 [208 Cal.Rptr.3d 244].

RELATED ISSUES

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation]." (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication
"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger*, *supra,* ~~(1991)~~ 52 Cal.3d at p.~~1210,~~ 1242 ~~[278 Cal.Rptr. 640, 805 P.2d 899]~~; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element
All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture—Premeditated Intent to Inflict Pain
Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre*, *supra,* ~~(2004)~~ 117 Cal.App.4th at pp.~~413,~~ 419–420 ~~[11 Cal.Rptr.3d 739]~~; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation
In *People v. Stanley*, *supra,* ~~(1995)~~ 10 Cal.4th at p.~~764,~~ 794 ~~[42 Cal.Rptr.2d 543, 897 P.2d 481]~~, the court approved this instruction regarding the length of time a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving
Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 117.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

571. Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense (Pen. Code, § 192)

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. **The defendant actually believed that (he/she/ [or] someone else/_____ <*insert name of third party*>) was in imminent danger of being killed or suffering great bodily injury;**

AND

2. **The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;**

BUT

3. **At least one of those beliefs was unreasonable.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

<*The following definition may be given if requested*>
[A danger is *imminent* ~~if, when~~if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]

[Imperfect self-defense does not apply when the defendant, through (his/her) own wrongful conduct, has created circumstances that justify (his/her) adversary's use of force.]

[If you find that _____<*insert name of decedent/victim*>** threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]**

[If you find that the defendant knew that _____<*insert name of decedent/victim*>** had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]**

[If you find that the defendant received a threat from someone else that (he/she) associated with _____<*insert name of decedent/victim*>**, you may consider that threat in evaluating the defendant's beliefs.]**

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

New January 2006; Revised August 2012, February 2015, September 2020, March 2022, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

See discussion of imperfect self-defense in Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519,

533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.

AUTHORITY

- Elements. ▸ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton, supra,* (1995) 12 Cal.4th at p.186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. ▸ *People v. Randle* (2005) 35 Cal.4th 987, 995-1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. ▸ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].
- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense is Entirely Delusional. ▸ *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. ‣ *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

- Attempted Voluntary Manslaughter. ‣ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

RELATED ISSUES

Intimate Partner* Batter*ing*~~ed~~ ~~*Women's Syndrome*~~ *and Its Effects

Evidence relating to ~~battered women's syndrome~~intimate partner battering (formerly "battered women's syndrome") and its effects may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]; see also *In re Walker* (2007) 147 Cal.App.4th 533, 536, fn.1 [54 Cal.Rptr.3d 411].)

Blakeley *Not Retroactive*

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. "Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant." (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also

People v. Anderson (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

Fetus
Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.'" (*Ibid*.)

See also the Related Issues section to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

Reasonable Person Standard Not Modified by Evidence of Mental Impairment
In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations
A defendant's physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 242–244.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[1][c], [2][a] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

580. Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))

When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.

The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

The defendant committed involuntary manslaughter if:

1. **The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**

2. **The defendant committed the (crime/ [or] act) with criminal negligence;**

AND

3. **The defendant's acts caused the death of another person.**

[The People allege that the defendant committed the following crime[s]: _____ *<insert misdemeanor[s]/infraction[s])/noninherently dangerous (felony/felonies)/inherently dangerous assaultive (felony/felonies)>***.**

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s])/ noninherently dangerous (felony/felonies)/inherently dangerous assaultive (felony/felonies)>***.]**

[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____ *<insert act[s] alleged>***.]**

Criminal negligence **involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:**

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A ***natural and probable consequence*** **is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]**

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A ***substantial factor*** **is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]**

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ *<insert alleged predicate acts when multiple acts alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]**

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

New January 2006; Revised April 2011, February 2013, September 2018, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony/inherently dangerous assaultive felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction, or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley*, *supra*, ~~(2000)~~ 23 Cal.4th at p.~~82,~~ 89 ~~[96 Cal.Rptr.2d 451, 999 P.2d 675]~~.)

The court has a **sua sponte** duty to instruct on involuntary manslaughter based on the commission of an inherently dangerous assaultive felony and to instruct on the elements of the predicate offense(s). (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33–34 [186 Cal.Rptr.3d 98]; see also *People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) See also CALCRIM No. 620, *Causation: Special Issues*.

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Involuntary Manslaughter Defined. ‣ Pen. Code, § 192(b).
- Due Caution and Circumspection. ‣ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld. ‣ *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony. ‣ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission. ‣ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. ‣ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez*, *supra*, ~~(1960)~~ 186 Cal.App.2d at p.~~433,~~ 440 ~~[8 Cal.Rptr. 863]~~.
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. ‣ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596

[12 Cal.Rptr.2d 637].

- Inherently Dangerous Assaultive Felonies ▸ -*People v. Bryant, supra,* ~~(2013)~~ 56 Cal.4th at p.~~959,~~ 964 ~~[157 Cal.Rptr.3d 522, 301 P.3d 1136]~~; *People v. Brothers, supra,* ~~(2015)~~ 236 Cal.App.4th at pp.~~24,~~ 33-34 ~~[186 Cal.Rptr.3d 98]~~.

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder, but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rptr.2d 553].)

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a "mitigating circumstance" that "reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley, supra,* ~~(2000)~~ 23 Cal.4th at p.~~82,~~ 91 ~~[96 Cal.Rptr.2d 451, 999 P.2d 675]~~ [discussing dissenting opinion of Mosk, J.].) Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*.

SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 246–260.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

850. Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness

You have heard testimony from _____ *<insert name of expert>* **regarding the effect of (battered women's syndrome/intimate partner battering/_____** *<insert other description used by expert for syndrome>***).**

(Battered women's syndrome/Intimate partner battering and its effects/_____ *<insert other description used by expert for syndrome>***) relate to a pattern of behavior that may be present in domestic abuse cases. Testimony as to (battered women's syndrome/the effects of intimate partner battering/_____** *<insert other description used by expert for syndrome>***) is offered only to explain certain behavior of an alleged victim of domestic abuse.**

_____'s *<insert name of expert>* **testimony about (battered women's syndrome/intimate partner battering/_____** *<insert other description used by expert for syndrome>***) is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].**

You may consider this evidence only in deciding whether or not _____'s *<insert name of alleged victim of abuse>* **conduct was ~~not in~~consistent with the conduct of someone who has been abused~~,~~ and in evaluating the believability of (his/her) testimony.**

New January 2006; Revised March 2017, April 2020, September 2022

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome)* when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6

Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

In *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574], the Supreme Court held that testimony from an expert in battered women's syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the "cycle of violence" and the frequency of recantation by victims of domestic abuse, without testifying specifically about "battered women's syndrome." (*Ibid.*) It is unclear if the court is required to give a cautionary admonition sua sponte when such evidence is admitted.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General,* and CALCRIM No. 332, *Expert Witness Testimony*.

See also CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

AUTHORITY

- Instructional Requirements. ▸ See Evid. Code, § 1107(a); *People v. Humphrey*, *supra,* (1996) 13 Cal.4th at p.1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Abuse Defined. ▸ Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined. ▸ Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse. ▸ See *People v. Brown*, *supra,* (2004) 33 Cal.4th at pp.892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Rehabilitate Victim's Credibility. ▸ *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [92 Cal.Rptr.2d 890] [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [68 Cal.Rptr.2d 772] [victim recanted].
- This Instruction Upheld. ▸ *People v. Sexton* (2019) 37 Cal.App.5th 457, 465-468 [250 Cal.Rptr.3d 496].

RELATED ISSUES

Assumptions Underlying Expert Testimony

It is unnecessary, and potentially misleading, to instruct that the expert testimony assumes that physical or mental abuse has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child sexual abuse accommodation syndrome].)

Definition and Preferred Name

In 2004, the Legislature amended Evidence Code section 1107(d), changing all references from "battered women's syndrome" to "intimate partner battering and its effects." Previous decisional law continues to apply. (Evid. Code, § 1107(f).) Battered women's syndrome has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." (*People v. Humphrey*, *supra*, ~~(1996)~~ 13 Cal.4th at pp.~~1073,~~ 1083–1084 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~.) The Supreme Court had previously noted that experts prefer to call the syndrome "expert testimony on battered women's experiences." (See ~~*People v. Humphrey, supra,*~~ *id.* ~~13 Cal.4th~~ at pp. 1083–1084, fn. 3.)

No Testimony on Actual State of Mind

While evidence is admissible "to explain how [a] defendant's asserted subjective perception of a need to defend herself 'would reasonably follow from the defendant's experience as a battered woman,' " an expert may not give an opinion "that the defendant *actually perceived* that she was in danger and needed to defend herself." (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400, 1401 [67 Cal.Rptr.2d 740] [§ 1107(a) codifies existing rules regarding battered women's syndrome testimony; original italics].) Section 1107 "does not create an exception to Penal Code section 29," which prohibits an expert who is testifying about a mental defect from testifying about whether a defendant had a required mental state. (*People v. Erickson, supra,* 57 Cal.App.4th at pp. 1401–1402 [syndrome was characterized as mental defect].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 49–52.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][C] (Matthew Bender).

908. Assault Under Color of Authority (Pen. Code, § 149)

The defendant is charged [in Count __] with (assaulting/ [or] beating) a person under color of authority and without lawful necessity [in violation of Penal Code section 149].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a *public officer*;**

2. **The defendant willfully [and unlawfully] (did an act that by its nature would directly and probably result in the application of force to _____**<*insert name of alleged victim*>**/touched _____**<*insert name of alleged victim*> **in a harmful or offensive manner);**

<*instruct with elements 3 and 4 for assault*>

[3. When the defendant did the act, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. **When the defendant did the act, (he/she) had the present ability to apply force to a person;]**

(3/5). When the defendant (did the act/touched _____ <*insert name of alleged victim*> **in a harmful or offense manner), the defendant was performing or purporting to perform (his/her) duties as a *public officer*;**

[AND]

(4/6). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) acted *without lawful necessity*(;/.)**

[AND]

[(5/7). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) did not act in (self-defense/ [or]defense of someone else).]**

[An officer of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

[A person employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a peace officer. A peace officer is a *public officer*.]**

[The duties of (a/an) _____ *<insert title of peace or public officer>* **include _____** *<insert job duties>*.**]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.]

[The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

***Without lawful necessity* means more force than was reasonably necessary under the circumstances.**

***Under color of authority* means clothed in the authority of law or when acting under pretense of law.**

[Special rules control the use of force by a peace officer.]

[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]

[A peace officer may use deadly force if (he/she):

1. **Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person;**

   OR

2. **Reasonably believed, based on the totality of the circumstances, that:**

   a. _____<*insert name of fleeing felon*> **was fleeing;**

   b. The force was necessary to arrest or detain _____<*insert name of fleeing felon* > **for the crime of _____**<*insert name of felony* >;

   c. The commission of the crime of _____ <*insert name of felony*> **created a risk of or resulted in death or serious bodily injury to another person;**

   AND

   d. _____<*insert name of fleeing felon*> **would cause death or serious bodily injury to another person unless immediately arrested or detained.]**

[*Deadly force* means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm.]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the

harm, but is one that, from appearances, must be instantly confronted and addressed.]

Totality of the circumstances **means all facts known to the peace officer at the time, including the conduct of the defendant and _____** <*insert name of officer*> **leading up to the use of deadly force.**

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

New September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5/7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court may instruct the jury on the appropriate definition of "public officer" from the statute. However, the court may not instruct the jury that the defendant was a public officer as a matter of law.

The court may give the bracketed sentence that begins "The duties of a _____ <*insert title . . .* > include" on request.

AUTHORITY

- Elements. ▸ Pen. Code, § 149.
- Objectively Reasonable Force to Effect Arrest. ▸ Pen. Code, § 835a(b).
- Violation of Statute Does Not Include Detention Without Lawful Authority. ▸ *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- Willful Defined. ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- Least Touching. ‣ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Public Officer. ‣ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Officer Includes De Facto Officer. ‣ *People v. Cradlebaugh* (1914) 24 Cal.App. 489, 491–492.
- Peace Officer Defined. ‣ Pen. Code, § 830 et seq.
- Without Lawful Necessity. ‣ *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling, supra,* 16 Cal.App.5th at pp. 298–299; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority. ‣ *People v. Plesniarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham,* but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry, supra,* 36 Cal.App.5th at p. 473, fn. 18.) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

RELATED ISSUES

Sexual Battery

Officer convicted of sexually assaulting an arrestee was properly convicted of both sexual battery and assault under color of authority because the latter offense is not a necessarily included offense in the former. (See *People v. Alford* (1991) 235 Cal.App.3d 799, 804–805 [286 Cal.Rptr. 762].)

1021. Oral Copulation by Fraud (Pen. Code, § 287(a), (j))

The defendant is charged [in Count __] with oral copulation by fraud [in violation of Penal Code section 287(j)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of oral copulation with someone else;**

2. **The other person submitted to the oral copulation because (he/she) believed the defendant was someone (he/she) knew, other than the defendant;**

AND

3. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.**

Oral copulation **is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

New January 2006; Revised February 2015, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

~~Former Penal Code section 288a(a) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

AUTHORITY

- Elements. Pen. Code, § 287(a), (j).

- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crime Against Decency, § 38.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [6] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

1036. Sodomy by Fraud (Pen. Code, § 286(j))

The defendant is charged [in Count __] with sodomy by fraud [in violation of Penal Code section 286(j)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sodomy with someone else;**

2. **The other person submitted to the sodomy because (he/she) believed the defendant was someone (he/she) knew, other than the defendant;**

AND

3. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that he was someone (he/she) knew, while intending to hide his own identity.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

New January 2006; Revised February 2015, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

~~Penal Code section 286(j) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. Pen. Code, § 286(j).

- Sodomy Defined. ▸ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

LESSER INCLUDED OFFENSES

- Attempted Sodomy by Fraud. ▸ Pen. Code, §§ 664, 286(j).

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [6] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

1051. Sexual Penetration by Fraud (Pen. Code, § 289(f))

The defendant is charged [in Count __] with sexual penetration by fraud [in violation of Penal Code section 289(f)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act of sexual penetration with another person;**

2. **At the time of the act, the defendant and the other person were not married to each other;**

3. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

4. **The other person submitted to the act because (he/she) believed the person (committing the act/causing the act to be committed) was someone (he/she) knew, other than the defendant;**

AND

5. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

New January 2006; Revised February 2015, April 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

~~Penal Code section 289(f) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(f).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration by Fraud. ▸ Pen. Code, §§ 664, 289(f).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 58.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [6] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

The defendant is charged [in Count __] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a caretaker of a dependent person;**

2. **The defendant~~, while serving as a caretaker,~~ willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on ~~that~~ a person;**

[AND]

3. **The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)**

<Give element 4 when instructing on force or violence>
[AND

4. **In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]**

A *lewd or lascivious act* is any touching of a person with the intent to sexually arouse the perpetrator or the other person. A *lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A *caretaker* is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <*insert specific facility from Pen. Code, § 288(f)(1)*>, that provides care for dependent persons or for those aged 65 or older.

A *dependent person* is someone who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have been significantly diminished by age.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent person is not required.]

[The *force* used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]

[*Duress* is a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the dependent person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the dependent person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[It is not a defense that the dependent person may have consented to the act.]

New January 2006; Revised February 2013, September 2017, March 2022, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with "The force must be substantially different." (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define "force" as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining "caretaker," insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Defenses—Instructional Duty

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the dependent adult consented to the act. (*People v. Montoya* (2021) 68 Cal.App.5th 980, 999 [284 Cal.Rptr.3d 18] ["nothing in the language of section 288, subdivisions (a) and (c)(2) indicates that lack of consent is an element of lewd conduct by a caretaker upon a dependent person."].) ~~In the context of lewd acts accomplished by force on a minor, there is disagreement as to whether knowing consent by the minor is an affirmative defense. (See *People v.*~~

~~*Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape by Force, Fear, or Threats*.)~~

AUTHORITY

- Elements. ▸ Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. ▸ Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. ▸ Pen. Code, § 288(f)(3).
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d at p. ~~38,~~ 50 ~~[216 Cal.Rptr. 221]~~; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. ▸ See Pen. Code, § 368(g).
- Menace Defined. ▸ See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. ▸ See *People v. McCurdy, supra,* ~~(1923)~~ 60 Cal.App. at p.~~499,~~ 502 ~~[213 P. 59]~~.
- Any Touching With Intent to Arouse. ▸ See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Dependent Person Touching Own Body Parts at Defendant's Instigation. ▸ See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d at p.~~38,~~ 52 ~~[216 Cal.Rptr. 221]~~; see also *People v. Griffin, supra,* ~~(2004)~~ 33 Cal.4th at pp.~~1015,~~ 1018–1019 ~~[16 Cal.Rptr.3d 891, 94 P.3d 1089]~~ [discussing *Cicero* and *Pitmon*].

- Lewd Defined. See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Defendant Need Not Be Victim's Caretaker. *People v. Montoya, supra,* 68 Cal.App.5th at p. 1001.

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon, supra,* (1985) 170 Cal.App.3d at p.38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas, supra,* (1994) 21 Cal.App.4th at pp.927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez, supra,* (1994) 7 Cal.4th at pp.847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of "force" as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero, supra,* (1984) 157 Cal.App.3d at p.465, 474 [204 Cal.Rptr. 582] disapproved on other grounds by *People v. Soto* (2011) 51 Cal.4th 229, 241–244 [119 Cal.Rptr.3d 775, 245 P.3d 410].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin, supra,* (2004) 33 Cal.4th at pp.1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero, supra,* (1984) 157 Cal.App.3d at p.465, 474] [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of "force" would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b), subsection (2).

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon, supra,* (1985) 170 Cal.App.3d at p.38, 52 [216 Cal.Rptr. 221] [duress].) Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal, supra,* (2004) 33 Cal.4th at pp.999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon, supra,* (1985) 170 Cal.App.3d at p.38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definition contained in Penal Code section 261

(rape). (See *People v. Cochran, supra,* (2002) 103 Cal.App.4th at pp.8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and former 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. ▸ Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. ▸ Pen. Code, §§ 664, 288(b)(2).
- Simple Battery Not Lesser Included Offense of Lewd Act on Dependent Person Under the Statutory Elements Test. ▸ *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263–1264 [209 Cal.Rptr.3d 371].

RELATED ISSUES

Developmental Disability

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41, 47–55, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iv], [v], [b]–[d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18, 12:19 (The Rutter Group).

1141. Distributing Obscene Matter Showing Sexual Conduct by a Minor (Pen. Code, §§ 311.1(a), 311.2(b))

The defendant is charged [in Count __] with distributing obscene matter that shows a minor engaging in sexual conduct [in violation of _____ *<insert appropriate code section[s]>***].**

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—sent or brought>

[1. The defendant (sent/ [or] brought) obscene matter into California [or caused obscene matter to be (sent/ [or] brought) into California];]

<Alternative 1B—possessed>

[1. The defendant (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] developed[,]/ [or] duplicated[,]/ [or] printed) obscene matter;]

<Alternative 1C— offered to distribute>

[1. The defendant offered to distribute obscene matter to someone else;]

<Alternative 1D—distributed>

[1. The defendant (distributed/ [or] showed/ [or] exchanged) obscene matter (to/with) someone else;]

2. When the defendant acted, (he/she) knew the character of the matter;

[AND]

3. When the defendant acted, (he/she) knew that the matter showed a person under the age of 18 years who was personally participating in or simulating sexual conduct(;/.)

<Give element 4 when instructing with alternative 1A, 1B, or 1C; see Bench Notes>

[AND

4. **When the defendant acted, (he/she) intended to (sell or distribute/distribute, show, or exchange/distribute) the matter to someone else [for money or other commercial benefit].]**

You must decide whether the matter at issue in this case meets the definition of obscene matter. Matter is *obscene* if, when considered as a whole:

1. **It shows or describes sexual conduct in an obviously offensive way;**

2. **A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value;**

AND

3. **An average adult person, applying contemporary statewide standards, would conclude it appeals to a prurient interest.**

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

***Matter* means any representation of information, data, or image, including any (film/filmstrip/photograph/negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/ [or] computer-generated image that contains any film or filmstrip).**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the matter on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.**

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However, you may not use the

standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value. When deciding whether the material is obscene, do not weigh its value against its prurient appeal.

[Matter is not considered obscene under the law if (all persons under the age of 18 depicted in the matter are legally emancipated/ [or] it only shows lawful conduct between spouses).]

[The depiction of nudity, by itself, does not make matter obscene. In order for matter containing nudity to be obscene, it must depict sexual activity and it must meet the requirements for obscenity listed above.]

[The depiction of sexual activity, by itself, does not make matter obscene. In order for matter depicting sexual activity to be obscene, it must meet the requirements for obscenity listed above.]

***Sexual conduct* means actual or simulated (sexual intercourse/ [or] oral copulation[,]/ [or] anal intercourse[,]/ [or] anal oral copulation[,]/ [or] _____ *<insert other sexual conduct as defined in Pen. Code, § 311.4(d)(1)>*). An act is simulated when it gives the appearance of being sexual conduct.**

The People must prove that the defendant knew the obscene nature of the matter but do not need to prove that the defendant knew whether the matter met the definition of obscene.

[*To distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

[*Commercial benefit* means receipt of, or intent to receive, financial value or compensation.]

[A person accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

[In deciding the matter's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/

publicity) indicate that the matter was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the matter lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the matter showed persons under the age of 16 years engaging in sexual conduct. You must decide the weight, if any, to give this evidence.]

[In deciding whether, applying contemporary statewide standards, the matter appeals to a prurient interest, you may consider whether similar matter is openly shown in the community. You must decide the weight, if any, to give this evidence.]

[If it appears from the nature of the matter or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the matter must be judged based on its intended audience.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

[A person who possesses obscene matter for his or her own personal use is not guilty of this crime.]

<Defense: Legitimate scientific or educational purpose>
[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific, or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Law enforcement agent>
[The defendant is not guilty of this offense if (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of criminal offenses. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting as a member [or agent] of a law enforcement or prosecuting agency. If the People

have not met this burden, you must find the defendant not guilty of this crime.

[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]]

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give one of the alternatives A–D depending on the charges and evidence in the case. Give element 4 when instructing with alternative 1A, 1B, or 1C. (*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [143 Cal.Rptr. 604]; *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [67 Cal.Rptr. 28]; *In re Klor* (1966) 64 Cal.2d 816, 819 [51 Cal.Rptr. 903, 415 P.2d 791].) When giving alternative 1A, select "sell or distribute" in element 4. When giving alternative 1B, select "distribute, show, or exchange" in element 4. When giving alternative 1C, select "distribute." Do not give element 4 with alternative 1D. No published case has held that distributing or showing obscene material requires specific intent. Give the bracketed phrase "for money or other commercial benefit" in element 4 if the defendant is charged under Penal Code section 311.2(b).

Give any of the other bracketed paragraphs on request.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e); 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

If there is sufficient evidence that the defendant was acting as a law enforcement agent, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 311.2(e).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower*, *supra*, ~~(2002)~~ 28 Cal.4th at pp.~~457,~~ 478–479 ~~[122 Cal.Rptr.2d 326, 49 P.3d 1067]~~.)

AUTHORITY

- Elements. ▸ Pen. Code, §§ 311.1(a), 311.2(b).
- Specific Intent to Distribute or Exhibit. ▸ *People v. Young*, *supra*, ~~(1977)~~ 77 Cal.App.3d Supp. at p.~~10,~~ 12 ~~[143 Cal.Rptr. 604]~~ [possession with intent to distribute or exhibit]; see *People v. Burrows*, *supra*, ~~(1968)~~ 260 Cal.App.2d at p.~~228,~~ 231 ~~[67 Cal.Rptr. 28]~~ [preparation or publication with specific intent to distribute]; *In re Klor*, *supra*, ~~(1966)~~ 64 Cal.2d at p.~~816,~~ 819 ~~[51 Cal.Rptr. 903, 415 P.2d 791]~~.
- Obscene Matter Defined. ▸ Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81 [127 Cal.Rptr. 317, 545 P.2d 229]; *Miller v. California* (1973) 413 U.S. 15, 24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [107 S.Ct. 1918, 95 L.Ed.2d 439].
- Contemporary Community Standards. ▸ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Prurient Interest Defined. ▸ *Bloom v. Municipal Court*, *supra*, ~~(1976)~~ 16 Cal.3d at p.~~71,~~ 77 ~~[127 Cal.Rptr. 317, 545 P.2d 229]~~.
- Sexual Conduct Defined. ▸ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Person Defined. ▸ Pen. Code, § 311(c).
- Distribute Defined. ▸ Pen. Code, § 311(d).
- Knowingly Defined. ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Exhibit Defined. ▸ Pen. Code, § 311(f).
- Matter Designed for Deviant Sexual Group. ▸ Pen. Code, § 311(a)(1); see *People v. Young*, *supra*, ~~(1977)~~ 77 Cal.App.3d Supp. at pp.~~10,~~ 14–15 ~~[143 Cal.Rptr. 604]~~.

- Commercial Exploitation Is Probative of Matter's Nature. ‣ Pen. Code, § 311(a)(2); *People v. Kuhns*, *supra*, ~~(1976)~~ 61 Cal.App.3d at pp.~~735,~~ 748–753 ~~[132 Cal.Rptr. 725]~~.
- Knowledge That Matter Depicts Child Under 16 Is Probative of Matter's Nature. ‣ Pen. Code, § 311(a)(3).
- Similar Matter Shown in Community. ‣ *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Exceptions to Statutory Prohibitions. ‣ Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); Pen. Code, § 311.8.
- Agent Defined. ‣ See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527] [in context of entrapment].
- Taken or Considered as a Whole. ‣ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Obscenity Contrasted With Sex. ‣ *Roth v. United States*, *supra*, ~~(1957)~~ 354 U.S. at p.~~476,~~ 487 ~~[77 S.Ct. 1304, 1 L.Ed.2d 1498]~~.
- Obscenity Contrasted With Nudity. ‣ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Possessing For Personal Use Not a Crime. ‣ *Stanley v. Georgia* (1969) 394 U.S. 557, 568 [89 S.Ct. 1243, 22 L.Ed.2d 542].
- Constructive vs. Actual Possession. ‣ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Commercial Benefit Defined. ‣ *People v. Wimer* (2022) 74 Cal.App.5th 113, 129 [289 Cal.Rptr.3d 164].

LESSER INCLUDED OFFENSES

- Attempted Distribution of Obscene Matter. ‣ Pen. Code, §§ 664, 311.1(a).
- Attempted Distribution of Obscene Matter for Commercial Consideration. ‣ Pen. Code, §§ 664, 311.2(b).

RELATED ISSUES

Advertising Obscene Matter Involving Minors
It is a felony to advertise for sale or distribution any obscene matter knowing that it depicts a minor engaged in sexual conduct. (Pen. Code, § 311.10.)

Employing or Using Minor to Pose in Film
It is a felony to employ, use, or persuade a minor to engage in or assist others in posing or modeling for the purpose of preparing a commercial or noncommercial film or other medium involving sexual conduct by a minor. (See Pen. Code, § 311.4(b), (c).) Producing child pornography and posting it on the Internet to induce others to trade such pornography without making a monetary profit satisfies the "commercial purposes" requirement of Penal Code section 311.4(b). (*People v. Cochran* (2002) 28 Cal.4th 396, 406–407 [121 Cal.Rptr.2d 595, 48 P.3d 1148].)

Excluded Conduct
Neither section 311.1 nor 311.2 applies to law enforcement and prosecuting agencies investigating or prosecuting criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses. (Pen. Code, §§ 311.1(b), 311.2(e); see Pen. Code, § 311.8(a) ["defense" that act committed in aid of legitimate scientific or educational purpose].) Nor do these sections apply to depictions of a minor who is legally emancipated. (Pen. Code, §§ 311.1(c), 311.2(f); see Fam. Code, § 7000 et seq. [emancipation of minors].)

Telephone Services
A telephone corporation (see Pub. Util. Code, § 234) does not violate section 311.1 or 311.2 by carrying or transmitting messages described in these sections, or by performing related activities in providing telephone services. (Pen. Code, §§ 311.1(d), 311.2(g).)

Expert Testimony Not Required
Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the obscene nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 94–106, 131.

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 486-492.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

1181. Sexual Abuse of Animal (Pen. Code, §§ 286.5~~, 597f~~)

The defendant is charged [in Count __] with sexual abuse of an animal [in violation of Penal Code section 286.5].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual~~ly~~ contact with~~assaulted~~ an animal;

AND

~~1.~~2. The defendant did so with the intent of sexual arousal or gratification, abuse, or financial gain~~arousing or gratifying (his/her) own sexual desire;~~.

~~AND~~

~~2. The animal was (abandoned or neglected/_____ <insert other description of "animal protected by Pen. Code, § 597f">).~~

***Sexual contact* means any act between a person and an animal involving contact between the sex organs or anus of one and the mouth, sex organs, or anus of the other, or, without a bona fide veterinary or animal husbandry purpose, the insertion, however slight, of any part of the body of a person or any object into the vaginal or anal opening of an animal, or the insertion of any part of the body of an animal into the vaginal or anal opening of a person.**

[*Animal* means any nonhuman creature, whether alive or dead.]

<Defense: Veterinarian>
[The defendant is not guilty of this offense if (he/she) was a licensed veterinarian who performed a lawful and accepted practice related to veterinary medicine. The People have the burden of proving beyond a reasonable doubt that the defendant was not a veterinarian who performed a lawful and accepted practice. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Veterinary Technician>
[The defendant is not guilty of this offense if (he/she) was a certified veterinary technician who, under the guidance of a licensed veterinarian, performed a lawful and accepted practice related to veterinary medicine. The

People have the burden of proving beyond a reasonable doubt that the defendant was not a veterinary technician who performed a lawful and accepted practice under the guidance of a licensed veterinarian. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Conduct Authorized>
[The defendant is not guilty of this offense if (he/she) performed any artificial insemination of animals for reproductive purposes, any accepted animal husbandry practices such as raising, breeding, or assisting with the birthing process of animals or any other practice that provides care for an animal, or to any generally accepted practices related to the judging of breed conformation. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to perform the act. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence that the defendant was a licensed veterinarian or a certified veterinary technician, or was otherwise authorized to perform the act, give the relevant bracketed *Defense* paragraph.

~~Penal Code section 286.5 only applies to an "animal protected by Section 597f." Penal Code section 597f broadly establishes the authority of public officers to take possession of and care for abandoned and neglected animals. Thus, the committee has included element 3.~~

AUTHORITY

- Elements. ▸ Pen. Code, §§ 286.5~~; 597f~~.
- Sexual Contact Defined. ▸ Pen. Code, § 286.5(c)(2).
- Animal Defined. ▸ Pen. Code, § 286.5(c)(1).
- Exceptions. ▸ Pen. Code, § 286.5(b).

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.12[1] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

1192. Testimony on Rape Trauma Syndrome

You have heard testimony from _____ *<insert name of expert>* **regarding rape trauma syndrome.**

Rape trauma syndrome relates to a pattern of behavior that may be present in rape cases. Testimony as to the trauma syndrome is offered only to explain certain behavior of an alleged victim of rape.

_____'s *<insert name of expert>* **testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].**

You may consider this evidence only in deciding whether or not _____'s *<insert name of alleged rape victim>* **conduct was ~~not in~~consistent with the conduct of someone who has been raped, and in evaluating the believability of the alleged victim~~her testimony~~.**

New January 2006; Revised April 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 2019) Sua Sponte Instructions, § 2.163; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] [instruction on CSAAS only required on request].)

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness Testimony*.

AUTHORITY

- Rebut Inference That Victim's Conduct Inconsistent With Claim of Rape. ▸ *People v. Bledsoe* (1984) 36 Cal.3d 236, 247–248 [203 Cal.Rptr. 450, 681 P.2d 291].
- Syndrome Evidence Not Admissible to Prove Rape Occurred. ▸ *People v. Bledsoe, supra,* ~~(1984)~~ 36 Cal.3d at p.~~236,~~ 251 ~~[203 Cal.Rptr. 450, 681 P.2d 291]~~.

COMMENTARY

It is unnecessary and potentially misleading to instruct that the expert testimony assumes that a rape has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child molestation].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, § 53.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:7 (The Rutter Group).

1193. Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.

Child sexual abuse accommodation syndrome relates to a pattern of behavior that may be present in child sexual abuse cases. Testimony as to the accommodation syndrome is offered only to explain certain behavior of an alleged victim of child sexual abuse.

_____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].

You may consider this evidence only in deciding whether or not _____'s <*insert name of alleged victim of abuse*> conduct was ~~not in~~consistent with the conduct of someone who has been molested, and in evaluating the believability of the alleged victim~~(his/her) testimony~~.

New January 2006; Revised August 2016, April 2020, March 2021, September 2022

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give this instruction when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 921 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness*.

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. ▸ *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].
- This Instruction Upheld. ▸ *People v. Munch* (2020) 52 Cal.App.5th 464, 473–474 [266 Cal.Rptr.3d 136]; *People v. Gonzales* (2017) 16 Cal.App.5th 494, 504 [224 Cal.Rptr.3d 421].

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker, supra,* ~~(1988)~~ 203 Cal.App.3d at p.~~385,~~ 394 ~~[249 Cal.Rptr. 886]~~.) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez, supra,* ~~(1989)~~ 208 Cal.App.3d at p.~~721,~~ 735 ~~[256 Cal.Rptr. 446]~~; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior
An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301 [283 Cal.Rptr. 382, 812 P.2d 563].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 54–56.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][B] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:7 (The Rutter Group).

1300. Criminal Threat (Pen. Code, § 422)

The defendant is charged [in Count __] with having made a criminal threat [in violation of Penal Code section 422].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____**<*insert name of complaining witness or member[s] of complaining witness's immediate family*>**;**

2. **The defendant made the threat ~~-~~(orally/in writing/by electronic communication device);**

3. **The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____**<*insert name of complaining witness*>**];**

4. **Under the circumstances, ~~T~~the threat was so clear, immediate, unconditional, and specific that it communicated to _____**<*insert name of complaining witness*> **a serious intention and the immediate prospect that the threat would be carried out;**

5. **The threat actually caused _____**<*insert name of complaining witness*>**to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];**

AND

6. **_____'s**<*insert name of complaining witness*> **fear was reasonable under the circumstances.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Sustained fear **means fear for a period of time that is more than momentary, fleeting, or transitory.**

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of "electronic communication" on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining "immediate family" should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements. ▸ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined. ▸ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances. ▸ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler, supra,* ~~(2000)~~ 85 Cal.App.4th at pp.~~745,~~ 752–753 ~~[102 Cal.Rptr.2d 269]~~; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime T~~t~~hat Will Result in Great Bodily Injury Judged on Objective Standard. ▸ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422. ▸ *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].

- Threat Not Required to Be Unconditional On Its Face. ‣ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Melhado, supra,* 60 Cal.App.4th at p. 1540; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- ~~Conditional Threat May Be True Threat, Depending on Context ‣ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].~~
- Immediate Ability to Carry Out Threat Not Required. ‣ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear. ‣ *In re Ricky T., supra,* ~~(2001)~~ 87 Cal.App.4th at pp.~~1132,~~ 1139–1140 ~~[105 Cal.Rptr.2d 165]~~; *People v. Solis, supra,* ~~(2001)~~ 90 Cal.App.4th at p.~~1002,~~ 1024 ~~[109 Cal.Rptr.2d 464]~~; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required. ‣ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague. ‣ *People v. Maciel, supra,* ~~(2003)~~ 113 Cal.App.4th at pp.~~679,~~ 684–686 ~~[6 Cal.Rptr.3d 628]~~.
- Attempted Criminal Threats. ‣ *People v. Chandler, supra,* ~~(2014)~~ 60 Cal.4th at p.~~508,~~ 525 ~~[176 Cal.Rptr.3d 548, 332 P.3d 538]~~.
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter. ‣ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

COMMENTARY

This instruction uses the current nomenclature "criminal threat," as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called "terrorist threat"]. (See also Stats. 2000, ch. 1001, § 4.)

Because a threat need only be "so … unconditional," a conditional threat may nonetheless violate Penal Code section 422 if it conveys a gravity of purpose and the immediate prospect of execution. (See *People v. Bolin, supra,* 18 Cal.4th at pp. 339–340, disapproving *People v. Brown, supra,* 20 Cal.App.4th at p. 1256.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ‣ See Pen. Code, § 422; *People v. Toledo, supra,* ~~(2001)~~ 26 Cal.4th ~~221,~~at pp. 230–231 ~~[109 Cal.Rptr.2d 315, 26 P.3d 1051]~~.

- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.*, *supra,* ~~(2004)~~ 33 Cal.4th at pp.~~620,~~ 628–629 ~~[16 Cal.Rptr.3d 61, 93 P.3d 1007]~~, a minor gave two classmates a poem containing language that referenced school shootings. The court held that "the text of the poem, understood in light of the surrounding circumstances, was not 'as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.' " (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler*, *supra,* ~~(2000)~~ 85 Cal.App.4th at p.~~745,~~ 755, fn. 4 ~~[102 Cal.Rptr.2d 269]~~; *People v. Melhado*, *supra,* ~~(1998)~~ 60 Cal.App.4th at pp.~~1529,~~ 1534, 1539 ~~[70 Cal.Rptr.2d 878]~~.)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 24–30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1] (Matthew Bender).

1403. Limited Purpose of Evidence of Gang Activity

You may consider evidence of gang activity only for the limited purpose of deciding whether:

- **[The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/ [and] enhancement[s]/ [and] special circumstance allegations) charged(;/.)]**

[OR]

- **[The defendant had a motive to commit the crime[s] charged(;/.)]**

[OR]

- **[The defendant actually believed in the need to defend (himself/herself~~)~~/ [or]someone else) and acted under fear of imminent death or great bodily injury to (himself/herself/ [or]someone else)(;/.)]**

[OR]

- **[The defendant acted in the heat of passion(;/.)]**

[OR]

- **[_____ <*insert other reason court admitted gang evidence*>.]**

[You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.]

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that (he/she) has a disposition to commit crime.

New January 2006; Revised September 2022

BENCH NOTES

Instructional Duty

On request, the court must give a limiting instruction when evidence of gang activity has been admitted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) There is, however, no sua sponte duty to instruct the jury on this issue.

AUTHORITY

- Instruction Must Be Given on Request. ‣ *People v. Hernandez, supra,* ~~(2004)~~ 33 Cal.4th ~~1040,~~at pp. 1051–1052 ~~[16 Cal.Rptr.3d 880, 94 P.3d 1080]~~.
- This Instruction Upheld. ‣ *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1170 [91 Cal.Rptr.3d 874]; *People v. Kaihea* (2021) 70 Cal.App.5th 257, 265 [285 Cal.Rptr.3d 334].
- Defense of Others. ‣ *People v. Kaihea, supra,* 70 Cal.App.5th at pp. 266–267.

SECONDARY SOURCES

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.03[2] (Matthew Bender).

1404–1499. Reserved for Future Use

1704. Possession of Burglary Tools (Pen. Code, § 466)

The defendant is charged [in Count __] with possessing [a]burglary tool[s][in violation of Penal Code section 466].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed [a](picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <*insert other instrument or tool*>);**

2. **When the defendant possessed the (picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <*insert other instrument or tool*>), (he/she) intended to use the item[s] to break or enter into a (building/railroad car/aircraft/vessel/trailer coach/vehicle);**

   AND

3. **When the defendant possessed the (picklock[s][,]/ [or]crow[bar][s][,]/ [or]keybit[s][,]/ [or]screwdriver[s][,]/ [or]vise grip[s][,]/ [or]pliers[,]/ [or]water-pump pliers[,]/ [or]slidehammer[s][,]/ [or]slim jim[s][,]/ [or]tension bar[s][,]/ [or]lock pick gun[s][,]/ [or]tubular lock pick[s][,]/ [or]bump key[s][,]/ [or]floor-safe door puller[s][,]/ [or]master key[s][,]/ [or]ceramic or porcelain spark plug chips or pieces/ [or] _____ <*insert other instrument or tool*>), (he/she) intended to commit [a](theft/ [or]_____<*insert one or more felonies*>) within a (building/railroad car/aircraft/vessel/trailer coach/vehicle).**

[To decide whether the defendant intended to commit _____ <*insert one or more felonies*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People allege that the defendant intended to commit _____ <*insert one or more felonies*>. You may not find the defendant guilty unless you all agree that (he/she) intended to commit one of those crimes when (he/she) possessed the item. You do not all have to agree on which one of those crimes (he/she) intended to commit.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A *vehicle* is a device by which any person or property may be propelled, moved, or drawn upon a highway, except a device moved exclusively by human power or used exclusively upon stationary rails or tracks.]

[A *trailer coach* is a vehicle, other than a motor vehicle, designed for human habitation or human occupancy for industrial, professional, or commercial purposes, for carrying property on its own structure, and for being drawn by a motor vehicle.]

[An *aircraft* is a manned contrivance used or designed for navigation of, or flight in, the air requiring certification and registration as prescribed by federal statute or regulation.]

New September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Penal Code section 466 encompasses additional conduct. This instruction addresses only possession of burglary tools.

AUTHORITY

- Elements. ▸ Pen. Code, § 466.
- Intent Requirement. ▸ *In re H.W.* (2019) 6 Cal.5th 1068, 1076 [245 Cal.Rptr.3d 51, 436 P.3d 941].
- Statute Prohibits Constructive Possession. ▸ *People v. Bay* (2019) 40 Cal.App.5th 126, 133 [253 Cal.Rptr.3d 26].
- Constructive vs. Actual Possession. ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Vehicle Defined. ▸ Veh. Code, § 670.
- Trailer Coach Defined. ▸ Veh. Code, § 635.
- Aircraft Defined. ▸ Public Utilities Code, § 21012.

COMMENTARY

Other Instrument or Tool

In addition to items expressly listed as burglary tools in Penal Code section 466, the statute also contemplates a violation based on possession of some "other instrument or tool." In *In re H.W., supra,* 6 Cal.5th at p. 1076, the California Supreme Court held that even if a nonenumerated item such as pliers qualified as an "other instrument or tool," a person may not be convicted of violating Penal Code section 466 without "a showing that the defendant intended to use the instrument or tool possessed to break or effectuate physical entry into a structure in order to commit theft or a felony within the structure." For example, in *In re H.W.*, pliers used to remove a security tag, rather than to enter the store, were found not to be a burglary tool.

2040. Unauthorized Use of Personal Identifying Information (Pen. Code, § 530.5(a))

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information [in violation of Penal Code section 530.5(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully obtained someone else's personal identifying information;**

2. **The defendant willfully used that information for an unlawful purpose;**

AND

3. **The defendant used the information without the consent of the person whose identifying information (he/she) was using.**

Personal identifying information **means _____**<*insert relevant items from Pen. Code, § 530.55(b)*> **or an equivalent form of identification.**

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity, or any other legal entity.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property[,]/ [or] medical information)/ [[or] _____ <*insert other unlawful purpose*>**] without the consent of the other person].**

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New January 2006; Revised August 2006, June 2007, August 2009, April 2010, August 2012, August 2013, September 2022

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (See, e.g., *People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 [69 Cal.Rptr.3d 42].)

AUTHORITY

- Elements. ▸ Pen. Code, § 530.5(a).
- Personal Identifying Information Defined. ▸ Pen. Code, § 530.55(b).
- Person Defined. ▸ Pen. Code, § 530.55(a).
- No Personation Requirement. ▸ *People v. Barba* (2012) 211 Cal.App.4th 214, 223-224 [149 Cal.Rptr.3d 371].
- Proof of Knowledge that Information Belonged to a Real Person Not Required. ▸ *People v. Zgurski* (2021) 73 Cal.App.5th 250, 264 [288 Cal.Rptr.3d 214].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 210, 212.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1], [4][h] (Matthew Bender).

2131. Refusal—Enhancement (Veh. Code, §§ 23577, 23612)

If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then decide whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).

To prove this allegation, the People must prove that:

1. **A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);**

2. **The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;**

~~[AND]~~

3. **The defendant willfully refused to (submit to a test/ [or] to complete the test)~~(./~~;~~)~~**

~~[~~AND

4. **The peace officer lawfully arrested the defendant and had reasonable cause to believe that defendant was driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153.~~[~~**

To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:

1. **(He/She) may choose a blood(,/ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]**

2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**

3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**

4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08 percent or more;**

AND

5. **Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.**

   <Short Alternative; see Bench Notes>
   [(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

   <Long Alternative; see Bench Notes>
   [A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;

   AND

   B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions,

suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">*.**]**

[A defendant's silence in response to an officer's request to (submit to a chemical test/ [or] complete a chemical test) may be a refusal. If you conclude that the defendant was silent in response to an officer's request to (submit to a chemical test/[or] complete a chemical test), you must decide whether that conduct was a refusal.]

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

New January 2006; Revised August 2009, March 2017, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the enhancement.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b), (c).)

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) ~~If there is a factual issue whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether giving bracketed element 4 is appropriate and whether the jury should be instructed on these additional issues.~~ For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of "fully advised" **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of "ten years" for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the "seven-year" time period.

The jury must determine whether the witness is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). (~~(~~*Ibid.*~~)~~) However, the court may not instruct the jury that the witness was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). (~~(~~*Ibid.*~~)~~) If the witness is a police officer, give the bracketed

sentence that begins with "A person employed as a police officer." If the witness is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

AUTHORITY

- Enhancements. ▸ Veh. Code, §§ 23577 & 23612.
- Statute Constitutional. ▸ *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading. ▸ *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].
- Silence in Response to Request May Constitute Refusal. ▸ *Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th~~th~~ 73, 82-84 [109 Cal.Rptr.3d 906].

RELATED ISSUES

Admonition Must Convey Strong Likelihood of Suspension

It is insufficient for the officer to advise the defendant that his or her license "could" be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra,* 6 Cal.3d at p. 906; *Giomi, supra,* 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed

"[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra,* 107 Cal.App.3d at p. 363, the court set aside the defendant's license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant's own "obstreperous conduct . . . prevented the officer from completing the admonition," or where the defendant's own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

Defendant Incapable of Understanding Due to Injury or Illness

When the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d 752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra,* 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension when defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. *(Ibid.)*

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 293–302.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[2][f], [4][a], [b] (Matthew Bender).

2132–2139. Reserved for Future Use

2500. Illegal Possession, Eetc.,~~,~~ of Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) _____ <*insert type of weapon* > [in violation of Penal Code section[s] _____<*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____ <*insert type of weapon*>;**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the _____ <*insert type of weapon*>;**

[AND]

<Alternative 3A—object capable of innocent uses>

[3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon (;/.)]

<Alternative 3B—object designed solely for use as weapon>

[3. The defendant knew that the object (was (a/an) _____ <*insert characteristics of weapon, e.g., "unusually short shotgun, penknife containing stabbing instrument"*>/could be used _____ <*insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense"*>)(;/.)]

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND

4. The defendant intended to sell it.]

[The People do not have to prove that the defendant intended to use the object as a weapon.]

*<Give only if alternative 3A is given.>***[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]**

<Give only if alternative 3B is given.>

[(A/An) _____ *<insert type of weapon>* **means _____** *<insert appropriate definition>***.]**

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>
[A _____*<insert type of weapon specified in element 3B>* **is _____***<insert defining characteristics of weapon>.*

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]]

[(A/An) _____ *<insert prohibited firearm>* **does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the following weapons: _____ *<insert description of each weapon when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be**

manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

<Defense: Statutory Exemptions>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend/buy/receive) (a/an) _____ *<insert type of weapon>* **if _____** *<insert exception>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____** *<insert type of weapon>***. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised August 2006, April 2008, February 2012, February 2015, March 2017, March 2019, September 2022

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed "as a weapon." (*People v. Fannin*~~, *supra,*~~ (2001) 91 Cal.App.4th 1399, ~~at p.~~ 1404 [111 Cal.Rptr.2d 496]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object "has no conceivable innocent function" (*People v. Fannin*, *supra,* ~~(2001)~~ 91 Cal.App.4th at p. ~~1399,~~ 1405 ~~[111 Cal.Rptr.2d 496]~~), or when the item is specifically designed to be one of the weapons defined in the

Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . .".

AUTHORITY

- Elements. ▸ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, ~~22010,~~ 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.

- Need Not Prove Intent to Use. ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb*, *supra,* ~~(1965)~~ 63 Cal.2d at pp.~~614,~~ 620–621, fn. 9 ~~[47 Cal.Rptr. 772, 408 P.2d 100]~~.
- Knowledge Required. ▸ *People v. Rubalcava*, *supra,* ~~(2000)~~ 23 Cal.4th at pp.~~322,~~ 331–332 ~~[96 Cal.Rptr.2d 735, 1 P.3d 52]~~; *People v. Gaitan*, *supra,* ~~(2001)~~ 92 Cal.App.4th at p.~~540,~~ 547 ~~[111 Cal.Rptr.2d 885]~~.
- Specific Intent Required for Offer to Sell. ▸ *People v. Jackson*, *supra,* ~~(1963)~~ 59 Cal.2d ~~468,~~at pp. 469–470 ~~[30 Cal.Rptr. 329, 381 P.2d 1]~~.

- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. ▸ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon. ▸ *People v. Grubb, supra,* ~~(1965)~~ 63 Cal.2d ~~614,~~at pp. 620–621 ~~[47 Cal.Rptr. 772, 408 P.2d 100]~~; *People v. Fannin, supra,* ~~(2001)~~ 91 Cal.App.4th ~~1399,~~at p. 1404 ~~[111 Cal.Rptr.2d 496]~~.
- Definition of Blackjack, etc. ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. ▸ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. ▸ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. ▸ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession. ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon. ▸ *People v. King, supra,* ~~(2006)~~ 38 Cal.4th ~~617,~~at p. 628 ~~[42 Cal.Rptr.3d 743, 133 P.3d 636]~~.
- Intent to Use as a Weapon. ▸ *People v. Baugh* (2018) 20 Cal.App.5th 438, 446 [228 Cal.Rptr.3d 898].

COMMENTARY

Element 3—Knowledge

"Intent to use a weapon is not an element of the crime of weapon possession." (*People v. Fannin, supra,* ~~(2001)~~ 91 Cal.App.4th at p.~~1399,~~ 1404 ~~[111 Cal.Rptr.2d 496]~~.) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that "[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020." (*People v. Rubalcava, supra,* ~~(2000)~~ 23 Cal.4th at pp.~~322,~~ 331–332 ~~[96 Cal.Rptr.2d 735, 1 P.3d 52]~~.) Applying this holding to possession of other

weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object "as a weapon." (*People v. Gaitan, supra,* ~~(2001)~~ 92 Cal.App.4th at p.~~540,~~ 547 ~~[111 Cal.Rptr.2d 885]~~; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra,* 92 Cal.App.4th at p. 547, for example, the court considered the possession of "metal knuckles," defined in now-repealed Penal Code section 12020(c)(7) as an object "worn for purposes of offense or defense." The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that "the instrument may be used for purposes of offense or defense." (*Ibid~~d~~.* ~~at p. 547.~~)

Similarly, in *People v. Taylor, supra,* 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that "[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword."

Finally, *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a "slungshot." The court held that "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*." (*Ibid.* [emphasis in original]; see also *People v. Grubb, supra,* ~~(1965)~~ 63 Cal.2d at pp.~~614,~~ 620–621 ~~[47 Cal.Rptr. 772, 408 P.2d 100]~~ [possession of modified baseball bat].)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was "sawed off" but that failure to give instruction was harmless if error].)

It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211-212.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

2670. Lawful Performance: Peace Officer

The People have the burden of proving beyond a reasonable doubt that _____ <*insert name, excluding title*> was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name[s] of all offense[s] with lawful performance as an element*>.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>
[A peace officer may legally detain someone if [the person consents to the detention or if]:

1. **Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;**

AND

2. **A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>
[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.]

<Arrest without warrant for most misdemeanors or infractions>
[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>
[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>***) without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or]** _____ *<insert misdemeanor not requiring commission in officer's presence>***). However, it is not required that the offense be committed in the officer's presence.]**

_____ *<insert crime that was basis for arrest>* **is (a/an) (felony/misdemeanor/infraction).**

<Entering home without warrant>
[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

1. **The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

   AND

2. **Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has

probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

<*When giving either paragraph A on unlawful detention or paragraph B on unlawful arrest, give the following paragraph also, if applicable*>**
[Photographing or recording a *peace officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime nor a basis for (reasonable suspicion to detain/ [nor] probable cause to arrest).]**

<C. Use of Force by a Peace Officer>
[Special rules control the use of force.]

[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]

[A peace officer may use deadly force if (he/she):

1. **Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person;**

   OR

2. **Reasonably believed, based on the totality of the circumstances, that:**

   a. _____<*insert name of fleeing felon*> **was fleeing;**

   b. The force was necessary to arrest or detain _____<*insert name of fleeing felon* > **for the crime of _____**<*insert name of felony* >;

   c. The commission of the crime of _____ <*insert name of felony*> **created a risk of or resulted in death or serious bodily injury to another person;**

   AND

   d. <*insert name of fleeing felon*> **would cause death or serious bodily injury to another person unless immediately arrested or detained.]**

[*Deadly force* means any use of ~~is~~ force that creates a substantial risk of causing death or serious bodily injury. Deadly force~~It~~ includes, but is not limited to, the discharge of a firearm. ~~It does not require that the encounter result in the death of the person against whom the force was used.~~]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.]

***Totality of the circumstances* means all facts known to the peace officer at the time, including the conduct of the defendant and _____** *<insert name of officer>* **leading up to the use of deadly force.**

~~[In considering the totality of the circumstances, you may consider whether:~~

- **~~[● Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)]~~**
- **~~[● Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)]~~**
- **~~[● The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] himself or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]~~**

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

<D. Use of Force by a Person Being Arrested or Detained>
[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any

weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him or her.]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016, March 2022, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that

bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with "However, you may not find the defendant guilty of resisting arrest."

When giving the bracketed section under the heading "A. Unlawful Detention," if there is a factual issue about whether the person was in fact "detained," the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed "B. Unlawful Arrest," two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading "Arrest without warrant for most misdemeanors or infraction." If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer's presence give the bracketed paragraph under the heading "Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence." The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins*, *supra,* ~~(1993)~~ 14 Cal.App.4th at p.~~761,~~ 777 ~~[17 Cal.Rptr.2d 743]~~.) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. *(Ibid.)*

AUTHORITY

- Instructional Duty. ▸ *People v. Gonzalez*, *supra,* ~~(1990)~~ 51 Cal.3d at p.~~1179,~~ 1217 ~~[275 Cal.Rptr. 729, 800 P.2d 1159]~~; *People v. Olguin*, *supra,* ~~(1981)~~ 119 Cal.App.3d at pp.~~39,~~ 46–47 ~~[173 Cal.Rptr. 663]~~; *People v. Castain*, *supra,* ~~(1981)~~ 122 Cal.App.3d at p.~~138,~~ 145 ~~[175 Cal.Rptr. 651]~~; *People v. White*, *supra,* ~~(1980)~~ 101 Cal.App.3d at pp.~~161,~~ 166–168 ~~[161 Cal.Rptr. 541]~~.
- Lawful Detention. ▸ *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].

- Lawful Arrest. ▸ Pen. Code, §§ 834–836, 841.
- Probable Cause Defined. ▸ *People v. Celis, supra,* ~~(2004)~~ 33 Cal.4th at p.~~667,~~ 673 ~~[16 Cal.Rptr.3d 85, 93 P.3d 1027]~~; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer's Training and Experience Relevant. ▸ *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. ▸ Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home ▸ *People v. Wilkins, supra,* ~~(1993)~~ 14 Cal.App.4th at p.~~761,~~ 777 ~~[17 Cal.Rptr.2d 743]~~; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force. ▸ Pen. Code, §§ 692, 693.
- Deadly Force Defined. ▸ Pen. Code, § 835a(e).
- Excessive Use of Deadly Force. ▸ Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful. ▸ *People v. White, supra,* ~~(1980)~~ 101 Cal.App.3d at pp.~~161,~~ 166–168 ~~[161 Cal.Rptr. 541]~~.
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. ▸ *People v. Curtis, supra,* ~~(1969)~~ 70 Cal.2d at p.~~347,~~ 356 ~~[74 Cal.Rptr. 713, 450 P.2d 33]~~.
- Merely Photographing or Recording Officers Not a Crime. ▸ Pen. Code, § 148(g).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham*, but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57

Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving "a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant." (*People v. Gonzalez, supra,* ~~(1990)~~ 51 Cal.3d at p.~~1179,~~ 1222~~ [275 Cal.Rptr. 729, 800 P.2d 1159]~~.) On the other hand, "the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement." (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. *(Ibid.)*

Lawfulness of Officer's Conduct Based on Objective Standard

The rule "requires that the officer's lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant's mens rea." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant's belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

SECONDARY SOURCES

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* §§ 11.01-11.06 (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [2] (Matthew Bender).

2672. Lawful Performance: Resisting Unlawful Arrest With Force

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The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <*insert other crime charged, e.g., resisting arrest*>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]

[A peace officer may use deadly force if (he/she):

1. **Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person;**

   OR

2. **Reasonably believed, based on the totality of the circumstances, that:**

   a. _____<*insert name of fleeing felon*> was fleeing;

   b. The force was necessary to arrest or detain _____<*insert name of fleeing felon*> for the crime of _____<*insert name of felony*>;

c. The commission of the crime of _____ <*insert name of felony*> created a risk of or resulted in death or serious bodily injury to another person;

AND

d. _____<*insert name of fleeing felon*> would cause death or serious bodily injury to another person unless immediately arrested or detained.]

[*Deadly force* means any use of~~is~~ force that creates a substantial risk of causing death or serious bodily injury. Deadly force~~It~~ includes, but is not limited to, the discharge of a firearm.~~ It does not require that the encounter result in the death of the person against whom the force was used.~~]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to,]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.]

***Totality of the circumstances* means all facts known to the peace officer at the time, including the conduct of the defendant and _____** *<insert name of officer>* **leading up to the use of deadly force.**

~~**[In considering the totality of the circumstances, you may consider whether:**~~

- ~~**[● Prior to the use of force, the officer (identified/ [or] attempted to identify) himself or herself as a peace officer and (warned/ [or] attempted to warn) that deadly force may be used(;/.)]**~~
- ~~**[● Prior to the use of force, the officer had objectively reasonable grounds to believe the defendant was aware that the officer was a peace officer and that deadly force may be used(;/.)]**~~

~~[● The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] himself or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]~~

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ *<insert crimes>***].**

New January 2006; Revised March 2022, September 2022

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- No Right to Forcibly Resist Arrest. ▸ Pen. Code, § 834a.
- Applies to Arrest, Not Detention. ▸ *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer. ▸ *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].
- Use of Reasonable Force in Response to Excessive Force Is Complete Defense. ▸ *People v. White, supra,* ~~(1980)~~ 101 Cal.App.3d at p.~~161,~~ 168 ~~[161 Cal.Rptr. 541]~~.
- May Not Be Convicted of Resisting Unlawful Arrest. ▸ *People v. White, supra,* ~~(1980)~~ 101 Cal.App.3d at p.~~161,~~ 166 ~~[161 Cal.Rptr. 541]~~; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].
- Deadly Force Defined. ▸ Pen. Code, § 835a(e).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer's actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham*, but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer's use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

SECONDARY SOURCES

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[2][b], 73.15[2] (Matthew Bender).

3149. Personally Used Firearm: Intentional Discharge Causing Injury or Death (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**

2. **The defendant intended to discharge the firearm;**

AND

3. **The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct~~, natural, and probable consequence~~ *natural and probable consequence* of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against/intended by) the defendant[of which the intentional discharge of a firearm was a *natural and probable consequence*]. A person is subject to prosecution if he or she committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised February 2012, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . .

." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the firearm "during the commission of" the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In element 3, give the bracketed phrase "who was not an accomplice to the crime" if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was a natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

If~~, in element 3,~~ the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancement. Pen. Code, §§ 667.61(e)(3), 12022.53(d).

- Firearm Defined. ▸ Pen. Code, § 16520.
- "During Commission of" Felony. ▸ *People v. Jones, supra,* ~~(2001)~~ 25 Cal.4th at pp.~~98,~~ 109–110 ~~[104 Cal.Rptr.2d 753, 18 P.3d 674]~~; *People v. Masbruch, supra,* ~~(1996)~~ 13 Cal.4th at p.~~1001,~~ 1014 ~~[55 Cal.Rptr.2d 760, 920 P.2d 705]~~; *People v. Taylor, supra,* ~~(1995)~~ 32 Cal.App.4th at p.~~578,~~ 582 ~~[38 Cal.Rptr.2d 127]~~.
- Proximate Cause. ▸ *People v. Jomo K. Bland, supra,* ~~(2002)~~ 28 Cal.4th at pp.~~313,~~ 335–338 ~~[121 Cal.Rptr.2d 546, 48 P.3d 1107]~~.
- Accomplice Defined. ▸ See Pen. Code, § 1111; *People v. Verlinde, supra,* ~~(2002)~~ 100 Cal.App.4th at pp.~~1146,~~ 1167–1168 ~~[123 Cal.Rptr.2d 322]~~; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Accomplice Exception Attaches to Intended Crime. ▸ *People v. Flores, supra,* 129 Cal.App.4th at p. 182; *People v. Morales, supra,* 67 Cal.App.5th at pp. 340–341.

RELATED ISSUES

Need Not Personally Cause Injury or Death

"[Penal Code] Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' (italics added), but only that he 'proximately caused' the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*People v. Jomo K. Bland, supra,* ~~(2002)~~ 28 Cal.4th at p.~~313,~~ 336 ~~[121 Cal.Rptr.2d 546, 48 P.3d 1107]~~ [italics in original].)

Person Injured or Killed Need Not Be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052 [12 Cal.Rptr.3d 325, 88 P.3d 56], the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The ~~C~~court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The ~~C~~court observed that "the phrase, 'any person other than an accomplice,' does not mean 'the victim' of the underlying crime." (*Id.* at p. 1055.) ~~Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)~~

Multiple Enhancements for Single Injury

The ~~C~~court in *Oates* (*supra,*~~(2004)~~ 32 Cal.4th at p. 1056~~48 [12 Cal.Rptr.3d 325, 88 P.3d 56]; discussed above~~) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available. ~~(*Id.* at p. 1056.)~~ The

~~C~~court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to "the long-recognized, judicially-created exception for cases involving multiple victims of violent crime." (*Id.* at p. 1062.) ~~Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)~~

Multiple Enhancements May Not Be Imposed Based on Multiple Participants
In *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1054, fn. 3 [21 Cal.Rptr.3d 869], the defendant and two others simultaneously shot at the decedent. The defendant was convicted of personally inflicting death by use of a firearm. (*Id.* at p. 1053; Pen. Code, § 12022.53(d).) In addition to the sentence for personally using a firearm, the trial court also imposed two sentences under Penal Code section 12022.53(e)(1) based on the other two participants having also fired at the decedent (*Ibid.* ~~*People v. Cobb, supra*, at p. 1053.~~) The Court of Appeal reversed the latter two enhancements, holding that Penal Code section 12022.53(f) did not permit multiple sentence enhancements based on multiple participants in one crime. (*Id.* at p. 1058.)

Self-Defense and Imperfect Self-Defense
Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

3150. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]

To prove that the defendant intentionally discharged a firearm, the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**

AND

2. **The defendant intended to discharge the firearm.**

If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct~~, natural, and probable consequence~~ *natural and probable consequence* of the act and the (injury/ [or] death) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person

would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime (charged against/intended by) the defendant[of which the intentional discharge of a firearm was a *natural and probable consequence*]. A person is subject to prosecution if he or she committed the crime or if:

1. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>

The People have the burden of proving each of these allegations beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised February 2012, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, or CALCRIM No. 3149,

Personally Used Firearm: Intentional Discharge Causing Injury or Death, whichever is appropriate.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

In the paragraph following the elements, give the bracketed phrase "who was not an accomplice to the crime" if there is evidence that the victim was an accomplice to the intended crime of which the intentional discharge of a firearm was the natural and probable consequence. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182 [28 Cal.Rptr.3d 232]; *People v. Morales* (2021) 67 Cal.App.5th 326, 340–341 [282 Cal.Rptr.3d 151].)

If~~, in the paragraph following the elements,~~ the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533~~–~~535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor]

with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Enhancement. ▸ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined. ▸ Pen. Code, § 16520.
- "During Commission of" Felony. ▸ *People v. Jones, supra,* ~~(2001)~~ 25 Cal.4th at pp.~~98,~~ 109–110 ~~[104 Cal.Rptr.2d 753, 18 P.3d 674]~~; *People v. Masbruch, supra,* ~~(1996)~~ 13 Cal.4th at pp.~~1001,~~ 1014 ~~[55 Cal.Rptr.2d 760, 920 P.2d 705]~~; *People v. Taylor, supra,* ~~(1995)~~ 32 Cal.App.4th at p.~~578,~~ 582 ~~[38 Cal.Rptr.2d 127]~~.
- Proximate Cause. ▸ *People v. Jomo K. Bland, supra,* ~~(2002)~~ 28 Cal.4th at pp.~~313,~~ 335–338 ~~[121 Cal.Rptr.2d 546, 48 P.3d 1107]~~.
- Accomplice Defined. ▸ See Pen. Code, § 1111; *People v. Verlinde, supra,* ~~(2002)~~ 100 Cal.App.4th at pp.~~1146,~~ 1167–1168 ~~[123 Cal.Rptr.2d 322]~~; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Accomplice Exception Attaches to Intended Crime. ▸ *People v. Flore, supra,* 129 Cal.App.4th at p. 182; *People v. Morales, supra,* 67 Cal.App.5th at pp. 340–341.

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, and CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.30[5] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04 (Matthew Bender).

3151–3159. Reserved for Future Use

3406. Mistake of Fact

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *<insert crime[s]>***.**

If you find that the defendant believed that _____ *<insert alleged mistaken facts>* **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** *<insert crime[s]>***.**

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ *<insert crime[s]>***, you must find (him/her) not guilty of (that crime/those crimes).**

New January 2006; Revised April 2008, December 2008, August 2014, September 2018, September 2022

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it, ~~and~~ there is substantial evidence supporting the defense, and the instruction is legally correct. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Speck* (2022) 74 Cal.App.5th 784, 791 [289 Cal.Rptr.3d 816] [No sua sponte duty to instruct on mistake of fact defense].) ~~The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.~~

The mistake of fact instruction must negate an element of the crime. (*People v. Speck, supra,* 74 Cal.App.5th at p. 791.)

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. ~~-~~(*People v.*

Gonzales (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt.– (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. ▸ Pen. Code, § 26(3).
- Burden of Proof. ▸ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].

- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. ▸ *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Ibid~~d~~. ~~at pp. 829–833~~*; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 47.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06 (Matthew Bender).

3456. Initial Commitment of Offender With A Mentall~~y~~ Health Disorder~~ed Offender~~ as Condition of Parole (Pen. Code, § 2970)

The petition alleges that _____ <*insert name of respondent*> is an offender with a mentall~~y~~ health disorder~~ed offender~~.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. **(He/She) was convicted of _____ <*specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)*> and received a prison sentence for a fixed period of time;**

2. **(He/She) had a severe mental disorder;**

3. **The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;**

4. **(He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;**

5. **The severe mental disorder either was not in remission, or could not be kept in remission without treatment;**

AND

6. **Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____ *<insert date of hearing, if desired>*], **the person:**

<Give one or more alternatives, as applicable>

[1. Was physically violent except in self-defense(;/.) [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family(;/.) [or]]

[3. Intentionally caused property damage(;/.) [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____ *<insert name of respondent>* **is an offender with a mentall~~y~~ health disorder~~ed offender~~ is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

New December 2008; Revised August 2014, September 2017, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is an offender with a mental ~~ly~~ health disorder~~ed offender~~.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Offender With A Mentally Health Disordered Offender*.

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*, CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant post-trial instructions. These instructions may need to be modified.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

AUTHORITY

- Elements and Definitions. ▸ Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. ▸ Pen. Code, § 2966(b); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement. ▸ Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. ▸ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. ▸ Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. ▸ *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].

- Evidence of Later Improvement Not Relevant. ‣ Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].
- Board of Parole Hearings. ‣ Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval. ‣ *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].
- Proof of Recent Overt Act Not Required. ‣ Pen. Code, § 2962(g).
- 90-Day Treatment Period Includes Extension Under Pen. Code, § 2963. ‣ *People v. Parker* (2020) 44 Cal.App.5th 286, 289 [257 Cal.Rptr.3d 493].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 763-767.

3457. Extension of Commitment as Offender With A Mentally Health Disordered Offender (Pen. Code, § 2970)

The petition alleges that _____ <*insert name of respondent*> is an offender with a mentally health disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Parole Hearings Prison Terms]:

1. **(He/She) (has/had) a severe mental disorder;**

2. **The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;**

AND

3. **Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ <*insert the date the trial commenced*>, the person:

<Give one or more alternatives, as applicable.>

[1. Was physically violent except in self-defense(;/.) [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family(;/.) [or]]

[3. Intentionally caused property damage(;/.) [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____<*insert name of respondent*>** is an offender with a mentally health disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

New December 2008; Revised September 2017, September 2020, September 2022

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is an offender with a mentally health disordered offender.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Offender With A Mentally Health Disordered Offender as Condition of Parole.*

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings,* CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions* and any other relevant post-trial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with "To prove this allegation" and use the past tense for an on-parole recommitment pursuant to Penal Code section

2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder That Was Basis For Initial Commitment. *People v. Torfason* (2019) 38 Cal.App.5th 1062, 1067-68 [252 Cal.Rptr.3d 11]; *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].
- Proof of Recent Overt Act Not Required. Pen. Code, § 2962(g).
- Redesignation of ~~MDO~~ Qualifying Conviction to Misdemeanor Under Penal Code Section 1170.18 Does Not Bar Recommitment. *People v. Foster* (2019) 7 Cal.5th 1202, 1211 [251 Cal.Rptr.3d 312, 447 P.3d 228].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 767.

3472. Right to Self-Defense: May Not Be Contrived

A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

[However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

New January 2006; Revised February 2016, March 2017, September 2022

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].) The California Supreme Court has held that language in CALJIC No. 5.55, which is similar to this instruction, correctly states California law on self-defense and imperfect self-defense. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762 [269 P.3d 543]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].)

Give the bracketed sentence if there is evidence that the ~~This instruction may require modification in the rare case in which a~~ defendant intended~~s~~ to provoke only a non-deadly confrontation and the victim responded~~s~~ with deadly force. (*People v. Eulian*~~,~~ (2016) 247 Cal.App.4th 1324, 1334 [203 Cal.Rptr.3d 101]; ~~see also~~ *People v. Ramirez* (2015) 233 Cal.App.4th 940, 952 [183 Cal.Rptr.3d 267].)

AUTHORITY

- Instructional Requirements. ▸ *People v. Olguin*, *supra*, ~~(1995)~~ 31 Cal.App.4th ~~1355,~~at p. 1381 ~~[37 Cal.Rptr.2d 596]~~; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw*, *supra*, ~~(1924)~~ 194 Cal. at p.~~1,~~ 26 ~~[227 P. 156]~~.
- This Instruction Generally a Correct Statement of Law.~~–~~ ▸ *People v. Eulian, supra,*~~(2016)~~ 247 Cal.App.4th at p.~~1324,~~ 1334 ~~[203 Cal.Rptr.3d 101]~~.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 75, 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.11[2][a] (Matthew Bender).

3473. Reserved for Future Use

Item number: 05

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Circulate for comment (out of cycle)

Title of proposal: Rules and Forms: Name and Gender Change Forms for Minors to Implement Assembly Bill 218 and Assembly Bill 421

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt form NC-530; revise forms NC-500, NC-500-INFO, NC-510G, NC-520; revoke form NC-530G

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

*Staff contact (*name, phone and e-mail*): Kendall W. Hannon, 415-865-7653, kendall.hannon@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): April 6, 2022
Project description from annual agenda: AB 218 and AB 1578 establish new procedures and orders relating to petitions seeking a name change order or a judgment recognizing their change of gender to female, male, or nonbinary, allowing for orders to change birth certificates of petitioner or of petitioner's child, and marriage certificates. Several current forms relating to such petitions must be revised to conform to the new law and requirements, and new forms will need to be developed to implement the law.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
After a related proposal was circulated for public comment, the Legislature enacted AB 421 which required further substantive revisions to the NC-500 series forms. Additional public comment is therefore needed on these revisions which were required by the new legislature.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SP22-08

Title
Rules and Forms: Name and Gender Change Forms for Minors to Implement Assembly Bill 218 and Assembly Bill 421

Proposed Rules, Forms, Standards, or Statutes
Adopt form NC-530; revise forms NC-500, NC-500-INFO, NC-510G, NC-520; revoke form NC-530G

Proposed by
Civil and Small Claims Advisory Committee
Hon. Tamara Wood, Chair

Action Requested
Review and submit comments by September 19, 2022

Proposed Effective Date
January 1, 2023

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov
Kendall W. Hannon, 415-865-7653
kendall.hannon@jud.ca.gov

Executive Summary and Origin

The Civil and Small Claims Advisory Committee is proposing revisions and additions to Judicial Council forms and the revocation of one form used to request recognition of a change of gender and change of name. Proposed forms implementing statutory changes in Assembly Bill 218 (Stats. 2021, ch. 577) were circulated for comment between April and May 2022. Among other things, AB 218 made significant changes to requirements for petitions for recognition of gender change for minors (removing the requirement for consent by, or notice to, a minor's parents) and added a new category of petitioners who may make such petitions on behalf of minors, placing certain requirements on them.

Shortly after comment on the proposed forms closed, the Legislature enacted Assembly Bill 421 (Stats. 2022, ch. 40), urgency legislation that modifies AB 218's provisions in significant ways. Because AB 421's amendments immediately went into effect upon signing by the Governor, they need to be incorporated in the proposed forms before the forms go into effect in January 2023. The proposed forms for minors' petitions have all been further revised to reflect these statutory changes, and have been reorganized to make them clearer.

Background

Assembly Bill 218 (2021)

Relevant to the instant invitation to comment, AB 218 (see Link A) changed provisions relating to petitions for orders recognizing gender changes (and new birth certificates reflecting gender changes) for minors. AB 218 eliminated provisions providing that if the petition does not include the signatures of both living parents, any non-signing living parent must be served with a copy of the petition and an order to show cause (OSC) with a date and time for a hearing.[1]

At the same time as eliminating the provision for serving any living, non-signing parents, AB 218 added a requirement for serving the minor's grandparents with a notice of hearing (and so required a hearing be set in advance of issuing an OSC in such cases), although this requirement was triggered only if either or both of the parents are deceased or unable to be located, and the petition was signed by either a guardian or an attorney guardian ad litem for a juvenile dependent.[2]

The other new notice requirement in AB 218 relating to minors was for issuance and service of an OSC if a petition for a minor's change of gender did not include a signature required in Health and Safety Code section 103430(b)(1),[3] that is, a signature by at least one parent, a guardian, a juvenile attorney, or—if both parents are deceased—a near relative or friend. (The committee found it difficult to envision when such an OSC would be issued, because if the petition does not include a signature required in new subdivision (b)(1), it would not be a valid petition to begin with, since the statute provides that the petition must be signed by an individual from one of the categories.)

These provisions of AB 218 were subsequently modified by Assembly Bill 421.

Assembly Bill 421 (2022)

In June 2022, before the advisory committee's proposed form revisions were acted on by the Judicial Council, the Legislature enacted AB 421 (see Link B), which further amends Health and Safety Code section 103430 as it relates to minors' petitions for name changes in three ways.

First, AB 421 adds back the requirement that any living parents who have not signed the minor's petition be given notice and an opportunity to object to their child's petition for recognition of change of gender.[4]

Second, the new law modifies when and how a minor's grandparents are entitled to notice of a petition to recognize the minor's gender change. An OSC why a minor's gender change petition should not be granted is to be served on the minor's living grandparents only if the petition is

[1] Former Health & Saf. Code, § 103430(e)(1). "Former" as used in citations hereafter refers to provisions enacted by AB 218. "New" refers to provisions enacted by AB 421.
[2] Former Health & Saf. Code, § 103430(c)(2).
[3] Former Health & Saf. Code, § 103430(e)(1).
[4] New Health & Saf. Code, § 103430(e)(1).

signed by a guardian or guardian ad litem and "*all* parents are deceased or cannot be located" (rather than if either one is deceased, as in the prior law).[5] By requiring an OSC be served on the minor's grandparents—rather than a "notice of hearing"—AB 421 clarifies that Health and Safety Code section 103430(h) applies to petitions where a minor's grandparents receive notice and, as a result, a hearing on the petition may not be held unless objections have been filed.[6]

Finally, AB 421 shortened the deadline by which a petitioner must serve any required OSC from 30 days to four week. This means that the time frame for serving orders to show cause and the timeframe for filing objections for gender change petitions are measured in the same unit of time (weeks).

Prior Circulation

A proposal with revisions to all the name change and gender change recognition forms was previously circulated for comment in spring 2022.[7] The proposed forms relating to minors' petitions for recognition of change of gender and sex identifier (the forms in the NC-500 form series) are being recirculated in light of the committee proposing significant further revisions to these forms required by AB 421's changes. All the forms will move forward together to the council after the public has had the opportunity to comment on the further revisions to the forms in the NC-500 series.[8]

The Proposal

The forms in the NC-500 series are for petitions to recognize a minor's change of gender, potentially combined with a name change. The proposed forms include a petition, an information sheet, a declaration, and an OSC. The committee previously proposed revisions to these forms and proposed a new order form developed to reflect the changes in AB 218. Further substantive revisions are now proposed to reflect the changes in AB 421. The proposed forms have been revised[9] as follows and are attached:

- *Petition for Recognition of Minor's Change of Gender and Sex Identifier and for Issuance of New Birth Certificate and Change of Name* (form NC-500) (formerly *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name*). The proposed form has been reorganized for clarity, with subheadings dividing the form into sections for "Information about Petitioner," "Recognition of Change of Gender and Sex Identifier," and "Request for Change of Name." Substantively, new item 2 has been included that notes that the petitioner is either a

[5] New Health & Saf. Code, § 103430(e)(2) (emphasis added).
[6] *See* New Health & Safety Code, § 103430(h).
[7] *See Rules and Forms: Name and Gender Change Forms to Implement Assembly Bill 218* (SPR22-04), https://www.courts.ca.gov/documents/spr22-04.pdf
[8] Comments have already been received on the proposed forms and revisions in the NC-100 and NC-300 series.
[9] The new revisions in forms NC-510G and 530 are highlighted in yellow while the surviving earlier revisions are highlighted in gray. Changes to proposed revised forms NC-500, NC-500-INFO, and NC-520 are not highlighted as those forms have been significantly revised and would require highlighting the entire form..

California resident or is seeking a change to a California birth certificate. Additionally, to implement AB 421's notice and OSC requirements, the section relating to recognition of change of gender and sex identifier has been revised to include requests that the court issue appropriate orders to show cause if either any living parent of the minor has not signed the petition (item 6), or all parents are deceased and the petition is being filed by a guardian or guardian ad litem (item 7).

- *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Sex Identifier* (form NC-500-INFO) (formerly *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name*). The information sheet has been substantially revised to reflect the change in NC-500's structure as well as the proposed revisions to the OSC (form NC-520). Additionally, item 6 has been revised to discuss AB 421's notice and OSC requirements.

- *Declaration of Guardian or Juvenile Attorney* (form NC-510G) (formerly *Declaration of Guardian or Dependency Attorney*). This form must be completed to include the information required when a guardian or dependency attorney signs with or for the minor. It was previously revised to implement AB 218. Only one further revision to this form was required after AB 421: the parenthetical in item 4 has been revised to require the information about the minor's grandparents only if all parents are deceased or cannot be located.

- *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-520). This proposed form was renamed and revised as part of the spring invitation-to-comment cycle to implement AB 218's provisions for issuing an OSC to any required signatory who had not signed the petition. The form has been further revised in order to comply with the notice and OSC changes in AB 421. As revised, it now implements the requirements of amended subdivision (e)(1), which requires that the court issue an OSC directed to parents when a petition is filed that does not include the signatures of all living parents, and amended subdivision (e)(2) which requires the same order, directed to grandparents, when all parents are deceased and the petition is filed by a guardian or guardian ad litem.[10] The proposed form also covers the OSC required by Code of Civil Procedure section 1277.5 when the petitioner seeks a decree of name change to conform to gender identity. As a result of these revisions, courts will be able to use a single OSC form to address all situations in which an OSC is required because of a

[10] New Health & Safety Code, § 103430(e)(1), (2). Before AB 421, such consolidation was not possible because in the latter situation, the statute required that a notice of hearing — rather than an OSC — be issued to the minor's living grandparents. *See* Former Health & Saf. Code, § 103430(c)(2).

minor's gender and name change petition.[11] The proposed form does not contain a notice of hearing because a hearing is to be set only if objections are received to an OSC.[12]

- *Order Recognizing Minor's Change of Gender and Sex Identifier and for Issuance of New Birth Certificate* (form NC-530). This proposed new form was developed and circulated in the spring to serve as a stand-alone order form for all petitions for minors. The single further revision to this form is minor: item 2 has been added to reflect that the petitioning minor must be a California resident or be seeking a change to a California birth certificate in order to bring the petition.

- *Order Recognizing Minor's Change of Gender and for Issuance of New Birth Certificate* (form NC-530G). The committee continues to propose that this form be revoked in light of proposed form NC-530 now taking its place.

Alternatives Considered

The committee did not consider the alternative of taking no action. The forms for gender-change petitions are mandatory and, particularly with the changes of law in this area, the petitions and accompanying orders are so complex that failure to have up-to-date forms would be burdensome for courts as well as parties.

The committee considered having three separate forms for orders to show cause on minor's petitions: one for petitions with name change requests included, one for petitions not signed by all living parents, and one for petitions where both parents are deceased and guardians or juvenile attorneys are required to notice the grandparents. The committee concluded that a single form that could be used for all three situations would be easier for both courts and participants to handle.

Fiscal and Operational Impacts

The statutory changes will require education of court staff and judicial officers. The new forms are intended to facilitate the courts' and parties' implementation of the changes in statute and will also require education, and may require some changes to computerized case management systems as well.

[11] In light of this, the committee is no longer recommending the form *Order to Show Cause—Petition by Guardian or Guardian ad Litem* (form NC-520G)), which was previously circulated for comment as part of the spring invitation-to-comment cycle.
[12] *See* Code Civ. Proc., § 1277.5(c); new Health & Saf. Code, § 103430(h).

Request for Specific Comments

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

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would six weeks from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? (Note, the new laws are operative as of January 1, 2023.)

Attachments and Links

1. Forms NC-500, NC-500-INFO, NC-510G, NC-520, NC-530, and NC-530G, at pages 7–17.
2. Link A: Assembly Bill 218, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB218
3. Link B: Assembly Bill 421, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB421

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:		**DRAFT**
NAME:			
FIRM NAME:			**08.09.2022**
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	
TELEPHONE NO.:	FAX NO.:		**not approved by Judicial Council**
E-MAIL ADDRESS:			
ATTORNEY FOR (*name*):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF			
STREET ADDRESS:			
MAILING ADDRESS:			
CITY AND ZIP CODE:			
BRANCH NAME:			
PETITION OF *(name of each petitioner):*			

PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND SEX IDENTIFIER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE
☐ **AND CHANGE OF NAME**

CASE NUMBER:

Use this form only for a petition relating to a minor. (Petitioners 18 years or older must use form NC-300.) Before completing this petition, read the *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Sex Identifier* (form NC-500-INFO).

- If you are seeking a name change in addition to recognition of gender change, complete items 8 or 9. If you are only seeking recognition of gender change, skip these items.
- If the petition is being brought by a guardian, an attorney appointed as guardian ad litem for a dependent minor (Welf. & Inst. Code, § 326.5), or an attorney for a minor under the jurisdiction of the juvenile court (Welf. & Inst. Code, § 601 or 602), you must also complete *Declaration of Guardian or Juvenile Attorney* (form NC-510G).

INFORMATION ABOUT PETITIONER

1. This request is being made by *(minor's present name)*: and *(check one of the following)*
   a. ☐ two parents *(names):*
   b. ☐ one parent *(name):*
   c. ☐ guardian *(name):*
   d. ☐ attorney for minor under jurisdiction of juvenile court *(name):*
   e. ☐ near relative or friend *(check only if both parents of minor are deceased and no guardian has been appointed)*
   Name and relationship to minor:
2. Petitioning minor is a California resident or seeks a change to a California birth certificate.
3. Parents of minor *(check one item below):*
   a. ☐ The minor has no living parent.
   b. ☐ The minor has no living parent other than the parent or parents who have signed this petition.
   c. ☐ Neither the minor nor the adult petitioner has any information about whether any non-signing parent is living.
   d. ☐ The minor has one or more living parents who have not signed the petition *(specify names and addresses):*

   (Parent's name): (Address):

   (Parent's name): (Address):

4. ☐ *(Check if petition is filed by a guardian or attorney appointed for minor under jurisdiction of juvenile court.)*
   This petition is supported by the information contained in attached *Declaration of Guardian or Juvenile Attorney* (form NC-510G).

RECOGNITION OF CHANGE OF GENDER AND SEX IDENTIFIER

5. Petitioners request a decree recognizing that minor's gender and sex identifier is changed to:
   a. ☐ female. b. ☐ male. c. ☐ nonbinary.

Form Adopted for Mandatory Use
Judicial Council of California
NC-500 [Rev. January 1, 2023]

Code of Civil Procedure, § 1277.5;
Health and Safety Code, §§ 103430, 103435
www.courts.ca.gov

PETITION OF *(name of each petitioner):*	CASE NUMBER:

6. ☐ *(Check if petition does not include the signature of all living parents.)* Petitioners requests that the court issue an order on form NC-520 directing any living parent who did not sign this petition to file written objections to show cause why this petition for recognition of minor's change of gender and sex identifier should not be granted. (Form NC-520 is filed along with this document.)

7. ☐ *(Check if petition is filed by a guardian or guardian ad litem for minor, and all parents are deceased or cannot be located.)* Petitioners request that the court issue an order on form NC-520 directing that any living grandparent file written objections to show cause why the petition for recognition of gender change and sex identifier should not be granted. (Form NC-520 is filed along with this document.)

REQUEST FOR CHANGE OF NAME

8. ☐ A decree of change of name for the minor has already been obtained and a certified copy of the decree is attached.

9. ☐ Petitioners request that the court decree that the minor's name is changed to conform to minor's gender identity to *(proposed name)*:

   a. Petitioners provide the additional required information in support of this request for name change on the attached *Name and Information About the Person Whose Name Is to Be Changed* (form NC-110).

   b. This is the right court for the petition to change name, because petitioner *(check (1) or (2))*:

      (1) ☐ is a resident of this county.
      (2) ☐ has a birth certificate that was issued in this county.

   c. Petitioners request that the court issue an order on form NC-520 directing all interested persons to file written objections to show cause why the petition for change of name should not be granted. (Form NC-520 is filed along with this document.)

10. Petitioners request the court to order that a new birth certificate be issued reflecting the recognition of gender change and any name change sought by this petition.

11. The number of attachments included in this petition is *(specify number)*:

DECLARATION

I *(minor's present name):* declare under penalty of perjury under the laws of the State of California that the request for a change in gender to *(check one):* ☐ **female** ☐ **male** ☐ **nonbinary** is to conform my legal gender to my gender identity and is not for any fraudulent purpose.

Date:

(TYPE OR PRINT NAME OF MINOR)

▶ (SIGNATURE OF MINOR)

Date:

(TYPE OR PRINT NAME OF PETITIONING ADULT and RELATIONSHIP TO MINOR)

▶ (SIGNATURE OF PETITIONING ADULT)

Date:

(TYPE OR PRINT NAME OF PETITIONING ADULT and RELATIONSHIP TO MINOR)

▶ (SIGNATURE OF PETITIONING ADULT)

Date:

(TYPE OR PRINT NAME OF PETITIONING ADULT and RELATIONSHIP TO MINOR)

▶ (SIGNATURE OF PETITIONING ADULT)

Date:

(TYPE OR PRINT NAME OF PETITIONER'S ATTORNEY)

▶ (SIGNATURE OF PETITIONER'S ATTORNEY)

INSTRUCTIONS FOR FILING PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND SEX IDENTIFIER

1. Who Can File

Anyone who lives in California or was born here (or got married or had children here) can ask a court for an order recognizing a change of gender and sex identifier and for issuance of a new birth certificate reflecting that change. If the person asking for the order is under 18, the petition must be made on form NC-500 and signed by an adult. (If the person is 18 or older, use form NC-300.) The petition for a minor must be signed by at least one of the following (it can be signed by more than one):

- one or both of the minor's parents
- the minor's guardian
- an attorney appointed to act as guardian ad litem for a dependent minor (under Welfare and Institutions Code section 326.5)
- an attorney representing a minor in the juvenile justice system (under Welfare and Institutions Code section 601 or 602)
- if both of minor's parents are deceased and no guardian has been appointed, a near relative or friend

2. Where to File

The petition to recognize a change of gender and sex identifier may be filed in the superior court of any county in California, but if the petition **includes a request to change the minor's name**, it must be filed either in the superior court in the county where the minor whose name is to be changed presently resides, or in the county where the minor's birth certificate was issued.

If the petition is filed by an attorney appointed as guardian ad litem for a dependent minor, or one representing a minor alleged or adjudged to be a person described in Welfare and Institutions Code section 601 or 602, the petition must be filed in the court having jurisdiction over the minor.

3. What Forms Are Required

All petitioners need an original and two copies of each of the following forms:

- *Petition for Recognition of Minor's Change of Gender and Sex Identifier and for Issuance of New Birth Certificate and Change of Name* (form NC-500)
- *Order Recognizing Minor's Change of Gender and Sex Identifier and for Issuance of New Birth Certificate* (form NC-530)
- *Civil Case Cover Sheet* (form CM-010)

Some petitioners will also need an original and two copies of each of the following forms:

- *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-520) This form is needed if
  (1) the petition is not signed by all living parents of the minor;
  (2) the petition is filed by a guardian, guardian ad litem, or attorney acting for a minor under Welfare and Institutions Code section 601 or 602, **and** all of minor's parents are deceased or cannot be located; or
  (3) the petition seeks a decree changing the minor's name.
- *Name and Information About the Person Whose Name Is to Be Changed* (form NC-110) (This form is needed if the petition seeks a decree changing the minor's name.)
- *Declaration of Guardian or Juvenile Attorney* (form NC-510G) (This form is needed if the petition is filed by a guardian, by an attorney guardian ad litem, or an attorney acting for a minor under Welfare and Institutions Code section 601 or 602.)

4. Completing the Petition

Use form NC-500 only for a person under 18. (Adults seeking an order recognizing change of gender must use form NC-300.)

Section of form titled Information About Petitioner:

- In item 1, provide the name of the minor and the name and relationship of the adult who is signing the petition. One of the persons listed in that item must sign. (See paragraph 1 above as to which adults can sign.)
- Item 2 asserts that the petitioning minor is a California resident or is seeking a change to a California birth certificate.
- Item 3 asks whether the minor has any living parents. If the minor has any living parents who did **not** sign the petition, provide the name and address of any non-signing parent in item 3d.
- In item 4, check the box if the petition is signed by a guardian or dependency attorney appointed as a guardian ad litem, or an attorney acting for a minor under Welfare and Institutions Code section 601 or 602, **and** attach *Declaration of Guardian or Juvenile Attorney* (form NC-510G) to the petition.

Section of form titled Recognition of Change of Gender and Sex Identifier:

- In item 5, check the box to indicate what gender and sex identifier the minor wants the court to recognize as the minor's new gender and sex identifier.
- **ONLY** check item 6 if the petition is not signed by all living parents of the minor. This item asks the court to issue an order that will provide notice to any non-signing parent that any objections to the petition must be filed with the court within a certain time frame.
- **ONLY** check item 7 if the petition is (1) filed by a guardian, guardian ad litem, or an attorney acting for a minor under Welfare and Institutions Code section 601 or 602 **and** (2) all of minor's parents are deceased or cannot be located. This item asks the court to issue an order that will give notice to the minor's living grandparents that any objections to the petition must be filed with the court within a certain time frame.

Section of form titled Request for Name Change:

> **Note**: If the petition is not asking the court to change the name of the minor or to have minor's birth certificate reflect a prior name change, do not complete items 8 and 9 on the form. If the minor wants their name changed on their birth certificate, follow the instructions below.

- If requesting a change of name check the box "and change of name" at the top part of form NC-500.
- Check item 8 if the minor has previously obtained a decree of name change and wants to have their birth certificate reissued to reflect this name change. If checked, a certified copy of the name change decree must be attached. (If item 8 is checked, you do not need to complete item 9.)
- In item 9, write the proposed new name the minor wants the court to order.
- Item 9a notes that *Name and Information About the Person Whose Name Is to Be Changed* (form NC-110) must be attached. Attach that form if seeking a name change in this petition.
- In item 9b, check the box showing why the name change petition may be filed in a particular court. (See paragraph 2 above.)
- Item 9c is required and asks the court to issue an order that will give notice to all interested persons that any objections to the name change petition must be filed with the court within a certain time frame.

Remaining items on form

- Item 10 asks that the court order that a new birth certificate be issued that will reflect the gender change to be recognized by the court as well as any name change being sought by the petition.
- In item 11, list the number of attachments that are included with the petition.
- *Declaration:* The minor may complete (check the box identifying the new gender) and sign the Declaration on the second page of the petition. Note that it is signed under penalty of perjury. The adult named in item 1 must also sign the form, and any living parent may also sign.

5. Filing and Filing Fee

Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition with any attachments or orders to show cause required on page 1 of this information sheet with the *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition and any order to show cause. A filing fee will be charged unless you qualify for a fee waiver. If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Court Fees and Costs* (form FW-001-INFO).

6. Orders to Show Cause and Hearing Date

When an Order to Show Cause is required

An order to show cause may be required with certain petitions if

- the petition includes a request to change a minor's name;
- the petition is not signed by all living parents of the minor; or
- the petition is filed by a guardian, guardian ad litem, or an attorney acting for a minor under Welfare and Institutions Code section 601 or 602 **and** all of minor's parents are deceased or cannot be located.

If any of these apply, complete the top part of an original and two copies of the *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-520) (complete the portion of the form above the title including checking the box if a name change is requested). Submit that form with the petition. The clerk will obtain the judicial signature and give you back copies.

What to do with the Order to Show Cause

The order to show cause must be served on certain individuals, as described below, within a set time frame:

- If the petition did not include the signature of all living parents of the minor, a copy of the order and the petition must be served on the non-signing parent within **four weeks** of issuance of the order.
- If a petition seeks a change of name, even though an order to show cause must be issued to all interested persons, it only needs to be served if all living parents have not signed the petition.
- If the petition was filed by a guardian, guardian ad litem, or an attorney acting for a minor under Welfare and Institutions Code section 601 or 602 **and** all of minor's parents are deceased or cannot be located, a copy of the order and the petition must be served on the minor's living grandparents within **four weeks** of issuance of the order.

If the person to be served lives in California, the form and petition must be served in person. If they live outside California, the form may be served either in person or by first-class mail requiring return receipt. If such service is not possible, or if the person lives outside the United States, then the court may order that service be done in another way. Service must be made by someone other than the petitioner, but the petitioner must have the server complete a proof of service and file it with the court. (Form NC-121 may be used.)

What happens next

If objections are filed within six weeks of the issuance of the order to show cause, the court will set a hearing date and send you and the objectors notice of the date, time, and place. If no objections are filed, the court will make the decision based on the petition.

7. Court Hearing

Check with the court after the deadline for objections to find out if a hearing will be held. If a hearing is held, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original order, form NC-530.

8. Domestic Violence Confidentiality Program

In cases where the minor is a participant in the state address confidentiality program (Safe at Home), the petition, including the name change portion of the petition, and any order to show cause should, instead of giving the proposed name, indicate that the new name is confidential and on file with the Secretary of State. See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)* (form NC-400-INFO).

9. Birth Certificate

If you were born in California, to obtain a new birth certificate reflecting the change of gender or name, file a certified copy of the order within 30 days with the Secretary of State and the State Registrar and pay the applicable fees. You may write or contact the State Registrar at:

California Department of Public Health
Vital Records – MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
Website: *www.cdph.ca.gov*

10. Self-Help Guide

For more information, please visit the California Courts Self-Help Guide on gender recognition, available at https://selfhelp.courts.ca.gov/gender-recognition-order-index.

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name and gender change petitions, and the times when petitions are heard.

PETITION OF *(Name of petitioner or petitioners):* **DRAFT 08.09.2022 not approved by Judicial Council** FOR CHANGE OF GENDER	CASE NUMBER:

DECLARATION OF GUARDIAN OR JUVENILE ATTORNEY (Attachment to Form NC-500)

Court-appointed guardians must fill out all items on this page.
An attorney appointed as guardian ad litem for a dependent minor (Welf. & Inst. Code, § 326.5), must complete items 1–4.
An attorney for a minor under the jurisdiction of the juvenile court (Welf. & Inst. Code, § 601 or 602), must complete items 1–3.

1. a. Petitioner *(name)*:
   b. Adddress *(street, city, county, and zip code)*:

2. a. Minor seeking recognition of gender change *(present name of minor)*:
   b. Address *(street, city, county, and zip code)*:

3. Petitioner was appointed guardian for minor or is attorney for minor who is under the jurisdiction of the juvenile court as follows:
   (a) Superior Court of California, County of *(name)*:
   (b) Department *(check one)*: ☐ Juvenile ☐ Probate
   (c) Case number *(specify)*:
   (d) Date of appointment *(if applicable)*:

4. The living grandparents of the minor *(provide if known and if all parents are deceased or cannot be located):*
   (a) (Grandparent's name): (address):
   (b) (Grandparent's name): (address):
   (c) (Grandparent's name): (address):
   (d) (Grandparent's name): (address):

   ☐ Neither the minor nor the petitioner has any information about whether any of minor's grandparents are living.

5. The minor identified in item 2 is likely to remain under the guardian's care until the minor reaches the age of majority because *(explain):*

   ☐ Continued *(If you need additional space, check the box, prepare an Attachment 5, and attach it to this declaration.)*

6. The minor identified in item 2 is not likely to be returned to the custody of the parents because *(explain):*

   ☐ Continued *(If you need additional space, check the box, prepare an Attachment 6, and attach it to this declaration.)*

7. Other relevant information about the guardianship and why the proposed change is in the best interest of the minor *(specify):*

   ☐ Continued *(If you need additional space, check the box, prepare an Attachment 7, and attach it to this declaration.)*

I declare under penalty of perjury under the laws of the State of California that the information in the foregoing declaration is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PETITIONER)

Guardian of *(name of minor):*

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:		**DRAFT** **08.09.2022** **not approved by the Judicial Council**
NAME:			
FIRM NAME:			
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	
TELEPHONE NO.:	FAX NO.:		
E-MAIL ADDRESS:			
ATTORNEY FOR (*name*):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:			
PETITION OF *(name of each petitioner):* FOR CHANGE OF GENDER (Minor)			
ORDER TO SHOW CAUSE FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE ☐ **and CHANGE OF NAME**			CASE NUMBER:

1. NAME CHANGE

☐ **TO ALL INTERESTED PERSONS**
(Check only if the petition (form NC-500) includes a request for change of name. If not checked, go to item 2.)

a. A petition has been filed seeking change of name
from *(minor's current name)*:
to *(proposed name)*: .

b. **THE COURT ORDERS** that any person objecting to the name change described above must file a written objection that includes the reasons for the objection **within six weeks of the date this order is issued**. If no written objection is timely filed, the court will grant the petition without a hearing.

2. GENDER AND SEX IDENTIFIER CHANGE

☐ **TO ANY LIVING PARENT OF MINOR WHO DID NOT SIGN PETITION**
(Check only if the petition (form NC-500) was not signed by all living parents of minor.)

☐ **TO ALL LIVING GRANDPARENTS OF MINOR**
(Check only if the petition (form NC-500) was brought by guardian or dependency attorney appointed as guardian ad litem *and all parents are deceased or cannot be located.)*

a. Petitioner *(name of petitioning adult):* filed a petition on behalf of *(name of minor):*
requesting a decree recognizing that minor's gender and sex identifier is changed to

☐ female
☐ male
☐ nonbinary

and an order for issuance of a new birth certificate reflecting minor's changed gender and sex identifier.

b. **THE COURT ORDERS** that any living parent or, if all parents are deceased or cannot be located, all living grandparents show cause, if any, why the petition should not be granted by filing a written objection that includes any reasons for the objection **within six weeks of the date this order is issued**. If no written objection is timely filed, the court will grant the petition without a hearing.

Date:

JUDGE OF THE SUPERIOR COURT

Form Adopted for Mandatory Use
Judicial Council of California
NC-520 [Rev. January 1, 2023]

ORDER TO SHOW CAUSE FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE

Health & Safety Code, § 103430(e)
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:		**DRAFT**
NAME:			
FIRM NAME:			**08.10.2022**
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	**not approved by the Judicial Council**
TELEPHONE NO.:	FAX NO.:		
E-MAIL ADDRESS:			
ATTORNEY FOR (*name*):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF			
STREET ADDRESS:			
MAILING ADDRESS:			
CITY AND ZIP CODE:			
BRANCH NAME:			
PETITION OF *(name of each petitioner):*			
(FOR CHANGE OF GENDER (Minor))			
ORDER RECOGNIZING MINOR'S CHANGE OF GENDER AND SEX IDENTIFIER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE ☐ **and DECREE CHANGING NAME**			CASE NUMBER:

1. The petition was duly considered
   a. ☐ at the hearing on *(date):* in Courtroom: of the above-entitled court.
   b. ☐ without a hearing.

THE COURT FINDS

2. ☐ Petitioner is a California resident or seeks a change to a California birth certificate.
3. a. All notices required by law have been given.
   b. The following person seeking recognition of a change of gender and sex identifier is a minor *(specify present name):*

   c. ☐ The petition includes a request for a change of name to *(specify new name):*
      (1) ☐ the minor is a resident in this county.
      (2) ☐ the minor's birth certificate was issued in this county.
   d The adult petitioner who signed on behalf of the minor was minor's:
      (1) ☐ two parents *(names):*
      (2) ☐ one parent *(name):*
      (3) ☐ guardian *(name):*
         (a) The minor is likely to remain in the guardian's care until the age of majority.
         (b) The minor whose name is to be changed is not likely to be returned to the custody of the parents.
      (4) ☐ attorney guardian ad litem appointed by the juvenile court *(name):*
      (5) ☐ attorney representing minor who is asserted be a person described in Welfare and Institutions Code section 601 or 602 *(name):*
      (6) ☐ near relative or friend *(name and relationship to minor):*
         (a) The minor's parents are both deceased.
         (b) No guardian has been appointed for minor.
   e. ☐ *(For name change)* Minor ☐ is not ☐ is required to register as a sex offender under Penal Code section 290.
      This determination was made *(check one)* ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.
   f. ☐ No timely objections to the proposed changes were made.
   g. ☐ Objections to the proposed changes were made by *(name and relationship to minor):*

PETITION OF *(name of each petitioner):*	CASE NUMBER:

h. ☐ *(If objections by parent)* After considering objections by minor's parent, it appears to the satisfaction of the court that the proposed recognition of change of gender and sex identifier

☐ is in the best interest of the minor, and the petition should be granted.

☐ is not in the best interest of the minor, and the petition should be denied.

i. ☐ It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient, that the proposed recognition of change of gender and sex identifier (and name, if requested) are not fraudulent, and that the petition should be granted.

j. ☐ Other findings *(if any):*

THE COURT ORDERS

4. ☐ The gender and sex identifier of the minor (*name*):
is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

5. ☐ A new birth certificate reflecting the change of gender described in item 3 shall be issued.

6. If minor was born in California, a certified copy of this order shall be filed by the petitioner within 30 days with the State Registrar. When the State Registrar receives a certified copy of this order and payment of the applicable fees, the State Registrar shall establish for the petitioner a new birth certificate reflecting the gender of the minor as it has been altered.

THE COURT FURTHER ORDERS

7. ☐ The name of *(present name):*
is changed to *(new name):*

8. ☐ Other orders:

Date:

JUDGE OF THE SUPERIOR COURT

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:		
NAME:			
FIRM NAME:			
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	**DRAFT**
TELEPHONE NO.:	FAX NO.:		
E-MAIL ADDRESS:			**03/22/22**
ATTORNEY FOR (*name*):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF			**Not approved by the Judicial Council**
STREET ADDRESS:			
MAILING ADDRESS:			
CITY AND ZIP CODE:			
BRANCH NAME:			
PETITION OF *(name of each petitioner):*			
(BY GUARDIAN or DEPENDENCY ATTORNEY)			
ORDER RECOGNIZING MINOR'S CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE ☐ **and DECREE CHANGING NAME**			CASE NUMBER:

1. The petition was duly considered
   a. ☐ at the hearing on *(date):* in Courtroom: of the above-entitled court.
   b. ☐ without a hearing.

THE COURT FINDS

2. a. All notices required by law have been given.
   b. The person seeking recognition of a change of gender *(specify present name)*: is a minor.
   c. ☐ The petition was filed on behalf of the minor by a dependency attorney appointed as guardian ad litem pursuant to rules adopted under section 326.5 of Welfare and Institutions Code *(attorney name):*
   d. ☐ The petition was filed on behalf of the minor by the minor's guardian *(name):*
      (1) The minor is likely to remain in the guardian's care until the age of majority.
      (2) The minor whose name is to be changed is not likely to be returned to the custody of his or her parents.
   e. The minor ☐ is not ☐ is required to register as a sex offender under section 290 of the Penal Code.
      This determination was made *(check one)* ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.
   f. ☐ No objections to the proposed recognition of gender change were made.
   g. ☐ Objections to the proposed recognition of gender change of name were made by *(name):*
   h. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient, that the proposed recognition of gender change is in the best interest of the minor, and that the petition should be granted.
   i. ☐ Other findings *(if any):*

Form Adopted for Mandatory Use
Judicial Council of California
NC-530G [New January 1, 2019]

ORDER RECOGNIZING MINOR'S CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE
(By Guardian or Dependency Attorney)

Health & Safety Code, §§ 103430, 103435
www.courts.ca.gov

PLAINTIFF: DEFENDANT:	CASE NUMBER:

THE COURT ORDERS

3. The gender of the minor *(name):*
   is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

4. ☐ A new birth certificate reflecting the change of gender described in item 3 shall be issued.

5. If minor was born in California, a certified copy of this order shall be filed by the petitioner within 30 days with the State Registrar. When the State Registrar receives a certified copy of this order and payment of the applicable fees, the State Registrar shall establish for the petitioner a new birth certificate reflecting the gender of the minor as it has been altered.

THE COURT FURTHER ORDERS

6. ☐ The name of *(present name):*
   is changed to *(new name):*

Date:

JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE OF JUDGE FOLLOWS LAST ATTACHMENT

Item number: 06

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Revision of Unlawful Detainer Summons for use in Forcible Detainer and Forcible Entry Cases

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Revise SUM-130

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

*Staff contact (*name, phone and e-mail*): Sarah Abbott, 415-865-7687, sarah.abbott@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11.16.2021

Project description from annual agenda: Consider revising form SUM-130. Currently the mandatory summons SUM-130, providing 5-days' notice, is, by its title, limited to use in unlawful detainer proceedings. There is no summons form for equivalent notice for forcible detainers. Parties have reported that courts will not accept individually amended forms. Revising the mandatory form to allow its use with forcible detainers would ensure that defendants are provided with the requisite notice.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
n/a

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☒ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☒ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-
For business meeting on September 19–20, 2022

Title
Rules and Forms: Revision of Unlawful Detainer Summons for Use in Forcible Entry and Forcible Detainer Cases

Rules, Forms, Standards, or Statutes Affected
Revise form SUM-130

Recommended by
Civil and Small Claims Advisory Committee
Hon. Tamara Wood, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 20, 2022

Contact
Sarah Abbott, 415-865-7687
Sarah.abbott@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee proposes that the Judicial Council revise form SUM-130, *Summons—Unlawful Detainer—Eviction*, to expand use of the mandatory form to expressly include forcible entry and forcible detainer proceedings. The revisions are intended to address confusion by courts and litigants as to whether form SUM-130 may be used in these types of proceedings.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2023, revise the title of form SUM-130 to expressly include forcible entry and forcible detainer proceedings among the types of proceedings for which the form may be used.

The revised form is attached at pages 4–5.

Relevant Previous Council Action

Summons—Unlawful Detainer—Eviction (form SUM-130) was initially adopted by the Judicial Council as *Summons—Unlawful Detainer* (form 982(a)(11)) and renumbered in 2004. The form has been revised a number of times, most recently effective January 1, 2022, to correct an internal reference, but the prior revisions are not relevant to this proposal.

Analysis/Rationale

Currently, form SUM-130 is, by its title, limited to use in unlawful detainer proceedings. However, forcible detainer and forcible entry proceedings, like unlawful detainers, are special proceedings governed by chapter 4 of title 3 (Summary Proceedings) of part 3 (Special Proceedings of a Civil Nature) of the Code of Civil Procedure, beginning at section 1159.[1] The summonses for all three types of proceedings are governed by section 412.20, which applies to all civil summonses, except that defendants in these special proceedings have only five days to respond to the summons.[2]

There is currently no separate summons form designated for use in forcible detainer or forcible entry proceedings. Courts have reported that some parties attempt to file individually amended summons forms for use in these cases, causing confusion and inefficiency for court users and staff. Revising the mandatory form SUM-130 to expressly provide for its use in forcible detainer and forcible entry proceedings by revising the form title to read *Summons—Eviction (Unlawful Detainer/Forcible Detainer/Forcible Entry)* would alleviate confusion, provide plaintiffs with an appropriate summons form, and ensure that defendants are provided with the requisite notice.

Policy implications

Because the proposal is intended only to clarify the scope of existing form SUM-130, no policy implications relating to this proposal were raised during the comment period or related committee discussions.

Comments

The proposed revised form was circulated for public comment between April 1 and May 13, 2022, as part of the regular spring comment cycle. The committee received four comments, which all indicated support for the proposal. The commenters included the Orange County Bar Association, the Superior Court of San Bernardino County, the Superior Court of San Diego County, and John Zorbas, director of the Butte County Public Law Library. Mr. Zorbas mentioned that forcible detainer is a common cause of action that currently requires modification of the existing form and "[t]he proposed amendment to SUM-130 has long been necessary!" The other commenters agreed that the proposal appropriately addresses its stated purpose, without offering any suggested modifications.

[1] See Code Civ. Proc., §§ 1159, 1160.

[2] See Code Civ. Proc., § 1167.

Alternatives considered

The committee considered not recommending any changes to the form, but decided expressly providing that form SUM-130 is also for use in forcible detainer and forcible entry cases would be beneficial to parties and courts. Alternative form titles were also considered, but the committee concluded that the proposed revised title would provide the most clarity. Finally, the committee considered whether any substantive revisions to the form would be appropriate to make the form usable in forcible detainer and forcible entry cases in addition to unlawful detainers, but concluded that the substance is already appropriate for use in all three types of proceedings.

Fiscal and Operational Impacts

The committee anticipates that this proposal will result in costs incurred by courts to incorporate new forms into their paper or electronic processes and to train court staff. However, given that the proposal only modifies the title of an existing form, any such costs or impacts are likely to be minor.

Attachments and Links

1. Form SUM-130, at pages 4–5
2. Chart of comments, at pages 6–7

SUMMONS—EVICTION
(CITACIÓN JUDICIAL—DESALOJO)
UNLAWFUL DETAINER / FORCIBLE DETAINER / FORCIBLE ENTRY
(RETENCIÓN ILÍCITA DE UN INMUEBLE / RETENCIÓN FORZOSA / ENTRADA FORZOSA)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

DRAFT

03/15/2022

Not Approved by
the Judicial Council

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 5 days. You have 5 DAYS, not counting Saturdays and Sundays and other judicial holidays, after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courts.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services website (*www.lawhelpca.org*), the California Courts Online Self-Help Center (*www.courts.ca.gov/selfhelp*), or by contacting your local court or county bar association.	*¡AVISO! Usted ha sido demandado. Si no responde dentro de 5 días, el tribunal puede emitir un fallo en su contra sin una audiencia. Una vez que le entreguen esta citación y papeles legales, solo tiene 5 DÍAS, sin contar sábado y domingo y otros días feriados del tribunal, para presentar una respuesta por escrito en este tribunal y hacer que se entregue una copia al demandante.* *Una carta o una llamada telefónica no lo protege. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no presenta su respuesta a tiempo, puede perder el caso por falta de comparecencia y se le podrá quitar su sueldo, dinero y bienes sin más advertencia.* *Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados local.*
FEE WAIVER: If you cannot pay the filing fee, ask the clerk for a fee waiver form. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.	***EXENCIÓN DE CUOTAS:*** *Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas.* ***AVISO:*** *Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos con un gravamen sobre cualquier cantidad de $10,000 ó más recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desestimar el caso.*

1. The name and address of the court is:
   (El nombre y dirección de la corte es):

CASE NUMBER *(número de caso):*

2. The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: *(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):*

PLAINTIFF *(Name)*:	CASE NUMBER:
DEFENDANT *(Name)*:	

3. *(Must be answered in all cases)* An **unlawful detainer assistant (Bus. & Prof. Code, §§ 6400–6415)** ☐ did **not** ☐ did for compensation give advice or assistance with this form. *(If plaintiff has received **any** help or advice for pay from an unlawful detainer assistant, complete item 4 below.)*

4. **Unlawful detainer assistant** *(complete if plaintiff has received any help or advice for pay from an unlawful detainer assistant):*

   a. Assistant's name:

   b. Telephone no.:

   c. Street address, city, and zip:

   d. County of registration:

   e. Registration no.:

   f. Registration expires on *(date)* :

Date: *(Fecha)* | Clerk, by *(Secretario)* | , Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons *(form POS-010).)*

[SEAL]

5. **NOTICE TO THE PERSON SERVED:** You are served
   a. ☐ as an individual defendant.
   b. ☐ as the person sued under the fictitious name of *(specify):*
   c. ☐ as an occupant.
   d. ☐ on behalf of *(specify):*
      under: ☐ CCP 416.10 (corporation). ☐ CCP 416.60 (minor).
      ☐ CCP 416.20 (defunct corporation). ☐ CCP 416.70 (conservatee).
      ☐ CCP 416.40 (association or partnership). ☐ CCP 416.90 (authorized person).
      ☐ CCP 415.46 (occupant). ☐ other *(specify):*
   e. ☐ by personal delivery on *(date):*

SPR22-06

Rules and Forms: Revision of Unlawful Detainer Summons for Use in Forcible Detainer and Forcible Entry Cases (Revise form SUM-130)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Daniel S. Robinson President	A	The proposal adequately addresses the stated purpose of providing a mandatory judicial council form to be used in forcible entry/forcible detainer proce[e]dings.	The committee appreciates the feedback and support for the proposal.
2.	Superior Court of San Bernardino County	NI	**Request for Specific Comments in addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:** • Does the proposal appropriately address the stated purpose? **Yes.** **The advisory committee [or other proponent] also seeks comments from courts on the following cost and implementation matters:** • Would the proposal provide cost savings? If so, please quantify. **No**. • What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Updating form packets. Informing/training staff.** • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	The committee appreciates the information provided.

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

SPR22-06

Rules and Forms: Revision of Unlawful Detainer Summons for Use in Forcible Detainer and Forcible Entry Cases (Revise form SUM-130)

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

	Commenter	Position	Comment	Committee Response
			• How well would this proposal work in courts of different sizes? **Do not think size would have an impact.**	
3.	Superior Court of San Diego by Mike Roddy, Court Executive Officer	A	Does the proposal appropriately address the stated purpose? **Yes.** Would the proposal provide cost savings? If so, please quantify. **No.** What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Updating internal procedures and training staff.** Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.** How well would this proposal work in courts of different sizes? **It appears that the proposal would work for courts of all sizes.**	The committee appreciates the information provided.
4.	John Zorbas Law Library Director/Attorney Butte County Public Law Library Oroville, CA	A	Forcible Detainer to my knowledge and experience is a common cause of action, and is a summary proceeding. The SUM-130 with the word "Forcible" written-above "Unlawful" and	The committee appreciates the feedback and support for the proposal.

SPR22-06

Rules and Forms: Revision of Unlawful Detainer Summons for Use in Forcible Detainer and Forcible Entry Cases (Revise form SUM-130)

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

	Commenter	Position	Comment	Committee Response
			with "Unlawful" lined-through is presently necessary in order to obtain the issuance of a Summons for Forcible Detainer, California Rules of Court, Rule 1.31(e) notwithstanding. Unauthorized "campers" have become a problem for Northern California property owners who themselves were displaced by the Camp Fire and by other fires. The proposed amendment to SUM-130 has long been necessary!	

Item number: 07

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Criminal Procedure: Motion and Order to Vacate Conviction or Sentence

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Revise forms CR-187 and CR-188

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

*Staff contact (*name, phone and e-mail*): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/2/2021
Project description from annual agenda: Review recently enacted legislation that may have an impact on criminal court administration - Revising form CR-187 (motion to vacate conviction or sentence) to reflect that relief is available for convictions and sentences under AB 1259

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This proposal implements a statutory change that became effective 1/1/22, so the revised forms should be effective immediately after the September council meeting.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☒ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-094
For business meeting on September 20, 2022

Title
Criminal Procedure: Motion and Order to Vacate Conviction or Sentence

Rules, Forms, Standards, or Statutes Affected
Revise forms CR-187 and CR-188

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

Agenda Item Type
Action Required

Effective Date
September 21, 2022

Date of Report
July 22, 2022

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

Executive Summary

The Criminal Law Advisory Committee recommends revisions to two optional Judicial Council forms in response to recent amendments to Penal Code section 1473.7(a)(1). Additionally, the revisions implement case law to (1) clarify the out-of-custody requirement; (2) include a request for appointment of counsel; and (3) add and clarify provisions around timeliness in filing the motion. The revisions also include nonsubstantive, technical amendments to simplify the language in the motion to aid self-represented petitioners and conform to the statutory language.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective September 21, 2022, revise *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to:

1. Reflect statutory changes to Penal Code section 1473.7, which became effective January 1, 2022;

2. Incorporate case law clarifying the custody requirement, appointment of counsel, and timeliness in filing the motion;

3. Simplify language to aid self-represented petitioners; and

4. Conform to statutory language.

The revised forms are attached at pages 8–13.

Relevant Previous Council Action

Optional forms *Motion to Vacate Conviction or Sentence* (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) were adopted by the Judicial Council, effective January 1, 2018, to implement the provisions of Assembly Bill 813 (Stats. 2016, ch. 739) and help individuals and the courts adhere to the procedural requirements of Penal Code sections 1016.5 and 1473.7 (Link A). The forms were last amended effective January 1, 2020, in response to Assembly Bill 2867 (Stats. 2018, ch. 825), which clarified the timing and procedural requirements of Penal Code section 1473.7.

Analysis/Rationale

The recommended revisions to the two forms reflect statutory changes to and case law interpreting section 1473.7.

Changes to Penal Code section 1473.7(a)(1)

Assembly Bill 1259 (Stats. 2021, ch. 420) (Link B) amended section 1473.7 to allow a moving party to seek relief based on a "prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence." (Pen. Code, § 1473.7(a)(1).) The amendment broadens relief to convictions that occurred at trial; previously, relief was limited to convictions resulting from a guilty or no contest plea. To implement these statutory changes, the committee recommends revising references to guilty or no contest pleas in items 3a and 3b on *Motion to Vacate Conviction or Sentence* (form CR-187) to refer to a conviction or sentence; and renumbering item 7 to item 8 and clarifying that if a guilty or no contest plea was entered, the moving party may request the court to allow withdrawal of the plea.

Case law regarding persons in custody for an unrelated conviction

Section 1473.7(a) states that "[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence" under subdivisions (a)(1) and (a)(2). In *People v. Rodriguez* (2021) 68 Cal.App.5th 301, 315, the court held that a person is not barred from moving to vacate a conviction under section 1473.7(a)(1) if that person is in custody for another, unrelated conviction. To reflect this holding, the committee recommends revising item 3 on form CR-187 to clarify that the moving party is not in custody in the particular case at hand.

Case law regarding the right to appointed counsel

In *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981, the court construed section 1473.7 to "provide the right to appointed counsel where an indigent moving party has set forth factual allegations stating a prima facie case for entitlement to relief under the statute" and added that

"to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality." The opinion also notes that the same requirements exist for a court to appoint counsel in a petition for writ of *coram nobis* and that "[w]e are not aware of any reason the rules for writs of *coram nobis* applicable to a section 1016.5 motion would not include the constitutionally grounded rules for appointing counsel for an indigent moving party." (*Id.* at p. 982.) To reflect this holding, the committee recommends new item 5 on form CR-187 for requesting appointment of counsel upon a finding by the court that there is a prima facie case for relief and requiring proof of indigency.

Statutes and case law regarding reasonable diligence in filing the motion

Motions brought under section 1473.7(a)(1) "shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody" (Pen. Code, § 1473.7(b)(1)), unless the motion "was not filed with reasonable diligence after the later of the following:

> (A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.
> (B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate."

(Pen. Code, § 1473.7(b)(2).)

In *People v. Perez* (2021) 67 Cal.App.5th 1008, 1015, the court held that even if a judge finds that a petitioner did not act with reasonable diligence in filing a motion to vacate under section 1473.7(a)(1), the court must exercise its discretionary authority and decide whether to deem the motion untimely. In *People v. Alatorre* (2021) 70 Cal.App.5th 747, 753, the court held that relief under section 1473.7(a)(1) extends to persons who seek vacatur of convictions that predate section 1473.7.

Additionally, motions brought under section 1473.7(a)(2) on the basis of newly discovered evidence of innocence "shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief." (Pen. Code, § 1473.7(c)).

The current version of *Order on Motion to Vacate Conviction or Sentence* (form CR-188) allows a court to deny a motion under section 1473.7(a)(1) because it was not filed with reasonable diligence, or to deny a motion under section 1473.7(a)(2) because the moving party failed to exercise due diligence in discovering the relevant evidence or failed to file without undue delay from the date the party discovered or could have discovered the evidence. However, the motion form (form CR-187) does not include corresponding questions regarding the party's timeliness in filing the motion. This proposal adds item 3c with questions on reasonable diligence to form CR-187 and also revises the order to clearly delineate the court's options on how to rule on the motion's timeliness, both under statute and under the court's discretionary authority to deem a motion timely or untimely as described in *People v. Perez*.

To reflect *People v. Alatorre*, the proposal also allows the moving party to explain, if both notices were received before the law went into effect on January 1, 2017, when the party became aware of the law and whether something happened to give the party a reason to look for conviction relief.

Policy implications

There was not controversy or intense debate within the committee about the proposal or recommendations. The recommended revisions to forms CR-187 and CR-188 will assist courts by providing court users—both self-represented petitioners and attorneys—with accurate guidance when applying for postconviction relief under section 1473.7.

Comments

The proposal circulated for public comment two separate times in 2022. The committee's specific responses to each comment are available in the attached comment charts at pages 12–26.

First circulation (SP22-04)[1]

In the first circulation, six comments were received—from the Superior Courts of Los Angeles and Orange Counties, the Los Angeles County Public Defender's Office, the Orange County Bar Association, a staff attorney for an appellate court, and a member of the public. One commenter agreed with the proposal and five commenters agreed if the proposal was modified. The committee incorporated several substantive changes from the comments and recirculated the forms for further comment.

Change heading from "Legal Invalidity With Immigration Consequences" to "Legal Invalidity With Actual or Potential Immigration Consequences" (form CR-187, item 3)

The committee revised the heading of item 3 in response to a comment suggesting revising the heading to "Legal Invalidity With Actual or Potential Adverse Immigration Consequences" to conform to the statutory text, which states that:

> [t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. (Pen. Code, § 1473.7(a)(1).)

The commenter's concern was that "[t]he absence of the word 'potential' … could mislead petitioners into incorrectly inferring that an actual adverse consequence must be shown." The committee incorporated the change, minus the word "adverse," for brevity and because the adverseness of the consequences is implied.

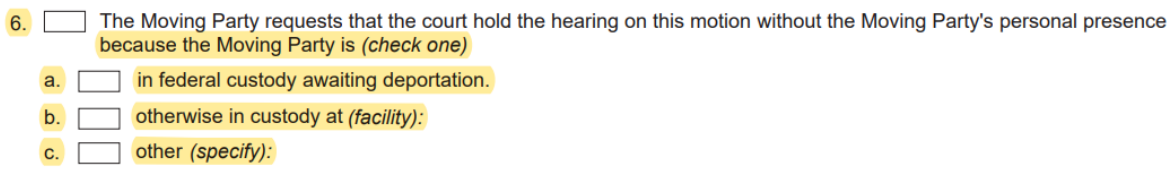
[1] See Judicial Council of Cal., Invitation to Comment, *Criminal Procedure: Motion and Order to Vacate Conviction or Sentence* (SP22-04), www.courts.ca.gov/documents/sp22-04.pdf.

Modify questions regarding filing of a motion under Penal Code section 1473.7(a)(1) with reasonable diligence (form CR-187, item 3c)
In response to comments, the committee revised item 3c regarding filing a motion under Penal Code section 1473.7(a)(1) with reasonable diligence to:

- state that the reasonable diligence questions may be skipped if the person is requesting appointment of counsel;
- restructure and rephrase the questions for clarity;
- clarify that the notices described in both subparagraphs A and B of section 1473.7(b)(2) must be received before the reasonable diligence element applies; and
- incorporate elements of the holding of *People v. Alatorre* by adding questions about when a moving party who received both notices before section 1473.7(a)(1) went into effect heard of the law and to explain what happened to give the moving party a reason to seek conviction relief.

Two commenters expressed concern that an unrepresented and indigent person should have the opportunity to consult with counsel before making a statement regarding why the petition could not have been brought earlier. The committee agreed in part and added a statement preceding item 3c3 that if the party is requesting appointment of counsel, the party may skip the item explaining reasonable diligence. This way, the court may assess whether the person has made a prima facie case for appointment of counsel based on the party's response to item 3b, Supporting Facts, and appointed counsel may then respond to the reasonable diligence questions, because the questions may be complex and reasonable diligence does not appear to be required to make a prima facie case for relief. Because the form is designed for use by self-represented parties requesting appointment of counsel, other self-represented parties, and counsel, the committee recommended this approach as a workable option to address how all three types of parties should approach the question.

Add options to the request to proceed without the party's personal presence (form CR-187, item 6)
Item 6 of form CR-187 addresses a request for the court to hold the hearing without the party's personal presence and includes several check boxes for the party to indicate the basis of the request:


6. ☐ The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence because the Moving Party is *(check one)*
a. ☐ in federal custody awaiting deportation.
b. ☐ otherwise in custody at *(facility):*
c. ☐ other *(specify):*

A commenter stated that a common reason for the inability to attend in person is that the moving party is outside of the United States and lacks permission to enter. The commenter requested adding a box reflecting this circumstance. The committee agreed and incorporated an additional check box into item 6.

Request to hold hearing without the personal presence of the moving party (CR-188)
The committee asked about the necessity of item 2 on CR-188, which is an existing provision on the order to allow the court to grant or deny a request to have the hearing without the personal presence of the moving party. Although two commenters from courts stated that the item was unnecessary because the determination is made before a hearing, upon further review, the committee decided to retain and move item 2 of form CR-188 to renumbered items 3 and 4, motions under Penal Code section 1473.7(a)(1) and (a)(2), respectively, because this provision relates to motions brought under Penal Code section 1473.7. The committee also recommends adding language that the court "finds good cause to grant" a request to have the hearing without the personal presence of the moving party, to conform to Penal Code section 1473.7(d).

Dismissal based on untimeliness (form CR-188, items 4b and 5b)
The committee requested comments about dismissals based on untimeliness:

> Item 4 on CR-188 allows the court to find a motion filed under Penal Code section 1473.7(a)(1) as untimely. Should it be revised to allow the court to also dismiss the motion on that basis?
>
> Item 5 on CR-188 allows the court to find that the Moving Party failed to timely file a motion filed under Penal Code section 1473.7(a)(2). Should it be revised to allow the court to dismiss the motion on that basis?

Two courts recommended adding dismissal language for clarity, but another commenter opposed it because, "[g]iven that '[a]ll motions shall be entitled to a hearing' (Pen. Code, § 1473.7 subd. (d)), courts may not summarily dismiss a motion under Penal Code section 1473.7 without a hearing." Additionally, a member of the public commented that courts should not be able to immediately dismiss due to untimeliness because of a lack of understanding of court procedures by self-represented petitioners.

The committee incorporated all comments by adding an option to dismiss after a hearing to renumbered items 3 and 4.

On the option to find the motion untimely, a commenter recommended adding, after the cite to *People v. Perez*, a cite to *People v. Alatorre*, stating that the *Alatorre* opinion clarified that relief "extends to persons who seek vacatur of convictions that predate section 1473.7." The committee replaced the cite to *Perez* with a cite to *Alatorre*, because it draws on *Perez*.

The committee also replaced references to the court *finding* the motion timely or untimely to *deeming* the motion timely or untimely, to conform to the statutory language.

Second circulation (SPR22-29)[2]

Two comments were received from the Superior Court of San Diego County and the Orange County Bar Association, both agreeing with the proposal if modified. The court noted an inadvertent check box on form CR-187, item 3c3. The committee removed this box in response to this comment. The bar association suggested simplifying the language in item 4 of form CR-188, regarding a motion for relief under section 1473.7(a)(2). The committee declined the suggestion because the proposed language reflects the statutory language of section 1473.7(c).

Alternatives considered

The committee did not consider the alternative of taking no action, determining that it is important for the forms to conform to the legislative change and case law.

Fiscal and Operational Impacts

Expected costs are limited to training, possible case management system updates, and the production of revised forms. No other implementation requirements or operational impacts are expected.

Attachments and Links

1. Forms CR-187 and CR-188, at pages 8–13
2. Chart of comments, at pages 14–27
3. Link A: Pen. Code, § 1473.7, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7&lawCode=PEN*
4. Link B: Assem. Bill 1259 (Stats. 2021, ch. 420), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1259*

[2] See Judicial Council of Cal., Invitation to Comment, *Criminal Procedure: Motion and Order to Vacate Conviction or Sentence* (SPR22-29), *www.courts.ca.gov/documents/spr22-29.pdf*.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	***FOR COURT USE ONLY*** DATE: TIME: DEPARTMENT:

MOTION TO VACATE CONVICTION OR SENTENCE

☐ Pen. Code, § 1016.5 ☐ Pen. Code, § 1473.7(a)(1) ☐ Pen. Code, § 1473.7(a)(2)

Instructions—Read carefully if you are filing this motion for yourself

- The term "Moving Party" as used in this form refers to the person asking for relief.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- You must file a separate motion for each separate case number.
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filing your motion.

1. This motion concerns a conviction or sentence in case number . On *(date):* , the Moving Party was convicted of a violation of the following offenses *(list all offenses included in the conviction):*

CODE	SECTION	TYPE OF OFFENSE *(felony, misdemeanor, or infraction)*

If you need more space to list offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

2. ☐ **MOTION UNDER PENAL CODE SECTION 1016.5**

a. **GROUNDS FOR RELIEF: The Moving Party requests relief based on the following:**

(1) Before acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise the Moving Party that the conviction might have immigration consequences, as required under Penal Code section 1016.5(a).

(2) The conviction that was based on the plea of guilty or nolo contendere may result in immigration consequences for the Moving Party, including possible deportation, exclusion from admission to the United States, or denial of naturalization.

(3) The Moving Party likely would not have pleaded guilty or nolo contendere if the court had advised the Moving Party of the immigration consequences of the plea. (*People v. Arriaga* (2014) 58 Cal.4th 950.)

b. **Supporting Facts**

Tell your story briefly. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences, (2) the possible immigration consequences, and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. (*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.*)

3. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity With Actual or Potential Immigration Consequences**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.) If you are claiming that your conviction or sentence is invalid due to ineffective assistance of counsel, before the hearing is held on this motion, you (or the prosecutor) must give timely notice to the attorney who you are claiming was ineffective in representing you.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. b. **Supporting Facts**

Tell your story briefly. What facts show prejudicial error? Include information that shows that the conviction or sentence you are challenging is currently causing or has the possibility of causing your removal from the United States, or the denial of your application for an immigration benefit, lawful status, or naturalization.

CAUTION: You must *state facts, not conclusions.* For example, if claiming ineffective assistance of counsel, you must state facts detailing what the attorney did or failed to do and how that affected your conviction or sentence.

Note: The court presumes your conviction or sentence is not legally valid if
(1) you pleaded guilty or nolo contendere based on a law that provided that the arrest and conviction would be deemed never to have occurred if specific requirements were completed;
(2) you completed those specific requirements; and
(3) despite completing those requirements, your guilty or nolo contendere plea has been, or possibly could be, used as a basis for adverse immigration consequences.

(*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

c. **Reasonable Diligence (*check all that apply*)**

(1) (a) ☐ On *(date):* _____, the Moving Party received a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(b) ☐ The Moving Party has not received a notice to appear in immigration court or other notice from immigration authorities as described above.

(2) (a) ☐ On *(date):* _____, the Moving Party received notice that a final removal order was issued against the Moving Party, based on the conviction or sentence that the Moving Party seeks to vacate.

(b) ☐ The Moving Party has not received a final notice of removal as described above.

(If you are requesting appointment of counsel, you may skip the following item, 3c(3).)

(3) This motion may be denied because of a delay in filing it. If you received *both* notices mentioned above, explain why you did not bring and could not bring this motion earlier. If you received both notices before this law went into effect on January 1, 2017, when did you become aware of the law? Did something happen to give you a reason to look for conviction relief?

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

4. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison or or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

(1) Newly discovered evidence of actual innocence exists that requires vacating the conviction or sentence as a matter of law or in the interests of justice.

(2) The Moving Party discovered the new evidence of actual innocence on *(date):*

b. **Supporting Facts**
Tell your story briefly. Describe the newly discovered evidence and how it proves your actual innocence. Explain why you could not discover this evidence at the time of your trial. Explain why you did not bring and could not bring this motion earlier. *(If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

5. ☐ **REQUEST FOR COUNSEL (*People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981)**

a. The Moving Party requests appointment of counsel upon a finding by the court that there is a prima facie case for relief.

b. The Moving Party is indigent and has completed and attached *Defendant's Financial Statement* (form CR-105) showing that the Moving Party cannot afford to hire a lawyer. Form CR-105 is available online at *www.courts.ca.gov/forms.*

6. ☐ The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence because the Moving Party is *(check one)*

a. ☐ in federal custody awaiting deportation.

b. ☐ otherwise in custody at *(facility):*

c. ☐ outside of the United States and lacks permission to enter.

d. ☐ other *(specify):*

7. The Moving Party requests that the court vacate the conviction or sentence in the above-captioned matter.

8. If the Moving Party entered a plea of guilty or nolo contendere, the Moving Party requests that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

(NAME OF MOVING PARTY OR ATTORNEY FOR MOVING PARTY)

(SIGNATURE OF MOVING PARTY OR ATTORNEY)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):		DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:		CASE NUMBER:
ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE ☐ Pen. Code, § 1016.5 ☐ Pen. Code, § 1473.7(a)(1) ☐ Pen. Code, § 1473.7(a)(2)		*FOR COURT USE ONLY* DATE: TIME: DEPARTMENT:

1. The court
   a. ☐ grants the request for appointment of counsel.
   b. ☐ denies the request for appointment of counsel because the Moving Party has not shown *(choose all that apply)*
      ☐ a prima facie case ☐ indigency.

2. **FOR PURPOSES OF PENAL CODE SECTION 1016.5 RELIEF, THE COURT**
   ☐ grants ☐ denies the Moving Party's request to vacate the judgment and to permit the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

3. **FOR PURPOSES OF PENAL CODE SECTION 1473.7(a)(1) RELIEF, THE COURT**
   a. ☐ finds good cause to grant ☐ denies the request that the court hold the hearing without the personal presence of the Moving Party.
   b. ☐ deems the motion timely because the Moving Party did not receive, or acted with reasonable diligence after receiving, notice from immigration authorities.
      ☐ exercises its discretion to deem the motion timely.
      ☐ deems the motion untimely and dismisses the motion after a hearing (*People v. Alatorre* (2021) 70 Cal.App.5th 747).
   c. ☐ grants ☐ denies the Moving Party's request to vacate the conviction or sentence on the basis that the conviction or sentence is legally invalid due to a prejudicial error damaging the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.
   d. ☐ permits the Moving Party to withdraw the plea of guilty or nolo contendre and enter a plea of not guilty.

4. **FOR PURPOSES OF PENAL CODE SECTION 1473.7(a)(2) RELIEF, THE COURT**
   a. ☐ finds good cause to grant ☐ denies the request that the court hold the hearing without the personal presence of the Moving Party.
   b. ☐ finds that the Moving Party filed without undue delay from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence.
   c. ☐ finds that the Moving Party failed to file the motion without undue delay from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence, and dismisses the motion after a hearing.

Form Approved for Optional Use
Judicial Council of California
CR-188 [Rev. September 21, 2022]

DEFENDANT:	CASE NUMBER:

4. d. ☐ grants ☐ denies the Moving Party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence. The court's basis for this ruling is specified below:

e. ☐ permits the Moving Party to withdraw the plea of guilty or nolo contendre and enter a plea of not guilty.

Date:

(JUDICIAL OFFICER)

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	Caitlin Peters Downieville, CA	AM	1.) Does the proposal appropriately address the stated purpose? * Yes and no See comments on specific provisions below. Would the proposal provide cost savings? If so, please quantify. * The proposal may not initially be cost saving but will become cost saving. First, the courts will become flooded with people bringing relief requests to the courts. Then, after the lower courts are aware of the new processes one can hope they will conduct business ethically. As of now, lower court judges are conducting unethical business practices. What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? * I feel that the local courts, if having kept up with recording and technology for transparency reasons should have no problem making any transitions.	The committee believes that the updated forms will result in an absorbable increase in the number of filed petitions. No response required.

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

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			How well would this proposal work in courts of different sizes? * It shouldn't matter the size. The courts responsible for reviewing the new forms and deciding which ones are worthy of dismissal and request of relief will have a hard task initially, but will inevitably mellow out in time.	No response required.
2.	Michael Maurer Lead Appellate Court Attorney Fifth Appellate District, Court of Appeal	AM	See comments on specific provisions below.	
3.	Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	AM	Although we support many of the suggested revisions—specifically, the inclusion of a request for appointment of counsel, the clarification of the out-of-custody requirement, and the simplification of language in the motion—and believe that many of the proposed changes meet their stated purpose, we believe that the changes outlined below are needed to assist pro per petitioners seeking PCR with the forms, and to conform the forms to the most recent caselaw. See comments on specific provisions below.	
4.	Orange County Bar Association by Daniel S. Robinson, President	AM	See comments on specific provisions below.	
5.	Superior Court of Los Angeles County by Bryan Borys	A	See comments on specific provisions below.	

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

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
6.	Superior Court of Orange County Elizabeth Flores, Operations Analyst	AM	Does the proposal appropriately address the stated purpose? Response: Yes. Would the proposal provide cost savings? If so, please quantify. Response: No, they do not. What would the implementation requirements be for the courts – for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Response: The existing process would support the modifications that are proposed. If it is judicial preference, docket codes may need to be created to capture the Court's ruling as to reasonable diligence. As a result, minor modifications would need to be made to the procedures possible training 1 hour training for all Clerk staff. How well would this proposal work in courts of different sizes? Response: This question is not applicable because it is a rewording of forms and not a process.	No response required.

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

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
			See comments on specific provisions below.	

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
Michael Maurer Lead Appellate Court Attorney, Fifth Appellate District, Court of Appeal Fresno, CA	Comment to Items 3.c. of CR-187. The reasonable diligence element does not come into play until both the notices described in § 1473.7(b)(2)(A) & (B) have been received. (*People v. Perez* (2021) 67 Cal.App.5th 1008, 1016.) Also, "the superior court must determine whether the motion 'was filed with reasonable diligence after the later of' " the notices. (Ibid., quoting §1473.7, subd. (b)(2).) The following proposed revisions to Item 3.c. reflect these principles and corrects the statement in (4) that "the law requires that this motion be brought without delay." (Italics added.) Reasonable diligence is no longer a requirement. Its absence does not automatically result in the motion being denied; instead, its absence gives the trial court the discretion, after considering the totality of the circumstances, to deem the motion untimely. (*Perez*, at p. 1012.) Proposed language for Item 3.c.(3) & (4): (3) ____ The Moving Party has not received both notices described above from immigration authorities. (4) ____ If the Moving Party has not received both notices described above from immigration authorities, this motion might be denied because of a delay in filing it. If you received both notices, explain why you did not bring and could not bring this motion earlier.	The committee agrees with the comment and restructured and rephrased item 3c to clarify that both notices in section 1473.7(b)(2) must be received before the reasonable diligence element applies.

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	**Item 3 Heading "Legal Invalidity With Immigration Consequences"** Penal Code section 1473.7, subdivisions (a)(1) and (e)(4), provide for relief for "actual or potential adverse immigration consequences." (Emphasis added.) The sufficiency of "potential" adverse immigration consequences also is stated in subdivisions (e)(1) and (e)(2). The proposed change to the section heading on item 3 to "Legal Invalidity With Immigration Consequences," however, omits this category of eligibility for relief under section 1473.7. The absence of the word "potential" within the proposed heading could mislead prospective petitioners into incorrectly inferring that an actual adverse consequence must be shown. Instead of the draft's proposed heading, we suggest this heading: "Legal Invalidity With Actual or Potential Immigration Consequences." The addition of "actual or potential" would conform the form to the statutory text. **Reasonable diligence under Item 3. c.** Item 3 section "c" adds a new "reasonable diligence" section for the moving party to indicate whether they received notice from immigration authorities and to explain why the party did not or could not bring the motion earlier. Self-represented petitioners may not know what to include or not include in this section. Although any petitioners may have meritorious reasons for not bringing a motion sooner, they may not know what reasons are meritorious. One way to alleviate this concern would be to make the reasonable diligence section inapplicable to moving parties who have applied for and are granted PCR counsel, so that their attorneys can assist them in identifying and articulating the circumstances showing reasonable	The committee agrees with the change, and modified the heading accordingly, minus the word "adverse" in order to keep the title brief and because adverse consequences are implied. The committee agrees with the comment and revised item 3c regarding timeliness of the motion to state that the reasonable diligence questions may be skipped if the moving party is requesting appointment of counsel.

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

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
	diligence. Another way would be to add checkboxes for additional circumstances that constitute "reasonable diligence." Section 1473.7 states that a motion may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following: (1) The date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization; or (2) Notice that a final removal order has been issued against the moving party, based on the existence of the challenged conviction or sentence. Courts have construed this language to deem motions under section 1473.7 to be timely when the petitioner has yet to receive a final order of removal. (See *People v. Alatorre* (2021) 70 Cal.App.5th 747, 758-759.) To more clearly implement the legislative intent, and to align with Alatorre, we suggest splitting checkbox (3) into a checkbox (3)(a), "The Moving Party has not received a notice to appear in immigration court," and a checkbox (3)(b), "The moving Party has not received a final notice of removal." This would ensure that courts recognize that a motion in not untimely for want of a final notice of removal. In addition, adjudication of reasonable diligence should factor the life events of the moving party that would give them a reason to look for a ground of post-conviction relief, or put them on notice of a need to investigate. (*People v. Alatorre* (2021) 70 Cal.App.5th 747, 762.) As proposed, the reasonable diligence section does not ask whether such events occurred, nor, if so, when. Further, *Alatorre* instructs that for petitioners whose adverse immigration events predate section 1473.7, courts should ask when petitioner had reason to become aware	The committee agrees with the comment and restructured and rephrased item 3c to clarify that both notices in section 1473.7(b)(2) must be received before the reasonable diligence element applies and to incorporate *People v. Alatorre* (2021) 70 Cal.App.5th 747.

Motion to Vacate Conviction or Sentence (form CR-187) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
	of the statutory remedy. As proposed the revision to CR-187 does not elicit such information. **Item 6** As drafted, the checkbox list of reasons for requesting that the court hold the motion hearing without the personal presence of the moving party includes two checkboxes for forms of custody, and a catch-all box "other." A common reason for inability to attend in person is that the moving party is located outside the United States and lacks legal permission to enter. As drafted, the proposal does not include a checkbox for this reason. One should be added, such as, "outside of the United States and without legal permission to enter."	The committee agrees with this comment and added a checkbox to item 6 stating that the petitioner is outside of the United States and lacks permission to enter.
Orange County Bar Association by Daniel S. Robinson, President	Item 3(c)(4) should be deleted. An unrepresented and indigent person should have the opportunity to consult with counsel before making a statement regarding why the petition could not have been brought earlier. Item 4(b) should be deleted. An unrepresented and indigent person should have the opportunity to consult with counsel before making a statement regarding how new evidence proves actual innocence.	The committee agrees with the comment in part and revised item 3c regarding timeliness of the motion to state that the reasonable diligence questions may be skipped if the moving party is requesting appointment of counsel. The committee believes it is appropriate to keep the part of item 4b about newly discovered evidence and how it proves the petitioner's actual innocence, as an unrepresented and indigent petitioner must set forth factual allegations stating a prima facie case for entitlement to relief under the statute for appointment of counsel. The *Petition for Writ of Habeas Corpus* (form HC-001), which is mandatory for self-represented petitioners, includes a similarly worded section, and these petitioners are also appointed counsel if they state a prima facie case for relief.

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-187 – Is the declaration sufficient for a motion by either a self-represented person or counsel?		
Commenter	**Comment**	**Committee Response**
Caitlin Peters Downieville, CA	* Yes a self represented defendant is ignorant to the law “lingo" and refusing their rights to be heard is unethical. A self represented defendant is not self represented by choice but forced to be their own attorney. For a multitude of reason but mainly because California public defenders are partnered with the local justices and destroying the judicial integrity at a unfathomable rate. Attorneys are well educated to have restrictions against the motions and rules of court when filing certain motions. Attorney should be held at a higher expectation than self represented persons. The courts should lower the expectations when a self represented person comes to court fighting for their lives.	The committee believes the language is sufficient for a motion filed by a self-represented petitioner or counsel.
Superior Court of Los Angeles County by Bryan Borys	This language is sufficient for either scenario.	The committee agrees with the comment.

Order on Motion to Vacate Conviction or Sentence (form CR-188) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
Michael Maurer Lead Appellate Court Attorney Fifth Appellate District, Court of Appeal	Comment to Item 4 on CR-188. The current proposal does not address motions that are premature because the moving party is still in custody. The general rule created by § 1473.7(b) is that the motion is deemed timely so long as the moving party is not in custody. The proposed revisions reflect this general rule, the discretionary exception allowing a motion to be deemed untimely, and the statute’s use of the phrase “deemed timely.”	The committee declined to modify item 4 to include an option to dismiss as premature.

Order on Motion to Vacate Conviction or Sentence (form CR-188) (general comments and suggested edits)		
Commenter	**Comment**	**Committee Response**
	Proposed language: 4. FOR PURPOSE OF PENAL CODE SECTION 1473.7(a)(1) RELIEF, THE COURT a. deems the motion timely unless ____ the court finds the Moving Party is in custody and, therefore, dismisses the motion as premature; or ____ the court finds the Moving Party received both notices from immigration authorities and did not act with reasonable diligence after receiving the later notice, and then, after considering the totality of the circumstances, exercises its discretion to deem the motion untimely.	
Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	Finally, while the draft proposed revision of CR-188, at section 4.a., cites *People v. Perez (2021) 67 Cal.App.5th 1008,* the order fails to cite *People v. Alatorre, supra*, 70 Cal.App.5th 747, although *Alatorre* applies *Perez*, and clarifies that it extends to persons who seek vacatur of convictions that predate section 1473.7. Petitions seeking relief from such older convictions are likely to be meritorious because when they occurred, immigration consequences of convictions were less likely to have been considered, understood, or mitigated. With convictions that predate 1473.7, the moving parties include persons such as appellant *Alatorre* who were deported years before the passage of Penal Code section 1473.7 and who would have no reason to know about it. *Alatorre* should be added to the form's citations to ensure that older convictions and sentences can be adjudicated for vacatur on the merits.	The committee agrees and replaced the cite to *People v. Perez* with a cite to *People v. Alatorre*.

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-188, item 2 – Is it necessary/helpful to include this provision?		
Commenter	**Comment**	**Committee Response**
Caitlin Peters Downieville, CA	Yes, It seems necessary and essential for a moving party to have the ability to have a remote hearing. No, they shouldn't be able to dismiss prior to hearing the merits of the motion. Where my concern lies is within the Superior Courts and the negligence of Administration during "remote hearings" The lack of rules governing judicial conduct and ethics while conducting remote hearing are being neglected. Judges are "muting" either party and disallowing them from speaking. The first amendment of "Right to freedom of speech" it protects by giving access to the public, this not happening. Rights to be treated as though you were present in the courthouse is not happening as it should. So, what should a person with court dealing do when this happens? Who do they call? How can they make sure their civil rights aren't being violated by discriminatory judges in superior court system?	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.
Superior Court of Los Angeles County By Bryan Borys	The provision regarding personal presence is unnecessary. It is simply a preliminary issue decided prior to a hearing on the merits.	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Item 2 is unnecessary because the determination is made before the motion is heard. Also, the moving party may confuse it as they are making the request.	The committee kept this provision since it requires a court finding if requested. However, -the committee modified this provision to state that the court finds good cause to grant the request, to conform to the statutory language, and, since this applies in the section 1473.7 context and not to section 1016.5, the committee moved this from item 2 to renumbered items 3 and 4.

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

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-188, item 4 – Should this be revised to allow dismisal on the basis that the motion is untimely?		
Commenter	**Comment**	**Committee Response**
Caitlin Peters Downieville, CA	* No, the court should not be able to immediately dismiss on grounds for "untimely". Many inmates or inmates already released have no clue to the rules and specific time limits. Many times the public defender has an agenda and that agenda is not the defendant. Public defenders are not filing motions to dismissed when statute of limitations are being violated by the courts. An example is a speedy trial taking 5 years and needed to fire 3 public defenders on grounds of discrimination and intent to cause harm by defender. Judges grant the request and acknowledge the abuse but then become abusive themselves.	The committee modified item 4 to allow a court to dismiss after a hearing.
Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Graciela Martinez, Head Deputy Public Defender	Another question posed was whether form CR-188—which is being revised to allow the court to designate whether it finds the motion timely as a matter of right, exercises its discretion to find the motion timely, or finds the motion untimely—should also be revised to allow the court to also dismiss the motion on that basis. Given that "[a]ll motions shall be entitled to a hearing" (Pen. Code, § 1473.7 subd. (d)), courts may not summarily dismiss a motion under Penal Code section 1473.7 without a hearing. Summary dismissal also would compound our concerns that self-represented petitioners cannot identify and will overlook meritorious factual circumstances that could establish reasonable diligence.	The committee modified item 4 to allow a court to dismiss after a hearing.
Superior Court of Los Angeles County By Bryan Borys	Yes. Without the option to dismiss it leaves uncertainty after a finding of untimeliness.	The committee modified item 4 to allow a court to dismiss after a hearing.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Inserting language of dismissal due to untimeliness will clarify the court's action for the moving party. It may also assist them in understanding that they may file another motion.	The committee modified item 4 to allow a court to dismiss after a hearing.

SP22-04

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Revise forms CR-187 and CR-188)

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

Form CR-188, item 5 – Should this be revised to allow the court to dismiss a motion that was not timely filed?		
Commenter	**Comment**	**Committee Response**
Caitlin Peters Downieville, CA	-No, the court should not be able to immediately dismiss on grounds for "untimely". Many inmates or inmates already released have no clue to the rules and specific time limits. Many times the public defender has an agenda and that agenda is not the defendant. Public defenders are not filing motions to dismissed when statute of limitations are being violated by the courts. An example is a speedy trial taking 5 years and needed to fire 3 public defenders on grounds of discrimination and intent to cause harm by defender. Judges grant the request and acknowledge the abuse but then become abusive themselves.	The committee modified item 5 to allow a court to dismiss after a hearing.
Superior Court of Los Angeles County By Bryan Borys	Yes. Same as above.	The committee modified item 5 to allow a court to dismiss after a hearing.
Superior Court of Orange County by Elizabeth Flores, Operations Analyst	Response: Inserting language of dismissal due to untimeliness will clarify the court's action for the moving party. It may also assist them in understanding that they may file another motion.	The committee modified item 5 to allow a court to dismiss after a hearing.

SP 22-29

Criminal Procedure: Motion and Order to Vacate Conviction or Sentence (Forms CR-187 and CR-188)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Daniel S. Robinson, President	AM	CR-188 Item 4(b) and (c) are confusing. 4(b) is a double negative. 4(c) is a triple negative. How about – Court finds the delay in filing is [ ] reasonable or [ ] undue (unreasonable). And Court finds evidence is [ ] new or [ ] not new, or could have been discovered before with reasonable diligence	The committee declined to make these suggested changes, as items 4b and 4c reflect the statutory language of section 1473.7(c) ("A motion pursuant to paragraph (2) or (3) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section or Section 745.")
2.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	Does the proposal appropriately address the stated purpose? **Yes.** Would the proposal provide cost savings? If so, please quantify. **No.** What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Staff will need to be trained to recognize these forms and route them accordingly.**	

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

	Commenter	Position	Comment	Committee Response
			How well would this proposal work in courts of different sizes? **Courts could see an increase in these motions, since these forms make it easier for litigants to file such motions. Any increase in filings affects courts of different sizes differently; but, it should not be too much of an impact disparity.** **Other Comments:** **CR-187**. There may be an inadvertent checkbox in item 3c(3). It seems like it should be formatted like 3b without a checkbox. On both forms, when there is a check box, sometimes the left justification lines up under the left side of the checkbox, and sometimes it lines up with just the wording of the paragraph.	The committee agrees with the suggestion and has deleted the extra checkbox.

Item number:08

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Rules Committee Meeting Date: August 18, 2022

Title of proposal: Family Law: Child Custody and Visitation in Cases Involving Abuse by a Parent and Child Testimony

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Amend rules 5.210, 5.220, 5.242, and 5.250; revise forms FL-311, FL-323, and FL-341

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle Selden, 415-865-8085 gabrielle.selden@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: Annual Agenda:November 2, 2020)
Project description from annual agenda: Item 1i: Requires a court that grants unsupervised visitation to a parent with histories of abuse, neglect or substance abuse to state its reasons for doing so in writing or on the record, and provides that if a child addresses a court regarding custody or visitation, they generally must be permitted to do so without the parties being present.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:* Current translations of forms FL-311, FL-323, and FL-341 will require updating if revisions are approved by the Judicial Council.
- *List any new forms that require translation by statute or that you will request to be translated:*

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-134
For business meeting on: September 19–20, 2022

Title
Family Law: Child Custody and Visitation in Cases Involving Abuse by Parent and Child Testimony

Rules, Forms, Standards, or Statutes Affected
Amend rules 5.210, 5.220, 5.242, and 5.250; revise forms FL-311, FL-323, and FL-341

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
August 4, 2022

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends amending four California Rules of Court and revising three forms to comply with Senate Bill 654 (Stats. 2021, ch. 768). The bill amended Family Code section 3011 by extending the requirement that a court state its reasons when granting sole or joint custody to someone despite allegations of abuse or substance abuse against that person to orders granting unsupervised visitation to someone against whom there are allegations of abuse or substance abuse. The bill also amended Family Code section 3042 regarding child testimony to prohibit allowing the child to testify in front of the parties unless specific findings are made, and to require that certain court professionals provide notice if a child changes their choice about addressing the court.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2023:

1. Amend rule 5.210 of the California Rules of Court, *Court-connected child custody mediation*, to include the obligations of a child custody recommending counselor to give notice about a child's desire to provide input and a child's change of choice about addressing the court under section 3042.

2. Amend rule 5.220, *Court-ordered child custody evaluations*, to include the obligations of a child custody evaluator to give notice about a child's desire to provide input and a child's change of choice about addressing the court under section 3042.

3. Amend rule 5.242, *Qualifications, rights, and responsibilities of counsel appointed to represent a child in family law proceedings*, to update counsel's obligations to give notice about a child's desire to provide input and include counsel's obligation to give notice if the child has changed their choice about addressing the court under section 3042.

4. Amend rule 5.250, *Children's participation and testimony in family court proceedings*, to include the obligations of all court professionals required to give notice under Family Code section 3042.

5. Revise *Child Custody and Visitation (Parenting Time) Application Attachment* (form FL-311) to add a request for child custody and unsupervised visitation orders involving allegations of a history of abuse or substance abuse under Family Code section 3011, and make other formatting changes.

6. Revise *Order Appointing Counsel for a Child* (form FL-323) to include counsel's duties under Family Code section 3042 to give notice about a child's desire to provide input and a child's change of choice about addressing the court, and make other formatting changes.

7. Revise *Child Custody and Visitation (Parenting Time) Order Attachment* (form FL-341) to make formatting changes, and include a new section for the court to make orders on a request for child custody and unsupervised visitation orders involving allegations of a history of abuse or substance abuse under Family Code section 3011.

The rules and forms are attached at pages 18–33.

Analysis/Rationale

Effective January 1, 2022, SB 654 (see Link A) amended Family Code section 3011(a)(5)(A) and (B) to require the court to follow specific procedures when it makes an order for child custody to a parent who is alleged to have a history of abuse or substance abuse. Before the amendment, absent a stipulation, the court was required to state its reasons in writing or on the record if it ordered sole or joint custody to a parent alleged to have a history of abuse or

substance abuse. The legislation extended that requirement to include orders for unsupervised visitation for a parent alleged to have a history of abuse or substance abuse.

To help courts comply with these changes, the committee proposes revising two forms, *Child Custody and Visitation (Parenting Time) Application Attachment* (form FL-311) and *Child Custody and Visitation (Parenting Time) Order Attachment* (form FL-341).

SB 654 also amended Family Code section 3042, relating to a child's testimony in court, in two significant ways. The first major change prohibits the court from permitting a child addressing the court regarding child custody or visitation to do so in the presence of the parties, unless the court determines that doing so is in the best interest of the child and states its reasons for that finding on the record. It also requires the court to provide an alternative to having the child address the court in the presence of the parties to obtain input directly from the child.

The second major change is to require the attorney appointed to represent the child, a child custody evaluator or investigator, or a child custody recommending counselor to inform the judge, the parties or their attorneys, and other professionals serving on the case if the child informs them that they have changed their choice with respect to addressing the court.

Family Code section 3042(j) specifically requires that the Judicial Council, "no later than January 1, 2023, develop or amend rules as necessary to implement this section." The committee proposes amending rules 5.210, 5.220, 5.242, and 5.250, and revising form FL-323 to implement the requirements of the statute.

Family Code section 3011

Forms FL-311 and FL-341 will be revised to incorporate the requirements of Family Code section 3011(a)(5)(A).

Section 3011(a)(5)(A) and (B) provide:

> (A) When allegations about a parent pursuant to paragraphs (2)[1] or (4)[2] have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody or unsupervised visitation to that parent, the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as

[1] Paragraph (2) relates to a history of abuse by one parent or any other person seeking custody against: (a) a child to whom the parent or person seeking custody is related by blood or affinity or with whom the parent or person seeking custody has had a caretaking relationship, no matter how temporary; (b) the other parent; or (c) a parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

[2] Paragraph (4) relates to the habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent.

to time, day, place, and manner of transfer of the child as set forth in subdivision (c) of Section 6323.

(B) This paragraph does not apply if the parties stipulate in writing or on the record regarding custody or visitation.

The statute describes the requirements for *court orders* in cases in which a party is alleged to have a history of abuse or substance abuse. Therefore, the committee initially only considered revising the custody order attachment (form FL-341). After further consideration, the committee decided that it was important to also recommend revisions to form FL-311, the form for requesting court orders relating to child custody and visitation.

Child Custody and Visitation (Parenting Time) Application Attachment (form FL-311)
Form FL-311 may be used by the parties to request court orders relating to child custody and visitation. It is attached to a petition for divorce or legal separation, a response to a petition, a request for order form, or a responsive declaration to a request for order.

The revisions to form FL-311 will give the parent the opportunity to state the reasons why they believe the court should grant child custody or unsupervised visitation to a parent alleged to have a history of abuse or substance abuse. The parent requesting the order would either write the reasons (their declaration) in the blank space provided on the form or attach a separate declaration.

The above revisions will allow the court to assess whether the reasons that the parent specified are sufficient to grant the parent's request for an interim order, a default judgment, or a judgment for child custody and visitation. In the case of a petitioner's request to enter a default judgment against a nonresponding party, the new content will further allow the judicial officer to better assess whether the judgment could be entered based exclusively on the declarations of the petitioner or whether the matter should be set for a hearing so that the court can consider evidence about the allegations of abuse or substance abuse before ruling on the request.

The specific changes in form FL-311 include two new sections on the form: the first, on page 1 (item 1b), will be titled "Custody with allegations of a history of abuse or substance abuse"; the other, on page 2 (item 3), will be titled "Visitation (parenting time) with allegations of a history of abuse, substance abuse, or other parenting concerns."

In new item 1b, the party requesting custody orders will:

- Specify that the case involves allegations of a history of abuse or substance abuse against parent(s) of the minor children;
- Ask the court to either grant or not grant an order for sole or joint custody of the minor children to a parent or parents who are alleged to have a history of abuse or substance abuse; and

- Specify the reasons why the court should grant the request for sole or joint custody to the person(s) alleged to have a history of abuse or substance abuse.

Similarly, in item 3, the party requesting visitation orders will be able to ask the court to order:

- Supervised visitation for cases involving abuse, domestic violence, child abuse or neglect;
- Supervised visitation for reasons other than abuse, domestic violence, child abuse or neglect (including substance abuse or other parenting concerns); or
- Unsupervised visitation to the person(s) alleged to have a history of abuse or substance abuse.

The second bullet point will apply to cases in which a party seeks supervised visitation for reasons such as to help introduce a parent and a child when there has been no existing relationship between them or to help reintroduce a parent and a child after a long absence.

Finally, the form will:

- Include the following statutory language under the request for unsupervised visitation: "The orders for visitation (parenting time) that you request must be specific as to time, day, place, and manner of transfer of the child, as Family Code section 6323(c) requires."

- Require the party to indicate the reasons why the court should make the orders in each of the situations in item 3. (Note: instead of requiring the party to respond by attaching a separate declaration in response to the item, the revised form will allow the party to choose to use the blank space on the form to write a declaration or attach a declaration.)

- Include a general note under item 4, "Transportation for visitation (parenting time) and place of exchange" to indicate that, "In cases of domestic violence, the court must have enough information to make orders that are specific as to time, place, and manner of transfer (exchange) of the child for custody and visitation under Family Code section 6323(c)." The new language mirrors the note in item 3b(5) regarding the need for specificity in the transportation or exchange of the child.

Formatting changes
The committee recommends formatting changes to accommodate the new content. Specifically, form FL-311 will be expanded to four pages and include additional rows to list up to six children in item 1a. In addition:

- Item 2e regarding visitation (parenting time) will be moved to the second page.

- The request for supervised visitation will be moved under new item 3.

- To avoid confusion, the request that includes specific information about the supervised visitation provider will be incorporated into item 3, rather than appear as a separate item 4 (as in the version that circulated for comment).

- Hyperlinks to other Judicial Council forms will be updated. For example, the reference and hyperlink to repealed *Declaration of Supervised Visitation Provider* (form FL-324) will be deleted and replaced with references to the current forms completed by the professional or nonprofessional supervised visitation provider (form FL-324(P)) and FL-324(NP)), which were adopted effective January 1, 2021.

- Items 7 through 10 will include more blank, fillable space to help parties who prefer to write complete answers directly on the form.

Other changes that the committee recommends to both forms FL-311 and FL-341 are described in the following section.

Child Custody and Visitation (Parenting Time) Order Attachment **(form FL-341)**
As indicated by the title, form FL-341 may be used by the court to write its orders relating to requests for child custody and visitation orders.

Form FL-341 will reflect the substantive changes to form FL-311 by including a new item 7 titled "Child custody orders with allegations of a history of abuse or substance abuse" and a new item 9 titled "Visitation (parenting time) with allegations of a history of abuse, substance abuse, or other parenting concerns."

Additional changes include the following: expanding the form to four pages, changing the sequence of the orders regarding child abduction from item 7 to item 5, moving the orders regarding visitation to page 2, and increasing the blank space made available to complete orders on page 4.

The committee also recommends minor changes in the language in various parts of the order attachment. For example, instead of stating that a party "will have visitation" in items 9a and 9b, the form will provide that the party "has visitation." And, instead of a statement to the judicial officer, such as "You must attach form FL-341(A)" in 9a, the committee proposes better highlighting the fact that additional orders apply with respect to the visitation orders made in this item. To this end, item 9a will be divided into subitems (1) and (2), with item (2) providing: "In addition, *Supervised Visitation Order* (form FL-341(A)) is attached."

Miscellaneous changes
In addition to the statutory changes and formatting changes, the committee proposes revisions to other items in both forms FL-311 and FL-341.

Two of the recommended changes will align content with the changes currently being proposed to domestic violence forms in the same cycle. For example, the definition of physical custody on the first page of the forms will be changed to "person the child regularly lives with." The

definition of legal custody will be changed to "person who decides about the child's health, education, and welfare."

The final change recommended to both forms is to the item about transportation for visitation (parenting time). Item 4a on form FL-311 and item 10a on form FL-341 will be changed as follows:

> The children must be driven only by a licensed and insured driver. The ~~car or truck~~ vehicle must be legally registered with the Department of Motor Vehicles, and must have child restraint devices properly installed, as required by law.

The above language will more accurately reflect the orders that judicial officers make in family court on the issue of transportation for child visitation (parenting time).

Family Code section 3042

Section 3042(g) provides:

> To assist the court in determining whether the child wishes to express a preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a child custody recommending counselor shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

In addition, section 3042(h) provides:

> If a child informs the minor's counsel, an evaluator, an investigator, or a child custody recommending counselor at any point that the child has changed their choice with respect to addressing the court, the minor's counsel, evaluator, investigator, or child custody recommending counselor shall, as soon as feasible, indicate to the judge, the parties or their attorneys, and other professionals serving on the case that the child has changed their preference.

The committee recommends that the Judicial Council amend rules 5.210, 5.220, 5.242, and 5.250 to reflect the duties of child custody recommending counselors, child custody evaluators and investigators, and attorneys appointed to represent the child under both sections 3042(g) and (h).

It should be noted that the committee considered using other terms instead of "child's choice" in the rules and forms, including "child's position," "child's preference," or "child's desire," but decided to recommend that the rules reflect the actual language in section 3042(h), which is "child's choice."

Rule 5.210, Court-connected child custody mediation
The committee recommends amending rule 5.210 to include new subdivision (d)(3) under "Responsibility for mediation services." Because the obligation to notify under section 3042 affects child custody recommending counselors[3] and not confidential mediators, the committee proposed amending the rule as follows:

> (3) If so informed by the child at any point, each child custody recommending counselor must notify the parties, other professionals serving on the case, and then the judicial officer:
>
> (A) About the child's desire to provide input and address the court; and
> (B) As soon as feasible, that the child has changed their choice about addressing the court.

Rule 5.220, Court-ordered child custody evaluations
In the invitation to comment, the committee initially proposed amending rule 5.225, *Appointment requirements for child custody evaluators*, by adding subdivisions (*l*)(7) and (8) to provide that a person appointed as a child custody evaluator must:

> (7) Inform the parties, other professionals serving on the case, and then the judicial officer about the child's desire to provide input and address the court;
>
> (8) If so informed by the child at any point, provide notice that the child has changed their choice about addressing the court. Notice must be provided as soon as feasible to the parties or their attorneys, other professionals serving on the case, and then to the judicial officer.

However, because rule 5.225 relates specifically to the *appointment* requirements of child custody evaluators, the committee has decided to recommend that the Judicial Council amend rule 5.220, *Court ordered child custody evaluations*, rather than rule 5.225. The committee believes it is more appropriate to include the evaluator's responsibilities under Family Code section 3042 with the other responsibilities of the evaluator already listed in rule 5.220 under subdivision (d)(2).[4]

Although rule 5.220 did not circulate for comment, the committee believes it is necessary that it be included among the other recommendations in the report. Amending rule 5.220, instead of

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[3] Under Family Code section 3183, mediators who make those recommendations (also known as child custody recommending counselors) are considered mediators for purposes of chapter 11 of the Family Code (commencing with section 3160) and are subject to all requirements for mediators for all purposes under the Family Code and the California Rules of Court.
[4] Rule 5.220 is found online at *www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_220*.

rule 5.225, would not be controversial and would avoid any confusion about the evaluator's duties with respect to children testifying in family court.

Rule 5.242, Qualifications, rights, and responsibilities of counsel appointed to represent a child in family law proceedings

The committee recommends that the rule be amended at subdivision (j)(4)(D). Currently, the subdivision includes counsel's obligation under section 3042(g) to inform the parties and the court about the child's desire to provide input. The amendment will provide that the obligation extends to "other professionals serving on the case" and replace "court" with "judicial officer."

In addition, subdivision (j)(4)(E) will be added to provide that, in any case in which counsel is representing a child who is called to testify in the proceedings, counsel must:

> <u>If so informed by the child at any point, provide notice that the child has changed their choice about addressing the court. Notice must be provided as soon as feasible to the parties or their attorneys, other professionals serving on the case, and then to the judicial officer.</u>

Rule 5.250, Children's participation and testimony in family court proceedings

The committee recommends that the rule be amended in several areas to comply with section 3042, as follows:

- A new subdivision (b) will reflect the statutory prohibition against permitting a child to address the court about child custody or visitation in the presence of the parties, and the exceptions that are included in the statute.

- Former subdivision (b) will be relettered as (c) and retitled "Determining if the child wishes to address<u>, or has changed their choice about addressing,</u> the court."

- Subdivision (c)(2) will be added to the rule to include the responsibility for an evaluator, investigator, minor's counsel, or child custody recommending counselor to provide notice if the child informs them, or changes their choice, about addressing the court.

- Other technical changes will avoid redundancy and make the rule internally consistent. These will include renaming subdivision (a) "Authority and overview" and transferring most of the language in (a) to subdivision (b) as it relates to the court's responsibilities in these matters, as well as adjusting the lettering of the subdivisions following (b).

Order Appointing Counsel for a Child **(form FL-323)**

Finally, the committee recommends revising *Order Appointing Counsel for a Child* (form FL-323). Specifically, item 8a(6) will be added under "Duties of Counsel for a Child" so that the form reflects counsel's obligation in rule 5.242(j)(4)(D) to "Inform the parties, other professionals serving on the case, and then the court about the child's desire to provide input and address the court." This duty was inadvertently left out of the form when it was initially adopted.

In addition, item 8a(7) will be added to specify counsel's duty to provide prompt notice when a child changes their choice about addressing the court under Family Code section 3042(h).

To make space for the new language in the form, the committee also recommends technical and organizational changes to form FL-323. Specifically, the section titled "Determination of Fees and Payment" will appear on the form as item 5 on page 1. In addition, the sections titled "Duties of Counsel for a Child" and "Counsel for a Child Has the Following Rights" will be grouped on the final page of the order. The items on the form will be renumbered to reflect the reorganized content.

Policy implications

There were no policy implications that contributed to controversy or intense debate within the committee about the proposal or the recommendations to amend the rules and revise the forms. The committee, though, emphasized the importance of revising forms FL-311 and FL-341 so that they are easy to understand and complete, and clearly reflect the requirements of section 3011 in cases involving allegations of a history of abuse or substance abuse.

Comments

The invitation to comment was circulated for public comment from April 1, 2022, to May 13, 2022, as part of the regular spring comment cycle. The committee received a total of seven comments. Court commenters included the Superior Courts of Orange, Los Angeles, and San Diego Counties. The committee also received comments from the following organizations: California Partnership to End Domestic Violence, Family Violence Appellate Project (FVAP), Harriet Buhai Center for Family Law (HBCFL), and the Orange County Bar Association (OCBA).

Two commenters agreed with the proposal, three commenters agreed with the proposal if modified, and two commenters did not specifically indicate a position but suggested changes or responded to specific questions from the committee. No one disagreed with the proposal. The complete comments and the committee's responses are included in the attached comment chart, at pages 34–52.

Comments about rules 5.210, 5.220, 5.242, 5.250

One commenter stated that proposed changes to these rules achieved their stated purpose and will be helpful to effectuate the changes to Family Code section 3042.

Comments about form FL-311

Two commenters (FVAP and HBCFL) proposed specific changes to item 1b on the form. The major substantive comments from FVAP and HBCFL and committee responses are noted below:

- "[t]he proposed changes to form FL-311 would not be helpful to parties or attorneys, and in fact will be confusing to self-represented litigants. It is not clear, for instance, that

items 1(b) and 3 do not have to be completed by everyone completing the parenting time application."

In response, the committee recommends specific revisions to item 1b to make the child custody request part of the form easier to understand and complete. One change would be to add a check box for the party to indicate that they do not want the court to order sole or joint custody to a person alleged to have a history of abuse or substance abuse. In addition, the committee recommends that item 3b include an instruction that the party should **only** complete it if they want the court to make orders for unsupervised visitation to a party alleged to have a history of abuse. The instruction would bring attention to the differences between a request for supervised visitation in 3a and unsupervised visitation in 3b.

- "[t]he language in both items 1(b) and 3 is misleading in that it does not seem to encompass the situation where the parent who is alleged to have a history of abuse would be asking for custody or unsupervised parenting time for themselves."

  In response, the committee disagrees that the form is misleading and not appropriate for use by a parent with an alleged history of abuse who seeks custody or unsupervised parenting time. Form FL-311 is a multiuse form, which serves as an attachment to a petition, response, request for order, or responsive declaration to request for order. As such, the committee developed items 1b and 3 to be completed by either the party alleging a history of abuse or the party alleged to have a history of abuse. For example, if the petitioner is alleged to be the party with a history of abuse and is asking for custody for themselves, the party would check "petitioner" is alleged to have a history of abuse. If all parties are alleged in the pleadings to have a history of abuse, the petitioner would be able to check "petitioner," "respondent," or "other parent/party."

- "[t]here is already space in the form asking parties to provide their facts and argument for their requests, so the information gathered in these two items 1(b) and 3 is already being gathered elsewhere on the form. Redundancy in the forms should be avoided when possible."

  In response, the committee does not agree that the proposed revisions to form FL-311 are redundant. No existing item includes specific statutory requirements of Family Code section 3011(a)(5)(A). Revising the form to include language from the statute allows a party to provide notice to the other parent that they are seeking those orders. It also gives a party the opportunity to state the reasons why they believe the court should grant child custody or unsupervised visitation to a parent alleged to have a history of abuse or substance abuse.

- "[w]e are VERY concerned that including these questions on the form would cause judicial officers to wrongly rely solely on the request forms to decide whether they need

to comply with Family Code section 3011, subdivision (a)(5)(A). Abuse does not need to be alleged in any specific place or form for those requirements to apply; abuse just has to be alleged in the case in general—it could be raised at the hearing, in the initial request, in a response, in a supplemental declaration, in a mediation report, in exhibits attached to a declaration, etc.

In response, the committee notes that resolving the issue raised by the commenter involves educating judicial officers about the requirements of Family Code section 3011, as well as other statutes relating to cases involving a history of abuse or substance abuse. For this reason, the committee continues to recommend placing items 1b and 3 on form FL-311 to bring awareness to the duties that judicial officers must comply with in section 3011. To address the specific concern raised by the commenter, the committee recommends revising the *Child Custody and Visitation (Parenting Time) Order Attachment* (form FL-341), item 7a to provide that the judicial officer has considered allegations of abuse from sources that are not limited to those made in form FL-311 before making the order for child custody or unsupervised visitation under section 3011(a)(5)(A).

- By placing these items 1(b) and 3 on this request form, it strongly suggests to courts and litigants that this is their one and only chance to bring up these allegations, and if not brought up here, the statutory requirements would not apply."

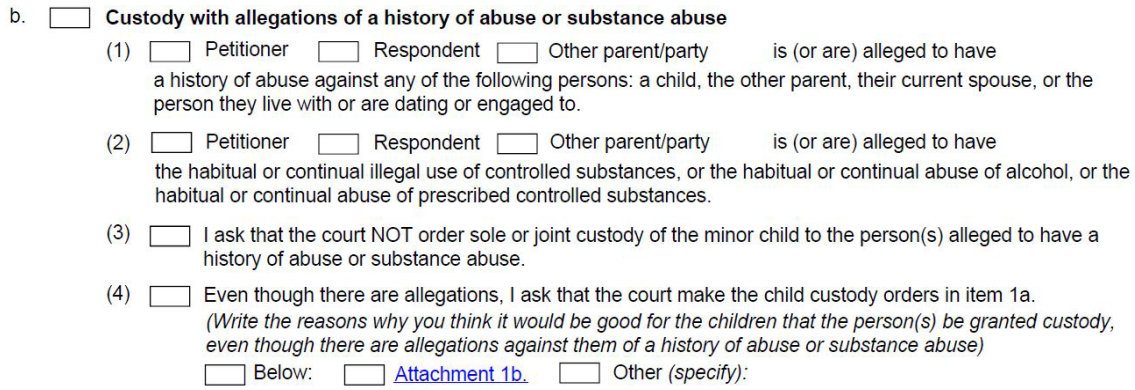
  The committee disagrees with the commenter on this point. There is no language in form FL-311 to suggest to courts and litigants that a party will be prevented from seeking the protections of the statute in the future if they do not check items 1(b) and 3. This is true for any item on the form. Unlike other forms that require the party to acknowledge that they are waiving a right under the law (for example, *Appearance, Stipulations, and Waivers* (form FL-130) and *Advisement and Waiver of Rights Re: Determination of Parental Relationship* (form FL-235)), this is not the purpose of form FL-311.

- "Before SB 654, there was no need to add items 1(b) and 3 to the form, so why is there a need now with SB 654? SB 654 did not affect the court's duty to state its reasons when allegations are raised, and SB 654 didn't place any duties on the parties. NO bill, statute, or law requires adding these items 1(b) and 3 to the form. And doing so would cause confusion and potential misapplication of the law."

  In response, it was the recent adoption of SB 654 that brought to the committee's attention the need to provide for the practice and procedures that cover *both* the recent amendments to Family Code section 3011 relating to unsupervised visitation and the previously enacted provisions of section 3011 relating to requests for child custody under allegations of a history of abuse. The forms revisions will help educate parties, attorneys, and the court about the law in cases involving allegations of a history of abuse and substance abuse, thereby avoiding confusion and the potential misapplication of the law.

Specific changes to items 1b and 3

After considering the specific suggestions from FVAP and HBCFL, the committee recommends that the Judicial Council revise item 1b on form FL-311, as follows:



b. ☐ **Custody with allegations of a history of abuse or substance abuse**

(1) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to.

(2) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.

(3) ☐ I ask that the court NOT order sole or joint custody of the minor child to the person(s) alleged to have a history of abuse or substance abuse.

(4) ☐ Even though there are allegations, I ask that the court make the child custody orders in item 1a. *(Write the reasons why you think it would be good for the children that the person(s) be granted custody, even though there are allegations against them of a history of abuse or substance abuse)*

☐ Below: ☐ Attachment 1b. ☐ Other *(specify):*

Based on the above recommendations to item 1b, the committee recommends that item 3 regarding supervised and unsupervised visitation be revised where appropriate to align with the content of item 1b, as shown on pages 2 and 3 of form FL-311.

Further, although no concerns were raised by commenters about revising form FL-311 to include the informational parenthetical in items 1b and 3, the committee decided to not recommend the change. The parenthetical that circulated for comment specified "*(If you have an agreement in writing or stated in court about child custody and visitation, do not complete item b. It does not apply to your case.)*." It was intended to reflect the language of section 3011(a)(5)(B), which specifies that "This paragraph does not apply if the parties stipulate in writing or on the record regarding custody or visitation."

The committee decided not to recommend that form FL-311 be revised to include the informational parenthetical to allow for the various ways that parties or attorneys use the form. For example, parties who have reached an agreement about child custody and visitation sometimes complete and incorporate form FL-311 into their agreement. The proposed note, however, could have deterred them from doing so.

In addition, the committee believed that the note could also cause confusion to parties who are asking the court to modify a current agreement (stipulation and order) for child custody and visitation. Parties who would have otherwise attached form FL-311 to a *Request for Order* (form FL-300) may believe that having an existing agreement would make them ineligible to ask for the orders under section 3011 that would protect their child from a parent alleged to have a history of abuse or substance abuse.

Finally, the committee believed that an instructional parenthetical is more appropriate for use in the court's order (form FL-341). Therefore, the committee decided to recommend the changes described in the section below to form FL-341.

Comments about form FL-323
One commenter stated that proposed changes to the form achieved their stated purpose and will be helpful to effectuate changes to Family Code section 3042.

Comments about form FL-341
Two commenters suggested changes to the order.

- FVAP commented that the "…proposed changes will be helpful to judicial officers by both reminding them of the requirements of Family Code section 3011, subdivision (a)(5)(A), and providing space to indicate the reasons for ordering child custody or unsupervised visitation when the statute applies. They also noticed a technical correction that was needed to item 9(a) to replace the reference to page 1 to page 2. The committee made this correction.

- HBCFL suggested new language for the order to allow the court to state that it does not grant sole or joint custody of a minor child or that it grants sole or joint custody of the minor child, even though there are allegations of a history of abuse or substance abuse. The committee agreed with the suggestions.

In response to both comments, the committee recommends that items 7 (child custody orders) and 9b (unsupervised visitation orders) on form FL-341 be revised, as illustrated below:

7. ☐ **Child custody orders with allegations of a history of abuse or substance abuse**
(Do not complete this section if the parties have entered or will enter into an agreement on child custody and/or visitation (parenting time), in writing or stated in court.)

a. Allegations have been raised in form FL-311, other documents filed in the court, or in a court hearing that
☐ petitioner ☐ respondent ☐ other parent/party has (or have) either:

(1) a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to; or

(2) the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.

b. ☐ The court does NOT grant sole or joint custody of the minor children to ☐ petitioner ☐ respondent ☐ other parent/party

c. ☐ Even though there are allegations of a history of abuse or substance abuse, the court GRANTS sole or joint custody of the minor child as set out in item 6 for the following reasons: ☐ Attachment 7c.

b. ☐ **Unsupervised visitation (parenting time)**
(Do not complete this section if the parties have entered or will enter into an agreement on child custody and/or visitation (parenting time), in writing or stated in court.)

(1) Even though there are allegations of a history of abuse or substance abuse under Family Code section 3011, the ☐ petitioner ☐ respondent ☐ other parent/party *(name):*
has (or have) unsupervised visitation (parenting time) with the minor children as set forth in 8.

(2) The reasons for granting unsupervised visitation to the person(s) alleged to have a history of abuse or substance abuse are: ☐ as follows: ☐ Attachment 9b.

(3) The orders for visitation (parenting time) are specific as to time, day, place, and manner of transfer of the child, as Family Code section 6323(c) requires.

The above illustrations include the recommendations for an informational parenthetical in items 7 and 9b to specify: *"(Do not complete this section if the parties have entered or will enter into an agreement on child custody and/or visitation (parenting time), in writing or stated in court.)*" The recommendations for the two items are based on the understanding that parties use the order to memorialize their agreements and judicial officers also use it to draft the order following a court hearing, which may include an agreement stated on the record. Revising the order to include these instructions promotes judicial economy and compliance with the requirements of section 3011(a)(5)(B).

Comments on other specific questions

The committee asked the public and the courts specific questions about the proposed changes to forms FL-311 and FL-341.

- The committee asked if it would be helpful to the parties and attorneys to provide space on form FL-311 to state the reasons why sole or joint custody, or unsupervised visitation,

should be granted if Family Code section 3011(a)(5)(A) applies to the case, especially in a potential default situation?

The committee received three responses. One court responded yes to this question. One organization stated that a place for the information would be helpful, but the proposed version is confusing. Another organization also responded that the changes would be helpful and expressed appreciation for the changes to the court forms.

- The committee asked the courts the following three questions:

  1. Would the proposed changes to form FL-341 be helpful to judicial officers in providing space to indicate the reasons for ordering child custody and visitation if Family Code section 3011(a)(5)(A) applies to the case?

     The two courts responding to the question indicated that the proposal would be helpful.

  2. Are the proposed changes to forms FL-311 and FL-341 helpful in reminding judicial officers about the requirements of Family Code section 3011(a)(5)(A) when reviewing requests and proposed orders and judgments relating to child custody and visitation?

     One court responded yes. The other court also responded yes, but added that the optional forms are not frequently used in their court, and suggested making a standalone form for the language in item 9 on form FL-341. Given the few changes required to the form under section 3011(a)(5)(A), the committee did not recommend that the Judicial Council adopt a new, standalone form. Courts can use form FL-341 to inform the revisions they make to their orders relating to child custody and visitation.

  3. Would the proposed changes in (1) and (2) be best handled by judicial education?

     One court responded yes to the question. The other commenter stated that judicial education would be helpful but "…it does seem beneficial to have these set forth in form."

Alternatives considered

Along with amending rule 5.225, the committee considered revising *Order Appointing Child Custody Evaluator* (form FL-327) to include the evaluator's duty to inform others if the child has indicated a change in choice about addressing the court. However, the committee decided not to include form FL-327, as it does not specify each of the child custody evaluator's duties in the same way as form FL-323 lists the specific duties of counsel appointed to represent a child. Thus, the committee decided that revising form FL-327 is not necessary to implement AB 654.

The committee also considered proposing only the mandatory changes to the rules to comply with the mandate of Family Code section 3042. The Legislature did not specify that the Judicial Council must adopt a rule of court or form to implement the amendments to section 3011. Therefore, the committee considered not revising forms FL-311 and FL-341 to reflect the amendments to section 3011.

However, as previously noted, the committee believes that revising forms FL-311 and FL-341 will help parties ask for orders and help judicial officers comply with the requirements of Family Code section 3011, respectively, in child custody and visitation cases involving allegations of abuse or substance abuse. The committee decided to ask for specific comments from the public and the courts to determine if they find the revisions to forms FL-311 and FL-341 helpful in cases involving requests for child custody and visitation under Family Code section 3011(a)(5)(A). Feedback about the proposed changes has helped inform the committee's recommendations to the Judicial Council about the forms.

Fiscal and Operational Impacts

Generally, the impact to the courts includes costs to (1) copy the revised forms, (2) educate judicial officers about the new procedure for specific orders made under section 3011, and (3) educate the court and court professionals about their expanded duties under section 3042(h). Specific responses included: training case processing staff, self-help staff, and courtroom clerks (approximately one hour each position); staff meeting agenda to inform staff of revisions; revising case processing and courtroom procedures; revising Self-Help Center packets to include updated forms; revising activities in case management systems to reflect appropriate order language.

Attachments and Links

1. Cal. Rules of Court, rules 5.210, 5.220, 5.242, and 5.250, at pages 18–22
2. Forms FL-311, FL-323, and FL-341, at pages 23–33
3. Chart of comments, pages 34–51
4. Link A: SB 654, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB654*

Rules 5.210, 5.220, 5.242, and 5.250 of the California Rules of Court are amended, effective January 1, 2023, to read:

Rule 5.210. Court-connected child custody mediation

(a)–(c) * * *

(d) Responsibility for mediation services

(1) * * *

(2) Each court-connected mediator must:

(A)–(C) * * *

(3) If so informed by the child at any point, each child custody recommending counselor must notify the parties, other professionals serving on the case, and then the judicial officer:

(A) About the child's desire to provide input and address the court; and

(B) As soon as feasible, that the child has changed their choice about addressing the court.

(e)–(h) * * *

Rule 5.220. Court-ordered child custody evaluations

(a)–(c) * * *

(d) Responsibility for evaluation services

(1) * * *

(2) The child custody evaluator must:

(A) Consider the health, safety, welfare, and best interest of the child within the scope and purpose of the evaluation as defined by the court order;

(B) Strive to minimize the potential for psychological trauma to children during the evaluation process; ~~and~~

(C) Include in the initial meeting with each child an age-appropriate explanation of the evaluation process, including limitations on the confidentiality of the process;

(D) Inform the parties, other professionals serving on the case, and then the judicial officer about the child's desire to provide input and address the court; and

(E) If so informed by the child at any point, provide notice that the child has changed their choice about addressing the court. Notice must be provided as soon as feasible to the parties or their attorneys, other professionals serving on the case, and then to the judicial officer.

(e)–(k) * * *

Rule 5.242. Qualifications, rights, and responsibilities of counsel appointed to represent a child in family law proceedings

(a)–(i) * * *

(j) Responsibilities of counsel for a child

Counsel is charged with the representation of the child's best interest. The role of the child's counsel is to gather evidence that bears on the best interest of the child and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel must present the child's wishes to the court.

(1)–(3) * * *

(4) In any case in which counsel is representing a child who is called to testify in the proceeding, counsel must:

(A)–(B) * * *

(C) Provide procedures relevant to the child's participation and, if appropriate, provide an orientation to the courtroom where the child will be testifying; ~~and~~

(D) Inform the parties, other professionals serving on the case, and then the ~~court~~ judicial officer about the client's desire to provide input and address the court; and

(E) If so informed by the child at any point, provide notice that the child has changed their choice about addressing the court. Notice must be provided as soon as feasible to the parties or their attorneys, other professionals serving on the case, and then to the judicial officer.

(k) * * *

Rule 5.250. Children's participation and testimony in family court proceedings

(a) ~~**Children's participation**~~ **Authority and overview**

This rule is intended to implement Family Code section 3042. ~~Children's participation in family law matters must be considered on a case-by-case basis.~~ No statutory mandate, rule, or practice requires children to participate in court or prohibits them from doing so. ~~When a child wishes to participate, the court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to challenge evidence relied upon by the court in making custody decisions.~~

(b) Children's participation

When a child wishes to participate in a court proceeding involving child custody and visitation (parenting time):

(1) The court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to be aware of and to challenge evidence relied on by the court in making custody decisions.

(2) The court must:

(A) Consider a child's participation in family law matters on a case-by-case basis; and

(B) Not permit a child addressing the court about child custody or visitation (parenting time) to do so in the presence of the parties. The court must provide an alternative to having the child address the court in the presence of the parties to obtain input directly from the child.

(3) Notwithstanding the prohibition in (b)(2)(B), the court:

(A) May permit the child addressing the court about child custody or visitation (parenting time) to do so in the presence of the parties if the court determines that doing so is in the child's best interests and states its reasons for that finding on the record; and

(B) Must, in determining the best interests of the child under (b)(2)(A), consider whether addressing the court regarding child custody or visitation (parenting time) in the presence of the parties is likely to be detrimental to the child.

~~(b)~~ **(c) Determining if the child wishes to address, or has changed their choice about addressing, the court**

(1) The following persons must ~~inform the court~~ notify the persons in (c)(2) if they have information indicating that a child in a custody or visitation (parenting time) matter either wishes to address the court or has changed their choice about addressing the court:

(A) An ~~minor's counsel~~ attorney appointed to represent the child in the case;

(B) An evaluator;

(C) An investigator; ~~and~~

(D) A child custody recommending counselor who provides recommendations to the ~~judge~~ judicial officer under Family Code section 3183; and

(E) Other professionals serving on the case.

(2) The notice described in (c)(1) must be given, as soon as feasible, to the following:

(A) The parties or their attorneys;

(B) The attorney appointed to represent the child;

(C) Other professionals serving on the case; and then

(D) The judicial officer.

~~(2)~~ (3) The following persons may inform the court if they have information indicating that a child wishes to address the court:

(A)–(B) * * *

~~(3)~~ (4) In the absence of information indicating a child wishes to address the court, the judicial officer may inquire whether the child wishes to do so.

~~(c)~~ (d) * * *

~~(d)~~ (e) Guidelines for receiving testimony and other input

(1)–(4) * * *

(5) In any case in which a child will be called to testify, the court may consider the appointment of minor's counsel for that child. The court may consider whether such appointment will cause unnecessary delay or otherwise interfere with the child's ability to participate in the process. In addition to adhering to the requirements for minor's counsel under Family Code section 3151 and rules 5.240, 5.241, and 5.242, and subdivision (c) of this rule, minor's counsel must:

(A)–(C) * * *

~~(D) Inform the parties and then the court about the client's desire to provide input~~

(6) * * *

~~(e)~~ (f) Additional responsibilities of court-connected or appointed professionals

In addition to the duties in (c), a child custody evaluator, a child custody recommending counselor, or ~~a mediator~~ an investigator assigned to meet with a child in a family court proceeding must:

(1)–(3) * * *

~~(f)~~ (g) * * *

~~(g)~~ (h) * * *

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

CHILD CUSTODY AND VISITATION (PARENTING TIME) APPLICATION ATTACHMENT

—This is not a court order—

TO ☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**
☐ **Other** *(specify):*

1. a. ☐ **Custody.** Custody of the minor children of the parties is requested as follows: ☐ Attachment 1a.

Child's Name	Date of Birth	Legal Custody to *(person who decides about the child's health, education, and welfare)*	Physical Custody to *(person the child regularly lives with)*

b. ☐ **Custody with allegations of a history of abuse or substance abuse**

(1) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to.

(2) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.

(3) ☐ I ask that the court NOT order sole or joint custody of the minor child to the person(s) alleged to have a history of abuse or substance abuse.

(4) ☐ Even though there are allegations, I ask that the court make the child custody orders in item 1a.
(Write the reasons why you think it would be good for the children that the person(s) be granted custody, even though there are allegations against them of a history of abuse or substance abuse.)
☐ Below: ☐ Attachment 1b. ☐ Other *(specify):*

2. ☐ **Visitation (Parenting Time).**
Note: Unless specifically ordered, a child's holiday schedule order has priority over the regular parenting time.
a. ☐ Reasonable right of parenting time (visitation) to the party without physical custody **(not appropriate in cases involving domestic violence)**.
b. ☐ See the attached _____ -page document dated *(specify date):*
c. ☐ The parties will go to child custody mediation or child custody recommending counseling at *(specify date, time, and location):*
d. ☐ No visitation (parenting time).

Form Approved for Optional Use
Judicial Council of California
FL-311 [Rev. January 1, 2023]

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

e. ☐ Visitation (parenting time). *(Specify start and ending date and time. If applicable, check "start of" OR "after school.")*

☐ **Petitioner's** ☐ **Respondent's** ☐ **Other Parent's/Party's** parenting time (visitation) will be as follows:

(1) ☐ **Weekends starting** *(date):*

(Note: The first weekend of the month is the first weekend with a Saturday.)

☐ 1st ☐ 2nd ☐ 3rd ☐ 4th ☐ 5th weekend of the month

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(a) ☐ The parties will alternate the fifth weekends, with the ☐ petitioner ☐ respondent ☐ other parent/party having the initial fifth weekend, which starts *(date):*

(b) ☐ The ☐ petitioner ☐ respondent ☐ other parent/party will have the fifth weekend in ☐ odd ☐ even numbered months.

(2) ☐ **Alternate weekends starting** *(date):*

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(3) ☐ **Weekdays starting** *(date):*

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(4) ☐ Other visitation (parenting time) days and restrictions are: ☐ listed in Attachment 2e(4) ☐ as follows:

3. ☐ **Visitation (parenting time) with allegations of a history of abuse, substance abuse, or other parenting concerns**

a. ☐ **Supervised visitation (parenting time)**

(1) I ask that ☐ petitioner ☐ respondent ☐ other parent/party have supervised visitation with the minor children according to the schedule in item 2 because of *(specify):*

(A) ☐ Domestic violence, child abuse, or neglect.

(B) ☐ Substance abuse: the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.

(C) ☐ Other parenting concerns *(specify below):*

(2) The reasons why the court should make the orders are *(specify)*:

(Write the reasons why you think unsupervised visitation (parenting time) would be bad for the children.)

☐ Below ☐ in Attachment 3a(2) ☐ Other *(specify):*

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

(3) I ask for the following orders about the supervised visitation provider:

(A) Visitation (parenting time) be monitored by *(name, if known):*

(i) ☐ The person or agency is a professional provider. A professional provider must meet the requirements listed in *Declaration of Supervised Visitation Provider (Professional)* (form FL-324(P)) and sign the declaration.

(ii) ☐ The person is a nonprofessional provider. That person must meet the requirements listed in *Declaration of Supervised Visitation Provider (Nonprofessional)* (form FL-324(NP)) and sign a declaration.

(iii) The provider's phone number is *(specify):*

(B) Any costs of supervision be paid as follows: petitioner: percent; respondent: percent. other parent/party: percent.

b. ☐ **Unsupervised visitation (parenting time)**

(Complete 3b only if you want the court to order unsupervised visitation to a person alleged to have a history of abuse or substance abuse.)

(1) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to.

(2) ☐ Petitioner ☐ Respondent ☐ Other parent/party is (or are) alleged to have the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.

(3) Even though there are allegations of a history of abuse or substance abuse, I request that the court order unsupervised visitation to *(specify):* ☐ Petitioner ☐ Respondent ☐ Other parent/party

(4) The reasons why the court should make the orders are *(specify)*:
(Write the reasons why you think it would be good for the children that the person(s) be granted unsupervised visitation (parenting time) even though there are allegations against them of a history of abuse or substance abuse.)
☐ Below: ☐ in Attachment 3b. ☐ Other *(specify):*

(5) *The orders for visitation (parenting time) that you request must be specific as to time, day, place, and manner of transfer of the child, as Family Code section 6323(c) requires.*

4. ☐ **Transportation for visitation (parenting time) and place of exchange**

Note: In cases of domestic violence, the court must have enough information to make orders that are specific as to the time, place, and manner of transfer (exchange) of the child for custody and visitation under Family Code section 6323(c).

a. The children must be driven only by a licensed and insured driver. The vehicle must be legally registered with the Department of Motor Vehicles and must have child restraint devices properly installed, as required by law.

b. ☐ Transportation **to** begin the visits will be provided by *(name):*

c. ☐ Transportation **from** the visits will be provided by *(name):*

d. ☐ The exchange point at the beginning of the visit will be *(address):*

e. ☐ The exchange point at the end of the visit will be *(address):*

f. ☐ During the exchanges, the party driving the children will wait in the car and the other party will wait in the home (or exchange location) while the children go between the car and the home (or exchange location).

g. ☐ Other *(specify):*

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

5. ☐ **Travel with children** The ☐ Petitioner ☐ Respondent ☐ Other parent/party **must** have written permission from the other parent or party, or a court order, to take the children out of the following places:
   a. ☐ the state of California.
   b. ☐ the following counties *(specify):*
   c. ☐ other places *(specify):*

6. ☐ **Child abduction prevention.** There is a risk that one of the parties will take the children out of California without the other party's permission. I request the orders set out on attached **form FL-312**.

7. ☐ **Children's holiday schedule.** I request the holiday and vacation schedule set out ☐ below ☐ on form FL-341(C)

8. ☐ **Additional custody provisions.** I request the additional orders for custody set out ☐ below ☐ on form FL-341(D)

9. ☐ **Joint legal custody provisions.** I request joint legal custody and want the additional orders set out ☐ below ☐ on form FL-341(E)

10. ☐ **Other.** I request the following additional orders *(specify):*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* DRAFT NOT APPROVED BY THE JUDICIAL COUNCIL v. 8/01/22
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	
ORDER APPOINTING COUNSEL FOR A CHILD	CASE NUMBER:

1. The proceeding was heard:
   On *(date):* at *(time)*: in Dept.: Room:
   Judge *(name):* ☐ Temporary Judge
   ☐ Petitioner/Plaintiff present ☐ Attorney present *(name)*:
   ☐ Respondent/Defendant present ☐ Attorney present *(name)*:
   ☐ Other parent/party present ☐ Attorney present *(name)*:
   ☐ On the request for order, order to show cause, or motion filed *(date):* by *(name)*:

2. **THE COURT FINDS** it is in the best interest of the child to appoint counsel to represent the child under Family Code section 3150(a).

   a. Counsel appointed for the child *(name of counsel):*
   b. Address:
   c. Phone number: d. Email address (optional):

3. **CHILD OR CHILDREN FOR WHOM COUNSEL IS APPOINTED**

Name	Date of birth	Address(es) *(if appropriate)*

4. **REASON FOR APPOINTMENT** *(specify):*

5. **DETERMINATION OF FEES AND PAYMENT**
   a. Counsel for the child will be compensated as follows:
      (1) *(Specify amount or rate and terms):*
      (2) ☐ The court reserves jurisdiction to determine compensation payable to counsel for the child.
      (3) The court reserves jurisdiction to modify the compensation payable to counsel for the child retroactively.

Form Adopted for Mandatory Use
Judicial Council of California
FL-323 [Rev. January 1, 2023]

Family Code, §§ 3150, 3151, 3151.5, 3152;
Government Code, § 77003;
Cal. Rules of Court, rules 5.240, 5.241, 5.242
www.courts.ca.gov

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	CASE NUMBER:

5. b. The court finds that the parties are able to pay the compensation and expenses for the child's counsel. The parties are ordered to pay counsel for the child as follows:

(1) ☐ Petitioner/Plaintiff % ☐ Respondent/Defendant: % ☐ Other parent/party: %

(a) ☐ Petitioner/Plaintiff must make installment payments of $ per month until paid or modified by court order.

(b) ☐ Respondent/Defendant must make installment payments of $ per month until paid or modified by court order.

(c) ☐ Other parent/party must make installment payments of $ per month until paid or modified by court order.

(2) The court reserves jurisdiction to reallocate attorney's fees and costs between the parties.

c. The court finds that the parties are unable to pay ☐ all ☐ a portion of the costs for child's counsel. The child's counsel must be paid as follows:

(1) ☐ The court will pay all the fees and expenses for the child's attorney.

(2) ☐ Petitioner/Plaintiff % ☐ Respondent/Defendant: % ☐ Other parent/party: %

☐ Payable by court: %

(a) ☐ Petitioner/Plaintiff must make installment payments of $ per month until paid or modified by court order.

(b) ☐ Respondent/Defendant must make installment payments of$ per month until paid or modified by court order.

(c) ☐ Other parent/party must make installment payments of $ per month until paid or modified by court order.

(3) The court reserves jurisdiction to reallocate attorney fees and costs between the parties.

(4) The court may seek reimbursement from the parties if the court pays all or a portion of the compensation for the child's counsel.

d. Other:

6. **ADDITIONAL ORDERS**

a. No later than 10 court days after being appointed by the court and before beginning work on the case, counsel for a child must file a declaration with the court indicating compliance with the requirements of rule 5.242 of the California Rules of Court. *Declaration of Counsel for a Child Regarding Qualifications* (form FL-322) or other local court forms may be used for this purpose.

b. The parties and their counsel are ordered to cooperate with counsel for the child to permit the performance of his or her duties.

c. Counsel for the child must be provided with complete copies of all relevant documents and records filed in the proceeding within 10 days of the appointment.

d. The parties must provide complete information concerning the child's school, medical, psychological, psychiatric, and other pertinent records to the child's counsel on request. The parties must execute such waivers and releases necessary to facilitate the child's counsel in securing access to records for the child.

e. The parties and/or their counsel must not compromise, settle, dismiss, or otherwise remove from the court's calendar all or any portion of the issues, claims, or proceedings concerning which the child's counsel has been appointed, without participation of the child's counsel or advance notice to the child's counsel.

f. Counsel must continue to represent the child until the appointment terminates, as provided in rule 5.240(f) of the California Rules of Court, or as stated below in item 9.

7. **OTHER ORDERS:**

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	CASE NUMBER:

8. **DUTIES OF COUNSEL FOR A CHILD**

a. Counsel for a child must:

(1) Represent the child's best interests.

(2) Gather evidence that bears on the best interest of the child and present that admissible evidence to the court in any manner appropriate for the counsel of a party.

(3) Present the child's wishes to the court if the child so desires.

(4) Serve notices and pleadings on all parties consistent with rules and laws applicable to parties.

(5) Unless under the circumstances it is inappropriate to exercise the duty:

(A) Interview the child;

(B) Review the court files and all accessible relevant records available to both parties; and

(C) Make any further investigations child's counsel considers necessary to ascertain evidence relevant to the custody or visitation hearings.

(6) If so informed by the child at any point, provide notice that the child:

(A) Wishes to address the court; or

(B) Has changed their choice about addressing the court.

(7) Provide the notice in (6) as soon as feasible to the parties or their attorneys, other professionals serving on the case, and then to the judicial officer.

b. Counsel may introduce and examine witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to represent the child adequately.

9. **COUNSEL FOR A CHILD HAS THE FOLLOWING RIGHTS:**

a. To have reasonable access to the child;

b. To have standing to seek affirmative relief on behalf of the child;

c. To receive notice of any proceeding, and all phases of that proceeding, including a request for examination affecting the child;

d. To be heard in the proceeding and take any action available to a party in the proceeding;

e. To have access to the child's medical, dental, mental health, and other health-care records;

f. To have access to the child's school and educational records;

g. To interview school personnel, caretakers, health-care providers, mental health professionals, and others who have assessed the child or provided care to the child;

h. To interview mediators subject to the provisions of Family Code sections 3177 and 3182;

i. To assert or waive any privilege on behalf of the child;

j. To receive reasonable advance notice of and the right to refuse any physical or psychological examination or evaluation that has not been ordered by the court;

k. On approval of the court, to seek independent psychological or physical examination or evaluation of the child for purposes of the pending proceeding;

l. On noticed motion to all parties and the local child protective services agency, to request the court to authorize the relevant local child protective services agency to release relevant reports or files concerning the child represented by the counsel as provided by Family Code section 3152; and

m. Not to be called as a witness in the proceeding. (Fam. Code, §§ 3151(b), 3151.5.)

THE COURT SO ORDERS.

Date: _____

_____
JUDICIAL OFFICER

NOTICE
Any party required to pay court-ordered attorney fees or reimburse the court for attorney fees paid on a party's behalf must pay interest on overdue amounts at the legal rate, which is currently 10 percent per year. Failure to pay court-ordered attorney fees or reimburse the court for fees paid on a party's behalf may result in a legal action being initiated to collect overdue payments and interest on overdue amounts.

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

CHILD CUSTODY AND VISITATION (PARENTING TIME) ORDER ATTACHMENT

TO ☐ ***Findings and Order After Hearing*** **(form FL-340)** ☐ ***Judgment*** **(form FL-180)** ☐ ***Judgment*** **(form FL-250)**
☐ ***Stipulation and Order for Custody and/or Visitation of Children*** **(form FL-355)**
☐ Other *(specify):*

1. **Jurisdiction.** This court has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, §§ 3400–3465).
2. **Notice and opportunity to be heard.** The responding party was given notice and an opportunity to be heard, as provided by the laws of the State of California.
3. **Country of habitual residence.** The country of habitual residence of the child or children in this case is
   ☐ the United States ☐ Other *(specify):*
4. **Penalties for violating this order.** If you violate this order, you may be subject to civil or criminal penalties, or both.
5. ☐ **Child abduction prevention.** There is a risk that one of the parties will take the children out of California without the other party's permission. (*Child Abduction Prevention Order Attachment* **(form FL-341(B))** is attached and must be obeyed.)
6. ☐ **Child custody**. Custody of the minor children of the parties is awarded as follows:

Child's Name	Birth Date	Legal custody to: *(person who decides about the child's health, education, and welfare)*	Physical custody to: *(person the child regularly lives with)*

7. ☐ **Child custody orders with allegations of a history of abuse or substance abuse**
   (Do not complete this section if the parties have entered, or will enter into, an agreement on child custody and/or visitation (parenting time), in writing or stated in court.)
   a. Allegations have been raised in form FL-311, other documents filed in the court, or in a court hearing that
      ☐ petitioner ☐ respondent ☐ other parent/party has (or have) either:
      (1) a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to; or
      (2) the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances.
   b. ☐ The court does NOT grant sole or joint custody of the minor children to ☐ petitioner ☐ respondent ☐ other parent/party
   c. ☐ Even though there are allegations of a history of abuse or substance abuse, the court GRANTS sole or joint custody of the minor child as set out in item 6 for the following reasons: ☐ Attachment 7c.

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

8. ☐ **Visitation (Parenting Time)**

a. ☐ Reasonable right of visitation to the party without physical custody **(not appropriate in cases involving domestic violence)**

b. ☐ See the attached _____ -page document

c. ☐ The parties will go to child custody mediation or child custody recommending counseling at *(specify date, time, and location):*

d. ☐ No Visitation (parenting time)

e. ☐ Visitation (parenting time) for the ☐ petitioner ☐ respondent ☐ other *(name):* will be as follows:

(1) ☐ **Weekends starting** *(date):*

(Note: The first weekend of the month is the first weekend with a Saturday.)

☐ 1st ☐ 2nd ☐ 3rd ☐ 4th ☐ 5th weekend of the month

from *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(a) ☐ The parties will alternate the fifth weekends, with the ☐ petitioner ☐ respondent ☐ other parent/party having the initial fifth weekend, which starts *(date):*

(b) ☐ The ☐ petitioner ☐ respondent ☐ other parent/party will have the fifth weekend in ☐ odd ☐ even numbered months.

(2) ☐ **Alternate weekends starting** *(date):*

from *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(3) ☐ **Weekdays starting** *(date):*

from *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

to *(day of week)* at *(time)* ☐ a.m. ☐ p.m./ if applicable, specify: ☐ start of school ☐ after school

(4) ☐ **Other visitation (parenting time) days and restrictions are:** ☐ listed in Attachment 7e(4) *(form MC-025 may be used for this purpose)* ☐ as follows:

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

9. ☐ **Visitation (parenting time) with allegations of a history of abuse, substance abuse, or other parenting concerns**

a. ☐ **Supervised visitation (parenting time).**

(1) Until ☐ further order of the court ☐ other *(specify):* , the
☐ petitioner ☐ respondent ☐ other parent/party *(name):*
will have supervised visitation (parenting time) with the minor children according to the schedule on page 2.

(2) **In addition, *Supervised Visitation Order* (form FL-341(A) is attached.**

b. ☐ **Unsupervised visitation (parenting time)**

(Do not complete this section if the parties have entered or will enter into an agreement on child custody and/or visitation (parenting time), in writing or stated in court.)

(1) Even though there are allegations of a history of abuse or substance abuse under Family Code section 3011, the
☐ petitioner ☐ respondent ☐ other parent/party *(name):*
has (or have) unsupervised visitation (parenting time) with the minor children as set forth in 8.

(2) The reasons for granting unsupervised visitation to the person(s) alleged to have a history of abuse or substance abuse are: ☐ as follows: ☐ Attachment 9b.

(3) The orders for visitation (parenting time) are specific as to time, day, place, and manner of transfer of the child, as Family Code section 6323(c) requires.

10. ☐ **Transportation for visitation (parenting time) and place of exchange**

a. The children must be driven only by a licensed and insured driver. The vehicle must be legally registered with the Department of Motor Vehicles, and must have child restraint devices properly installed, as required by law.

b. ☐ Transportation **to** begin the visits will be provided by the ☐ petitioner ☐ respondent ☐ other *(specify):*

c. ☐ Transportation **from** the visits will be provided by the ☐ petitioner ☐ respondent ☐ other *(specify):*

d. ☐ The exchange point at the beginning of the visit will be at *(address):*

e. ☐ The exchange point at the end of the visit will be at *(address):*

f. ☐ During the exchanges, the party driving the children will wait in the car and the other party will wait in the home (or exchange location) while the children go between the car and the home (or exchange location).

g. ☐ Other *(specify):*

11. ☐ **Travel with children**. The ☐ petitioner ☐ respondent ☐ other parent/party *(name):*
must have written permission from the other parent or a court order to take the children out of

a. ☐ the state of California.

b. ☐ the following counties *(specify):*

c. ☐ other places *(specify):*

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

12. ☐ **Holiday schedule**. The children will spend holiday time as listed ☐ below ☐ in the attached schedule. (*Children's Holiday Schedule Attachment* (*form FL-341(C)*) may be used for this purpose.)

13. ☐ **Additional custody provisions**. The parties will follow the additional custody provisions listed ☐ below ☐ in the attached schedule. (*Additional Provisions—Physical Custody Attachment* (form FL-341(D)) may be used for this purpose.)

14. ☐ **Joint legal custody**. The parties will share joint legal custody as listed ☐ below ☐ in the attached schedule. (*Joint Legal Custody Attachment* (form FL-341(E)) may be used for this purpose.)

15. **Access to children's records.** Both the custodial and noncustodial parent have the right to access records and information about their minor children (including medical, dental, and school records) and consult with professionals who are providing services to the children.

16. ☐ **Other** *(specify):*

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	California Partnership to End Domestic Violence By Christine Smith Public Policy Coordinator Sacramento	AM	See specific comments below.	See committee's response below.
2.	Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	NI	See specific comments below.	See committee's response below.
3.	Harriet Buhai Center for Family Law By Rebecca L. Fisher, Senior Staff Attorney Los Angeles	AM	See specific comments below.	See committee's response below.
4.	Orange County Bar Association By Daniel S. Robinson, President Newport Beach	A	See specific comments below.	See committee's response below.
5.	Superior Court of Los Angeles County	A	See specific comments below.	See committee's response below.
6.	Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	NI	See specific comments below.	See committee's response below.
7.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	AM	See specific comments below.	See committee's response below.

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

1. Comments about rule 5.210		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to California Rules of Court, rule 5.210 achieve their stated purpose and will be helpful to effectuate changes to Family Code section 3042.	No response required.

2. Comments about rule 5.225		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to California Rules of Court, rule, 5.225 achieve their stated purpose and will be helpful to effectuate changes to Family Code section 3042.	Because rule 5.225 relates to the appointment requirements of child custody evaluators, the committee has decided to recommend the same amendments to rule 5.220. *Court ordered child custody evaluations* under item (d)(2) rather than to rule 5.225.

3. Comments about rule 5.242		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to California Rules of Court, rule, 5.242 achieve their stated purpose and will be helpful to effectuate changes to Family Code section 3042.	No response required.

4. Comments about rule 5.250		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to California Rules of Court, rules 5.250 achieve their stated purpose and will be helpful to effectuate changes to Family Code section 3042.	No response required.

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

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to form FL-311 would not be helpful to parties or attorneys, and in fact will be confusing to self-represented litigants. It is not clear, for instance, that items 1(b) and 3 do not have to be completed by everyone completing the parenting time application.	Based on the comments, the committee recommends specific revisions to item 1b to make the child custody request part of the form easier to understand and complete. One change the committee recommends is adding a check box for the party to indicate that they do not want the court to order sole or joint custody to a person alleged to have a history of abuse or substance abuse. In addition, the committee recommends that item 3b include a notice that the party should ONLY complete it if they want the court to make orders for unsupervised visitation to a party alleged to have a history of abuse.
	Moreover, the language in both items 1(b) and 3 is misleading in that it does not seem to encompass the situation where the parent who is alleged to have a history of abuse would be asking for custody or unsupervised parenting time for themselves.	The committee specifically drafted items 1b and 3 to be completed by either the party alleging a history of abuse or the party alleged to have a history of abuse. For example, if the petitioner is alleged to be the party with a history of abuse and is asking for custody for themselves, the party would check "petitioner" is alleged to have a history of abuse. If all parties are alleged in the pleadings to have a history of abuse, the petitioner would be able to check "petitioner," "respondent," or "other parent/party."
	In addition, there is already space in the form asking parties to provide their facts and argument for their requests, so the information gathered in these two items 1(b) and 3 is already being gathered elsewhere on the form. Redundancy in the forms should be avoided when possible.	The committee does not agree that the proposed revisions to form FL-311 are redundant. No existing item provides the parties with the specific statutory requirements of Family Code section 3011 that would allow a party the specific opportunity to state the reasons why they believe the court should grant child custody or

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
		unsupervised visitation to a parent alleged to have a history of abuse or substance abuse.
	Finally, and perhaps most importantly, we are VERY concerned that including these questions on the form would cause judicial officers to wrongly rely solely on the request forms to decide whether they need to comply with Family Code section 3011, subdivision (a)(5)(A). Abuse does not need to be alleged in any specific place or form for those requirements to apply; abuse just has to be alleged in the case in general—it could be raised at the hearing, in the initial request, in a response, in a supplemental declaration, in a mediation report, in exhibits attached to a declaration, etc.	The committee appreciates the commenter's concerns. In response, the committee notes that resolving the issue raised by the commenter involves more than changing the forms in the report. It will involve educating judicial officers about the requirements of Family Code section 3011, as well as other statutes relating to cases involving a history of abuse or substance abuse. Including items 1b and 3 on form FL-311 will also bring awareness to the duties that judicial officers have to comply with section 3011. Further, providing an opportunity for the parties to present facts in writing on form FL-311 improves the ability of the court to better assess whether the reasons that the parent specified are sufficient to grant the parent's request for child custody or visitation (parenting time) orders on allegations of a history of abuse. Based on this comment, the committee also recommends changing the court order (form FL-341) item 7a, to provide that the judicial officer has considered allegations of abuse from sources that are not limited to those made in form FL-311 before making the order for child custody or unsupervised visitation under section 3011(a)(5)(A).

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
	By placing these items 1(b) and 3 on this request form, it strongly suggests to courts and litigants that this is their one and only chance to bring up these allegations, and if not brought up here, the statutory requirements would not apply.	The committee disagrees with the commenter on this point. The comment does not reflect an understanding of the purpose of form FL-311. Unlike other forms (for example, *Appearance, Stipulations, and Waivers* (for FL-130) and *Advisement and Waiver of Rights Re: Determination of Parental Relationship* (form FL-235)), form FL-311 does not require a party to waive any rights or remedies under the law. There is no language in form FL-311 to suggest that to courts and litigants that a party will be prevented from seeking the protections of the statute in the future if they do not check items 1(b) and 3. This is true for any item on the form. Parties with questions about the form may get help from the local court's Family Law Facilitator's Office or Self-Help Center, or the self-help portal of the California Courts website.
	Family Code section 3011 places the onus on the court, not the parties, to determine whether allegations of abuse have been raised, and, if so, to state its reasons on the record for granting the allegedly abusive parent custody or unsupervised visitation. Parents may not realize their reasons for a particular custody arrangement qualify as domestic violence under the law, or parents may allege facts they think are abuse but are not abuse under the law. It is incumbent on judicial officers to apply the law to the facts before them, however and whenever those facts have been raised in the case, and regardless whether a parent expressly invokes Family Code section 3011.	The committee believes that the changes to form FL-311 and FL-341 will serve to educate judicial officers about the mandate under Family Code section 3011. This increases compliance with the law because the parties' responses to the specific item would allow the judicial officer to better assess if child custody or unsupervised visitation should be granted and make the required findings.
	In FVAP's experience, we have found it incredibly difficult to get judicial officers to comply with basic requirements for	See above response.

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
	stating their reasons (e.g., Fam. Code, §§ 3011, subd. (a)(5)(A), 3044, subd. (f)), so it is very important to us that the forms courts use do not cause judicial officers to think they do not have to comply with certain requirements when in fact they do. It is also noteworthy that the court was, before SB 654 was enacted, already required to state its reasons if it grants custody to an alleged abuser, per Family Code section 3011, subdivision (a)(5)(A). SB 654 just expanded the universe of cases where that requirement applies, to now include unsupervised visitation as well as custody (since there is sometimes little practical difference between significant unsupervised visitation and custody). Before SB 654, there was no need to add items 1(b) and 3 to the form, so why is there a need now with SB 654? SB 654 did not affect the court's duty to state its reasons when allegations are raised, and SB 654 didn't place any duties on the parties. NO bill, statute, or law requires adding these items 1(b) and 3 to the form. And doing so would cause confusion and potential misapplication of the law. We **STRONGLY** suggest removing items 1(b) and 3 from proposed revised form FL-311 form and instead adding item 2(f) as follows: f. □ Visitation should be supervised by □ professional □ nonprofessional supervisor.	The recent adoption of SB 654 brought to the committee's attention the need to provide for the practice and procedures that cover *both* the recent amendments to Family Code section 3011 relating to unsupervised visitation and the previously enacted provisions of section 3011 relating to requests for child custody under allegations of a history of abuse. Revising form FL-311 as recommended will help to alert judicial officers and self-represented litigants about the law. Therefore, the committee recommends that the Judicial Council provide by rule for the practice and procedure in these proceedings to avoid confusion and the potential misapplication of the law. The committee appreciates the commenter's suggestions for achieving this end. For reasons previously stated, the committee does not agree to remove items 1b and 3 from the recommendations it is making to the Judicial Council. Because the commenter's suggestion does not fully address the provisions under Family Code section 3011 relating to child custody and unsupervised visitation to a parent alleged to have a history of abuse or substance

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
		abuse, the committee does not agree to revise the form to remove new items 1(b) and 3 and instead add the proposed language regarding professional or nonprofessional supervised visitation.
	If not removed, items 1(b) and 3 should be modified extensively to clarify all of the following:	
	1) they should only be completed if there are allegations of abuse/substance abuse against a parent, and the person completing the form thinks the allegedly abusive/substance abusing parent should have custody in item 1(b) or unsupervised visitation in item 3, because absent these allegations these parts of form should not be completed; and	Because the committee recommends that item 1b be included on the form as a check box (like item 1a above it, regarding child custody), the committee believes that additional notices on the form are not needed to provide that item 1b only needs to be completed if there are allegations of a history of abuse or substance abuse. The party will not check the box if the custody case does not involve allegations of a history of abuse or substance abuse. However, the committee does recommend that the California Courts Self-Help portal be updated to provide information that reflects the new practice and procedures in the revisions to form FL-311 and FL-341.
	2) item 1(b) or 3 should be completed by the parent who is alleged to have committed abuse/abused substances, if that parent wants custody or unsupervised visitation; and	The committee does not agree to limit the application of item 1b to the person who is alleged to have a history of abuse or substance abuse. As previously indicated, the committee specifically drafted items 1b and 3 to be completed by either party. Generally, form FL-311 is a multi-use attachment. It can be attached to a Petition, Response, Request for Order, or Responsive Declaration to Request for Order.

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
	3) notice should be provided on the form that failing to complete these items does NOT mean allegations of abuse/substance abuse cannot be raised in another way, and indeed the court MUST still follow Family Code section 3011(a)(5)(A) if allegations are made, even if these boxes are not checked.	To address the specific concern raised by the commenter, the committee recommends revising the *Child Custody and Visitation (Parenting Time) Order Attachment* (form FL-341) to provide that the judicial officer has considered allegations of abuse from sources that are not limited to those made in form FL-311, as previously described.
Harriet Buhai Center for Family Law By Rebecca L. Fisher, Senior Staff Attorney Los Angeles	On the proposed FL-311, many litigants would likely mark item 1b in order to show that there have been allegations against the other party even if the proposed custody arrangement does not award custody to the other person. If they do so, it will be unclear whether they should provide information in 1(b)(2) or not because they may be asking for sole legal and sole physical custody in 1a and so view 1(b)(2) as not applying. If the goal of the form changes is to help courts comply with the changes to FL 3011 (particularly in default cases), it is critical that the form flags all cases with the FC 3011 allegations; that is the best way to make sure the orders comply with FC 3011(a)(5)(A). The visitation sections are much clearer on the FL-311 and FL-341 than the custody sections. Proposed changes: FL-311: 1b. [ ] Allegations of abuse or substance abuse	After considering all comments about the proposed changes to form FL-311, and following further discussion, the committee recommends that the Judicial Council revise item 1b of form FL-311 provide, as follows: 1b. [] **Custody with allegations of a history of abuse or substance abuse** (1) [] Petitioner [] Respondent [] Other parent/party is (or are) alleged to have a history of abuse against any of the following persons: a child, the other parent, their current spouse, or the person they live with or are dating or engaged to. (2) [] Petitioner [] Respondent [] Other parent/party is (or are) alleged to have the habitual or continual use of controlled substances, alcohol, or prescribed drugs. (3) [] I ask that the court NOT order sole or joint custody of the minor child to the person(s) alleged to have a history of abuse or substance abuse. (4) [] Even though there are allegations, I ask that the court make the child custody orders in 1a. *(Write*

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

5. Comments about form FL-311		
Commenter	**Comment**	**Committee Response**
	[ ] Petitioner [ ] Respondent [ ] Other Party/ Parent has a history of (mark all that apply): [ ] history of abuse [ ] habitual or continual use of controlled substances, alcohol, or prescribed substances Information regarding the above allegations are (specific): [ ] as follows [ ] attachment 1b	the reasons why you think it would be *good for the children that the person(s) be granted custody, even though there are allegations against them of a history of abuse or substance abuse.)* [] Below [] Attachment 1b. [] Other *(specify)*__ The committee believes that the above language will facilitate a more complete application for orders in cases involving allegations of a history of abuse or substance abuse by either party.
Orange County Bar Association By Daniel S. Robinson, President Newport Beach	Additional space on the form FL-311 would be appreciated to explain the requests for specific custody and visitation orders.	The committee recommends and has expanded blank space wherever feasible on the form for the party to explain requests for specific custody and visitation orders.

6. Comments about form FL-323		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff Attorney Oakland	The proposed changes to form FL-323 achieve their stated purpose and will be helpful to effectuate changes to Family Code section 3042.	No response required.

7. Comments about form FL-341		
Commenter	**Comment**	**Committee Response**
Family Violence Appellate Project By Cory Hernandez, Staff	The other proposed changes to Form FL-341 will be helpful to judicial officers by both reminding them of the requirements of	No response required.

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

7. Comments about form FL-341		
Commenter	**Comment**	**Committee Response**
Attorney Oakland	Family Code section 3011, subdivision (a)(5)(A), and providing space to indicate the reasons for ordering child custody or unsupervised visitation when the statute applies. In addition, judicial education on when the statute applies, why it exists, and what are good reasons for ordering custody or unsupervised visitation when allegations of abuse are made would be extremely helpful in addressing the purpose of the law. In item 9(a) of revised Form FL-341, there is a mistake, in the phrase "will have supervised visitation (parenting time) with the minor children according to the schedule on page 1," page 1 needs to be revised to "page 2."	The committee appreciates the response and will refer the issue of judicial education to the Center for Judicial Education and Research. The committee has corrected the mistake in item 9.
Harriet Buhai Center for Family Law By Rebecca L. Fisher, Senior Staff Attorney Los Angeles	FL-341: we propose modifying item 7: Keep 7a. New 7b. [ ] The court's order does not grant sole or joint custody of the minor child to the person(s) alleged to have a history of abuse or substance abuse. New 7c. [ ] Even though there are allegations of a history of abuse or substance use, the court grants sole or joint custody of the minor child as set out in item 6. The reasons for making the custody orders to the person(s) alleged to have a history of abuse or substance abuse are [etc. as drafted]	The committee agrees and recommends that the Judicial Council adopt the changes to item 7 on form FL-341. Same as above response.

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

8. Does the proposal appropriately address the stated purpose?		
Commenter	**Comment**	**Committee Response**
California Partnership to End Domestic Violence By Christine Smith Public Policy Coordinator Sacramento	Yes.	No response required.
Harriet Buhai Center for Family Law By Rebecca L. Fisher, Senior Staff Attorney Los Angeles	In general, yes.	No response required.
Orange County Bar Association By Daniel S. Robinson, President Newport Beach	The proposal appropriately addresses the stated purpose.	No response required.
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	Yes, the proposal addresses the stated purpose.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Yes.	No response required.

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

9. Would it be helpful to the parties and attorneys to provide space on form FL-311 to state the reasons why sole or joint custody, or unsupervised visitation, should be granted if Family Code section 3011(a)(5)(A) applies to the case, especially in a potential default situation?		
Commenter	**Comment**	**Committee Response**
California Partnership to End Domestic Violence by Christine Smith Public Policy Coordinator Sacramento	This change would be helpful. Because so many family law litigants are self-represented, we appreciate the changes to court forms that give self-represented litigants the opportunity to more fully express why they are making certain requests of the court, especially since they often don't know to file declarations and other important documents.	No response required.
Harriet Buhai Center for Family Law By Rebecca L. Fisher, Senior Staff Attorney Los Angeles	A place for this information would be helpful, but the proposed version is confusing. [The commenter's proposed changes to form FL-311 are found in table 5.]	See the committee's response in table 5.
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	Yes, this would be helpful for all parties and the court.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Yes.	No response required.

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

10. What is the impact of these changes to the forms on low income people?		
Commenter	**Comment**	**Committee Response**
California Partnership to End Domestic Violence by Christine Smith Public Policy Coordinator Sacramento	It is unclear what the specific impact will be on low-income people, but if the comment section is left blank, the court might assume that no 3011 presumption applies, and this is more likely to happen in the case of self-represented litigants, a large percentage of whom are low-income.	No response required.
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	The changes do not appear to have an impact on low-income people.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Unknown.	No response required.

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

11. Would the proposed changes to form FL-341 be helpful to judicial officers in providing space to indicate the reasons for ordering child custody and visitation if Family Code section 3011(a)(5)(A) applies to the case?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	The proposed changes would be helpful for the judicial officer's review and consideration.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Yes.	No response required.

12. Are the proposed changes to forms FL-311 and FL-341 helpful in reminding judicial officers about the requirements of Family Code section 3011(a)(5)(A) when reviewing requests and proposed orders and judgments relating to child custody and visitation?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	Yes, the proposed changes are helpful.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Yes, although these optional forms are not frequently used in the San Diego Superior Court. Therefore, making the contents of item 9 [on form FL-341] a standalone mandatory form might be ideal.	Proposing a new standalone order form is a substantive change and would require that a different proposal be circulated for additional comment. The committee will consider this for a future cycle.

13. Would the proposed changes indicated the preceding tables 13 and 14 be best handled by judicial education?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	Yes.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Judicial education will certainly be helpful, but given the myriad of findings and factors judicial officers must make and consider for custody orders, it does seem beneficial to have these set forth in a form.	No response required.

14. Would the proposal provide cost savings? If so, please quantify.		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	The proposal does not appear to provide any cost savings.	No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	No.	No response required.

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15. What would the implementation requirements be for courts?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	• Training case processing staff, Self-Help staff, and courtroom clerks (approximately 1 hour each position). • Staff meeting agenda to inform staff of revisions. • Revising case processing and courtroom procedures. • Revising Self-Help Center packets to include updated forms. • Revising activities in case management system to reflect appropriate order language	The committee appreciates receiving this information. No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Updating local packets and training staff.	The committee appreciates receiving this information. No response required.

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Family Law: Child Custody and Visitation in Cases Involving Abuse by Parent and Child Testimony (Amend rules 5.210, 5.220, 5.242, and 5.250; revise forms FL-311, FL-323, and FL-341)

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

16. Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?		
Commenter	**Comment**	**Committee Response**
Superior Court of Los Angeles County	These changes will take longer than 3 months to implement.	Senate Bill 654 requires that the Judicial Council develop or amend rules to implement the provisions of Family Code section 3011 no later than January 1, 2023. Therefore, the committee is unable to recommend that the Judicial Council delay the effective date of the changes to the forms that implement the bill. The Judicial Council will provide training to self-help staff, family court services mediators, and judicial officers regarding the change in the law.
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	No, six months will be needed to make the necessary update in procedures, and training needs.	See above response to Superior Court of Los Angeles County.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	Yes, if the final versions of the forms are provided to the court by that time. This will ensure that the court is able to provide training to staff, modify local packets and obtain printed stock.	The committee endeavors to publish the forms and make them available to the courts with sufficient time to allow courts to modify packets and obtain printed stock.

SP22-09

Family Law: Child Custody and Visitation in Cases Involving Abuse by Parent and Child Testimony (Amend rules 5.210, 5.220, 5.242, and 5.250; revise forms FL-311, FL-323, and FL-341)

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

17. How well would this proposal work in courts of different sizes?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County Family Law and Juvenile Division By Vivian Tran Operations Analyst	This proposal would work for Orange County.	The committee appreciates receiving this information. No response required.
Superior Court of San Diego County By Michael M. Roddy Executive Officer	It appears that the proposal would work for courts of all sizes.	The committee appreciates receiving this information. No response required.

Item number: 09

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Parentage Actions Under Assembly Bill 429

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt rule 5.51 and form FL-211

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

*Staff contact (*name, phone and e-mail*): Gabrielle Selden, 415-865-8085 gabrielle.selden@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2020
Project description from annual agenda: AB 429 (Dahle) Child support: access to records (Ch. 52, Stats. of 2021) Establishes that trials and court files are to be open to the public for new actions filed under the Uniform Parentage Act on or after January 1, 2023, excluding assisted reproduction cases.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☒ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☒ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-135
For business meeting on September 19–20, 2022

Title
Rules and Forms: Parentage Actions Under AB 429

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 5.51; adopt form FL-211

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 21, 2022

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends the adoption of one new rule of court and a new confidential cover sheet, effective January 1, 2023, to comply with the mandate of Family Code section 7643.5, added by Assembly Bill 429 (Stats. 2021, ch. 52). The new form will be used by the petitioner to identify that the action or proceeding initially filed with the court to determine a parental relationship involves assisted reproduction under Family Code section 7613 or 7630(f), or sections 7960–7962, and to include information about the limitations on access to documents in such actions.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2023, adopt:

1. Rule 5.51 of the California Rules of Court to comply with the mandate of Family Code section 7643.5; and

2. *Confidential Cover Sheet—Parentage Action Involving Assisted Reproduction* (form FL-211) to implement the requirements of Family Code section 7643.5.

The proposed rule and form are attached at pages 7–8.

Relevant Previous Council Action

Because this is a new area of consideration by the council, it has taken no previous action.

Analysis/Rationale

Actions to determine a parental relationship under the Uniform Parentage Act in the Family Code have historically been confidential: the proceedings are closed to the public, and the public has limited access to records in the court file. However, AB 429 amended the provisions governing the confidentiality currently applicable to all proceedings and records under the Uniform Parentage Act. Under amended Family Code section 7643, parentage actions filed before January 1, 2023, will remain confidential. However, actions filed after January 1, 2023, that do not involve assisted reproduction will no longer be confidential.

AB 429 also added section 7643.5 to the Family Code to provide that confidentiality will continue to apply to parentage cases involving assisted reproduction, whenever they are, or were, filed in family court. Like all parentage actions filed before January 1, 2023, parentage cases involving assisted reproduction may be held in closed court, with limited access to records for inspection and copying.

Section 7643.5 also provides that "[o]n or before January 1, 2023, the Judicial Council shall create a new form or modify an existing form, as it deems appropriate, that requires a party initiating an action or proceeding filed under Section 7613, subdivision (f) of Section 7630, or Part 7 (commencing with Section 7960) to designate the action or proceeding as filed under the identified statutory provision."

Adopting rule 5.51 and form FL-211 will implement the requirements of Family Code section 7643.5.

Rule 5.51, Confidential cover sheet for parentage actions or proceedings involving assisted reproduction; other requirements

This rule will specify the responsibilities of the petitioner to complete the confidential cover sheet and attach it to the initial document filed with the court. It will be placed under chapter 4 (Starting and Responding to a Family Law Case; Service of Papers), article 1 (Summonses, Notices, and Declarations), with the other rules that relate to the first papers issued by the court or required to be filed by the parties.

Confidential Cover Sheet—Parentage Action Involving Assisted Reproduction (form FL-211)

This form will require the petitioner to identify that the initial filing in the case involves assisted reproduction and specify the name of the form attached to the cover sheet. It will also include

instructions for the parties and the court clerk, as well as notice to the parties and the court about the limitations on inspection and copying of records in the matter. The one-page form is based on the existing *Confidential Cover Sheet—False Claims Action* (form CM-011), used in civil actions.

Policy implications

There was not controversy or intense debate within the committee on the proposal or the recommendations. The new rule and form will help the parties and their attorneys, as well as the courts, understand the new procedures relating to actions to determine a parental relationship involving assisted reproduction, including the limitations on access to information in these case files.

Comments

The invitation to comment was circulated for public comment from April 14 to May 13, 2022, as part of the regular spring comment cycle. The committee received a total of six comments. Commenters included four courts (the Superior Courts of Los Angeles, Orange, Riverside, and San Diego Counties), one organization (the Orange County Bar Association), and one individual attorney.

All commenters agreed with the proposal. Three commenters agreed without proposing revisions and three commenters provided specific suggestions for improving the rule and form.

Comments about rule 5.51

One commenter asked whether the rule of court "should include a procedure for circumstances where a Petitioner does not submit the form" and whether "the Respondent could submit the form with the response when it was not filed with the petition, although the statute only specifies the initiating party to do so."

The committee discussed the commenter's questions in light of the requirements of Family Code section 7643.5. Because the statute requires that a party initiating the assisted reproduction parentage action or proceeding file the confidential form, the committee did not agree to expand the rule to allow the respondent to submit the form.

Comments about form FL-211

Description of statutes

As previously noted, section 7643.5(c) requires that a party in an assisted reproduction parentage case use the mandatory form to identify whether the case is filed under Family Code section 7613(f), section 7630, or sections 7960-7962. For this reason, a commenter suggested that the form include "a brief description of the Family Law Code language so the litigant has the information readily available and thus is better able to select the appropriate box." The commenter also suggested that the Judicial Council adopt a new information sheet to accompany form FL-211.

The committee acknowledged that the commenter's suggestions would help the party select the appropriate box on the form, and then considered proposing a new information sheet and expanding the form to two pages to include the text of Family Code sections 7613, 7630(f), and 7960–7962, along with instructions for completing, filing, and serving the form. However, the committee determined that these are substantive changes and would require that the proposal be recirculated for comment. An additional comment period is not an option because section 7643.5 mandates that the Judicial Council adopt the confidential cover sheet effective January 1, 2023.

In addition, the committee considered providing short descriptions of the statutes on the form in response to commenter's suggestion. The committee developed and discussed several short descriptions. However, the committee did not come to a consensus regarding the short descriptions, pointing out the need for additional comment. Given that these cases almost always involve represented parties due to the nature of the proceeding and the need for a contractual agreement, the committee decided not to recommend including short descriptions of sections 7613, 7630(f) and 7960-7962 on form FL-211. Instead, the committee decided to recommend inserting hyperlinks to the code sections on the form to allow parties to verify the correct code section in an efficient and uncomplicated manner. Adding hyperlinks to the statutes from the official site of the California Legislature is technical in nature, would not require additional comment, and is consistent with other forms recently adopted by the Judicial Council, such as *Notice of Rights and Responsibilities* (form FL-192), which includes hyperlinks to Family Code section 4007.5.

If a uniform, statewide set of forms is developed in a future cycle for assisted reproduction cases involving a parentage determination, the committee will revisit the commenter's suggestions, as well as the above-mentioned options that the committee considered in response to the comment.

Instructions to the court clerk
One other commenter raised an issue with the instructions on the form directed to the court clerk. As circulated for comment, the instructions were: "TO THE CLERK: The Confidential Cover Sheet and the attached documents must be separately file-stamped."

The commenter stated that "[t]he cover sheet should only be required once with the initial petition and not once per document, especially given the instruction that the cover sheet and each attached document shall be filed stamped separately. Also, the case security will be required at the confidential security level; it does not seem that each document should require this confidential coversheet."

In response, the committee notes that, unlike form CM-011, *Confidential Cover Sheet—False Claims Action,* which served as the model for form FL-211, the committee did not intend to require that form FL-211 be attached as the cover page to any other paper filed in the case beyond the petitioner's initial filing. As to the petitioner's initial filing, the rule and form were drafted to require that form FL-211 be affixed one time as the cover page to all papers included with the initial filing.

Based on the comment, the committee determined that the note to the clerk caused confusion, and did not reflect the purpose of the form, which is to provide notice that (1) the court must treat the assisted reproduction parentage action filed with the cover sheet differently from other parentage actions, and (2) the action is confidential, except for the final judgment. Although the form did circulate for comment with language that the final judgment of parentage is not confidential, the committee believes that it should be highlighted in the note directed to the court clerk. This way, the information is not overlooked by the clerk as instructions or information relevant only to the parties.

In light of the above, the committee reconsidered the content of the note to the clerk on the form and recommends that it specify: "The papers filed with the Confidential Cover Sheet and all subsequent papers filed in the case—except for the final judgment—must be maintained in a confidential court file." The committee recommends that this language be included in both the rule and the form for consistency, so that assisted reproduction parentage cases are initially set up as confidential court files that receive all the protections identified in Family Code section 7643.5.

Other changes to the form
In addition to the above changes, the committee recommends that the signature line on the form be modified to include the option for either the petitioner or the petitioner's attorney to sign, rather than just the petitioner. This adjustment makes form FL-211 consistent with other cover sheets adopted by the Judicial Council, such as *Civil Case Cover Sheet* (form CM-010),[1] and would make it easier for the petitioner's attorney to file the cover sheet with the initial documents if the attorney was unable to obtain the petitioner's signature on the form.

Comments on another specific question from the committee
To inform its future work, the Family and Juvenile Law Advisory Committee asked the public whether creating rules of court and/or forms specifically for assisted reproduction parentage cases would be beneficial to courts and litigants and, if so, what should be included?

The committee received three responses stating that it would be beneficial to create rules and forms specifically for these case types. Suggestions included:

- "[A] judgment checklist";
- "Information required by all applicable statutes"; and
- "Gestational Surrogacy Checklist; UCCJEA; Appearance, Stipulations and Waiver; Notice of Entry of Judgment; Petition; Summons; Response to Petition; Declaration for Default or Uncontested Judgment; Advisement of Waiver of Rights: Re Determination of Parental Relationships; Stipulation for Entry of Judgment; and Judgment."

[1] Form CM-010 is found at *www.courts.ca.gov/documents/cm010.pdf*.

In response, the committee plans to consider developing a statewide set of forms for assisted reproduction parentage actions in a subsequent rules cycle following research and discussion of forms and procedures used in local courts.

Alternatives considered

Family Code section 7643.5 requires that the Judicial Council adopt a form or modify an existing form to comply with the statute. The committee, therefore, considered whether it should propose revising existing parentage forms as an additional way to comply with the mandate of the statute. Because no set of Judicial Council forms is specific to assisted reproduction parentage cases, and litigants and attorneys may use their own pleadings, the committee decided to propose a new confidential cover sheet and require it to be attached to whatever form or pleading initiates the case.

In addition, the committee considered proposing only the mandatory cover sheet without an accompanying rule of court. However, because the Legislature required a new form to commence a legal action or proceeding in family court, the committee decided it was important that the title V rules reflect this important change in the law in chapter 4.

Fiscal and Operational Impacts

Based on responses from courts and included in the comment chart, the impact to the courts includes costs to copy the new form, as well as the cost to educate court clerks and judicial officers about the new form and rule. Courts may also need to revise their local rules and procedures, update their case management systems, and create new docket codes for the new form. On balance, the fiscal impacts are typical whenever the Judicial Council adopts a new form that is mandated by the Legislature and affects court administration and procedures.

In further response, the committee is aware that implementing the rule and form will require education and training for court professionals about the new requirements for filing assisted reproduction parentage actions. While other parentage actions will no longer be confidential, these cases will continue to follow former guidelines regarding confidentiality, inspection and copying. Parties and the attorneys who represent the parties in these cases will also need information about the new filing procedures involving form FL-211. To this end, the committee recommends that new content be developed for the self-help website about completing and filing form FL-211.

Attachments and Links

1. Cal. Rules of Court, rule 5.51, at page 7
2. Form FL-211, at page 8
3. Chart of comments, at pages 9–17
4. Link A: Assem. Bill 429, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB429*

Rule 5.51 of the California Rules of Court is adopted, effective January 1, 2023, to read:

Rule 5.51. Confidential cover sheet for parentage actions or proceedings involving assisted reproduction; other requirements

(a) Application

This rule applies to actions or proceedings filed with the court after January 1, 2023, involving assisted reproduction, in which the parties seek to determine a parental relationship under Family Code section 7613 or 7630, or sections 7960–7962.

(b) Filing Requirement

To comply with Family Code section 7643.5, for all actions in (a):

(1) Petitioner must complete a *Confidential Cover Sheet—Parentage Action Involving Assisted Reproduction* (form FL-211) and attach it to the initial papers being filed with the court; and

(2) The court clerk must maintain form FL-211, the initial papers, and all subsequent papers—other than the final judgment—in a confidential court file.

CONFIDENTIAL

FL-211

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:		*FOR COURT USE ONLY*
NAME:			
FIRM NAME:			**DRAFT-**
STREET ADDRESS:			
CITY:	STATE:	ZIP CODE:	**NOT APROVED BY THE JUDICIAL COUNCIL**
TELEPHONE NO.:	FAX NO.:		
EMAIL ADDRESS:			**V 72022gs**
ATTORNEY FOR *(name):*			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF			
STREET ADDRESS:			
MAILING ADDRESS:			
CITY AND ZIP CODE:			
BRANCH NAME:			
PETITIONER:			
RESPONDENT:			
CONFIDENTIAL COVER SHEET— PARENTAGE ACTION INVOLVING ASSISTED REPRODUCTION			CASE NUMBER:

TO THE COURT CLERK: The papers filed with the *Confidential Cover Sheet* and all subsequent papers filed in the case—other than the final judgment—must be maintained in a confidential court file.

INSTRUCTIONS

Petitioner must

1. complete items 1 and 2 to identify the matter as an action or proceeding to determine a parental relationship involving assisted reproduction under Family Code section 7613 or 7630(f), or sections 7960–7962;
2. sign and date the form; and
3. present the completed form as the cover sheet to the initial documents that are filed with the court clerk.

LIMITATIONS ON INSPECTION AND COPYING OF RECORDS

All papers and records, other than the final judgment, pertaining to the action or proceeding are confidential. They are subject to inspection and copying only by

a. the parties to the action or their attorneys;

b. agents acting on a written authorization from the parties to the action;

c. agents acting on a written authorization of the attorneys for the parties (Note: The agent's written authorization must state that the attorney obtained the consent of the party before authorizing the agent to inspect and copy the permanent record);

d. any local child support agency, as defined in Family Code section 17000(h), for purposes of establishing parentage and enforcing child support orders; and

e. all others by court order for good cause shown.

1. This action or proceeding to determine a parental relationship involves assisted reproduction under *(specify):*
   a. ☐ Family Code section 7613 or 7630(f).
   b. ☐ Family Code sections 7960–7962.
2. The following documents are being filed with this cover sheet *(specify):*
   a. ☐ *Petition to Determine Parental Relationship* (form FL-200)
   b. ☐ *Stipulation for Entry of Judgment Re: Determination of Parental Relationship* (form FL-240)
   c. ☐ Other *(specify below):*

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PETITIONER OR PETITIONER'S ATTORNEY)

SP22-10

Rules and Forms: Parentage Actions Under Assembly Bill 429 (Adopt Cal. Rules of Court, rule 5.51 and form FL-211)

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

	Commenter	Position	Comment	Committee Response
1.	Stephanie Caballero, Esq. The Surrogacy Law Center, APLC Carlsbad	A	The form looks fine to me, and I have no other comments regarding it. On the second issue, I believe it would be beneficial for litigants and the court to create rules of court and forms for assisted reproduction cases to help streamline the process for the courts and for our clients. The following forms should be included: Gestational Surrogacy Checklist; UCCJEA; Appearance, Stipulations and Waiver; Notice of Entry of Judgment; Petition; Summons; Response to Petition; Declaration for Default or Uncontested Judgment; Advisement of Waiver of Rights: Re Determination of Parental Relationships; Stipulation for Entry of Judgment; and Judgment.	No response required. The committee will consider these suggestions in a future rules cycle. The committee thanks the commenter for providing the list of forms. The committee will consider this list in a future rules cycle.
2.	Orange County Bar Association By Daniel S. Robinson, President Newport Beach	A	The proposal addresses the stated purpose.	No response required.
3.	Superior Court of Los Angeles County	A	The cover sheet should only be required once with the initial petition and not once per document, especially given the instruction that the cover sheet and each attached document shall be filed stamped separately. Also, the case security will be required at the confidential security level; it does not seem that each document should require this confidential coversheet.	Unlike form CM-011, *Confidential Cover Sheet-False Claims Action,* which served as the model for form FL-211, the committee did not intend to require that form FL-211 be attached as the cover page to any other paper filed in the case beyond petitioner's initial filing. As to petitioner's initial filing, the rule and form was drafted to require that form FL-211 be filed one time as the cover page to all papers that comprise the initial filing.

SP22-10
Rules and Forms: Parentage Actions Under Assembly Bill 429 (Adopt Cal. Rules of Court, rule 5.51 and form FL-211)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
4.	Superior Court of Orange County Family Law and Juvenile Division	A	• Does the proposal appropriately address the stated purpose? Yes, the proposal appropriately addresses the stated purpose. • To inform its future work, the Family and Juvenile Law Advisory Committee is interested in comments about whether it would be beneficial to the courts and litigants to create rules of court and/or forms specifically for assisted reproduction parentage cases. If so, what should be included? Yes, it would be beneficial to the courts and litigants to create rules of court and forms specifically for assisted reproduction parentage case. Information required by all applicable statutes should be included. • Would the proposal provide cost savings? If so, please quantify. The proposal does not appear to provide any cost savings. • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?	The committee appreciates this information. No response is required. The committee appreciates this information, and will consider developing rules of court and forms in a future rules cycle. No response required.

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

SP22-10
Rules and Forms: Parentage Actions Under Assembly Bill 429 (Adopt Cal. Rules of Court, rule 5.51 and form FL-211)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Training case processing clerks and courtroom clerks (approximately 1-2 hours). Revising applicable processes and procedures. Adding/revising event codes in case management systems. Modifying additional case management system applications. • Would three (3) months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months will be sufficient time for implementation. • How well would this proposal work in courts of different sizes? This proposal would work for Orange County.	The committee appreciates this information. No response is required. The committee appreciates receiving this information. No response is required. The committee appreciates receiving this information. No response is required.
5.	Superior Court of Riverside County By Susan Ryan Chief Deputy of Legal Services	A	• Does the proposal appropriately address the stated purpose? Yes • To inform its future work, the Family and Juvenile Law Advisory Committee is interested in comments about whether it would be beneficial to the courts and litigants to create rules of court and/or forms specifically for assisted reproduction parentage cases. If so, what should be included?	The committee appreciates receiving this information. No response is required.

SP22-10
Rules and Forms: Parentage Actions Under Assembly Bill 429 (Adopt Cal. Rules of Court, rule 5.51 and form FL-211)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Additional language would be helpful on the form to help the litigant understand which box to select. On #1 at the bottom of the form (FL-211), add a brief description of the Family Law Code language so the litigant has the information readily available and thus is better able to select the appropriate box. Otherwise an Information Sheet should be provided to explain what is required of the litigant. The Information Sheet should also explain the difference between the two cited Family Law Code sections at the bottom, to assist the litigant in selecting the appropriate box. • Would the proposal provide cost savings? If so please quantify.	After discussion, instead of brief descriptions of the code sections, the committee recommends that the form include hyperlinks to the Family Codes listed in item 1 that open to leginfo.legislature.ca.gov, as the committee has previously recommended for other forms approved by the Judicial Council. The committee appreciates the suggestion that the Judicial Council adopt a new information sheet to accompany form FL-211. The committee considered proposing a new information sheet. The committee also considered expanding the form to two pages to include instructions and descriptions of the types of assisted reproduction cases. However, the committee determined that either a new information sheet or supplemental information on the back of the form comprise substantive changes that would require additional comment. Nonetheless, the committee agreed to develop information on the self-help website about form FL-211 and about assisted reproduction parentage cases in response to the commenter's suggestions.

	Commenter	Position	Comment	Committee Response
			Uncertain at this time.	No response required.
			• What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. Clerk's office and courtroom staff would need to be informed of the new form FL-211 (approximately 1 hour). Procedures would need to be modified to reflect the changes. Codes would need to be created/modified in the case management system to conform with the new language for the personal conduct orders.	The committee appreciates receiving this information. No response is required.
			• Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	The committee appreciates receiving this information. No response is required.
			• How well would this proposal work in courts of different sizes? The size of the court would have no impact.	The committee appreciates receiving this information. No response is required.
6.	Superior Court of San Diego County By Michael M. Roddy	A	• Does the proposal appropriately address the	The committee appreciates receiving this information. No response is required.

	Commenter	Position	Comment	Committee Response
	Executive Officer		stated purpose? Yes. • To inform its future work, the Family and Juvenile Law Advisory Committee is interested in comments about whether it would be beneficial to the courts and litigants to create rules of court and/or forms specifically for assisted reproduction parentage cases. If so, what should be included? Yes. It would be beneficial to have specific procedures/requirements for ARP cases, including but not limited to a judgment checklist.	The committee appreciates this information, and will consider these suggestions in a future rules cycle.
			• Would the proposal provide cost savings? If so, please quantify. No.	The committee appreciates receiving this information. No response is required.
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Updating internal procedures, case management system, and training staff.	The committee appreciates receiving this information. No response is required.
			• Would 3 months from Judicial Council	

	Commenter	Position	Comment	Committee Response
			approval of this proposal until its effective date provide sufficient time for implementation? Yes, if the final versions of the forms are provided to the court by that time. This will ensure that the court is able to provide training to staff make the necessary updates to internal procedures and the court's case management system. • How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes. • It may be worth considering the following as well: 1) Whether the Rule of Court should include a procedure for circumstances where a Petitioner does not submit the form;	The committee appreciates receiving this information. No response is required. The committee appreciates receiving this information. No response is required. The committee discussed the commenter's suggestion in light of the requirements of Family Code section 7643.5. Because the statute requires a party initiating an action or proceeding filed under Section 7613, subdivision (f) of Section 7630, or Part 7 (commencing with Section 7960) file the form FL-211, the committee did not agree to expand the rule or form to include a procedure for circumstances in which a petitioner does not submit the form. Implementing the rule and form will require

	Commenter	Position	Comment	Committee Response
				education and training court clerks about the new requirements for filing assisted reproduction parentage to ensure that the case is set up from the beginning as a confidential case file to receive all the protections identified in Family Code section 7643.5 regarding inspection and copying.
			2) Whether the Respondent could submit the form with the response when it was not filed with the petition, although the statute only specifies the initiating party to do so;	Because the statute is clear that petitioner is required to file the confidential form, the committee does not agree to include in the rule and form that respondent may submit it when it was not filed with the petition.
			3) Whether an item should be added to the top of the FL-200 to indicate that an FL-211 is also being submitted – this will remind parties and advise the clerk to look for the document when initiating the case;	The commenter's suggestion to revise form FL-200 would be a substantive change to the proposal, which would require additional public comment. The committee will consider these suggestions in a future rules cycle.
			4) Whether FL-200 should be modified to add a reminder to item 5(b) and FL-220, item 6(a) to redact social security numbers from the attached VDOP as now the case files will be public;	The commenter's suggestion to revise form FL-200 would be a substantive change to the proposal, which would require additional public comment. The committee will consider these suggestions in a future rules cycle.
			5) Whether a similar reminder should be added to forms FL-260 and FL-270, item 2(b) as the redacting of social security numbers is frequently	Same response as above.

SP22-10
Rules and Forms: Parentage Actions Under Assembly Bill 429 (Adopt Cal. Rules of Court, rule 5.51 and form FL-211)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			overlooked in these public files; 6) Whether the attorney's verification should be added to forms FL-200, FL-220, FL-260, and FL-270 when/if revised.	Same response as above.

S

Item number:10

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620

Committee or other entity submitting the proposal:
F&J, CSCAC

*Staff contact (*name, phone and e-mail*): John Henzl, 5-7607, john.henzl@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/2/2021
Project description from annual agenda: In consultation with the Civil and Small Claims Advisory Committee, update federal statutory references in item 5, Declaration of nonmilitary status, on the Request to Enter Default (Family Law-Uniform Parentage) (FL-165) and item 3 Request to Enter Default Judgment (Governmental) (FL-620) and consider whether the current affidavit language is legally sufficient. Because the legal accuracy of the forms is in question, the committee needs to act to correct these forms.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☒ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-161
For business meeting on: September 19–20, 2022

Title
Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act

Rules, Forms, Standards, or Statutes Affected
Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620

Recommended by
Civil and Small Claims Advisory Committee
Hon. Tamara L. Wood, Chair

Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
August 1, 2022

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Executive Summary

The Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee jointly propose that the Judicial Council revise six forms so that they comply with the Servicemembers Civil Relief Act (SCRA) and reflect the act's current title and legal citation. The revisions are intended to address concerns by courts that the forms are noncompliant with the act because they do not include a declaration as to how the petitioner/plaintiff determined the respondent's/defendant's nonmilitary status before requesting default judgment, and to make other minor technical revisions as appropriate. The joint proposal seeks to ensure that the declarations of nonmilitary status on civil and family law forms are consistent to the extent appropriate.

Recommendation

The Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee jointly recommend that the Judicial Council, effective January 1, 2023:

1. Revise the declaration of nonmilitary status in the following forms to (1) comply with section 3931(b) of the Servicemembers Civil Relief Act (SCRA) by providing a way for the petitioner/plaintiff to state facts necessary to support a declaration regarding the nonresponding party's nonmilitary status, and (2) include information that may help the petitioner/plaintiff determine the nonresponding party's military status and how to proceed depending on that determination:

    - Item 8 of *Request for Entry of Default* (form CIV-100);
    - Item 9 of *Request for Entry of Default* (form CIV-105);
    - Item 5 of *Request to Enter Default* (form FL-165); and
    - Item 3 of *Request to Enter Default Judgment* (form FL-620).

2. Revise the following forms to update the title and citation of the SCRA:

    - *Appearance, Stipulations, and Waivers* (form FL-130); and
    - *Declaration and Conditional Waiver of Rights Under the Servicemembers Civil Relief Act of 2003* (form FL-130(A)).

The revised forms are attached at pages 13–23.

Relevant Previous Council Action

Request for Entry of Default (form CIV-100)
The Judicial Council adopted the precursor to form CIV-100 on July 1, 1971. In 2005, the form was revised to, among other things, reflect federal legislation renaming the Soldiers' and Sailors' Civil Relief Act of 1940 (the law on which the declaration of nonmilitary status is based) to the SCRA. The form was renumbered in 2007 and revised in 2017 in part to include the state law definition of military service in the declaration of nonmilitary status. In 2020, technical revisions were made to update statutory citations in the form's nonmilitary status declaration.

Request for Entry of Default (form CIV-105)
The Judicial Council adopted form CIV-105 effective January 1, 2018. In 2020, technical revisions were made to update statutory citations in the form's nonmilitary status declaration.

Appearance, Stipulations, and Waivers (form FL-130) and Declaration and Conditional Waiver of Rights Under the Servicemembers Civil Relief Act of 2003 (form FL-130(A))
The Judicial Council previously revised form FL-130, effective January 1, 2006, by updating the title of the federal act formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940 to the SCRA. Effective January 1, 2010, the Judicial Council revised form FL-130 to update the title of the SCRA and reference new form FL-130(A). The council approved form FL-130(A) for use by a servicemember-respondent to request that the court enter a stipulated judgment or marital settlement agreement while the servicemember is on active duty.

Request to Enter Default (form FL-165) and Request to Enter Default Judgment (form FL-620)
Effective January 1, 2005, the Judicial Council revised forms FL-165 and FL-620 by including a reference to the SCRA, which had replaced the Soldiers' and Sailors' Civil Relief Act of 1940.

Analysis/Rationale

The SCRA, codified at 50 U.S.C. §§ 3901–4043, is a federal law that provides rights and protections for members of the U.S. military on active duty. In California, similar protections are afforded to persons in military service as defined by section 402(f) of the California Military and Veterans Code. Section 3931 of the SCRA protects servicemembers against default judgments in any civil action, including child custody proceedings, in which the defendant/respondent does not make an appearance. In pertinent part, section 3931(b)(1) provides that:

> In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—
> (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
> (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

Section 3931(b)(4) further specifies that "[t]he requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury."

Declaration under SCRA section 3931(b)

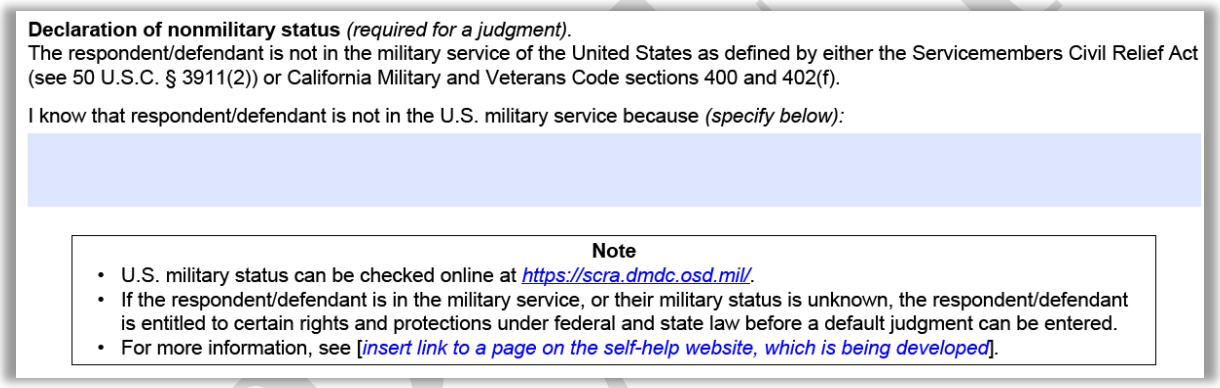
Each request-to-enter-default form currently includes a declaration of nonmilitary status comprised of a short statement by the petitioner/plaintiff declaring that the respondent/defendant is not in military service and, therefore, is not entitled to the benefits of the SCRA. However, none of the existing default forms provides a way for the petitioner/plaintiff to show necessary facts to support the declaration of nonmilitary status

(i.e., how the petitioner/plaintiff knows that the nonresponding party is *not* in military service), as required by section 3931(b)(1)(A) of the SCRA.

To comply with the statute, the committees recommend that the Judicial Council revise:

- Item 8 of *Request for Entry of Default* (form CIV-100);
- Item 9 of *Request for Entry of Default* (form CIV-105);
- Item 5 of *Request to Enter Default* (form FL-165); and
- Item 3 of *Request to Enter Default Judgment* (form FL-620).

As circulated for public comment, the proposal was to replace the language in each item with the following (with the appropriate reference to either named "defendant" for civil forms or "respondent" for family law forms):


Declaration of nonmilitary status *(required for a judgment).*
The respondent/defendant is not in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that respondent/defendant is not in the U.S. military service because *(specify below):*

Note
- U.S. military status can be checked online at *https://scra.dmdc.osd.mil/*.
- If the respondent/defendant is in the military service, or their military status is unknown, the respondent/defendant is entitled to certain rights and protections under federal and state law before a default judgment can be entered.
- For more information, see [*insert link to a page on the self-help website, which is being developed*].

As noted above, the committees also proposed that each form include information that could help the petitioner/plaintiff answer the question about the nonresponding party's military status. The new "Note" box would include a link to the search engine maintained by the U.S. Secretary of Defense, Defense Manpower Data Center, which can be used to check a person's military status if some basic information is known, such as their date of birth or social security number.[1] In addition, the box would include a link to new self-help online content on the California Courts website that would:

- Contain information intended to help a party understand how to obtain a default judgment if the nonresponding party is in U.S. military service or their military status is unknown;
- Explain how to use the federal government search engine to find out military status; and
- Explain how the federal and state codes define military service.

[1] See *https://scra.dmdc.osd.mil/scra/#/home*.

As discussed further in the comments section of this report, in response to concerns raised in public comments regarding the proposal, the committees recommend changes to proposed revisions to the declaration of nonmilitary status in forms CIV-100, CIV-105, FL-165, and FL-620. The recommended changes are better suited to the purpose of each form and are intended to better reflect how parties in civil, family, and governmental child support cases use them.

Update title and citation to SCRA

The committees also recommend revising the following two forms to reflect the current title and citation of the SCRA: *Appearance, Stipulations, and Waivers* (form FL-130) and *Declaration and Conditional Waiver of Rights Under the Servicemembers Civil Relief Act of 2003* (form FL-130(A)).

Policy implications

Because the proposal is intended only to conform the forms to federal law, provide additional information that may be helpful to litigants in completing the forms, and update citations, no policy implications were identified that contributed to significant controversy or intense debate within the committees about the proposal.

Comments

The invitation to comment was circulated for public comment from April 1, 2022, to May 13, 2022, as part of the regular spring comment cycle. The committees received a total of nine comments. Three commenters—the Superior Courts of Los Angeles and San Diego Counties and the Orange County Bar Association (OCBA)—agreed with the proposal as circulated. Four commenters—the California Department of Child Support Services (DCSS), the Harriet Buhai Center for Family Law (HBCFL), Judge Christine Donovan of the Superior Court of Solano County, and the Superior Court of San Bernardino County—did not specifically indicate a position but suggested changes and/or responded to specific questions from the committees. One commenter, the California Partnership to End Domestic Violence (CPEDV), agreed with the proposal if modified in the manner proposed in its comments. Another commenter, the Family Violence Appellate Project (FVAP), joined in CPEDV's comments without elaboration.

The Civil and Small Claims and Family and Juvenile Law Advisory Committees reviewed all of the public comments. A chart with the full text of the comments received and the committees' responses is attached at pages 24–39. The main comments and the committees' responses thereto are discussed below.

Comments relating to proposed revisions to the declaration of nonmilitary status

Several commenters expressed concern about the proposal to add open-ended blank space to the nonmilitary status declaration in each form that would require litigants to provide necessary facts as to how they know that the respondent/defendant is not in the military. For example:

- CPEDV commented that, while the proposal solves the issue of providing space for a litigant to provide necessary facts supporting a declaration of nonmilitary status, some litigants might leave the space blank for fear of being asked to "prove a negative."
- FVAP joined in CPEDV's comments without further comment.
- HBCFL also was concerned that the space being added for a petitioner to state necessary facts to support a declaration of nonmilitary status could be seen as requiring litigants to "prove a negative" without providing examples of what would constitute a sufficient factual showing. Further, HBCFL expressed concern that the open-ended nature of the provided space might invite the legal interpretation of a statute by clerks processing default judgment forms, and the commenter questioned whether judicial review of the forms would be available.
- Additionally, specific to the FL-620, DCSS expressed concern that, while the proposed changes would "address the gap in providing specific facts to support the declaration of non-military status," the proposed method of doing so—open-ended blank space for the petitioner/plaintiff to provide an explanation—would impact statewide uniformity and significantly increase the workload of local child support agencies completing the form. DCSS added that the agencies' mandatory investigative process currently allows them to automatically generate a form FL-620 when certain criteria, including a determination of nonmilitary status, are met. DCSS estimated that revising the form to require an individual explanation of necessary facts in each case would require an additional 729 hours of caseworker time annually.

To address their concerns about the open-ended space to provide facts to support the declaration of nonmilitary status, commenters suggested the following changes:

- HBCFL suggested adding check boxes to form FL-165 containing "statements that would each individually constitute sufficient facts for purposes of showing non-military status" such as (1) "Respondent's name does not appear on *https://scra.dmdc.osd.mil/*," (2) "I am in routine contact with Respondent and they are not in the U.S. military service," or (3) "Respondent is not eligible for military service."[2]
- CPEDV suggested adding a response of "other" to the relevant item of each form.
- DCSS submitted suggestions specific to form FL-620 that would help simplify the process for local child support agencies to complete it. They suggested including a check box affirming that "[t]he Child Support Enforcement System has no evidence of active military duty (for use by IV-D agencies only)." DCSS also recommended

[2] HBCFL also suggested amending rule 5.402 to address the procedure when one of these boxes is or is not checked, and revising form FL-165 to allow for default of a third party, including a specific item to indicate date of service. The committees decided not to include these changes among the recommendations being made to the Judicial Council, as they are outside the scope of the proposal as it relates to the SCRA.

that form FL-165 be revised to include the same change, as it is sometimes used by local child support agencies.

Similarly, other commenters suggested ways to revise the declaration of nonmilitary status on the forms.

- Judge Donovan of the Superior Court of Solano County suggested that forms FL-165 and FL-620 be further revised to include check boxes indicating that (1) the respondent is not in the military as verified by checking the federal website, (2) the respondent is in the military but has signed a stipulation and limited waiver of rights on form FL-130(A), or (3) the respondent is in the military and the petitioner requests appointment of counsel for the respondent.
- To address the stated purpose of the proposal, the Superior Court of San Bernardino County commented that the forms should provide space for a litigant to state that they are unable to determine whether or not the nonresponding party is in the military.

Finally, the committees received one comment about the information in the "Note" box below the declaration of nonmilitary status. HBCFL stated that:

> "Listing the website (*https://scra.dmdc.osd.mil/*) in the note box implies that the expected way to show military status is by using the website. The website is only available in English. The user guide offered by the site is also only available in English and is 54 pages long. Using the site requires setting up an account (again only available in English). The technology and language both present a barrier to pro per litigants. And unlike some otherwise burdensome but relatively rare processes, like service by posting, this step is *required* in every default case.
>
> Although a self-help website that provides more information on the topic would be welcome, it still does not address our concern that the form itself should provide some indication of what would be required under the law without requiring the use of technology."

After considering these comments and suggested revisions, the committees decided *not* to recommend the proposed revisions to the declaration of nonmilitary status in the forms that were circulated for comment. The committees agreed with commenters that the declarations in the forms should provide further clarity for litigants to avoid the possibility of them leaving the item blank due to uncertainty over how to respond or fear of being asked to "prove a negative." The committees determined that modifying the declaration of nonmilitary status to include check boxes would be a beneficial change that could avoid confusion, provide needed clarity for litigants, and avoid the implication that a party is required to show the court results from a specific website to proceed with their case.

However, the committees decided that it would not be beneficial to add check boxes to any of the existing default judgment forms affirming that a respondent/defendant *is* in the service of the U.S. military or the declarant is *unable to determine* military status, as doing so could cause confusion for litigants and court staff and would significantly alter existing processes for the approval of requests for default judgments. Instead, the committees determined that these changes would be more appropriately considered as part of a potential future proposal for other, additional SCRA-related rules and forms.

Based on the foregoing, the committees recommend that:

1. The declaration of nonmilitary status in each form have a series of check boxes containing statements that could, individually, constitute sufficient facts for purposes of showing nonmilitary status.
2. The check boxes included in the declaration of nonmilitary status of each form be tailored, as appropriate, to the type of proceeding in which the form is used.
3. Each form include an identical "Note" box below the declaration of nonmilitary status to provide information and resources that may help the petitioner/plaintiff determine the nonresponding party's military status and appropriate next steps depending on that status. The content of this new box does not differ greatly from the original proposal, except that the third item (see page 4 of this report) will include the link to the California Courts Self-Help portal that contains information and resources for SCRA-related cases.

The committees made specific recommendations about the content of the check box statements to include on the different types of forms, as described in the next sections.

Forms CIV-100 and CIV-105

Although no comments were received specific to the civil forms, the concerns raised in the comments about the open-ended nature of the blank space included in the revised forms as circulated (and the possibility of litigants seeing it as a request to "prove a negative") are applicable to the civil forms as well as the family law forms. Therefore, the committees recommend that the declaration of nonmilitary status in forms CIV-100 (item 8) and CIV-105 (item 9) be revised as follows:

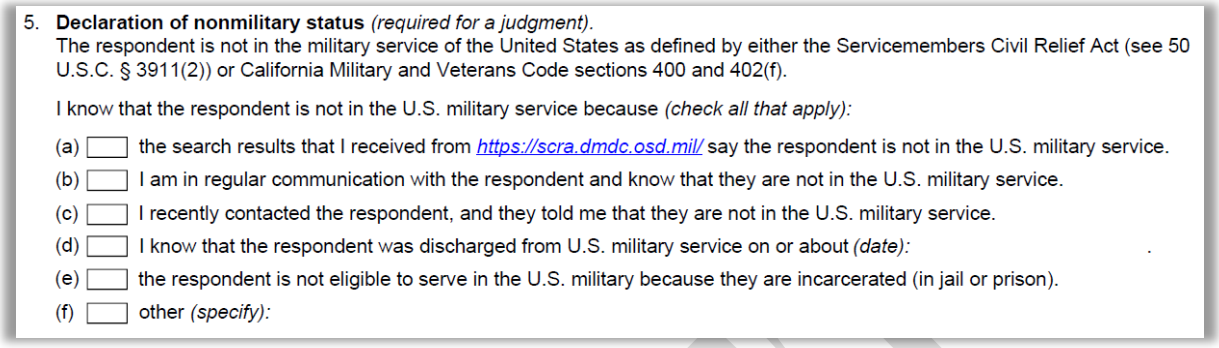
8. **Declaration of nonmilitary status** *(required for a judgment)*.
No defendant/respondent named in item 1c is in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that no defendant/respondent named in item 1c is in the U.S. military service because *(check all that apply)*:

a. ☐ the search results that I received from *https://scra.dmdc.osd.mil/* say the defendant/respondent is not in the U.S. military service.
b. ☐ I am in regular communication with the defendant/respondent and know that they are not in the U.S. military service.
c. ☐ I recently contacted the defendant/respondent, and they told me that they are not in the U.S. military service.
d. ☐ I know that the defendant/respondent was discharged from U.S. military service on or about *(date):*
e. ☐ the defendant/respondent is not eligible to serve in the U.S. military because they are:
☐ incarcerated ☐ a business entity
f. ☐ other *(specify):*

Forms FL-165 and FL-620

The committees recommend the following changes to the declaration of a respondent's nonmilitary status in item 5 on form FL-165:

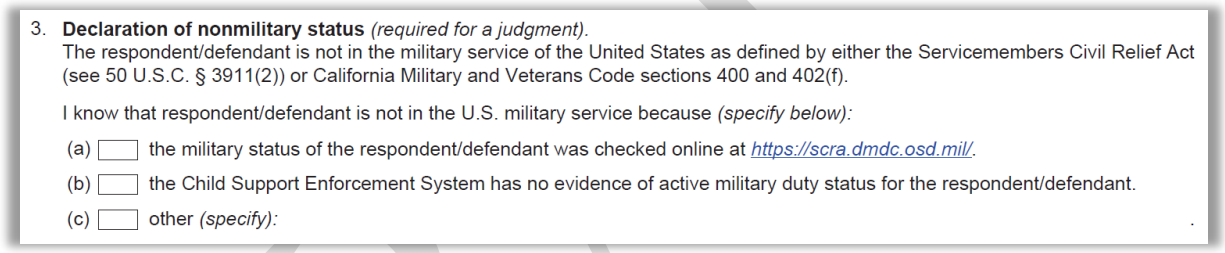


5. **Declaration of nonmilitary status** *(required for a judgment)*.
The respondent is not in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that the respondent is not in the U.S. military service because *(check all that apply)*:

(a) ☐ the search results that I received from https://scra.dmdc.osd.mil/ say the respondent is not in the U.S. military service.
(b) ☐ I am in regular communication with the respondent and know that they are not in the U.S. military service.
(c) ☐ I recently contacted the respondent, and they told me that they are not in the U.S. military service.
(d) ☐ I know that the respondent was discharged from U.S. military service on or about *(date)*: .
(e) ☐ the respondent is not eligible to serve in the U.S. military because they are incarcerated (in jail or prison).
(f) ☐ other *(specify)*:

Further, the committees recommend that the declaration of nonmilitary status on form FL-620 (item 3) of a respondent/defendant in a governmental child support case be revised as follows:



3. **Declaration of nonmilitary status** *(required for a judgment)*.
The respondent/defendant is not in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that respondent/defendant is not in the U.S. military service because *(specify below)*:

(a) ☐ the military status of the respondent/defendant was checked online at https://scra.dmdc.osd.mil/.
(b) ☐ the Child Support Enforcement System has no evidence of active military duty status for the respondent/defendant.
(c) ☐ other *(specify)*: .

As illustrated above, the recommended changes to the declaration of nonmilitary status in form FL-620 differ significantly from the recommendations for form FL-165. The committees agreed to incorporate DCSS's suggestions that the governmental form provide a standardized way for local child support agencies to accurately and efficiently complete the declaration of nonmilitary status. Thus, the number of check boxes is reduced and option (b) includes a general statement that the Child Support Enforcement System has no evidence of active military duty status for the respondent.

Other forms: FL-130 and form FL-130(A)

The committees received no comments objecting to their proposal to update the current title and citation of the SCRA in *Appearance, Stipulations, and Waivers* (form FL-130) and *Declaration and Conditional Waiver of Rights Under the Servicemembers Civil Relief Act of 2003* (form FL-130(A)). After further review, the committees determined that no further changes to the forms are required to address the stated purpose of the proposal.

Comments relating to the development of additional forms

In the invitation to comment, the committees asked whether it would be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel

and other requirements under the SCRA when a respondent/defendant is in the U.S. military service or their military status is unknown.

The committees received seven responses to the question. Five commenters agreed that developing a statewide set of forms would be helpful and two did not. Specifically:

- DCSS responded that it may be helpful to develop forms for the circumstance when a respondent/defendant is in the military, such as requesting appointment of counsel or other remedies to obtain a judgment in such cases.
- HBCFL, OCBA, and the Superior Court of San Bernardino County likewise responded that it would be helpful for the council to develop additional forms.
- The Superior Court of San Diego County agreed that additional statewide forms might be helpful if they are optional and courts with their own local forms may continue to use them.
- CPEDV did not see the need for the development of additional forms. FVAP joined in CPEDV's comments without further commentary.

The committees will continue to gather input from stakeholders in the coming year and potentially propose new forms relating to the SCRA in a future rules cycle.

With respect to attorney appointment, the committees note that while both the SCRA and state law require that before default judgment is granted in cases involving active-duty military members, or where the nonresponding party's military status is unknown, counsel be appointed (see 50 U.S.C. § 3931; Mil. & Vet. Code, § 402), neither statute addresses compensation of the appointed attorney. Currently, it appears that neither the courts nor the counties have a legal obligation to pay for counsel appointed pursuant to the SCRA or a funding source to do so. Thus, any such process developed in a future rules and forms proposal would likely require attorneys to volunteer for appointment or for parties to pay the costs.

Comments on other specific questions

The committees sought comment on four other specific questions about the proposal.

- *Does the proposal appropriately address the stated purpose?*
  As noted throughout the report, many commenters strongly believed that substantial changes were needed before the proposal would effectively address the stated purpose. Having incorporated many of the commenters' suggestions into the recommended revisions to the civil and family law forms, the committees believe that the recommendations in this report now appropriately address the stated purpose.
- *Will the proposal provide cost savings? If so, please quantify.*
  Two commenters responded, without further comment, that the proposal will not provide cost savings.

- *Will three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*
  Three commenters responded to this question. One replied "yes," without further comment. Another replied, "Yes, if the final versions of the forms are provided to the court by that time. This will ensure that the court is able to provide training to staff, modify local packets and obtain printed stock." The third believed that the changes will take longer than three months to implement.
- *How well will this proposal work in courts of different sizes?*
  Two courts responded. One stated that "[i]t appears that the proposal would work for courts of all sizes." The other stated that "[s]ize should not have an impact."
- *What would be the implementation requirements for courts?*
  Two courts responded and noted that implementation requirements would likely include updating internal procedures and local packets, as well as informing and training staff.

Alternatives considered

The committees considered whether to revise the forms in the proposal or take no action. To this end, the committees reviewed and considered federal and state law to better understand the responsibilities of courts, parties, and attorneys appointed to represent a nonresponding respondent/defendant on active duty in the U.S. military. The committees concluded that the declaration of nonmilitary status on the forms was insufficient and, therefore, recommended that it be revised to better comply with the requirements of the SCRA.

The committees also considered whether to recommend that that civil and family law forms use identical language for the declaration of nonmilitary status. As circulated for public comment, the committees proposed that the declaration of nonmilitary status in all of the forms be largely identical and provide open-ended space for a petitioner/plaintiff to state how they know that a defendant/respondent is not in the military. This changed following the comment period.

The committees initially considered developing new statewide forms for use in proceedings where the SCRA provides protections, similar to forms used in other jurisdictions,[3] such as a form for requesting a default judgment when the nonresponding party *is* in the military or

[3] The Alaska courts, for example, use the following forms:

- *Default Application for Divorce, Custody, or Legal Separation* (form SHC-400);
- *Affidavit of Attorney Appointed Under Servicemembers Civil Relief Act* (form CIV-661);
- *Information Sheet for Attorneys Appointed Under the Servicemembers Civil Relief Act* (form CIV-662); and
- *Information Sheet for Parties Seeking Default Under the Servicemembers Civil Relief Act* (form CIV-663).

when military status is unknown, However, they determined that such action would go beyond the scope of the current proposal.

Fiscal and Operational Impacts

Based on the comments received from courts and committee discussions, some minimal fiscal and operational impacts are expected, including costs to copy the revised forms and update forms packets and resources needed to educate court professionals about the SCRA requirements. The Superior Court of Los Angeles County commented that "[c]hanges will take longer than 3 months to implement" but did not provide any explanation as to why this might be so. In any event, it appears from the comments that any potential implementation requirements would be relatively minimal and do not present a barrier to adoption of the proposal.

Attachments and Links

1. Forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620, at pages 13–23
2. Chart of comments, at pages 24–39
3. Link A: Servicemembers Civil Relief Act, *http://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter50&edition=prelim*
4. Link B: Military and Veterans Code sections 400–409.15, *https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=MVC&division=2.&title=&part=1.&chapter=7.5.&article=*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* DRAFT NOT APPROVED BY THE JUDICIAL COUNCIL V. 07/13/2022
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff/Petitioner: Defendant/Respondent:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**	CASE NUMBER:

Not for use in actions under the Fair Debt Buying Practices Act (Civ. Code, § 1788.50 et seq.); (see form CIV-105)

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date):*
   b. by *(name):*
   c. ☐ Enter default of defendant *(names):*

   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names):*

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date):*

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$	$	$
b. Statement of damages*			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$	$	$

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date):*

   (Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case.)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4)*.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on *(date):*
(2) ☐ Default NOT entered as requested *(state reason):*

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2023]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courts.ca.gov

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state:
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☐ **Declaration under Code Civ. Proc., § 585.5** *(for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney *(names):*
   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):*
      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees . . . . . $
   b. Process server's fees . . . . . $
   c. Other *(specify):* $
   d. $
   e. **TOTAL** . . . . . $ _____
   f. ☐ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing item 7 is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

8. **Declaration of nonmilitary status** *(required for a judgment)*.
No defendant/respondent named in item 1c is in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that no defendant/respondent named in item 1c is in the U.S. military service because *(check all that apply)*:

a. ☐ the search results that I received from *https://scra.dmdc.osd.mil/* say the defendant/respondent is not in the U.S. military service.
b. ☐ I am in regular communication with the defendant/respondent and know that they are not in the U.S. military service.
c. ☐ I recently contacted the defendant/respondent, and they told me that they are not in the U.S. military service.
d. ☐ I know that the defendant/respondent was discharged from U.S. military service on or about *(date):*
e. ☐ the defendant/respondent is not eligible to serve in the U.S. military because they are:
☐ incarcerated ☐ a business entity
f. ☐ other *(specify):*

Note

- U.S. military status can be checked online at *https://scra.dmdc.osd.mil/*.
- If the defendant/respondent is in the military service, or their military status is unknown, the defendant/respondent is entitled to certain rights and protections under federal and state law before a default judgment can be entered.
- For more information, see *https://selfhelp.courts.ca.gov/military-defaults*.

I declare under penalty of perjury under the laws of the State of California that the foregoing item 8 is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT NOT APPROVED BY THE JUDICIAL COUNCIL V. 07/06/2022
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff/Petitioner: Defendant/Respondent:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Judgment**	CASE NUMBER:

For use only in actions under the Fair Debt Buying Practices Act (Civ. Code, § 1788.50 et seq.)

1. On the complaint or cross-complaint filed
   a. on *(date):*
   b. by *(name):*
   c. ☐ Enter default of defendant *(names):*
   d. ☐ I request a judgment under Civil Code section 1788.60 and Code of Civil Procedure section 585 against defendant *(names):*

   _____

   (Testimony may be required. Check with the clerk regarding whether a hearing date is needed.)
   e. ☐ Default was previously entered on *(date):*

2. **Judgment to be entered.**

		Amount	Credits acknowledged	Balance
a.	Demand of complaint*	$	$	$
b.	Interest	$	$	$
c.	Costs *(see page 3)*	$	$	$
d.	Attorney fees	$	$	$
e.	**TOTALS**	$	$	$

(Must be established by business records, authenticated through a sworn declaration, submitted with this application. (Civ. Code, §§ 1788.58(a)(4), 1788.60(a).))*

3. This action is not barred by the applicable statute of limitations (Civ. Code, § 1788.56).
4. **Requirements for the complaint**.
   a. The complaint alleges ALL of the following (Civ. Code, §§ 1788.58, 1788.60):
      (1) That the plaintiff is a debt buyer;
      (2) A short, plain statement regarding the nature of the underlying debt and the consumer transaction from which it is derived;
      (3) That the plaintiff is EITHER the sole owner of the debt OR has the authority to assert the rights of all owners of the debt;
      (4) The debt balance at charge-off and an explanation of the amount and nature of, and reason for, all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt;
      (5) The date of the default OR the date of the last payment;
      (6) The name and address of the charge-off creditor at the time of charge-off in sufficient form so as to reasonably identify the charge-off creditor, and the charge-off creditor's account number associated with the debt;

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

4. a. (7) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt;

   (8) The names and addresses of all persons or entities that purchased the debt after charge-off, including the plaintiff debt buyer, in sufficient form so as to reasonably identify each such purchaser; and

   (9) That the plaintiff has complied with Civil Code section 1788.52.

   b. A copy of the contract or other document described in Civil Code section 1788.52(b) is attached to the complaint.

5. **Documentation requirements for default judgment**. ALL of the following documents are submitted with this request for default judgment (Civ. Code, § 1788.60(a)–(c)):

   a. A copy of the contract or other document evidencing the debtor's agreement to the debt, authenticated through a sworn declaration. See Civil Code section 1788.52(b) regarding documentation, including for revolving credit accounts.

   b. Business records, authenticated through a sworn declaration, to establish:

      (1) That the plaintiff is EITHER the sole owner of the debt OR has the authority to assert the rights of all owners of the debt;

      (2) The debt balance at charge-off, and an explanation of the amount and nature of, and reason for, all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt;

      (3) The date of the default OR the date of the last payment;

      (4) The name and address of the charge-off creditor at the time of charge-off in sufficient form so as to reasonably identify the charge-off creditor, and the charge-off creditor's account number associated with the debt;

      (5) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt; and

      (6) The names and addresses of all persons or entities that purchased the debt after charge-off, including the plaintiff debt buyer, in sufficient form so as to reasonably identify each such purchaser.

Date:_____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY	(1) ☐ Default entered as requested on *(date):* (2) ☐ Default NOT entered as requested *(state reason):* Clerk, by_____, Deputy

6. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state:

   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

7. ☐ **Declaration under Code Civ. Proc., § 585.5** *(for entry of default under Code Civ. Proc., § 585(a)).* This action

   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).

   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).

   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

8. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was

   a. ☐ **not mailed** to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney *(names):*

   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:

   (1) Mailed on *(date):*

   (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 6, 7, and 8 are true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

9. **Declaration of nonmilitary status** *(required for a judgment).*
No defendant/respondent named in item 1c is in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

I know that no defendant/respondent named in item 1c is in the U.S. military service because *(check all that apply)*:

a. ☐ the search results that I received from https://scra.dmdc.osd.mil/ say the defendant/respondent is not in the U.S. military service.

b. ☐ I am in regular communication with the defendant/respondent and know that they are not in the U.S. military service.

c. ☐ I recently contacted the defendant/respondent, and they told me that they are not in the U.S. military service.

d. ☐ I know that the defendant/respondent was discharged from U.S. military service on or about *(date):*

e. ☐ the defendant/respondent is not eligible to serve in the U.S. military because they are:
   ☐ incarcerated ☐ a business entity

f. ☐ other *(specify):*

Note

- U.S. military status can be checked online at https://scra.dmdc.osd.mil/.
- If the defendant/respondent is in the military service, or their military status is unknown, the defendant/respondent is entitled to certain rights and protections under federal and state law before a default judgment can be entered.
- For more information, see https://selfhelp.courts.ca.gov/military-defaults.

10. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):

   a. Clerk's filing fees ..... $

   b. Process server's fees ..... $

   c. Other *(specify):* $

   d. $

   e. **TOTAL** ..... $

   f. ☐ Costs and disbursements are waived.

   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing items 9 and 10 are true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

PARTY WITHOUT ATTORNEY OR ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	**DRAFT**
EMAIL ADDRESS:		**NOT APPROVED BY THE JUDICIAL COUNCIL**
ATTORNEY FOR (*name*):		**v 7/06/2022**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PETITIONER:		
RESPONDENT:		
REQUEST TO ENTER DEFAULT		CASE NUMBER:

1. **To the clerk:** Please enter the default of the respondent who has failed to respond to the petition.
2. A completed *Income and Expense Declaration* (form FL-150) or *Financial Statement (Simplified)* (form FL-155)
   ☐ is attached ☐ is not attached.
   A completed *Property Declaration* (form FL-160) ☐ is attached ☐ is not attached
   because *(check at least one of the following):*
   (a) ☐ there have been no changes since the previous filing.
   (b) ☐ the issues subject to disposition by the court in this proceeding are the subject of a written agreement.
   (c) ☐ there are no issues of child, spousal, or partner support or attorney fees and costs subject to determination by the court.
   (d) ☐ the petition does not request money, property, costs, or attorney fees. (Fam. Code, § 2330.5.)
   (e) ☐ there are no issues of division of community property.
   (f) ☐ this is an action to establish parental relationship.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF [ATTORNEY FOR] PETITIONER)

3. **Declaration**
   (a) ☐ No mailing is required because service was by publication or posting and the address of the respondent remains unknown.
   (b) ☐ A copy of this *Request to Enter Default,* including any attachments and an envelope with sufficient postage, was provided to the court clerk, with the envelope addressed as follows *(address of the respondent's attorney or, if none, the respondent's last known address):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

FOR COURT USE ONLY

☐ *Request to Enter Default* mailed to the respondent or the respondent's attorney on *(date):*
☐ Default entered as requested on *(date):*
☐ Default **not** entered. Reason:

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
FL-165 [Rev. January 1, 2023]

REQUEST TO ENTER DEFAULT
(Family Law—Uniform Parentage)

Code of Civil Procedure, §§ 585, 587;
Family Code, § 2335.5
www.courts.ca.gov

PETITIONER: RESPONDENT:	CASE NUMBER:

4. **Memorandum of costs**
   a. ☐ Costs and disbursements are waived.
   b. Costs and disbursements are listed as follows:
      (1) ☐ Clerk's fees ..... $ .....
      (2) ☐ Process server's fees ..... $ .....
      (3) ☐ Other *(specify):* ..... $ .....
      ..... $ .....
      ..... $ .....
      ..... $ .....
      TOTAL ..... $ .....
   c. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief, the foregoing items of cost are correct and have been necessarily incurred in this cause or proceeding.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

5. **Declaration of nonmilitary status** *(required for a judgment)*.
   The respondent is not in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

   I know that the respondent is not in the U.S. military service because *(check all that apply):*

   (a) ☐ the search results that I received from *https://scra.dmdc.osd.mil/* say the respondent is not in the U.S. military service.
   (b) ☐ I am in regular communication with the respondent and know that they are not in the U.S. military service.
   (c) ☐ I recently contacted the respondent, and they told me that they are not in the U.S. military service.
   (d) ☐ I know that the respondent was discharged from U.S. military service on or about *(date):*
   (e) ☐ the respondent is not eligible to serve in the U.S. military because they are incarcerated (in jail or prison).
   (f) ☐ other *(specify):*

Note
- U.S. military status can be checked online at *https://scra.dmdc.osd.mil/*.
- If the respondent is in the military service, or their military status is unknown, the respondent is entitled to certain rights and protections under federal and state law before a default judgment can be entered.
- For more information, see *https://selfhelp.courts.ca.gov/military-defaults*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

PARTY WITHOUT ATTORNEY *or* ATTORNEY STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **Draft** **Not approved by the Judicial Council** **v. 7/06/22gs**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
APPEARANCE, STIPULATIONS, AND WAIVERS	CASE NUMBER:

1. **Appearance by respondent** *(you must choose one):*
   - a. ☐ By filing this form, I make a general appearance.
   - b. ☐ I have previously made a general appearance.
   - c. ☐ I am a member of the military services of the United States of America. I have completed and attached to this form *Declaration and Conditional Waiver of Rights Under the Servicemembers Civil Relief Act* (form FL-130(A)).
2. **Agreements, stipulations, and waivers** *(choose all that apply):*
   - a. ☐ The parties agree that this cause may be decided as an uncontested matter.
   - b. ☐ The parties waive their rights to notice of trial, a statement of decision, a motion for new trial, and the right to appeal.
   - c. ☐ This matter may be decided by a commissioner sitting as a temporary judge.
   - d. ☐ The parties have a written agreement that will be submitted to the court, or a stipulation for judgment will be submitted to the court and attached to *Judgment (Family Law)* (form FL-180).
   - e. ☐ None of these agreements or waivers will apply unless the court approves the stipulation for judgment or incorporates the written settlement agreement into the judgment.
   - f. ☐ This is a parentage case, and both parties have signed an *Advisement and Waiver of Rights Re: Determination of Parental Relationship* (form FL-235) or its equivalent.
3. **Other** *(specify):*

Date: _____

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF PETITIONER)

Date: _____

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF RESPONDENT)

Date: _____

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF ATTORNEY FOR PETITIONER)

Date: _____

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF ATTORNEY FOR RESPONDENT)

Form Approved for Optional Use
Judicial Council of California
FL-130 [Rev. January 1, 2023]

APPEARANCE, STIPULATIONS, AND WAIVERS
(Family Law—Uniform Parentage—Custody and Support)

Government Code, § 70673
www.courts.ca.gov

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT:	CASE NUMBER:

DECLARATION AND CONDITIONAL WAIVER OF RIGHTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

Attachment to *Appearance, Stipulations, and Waivers* (form FL-130)

Notice to Servicemember

The Servicemembers Civil Relief Act (50 U.S.C. §§ 3901–4043) is a federal law that provides protections for military members when they enter active duty. You may obtain a copy of the act from the public law library or from the website of the United States Department of Justice at *www.justice.gov*.

By signing this conditional waiver and attaching it to *Appearance, Stipulations, and Waivers* (form FL-130), I declare that I am entitled to the benefits of the Servicemembers Civil Relief Act (SCRA), and:

1. To permit the court to decide this cause as an uncontested matter and enter a judgment that incorporates the terms of the written agreement made between the petitioner and me (a copy of which is attached to this form), I make a knowing, intelligent, and voluntary conditional waiver of the right to seek to set aside a default judgment entered against me in this matter, as provided by section 3918 of the SCRA.
2. This waiver is conditioned as follows:
   a. The waiver applies only to a default judgment that incorporates the terms and conditions of the written agreement between the petitioner and me that is titled *(specify):*
      (1) ☐ Stipulation for Judgment
      (2) ☐ Marital Settlement Agreement
      (3) ☐ Other *(specify):*
   b. The court must enter a judgment in this case that incorporates only the terms and conditions of the above written agreement without any change; and
   c. Should the court enter a judgment that changes the above written agreement in any way, then I do not waive any of my rights under the SCRA, including my right to seek to set aside the judgment at any time.
3. This conditional waiver was executed during or after a period of military service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF RESPONDENT)

Attention: Clerk of the Court

By law, a servicemember must not be charged a fee to file *Appearance, Stipulations, and Waivers* (form FL-130).

GOVERNMENTAL AGENCY (under Family Code, §§ 17400 and 17406):	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(name):*	**DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT:	
REQUEST TO ENTER DEFAULT JUDGMENT	CASE NUMBER:

1. More than 30 days have passed since service of the summons, complaint, and copy of the proposed judgment.

2. To my knowledge no answer or other responsive pleading has been filed.

3. **Declaration of nonmilitary status** *(required for a judgment).*
   The respondent/defendant is not in the military service of the United States as defined by either the Servicemembers Civil Relief Act (see 50 U.S.C. § 3911(2)) or California Military and Veterans Code sections 400 and 402(f).

   I know that respondent/defendant is not in the U.S. military service because *(specify below):*

   (a) ☐ the military status of the respondent/defendant was checked online at *https://scra.dmdc.osd.mil/*.

   (b) ☐ the Child Support Enforcement System has no evidence of active military duty status for the respondent/defendant.

   (c) ☐ other *(specify):*

Note
- U.S. military status can be checked online at *https://scra.dmdc.osd.mil/*.
- If the respondent/defendant is in the military service, or their military status is unknown, the respondent/defendant is entitled to certain rights and protections under federal and state law before a default judgment can be entered.
- For more information, see *https://selfhelp.courts.ca.gov/military-defaults*.

4. The local child support agency requests that default and judgment be entered under Family Code section 17430.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on (*date*): _____

(2) ☐ Default not entered as requested. (*State reason*):

By: _____

Form Adopted for Mandatory Use
Judicial Council of California
FL-620 [Rev. January 1, 2023]

REQUEST TO ENTER DEFAULT JUDGMENT
(Governmental)

Family Code, §§ 17400, 17402, 17404, 17430
www.courts.ca.gov

SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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

	Commenter	Position	Comment	Committee Response
1.	California Department of Child Support Services by Selis Koker, Chief Counsel Rancho Cordova, CA	NI	*While the proposed changes will address the gap in providing specific facts to support the declaration of non-military status, the proposed method to provide these facts will significantly change the processes and workload of our Local Child Support Agencies (LCSA). When an application is received by an LCSA, pursuant to federal law and state policy, an interview must be accomplished within 10 business days to elicit any information to locate, establish or enforce services. The application itself asks if there is a military employer and if the case participant is on active duty. If these questions are left blank, the required interview assures receiving information. In addition, when locating information about a case participant, LCSAs utilize the Federal Parent Locator Service (FPLS), to discover social security numbers, the most recent home address, wage and benefit information as well as employment data. Therefore, with each case, at the time of opening the applicant is asked and locate sources are used to find information about the other case participant, including whether there is a military address and/or employer. When information is gathered, a separate page in the Child Support Enforcement System (CSE) is completed to indicate the military role in the participant's life, including whether this individual is on active duty. These mandated processes assure that a	Thank you for this information as it helped inform the recommendations that the committees are making to the Judicial Council.

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

	Commenter	Position	Comment	Committee Response
			check of CSE and its analysis constitute the specific facts you may need on the FL-620 form. When 14 specified criteria are met, including whether the respondent is active in the military, default requests, including the FL-620 *Request to Enter Default Judgment,* are automatically generated out of CSE. CSE is automated to prevent a default judgment from generation without meeting all specified criteria. When the respondent is on active duty in the military, CSE will not automatically generate a default, but will instead send a task to the assigned case worker to review the case for default. In 2021 the FL-620 form was generated 21,862 times. Assuming case workers need to manually type specific facts into the FL-620 form, an additional 2 minutes of time would be spent which translates to 729 hours of caseworker time annually at the 2021 levels. We understand the reasons for needing the facts but would prefer the use of a checkbox system so that the time required is minimal. In addition, those cases that are processed automatically out of CSE may be coded to check the appropriate boxes.	
			One suggestion would be: [The graphic pasted below has been reduced in size to fit this column.]	The committees agree with these suggestions and have incorporated them, with minor alterations, into the revisions that they are recommending for adoption.

SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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

	Commenter	Position	Comment	Committee Response
			☐US military status was checked online at https://scra.dmdc.osd.mil/ ☐ The Child Support Enforcement System has no evidence of active military duty (*for use by IV-D agencies only)* ☐ Other: _____ **Note:** If the respondent is in the military service, or their military status is unknown the respondent is entitled to certain rights and protections under federal and state law before a default judgment can be entered. For more information see: [*insert link to self-help website, currently under development*]	
			Alternatively, DCSS would hard code into the system something like: "after reviewing the application for services, and parent locator system available within the Child Support Enforcement (CSE) system, there is no indication that respondent is on active military duty." The appropriate checkbox would be checked, or language coded for automatic insertion for those cases that meet the existing criterion. Without the ability to have standard language on your proposed form, or a checkbox that would allow the system to mark on our automatically generated forms, each form would be required to be manually generated, increasing workload and costs. Of the two alternatives, the checkbox method is recommended. This method reinforces the ways in which a caseworker can verify military service and are familiar to caseworkers who utilize them on other forms. Standard language may cause some caseworkers to overlook the verification process, and a free form box would reduce statewide uniformity as well as increase workloads.	No response required.

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SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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	Commenter	Position	Comment	Committee Response
			While the comments made were specific to the FL-620, Request to Enter Default Judgment, they also apply to the FL-165, Request to Enter Default which is occasionally used by LCSAs. It may be helpful to develop forms for the circumstance when a respondent is, in fact, on active duty in the military to assist litigants understand what options are available to them, to request appointment of counsel or other remedies to obtain a judgment in these cases.	Based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. Comments will be welcomed regarding the need for and efficacy of any future proposal. Additionally, a link to new online self-help content on the California Courts website, discussing how parties can proceed in these situations, will be included on the forms.
2.	California Partnership to End Domestic Violence by Christine Smith, Public Policy Coordinator Sacramento, CA	AM	Does the proposal appropriately address the stated purpose? Yes, the proposal appropriately addresses the stated purpose. However, we are concerned that pro per litigants will leave question 5 blank because they are being asked to prove a negative. Already pro per litigants leave question 4 on FL150s blank because they don't want to speculate, for the litigants, asking them how they know the other party is not in the military will cause them to feel they have to guess and they will leave it blank. Our recommendation is to offer an option on forms including "other", otherwise pro per litigants will leave the paragraph blank. While the note language could be helpful for many litigants, we are concerned that it puts the burden on the survivor to do additional research on the respondent to find their military status or lack thereof.	The committees agree that providing checkboxes for the declarant to indicate how they know the nonappearing party is not in the U.S. military, while also including an "other" option, will cause less confusion and will be more user-friendly than requiring the completion of a blank, fillable field. This in turn would reduce the number of incomplete default forms that may be rejected by the court.

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

SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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

	Commenter	Position	Comment	Committee Response
			Would it be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel and other requirements under the SCRA when the nonappearing respondent/defendant is in the U.S. military service or their military status is unknown? If so, are there particular processes or forms currently in effect that the commenter believes would be effective? We recommend generally limiting forms unless there is a specific needed purpose, which we do not see in this case.	Based on comments and other feedback received, the committees will consider proposing, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. Comments will be welcomed regarding the need for and efficacy of any future proposal. Additionally, a link to new online self-help content on the California Courts website, discussing how parties can proceed in these situations, will be included on the forms.
3.	Hon. Christine N. Donovan Superior Court of Solano County	NI	In regards to Item 5 on the FL-165 and Item 3 on the FL-620, I propose that the person be required to check one of three boxes. Box One would be a statement that the defaulted respondent is NOT in the military and that the petitioner verified this fact by checking at the SCRA website mentioned on the proposed box. Box Two would be a statement that the defaulted respondent IS in military service but that the respondent has signed or will be signing a stipulated judgment or MSA AND has signed or will be signing a limited waiver of rights on JC form FL-130(A). (Box Two would not be an option in Title IV-D cases [form FL-620] as there is no option for a default with agreement in those cases of which I'm aware. But if that is in fact an option, then it may be worth considering.) Box Three would be a statement that the defaulted respondent IS in military service, that the respondent is not signing an agreement nor	The suggestion to include a statement that the respondent is in U.S. military service on the default forms goes beyond the scope of this proposal. However, based on comments and other feedback received, the committees will consider proposing, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. At that time, comments will be welcomed regarding the need for and efficacy of any future proposal. Additionally, a link to new online self-help content on the California Courts website, discussing how parties can proceed in these situations, is included on the forms.

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	Commenter	Position	Comment	Committee Response
			executing a limited waiver of rights on JC form FL-130(A), and that the petitioner requests that counsel be appointed for the respondent. All three statements would be under penalty of perjury. I think this could be an efficient use of an existing form and could ensure that the appropriate rights are protected.	
4.	Family Violence Appellate Project Cory Hernandez Staff Attorney	NI	*FVAP would like to join in the comments submitted by the California Partnership to End Domestic Violence regarding this proposal.	See the responses above to the comments received from the California Partnership to End Domestic Violence.
5.	Harriet Buhai Center for Family Law Rebecca L. Fischer, Senior Staff Attorney Los Angeles, CA	AM	**Strong Reservations** to proposed changes **as drafted**	
			Does the proposal appropriately address the stated process? We have significant concerns about the proposal as drafted for purposes of Family Law (FL-165 and FL-620). Although we recognize the importance of complying with the Servicemembers Civil Relief Act, the proposed changes present two major concerns: 1) significant barriers to use by pro per litigants and 2) legal interpretation of statutes by clerks.	See response to these concerns below.
			<u>Barriers to Use by Pro Per Litigants:</u> Based on our experience and practice, the vast majority of family law default cases are cases filed by a petitioner in pro per. Pro per litigants already face significant hurdles in navigating the default process given the number of forms required and	The committees appreciate this feedback and have made revisions to the forms. See specific responses below.

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SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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	Commenter	Position	Comment	Committee Response
			the significant amount of information that must be provided. The proposed changes make the FL-165 even more difficult to complete by requiring litigants to prove a negative without providing any examples of what would constitute a sufficient factual declaration. Listing the website (https://scra.dmdc.osd.mil/) in the note box implies that the expected way to show military status is by using the website. The website is only available in English. The user guide offered by the site is also only available in English and is 54 pages long. Using the site requires setting up an account (again only available in English). The technology and language both present a barrier to pro per litigants. And unlike some otherwise burdensome but relatively rare processes, like service by posting, this step is *required* in every default case. Although a self-help website that provides more information on the topic would be welcome, it still does not address our concern that the form itself should provide some indication of what would be required under the law without requiring the use of technology.	
			Legal Interpretation of Statutes by Clerks: At present in Los Angeles County, the Request to Enter Default is a form processed by court clerks. Unless the form is modified, the form invites	The committees appreciate this feedback and agree that the proposed revision could result in clerks exercising discretion to make legal decisions. The

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	Commenter	Position	Comment	Committee Response
			clerks to use their individual discretion to decide whether or not the facts presented by a litigant are sufficient. In addition, the proposed changes do not make it clear what happens if a clerk decides the information is insufficient; is the form sent to a judicial officer for review before rejection? Does a litigant have to request a special hearing by filing an ex parte? Will default be entered and then only later will the default judgment be rejected because the facts on the form are deemed insufficient by a later clerk or judicial officer? In our experience, even in cases where litigants are represented, clerks routinely reject properly filed request to enter default. These rejections can be based on simple error (looking at the wrong proof of service in the file), improper understanding of facts (deeming a proof of service invalid because the service address is unlike a traditional address in the U.S.) or even misapplication/ misinterpretation of the law (rejecting a request to enter default because it is requested against a third party). The proposed form would only exacerbate this issue because of the variety of ways litigants—particularly those in pro per—will finish the sentence "I know that respondent is not in the U.S. military service because".	committees have revised the forms accordingly. See specific responses below.

SPR22-12

Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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	Commenter	Position	Comment	Committee Response
			Although there is recourse for correcting an improperly rejected Request to Enter Default, it requires filing an ex parte request which requires knowing that you can file an ex parte request on this issue and having the resources to be able to do so.	
			Proposed Changes: We propose adding checkable boxes to item 5 on FL-165 that contain statements that would each individually constitute sufficient facts for purposes of showing non-military status to allow entry of default. The boxes could make filling out the form much easier for the majority of litigants attempting to enter default. If Judicial Council considers checking the website above the minimum standard, that could be one of the boxes (i.e., "I know that respondent is not in the U.S. military service because (specify below): a. respondent's name does not appear on https://scra.dmdc.osd.mil/). Other boxes could be tied to relationship with the respondent ("I am in routine contact with Respondent and they are not in the U.S. military service" or "Respondent is not eligible for military service") or other areas of personal knowledge. There could continue to be space for situations that did not fit one of the boxes. Other Judicial Council forms contain similar checkboxes of listed facts that could support a legal finding. For example, on the FL-200, in	The committees agree with these suggestions and have incorporated them, with minor alterations, into the revisions that they are recommending for adoption. Specifically, the committees agree that including checkboxes for the declarant to indicate how they know the nonappearing party is not in the U.S. military, while also including an "other" option, will cause less confusion and will be more user-friendly than requiring the completion of a blank, fillable field. This in turn would reduce the number of incomplete default forms that may be rejected by the court.

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	Commenter	Position	Comment	Committee Response
			item 2, there are checkboxes for the most common reasons the court would have jurisdiction over the Respondent and then a third checkbox is provided for other circumstances.	
			In conjunction with the above changes, we propose amending CA Rule of Court 5.402 to provide that if one of the boxes is marked, clerks may process the Request to Enter Default. If no box is checked and the clerk is going to reject the request, the form must be sent to a judicial officer.	Because the proposed amendment to rule 5.402 would be a substantive change and goes beyond the scope of the current proposal, the committees believe public comment should be sought before it is considered for adoption. The committees may consider this suggestion during a future rules cycle.
			It is our belief that the proposed changes would reduce pro per litigant confusion, reduce potential clerical errors or overreaching, and reduce delays in cases proceeding by default.	The committees agree that the forms will benefit from the proposed changes.
			Would it be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel and other requirements under the SCRA when the nonappearing respondent/ defendant is in the U.S. military service or their military status is unknown? If so, are there particular processes or forms currently in effect that the commenter believes would be effective? Yes.	Based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. Comments will be welcomed regarding the need for and efficacy of any future proposal.
			<u>Additional Comments on the Request to Enter Default (FL-165):</u>	

	Commenter	Position	Comment	Committee Response
			If the Request to Enter Default is revised, we ask Judicial Council to consider making additional changes to improve the usability of the form. • Modify the form to allow for default of a third party. There are many instances in family court when joinder of a third party is required by law. Third parties in family law cases are no more likely to participate in a family law case than first named Respondents. At present, the form does not readily allow for entry of judgment against third parties. o Add space in the caption to list a third party o Change "respondent" in item 1 to read "please enter the default of the party _____ who has failed to respond to the petition" o Change all other "respondents" to "party listed in 1" • Insert an optional line to allow a party to identify the date of service and date proof of that service was filed. This would allow parties to identify the proof of service of summons to make review by clerks easier. This is particularly important in cases where multiple proofs of service have been filed or the file is otherwise voluminous. It would also help remind litigants that service must	Because these proposed changes to form FL-165 would be substantive changes and go beyond the scope of the current proposal, the committees believe public comment should be sought before they are considered for adoption. The committees may consider these suggestions during a future rules cycle.

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Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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	Commenter	Position	Comment	Committee Response
			be complete before default is entered. It should be optional because the proof of service may be filed concurrently with the Request to Enter Default. o 1a (optional) The party in 1 was served with the Summons on _____. Proof of the service of summons was filed on_____.	
6.	Orange County Bar Association by Daniel S. Robinson, President Newport Beach, CA	A	The proposal adequately addresses the stated purpose of providing appropriate forms to use in certain family law and civil law forms regarding a defendant's default.	No response required.
			Yes, it would be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel and other requirements under the SCRA when the nonappearing respondent/defendant is in the U.S. military service or their military status is unknown.	Based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. Comments will be welcomed regarding the need for and efficacy of any future proposal.
7.	Superior Court of Los Angeles by Bryan Borys	A	Changes will take longer than 3 months to implement.	The committees appreciate this comment but based on other feedback received believe that 3 months will be sufficient time for courts to implement any required changes.
8.	Superior Court of San Bernardino County Court Executive Office	NI	Does the proposal appropriately address the stated purpose? Not entirely. In the background section of the request for comment, it mentions that "In any action or proceeding covered by this section, the	The committees previously considered whether to expand the scope of the proposal to include new statewide forms to address the procedure for having the court appoint an attorney when the nonappearing party is in U.S. military service or that their status is unknown. However, the

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SPR22-12

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			court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit – (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) If the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in the military service. The proposed forms do not seem to address section B.	committees decided not to expand the scope of this proposal. Nevertheless, based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. At that time, comments will be welcomed regarding the need for and efficacy of any future proposal. Additionally, a link to new online content on the California Courts website, discussing how parties can proceed in these situations, is included on the forms.
			Would it be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel and other requirements under the SCRA when the non-appearing respondent/defendant is in the U.S. military service or their military status is unknown? We believe so yes. It would make it consistent.	Based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S. military service or that their status is unknown. At that time, comments will be welcomed regarding the need for and efficacy of any future proposal.
			If so, are there particular processes or forms currently in effect that the commenter believes would be effective? None known.	No response required.
			Would the proposal provide cost savings? If so, please quantify.	No response required.

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	Commenter	Position	Comment	Committee Response
			No.	
			What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Updating form packets. Informing/training staff.	These implementation requirements are noted in the report.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	No response required.
			How well would this proposal work in courts of different sizes? Size should not have an impact.	No response required.
9.	Superior Court of San Diego by Mike Roddy, Executive Officer	A	Does the proposal appropriately address the stated purpose? Yes.	No response required.
			Would it be helpful for the Judicial Council to develop a statewide set of forms to address the appointment of counsel and other requirements under the SCRA when the non-appearing respondent/defendant is in the U.S. military	Based on comments and other feedback received, the committees will consider recommending, in a future rules cycle, that rules and forms be revised or created to allow for the declarant to indicate to the court that the nonappearing party is in U.S.

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Civil Law and Family Law: Request to Enter Default Forms Under the Servicemembers Civil Relief Act (Revise forms CIV-100, CIV-105, FL-130, FL-130(A), FL-165, and FL-620)

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	Commenter	Position	Comment	Committee Response
			service or their military status is unknown? If so, are there particular processes or forms currently in effect that the commenter believes would be effective? *Yes, to the extent that they're optional forms allowing courts that have developed local forms to continue to use them.	military service or that their status is unknown. If such a proposal is developed in a future rules cycle, the committees will consider whether any new forms should be mandatory or optional. At that time, comments will be welcomed regarding the need for and efficacy of any future proposal.
			Would the proposal provide cost savings? If so, please quantify. No.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Updating internal procedures, local packets, and training for staff.	These implementation requirements are noted in the report.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, if the final versions of the forms are provided to the court by that time. This will ensure that the court is able to provide training to staff, modify local packets and obtain printed stock.	No response required.

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			How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes.	No response required.

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RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800

Committee or other entity submitting the proposal:
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

*Staff contact (*name, phone and e-mail*): Christy Simons, 415-865-7694 | christy.simons@jud.ca.gov*

Tracy Kenny, 916 263-2838 tracy.kenny@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021 and amendment to AAC Agenda on January 5, 2022
Project description from annual agenda:
Appellate Advisory Committee:
Appellate review of transfer of juvenile to a court of criminal jurisdiction
This is a joint project with the Family and Juvenile Law Advisory Committee. AB 624 (Ch.195, Stats. of 2021), which enacted Welfare and Institutions Code section 801, authorizes immediate appellate review of an order transferring a minor from the juvenile court to a court of criminal jurisdiction if a notice of appeal is filed within 30 days of the transfer order. Rules of court in Title 5 and Title 8 must be amended to implement the legislation.

Family and Juvenile Law Advisory Committee
Legislative Changes from the 2021 Legislative Session
As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration and will take action only where necessary to allow courts to implement the legislation efficiently.
s. AB 624 (Bauer-Kahn) Juveniles: transfer to court of criminal jurisdiction: appeals (Ch.195, Stats. of 2021)
Authorizes immediate appellate review of an order transferring a minor from the juvenile court to a court of criminal jurisdiction if a notice of appeal is filed within 30 days of the transfer order.

Proposition 57 and SB 1391
Monitor implementation of a recently enacted propositions and legislation, and assist juvenile courts with any required implementation: Proposition 57 enacted November 8, 2016 restructured the process for transfer of jurisdiction from juvenile to criminal court and eliminated the ability of prosecutors to directly file cases in criminal court. SB 1391 limited the transfer of youth to those age 16 and over or who are arrested after the age of juvenile court jurisdiction. The California Supreme Court granted review in a case decided in October 2019 (O.G. v. Superior Court, 40 Cal.App.5th 626 (2019)) that held that SB 1391 was enacted in violation of Proposition 57 and thus a rules and forms proposal to implement the legislation that was enacted by the council on September 24, 2019, was rescinded by the council on November 25, 2019. On February 25, 2021 the court ruled that the provisions of SB 1391 were a permissible amendment to Proposition 57 and thus were valid. As a result, the changes rescinded in 2019 may now

move forward, and should be coordinated with the changes necessary to implement DJJ realignment (see above).

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 19–20, 2022

Title
Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 20, 2022

Contact
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Executive Summary

In 2018, the Legislature passed Senate Bill 1391 (Lara; Stats. 2018, ch. 1012), which amended Welfare and Institutions Code section 707 to provide that a minor must be at least 16 years of age to be considered for transfer of jurisdiction to criminal court unless the individual for whom transfer is sought was 14 or 15 at the time of the offense, the offense is listed in section 707(b), and the individual was not apprehended until after the end of juvenile court jurisdiction. The Judicial Council took action to implement these age-related changes in the jurisdiction of the juvenile court in 2019 but revoked that action when a split of authority within the California Courts of Appeal arose as to whether these changes were enacted in a constitutional manner. That split was resolved by the California Supreme Court in 2021 in favor of the constitutionality

of the legislation. Additionally, legislation was enacted in 2021 to provide an expedited review on the merits from an order granting a motion to transfer. The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee propose adopting a new rule of court, amending several other rules, and revising two forms pertaining to the transfer-of-jurisdiction process and juvenile appeals to reflect both legislative changes to the transfer statutes.

Recommendation

The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2023:

1. Adopt California Rules of Court, rule 8.417 to govern the appeal of orders transferring jurisdiction from juvenile to criminal court;

2. Amend California Rules of Court, rules 5.766, 5.768, and 5.770 to implement statutory and recent case law changes pertaining to the transfer-of-jurisdiction process and update terminology;

3. Amend California Rules of Court, rules 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412 to clarify and implement new statutory provisions pertaining to appeals of orders transferring jurisdiction from juvenile to criminal court;

4. Revise *Order to Transfer Juvenile to Criminal Court Jurisdiction* (form JV-710) to reflect recent changes in the transfer statute and case law, and update terminology; and

5. Revise *Notice of Appeal—Juvenile* (form JV-800) to include specific provisions concerning appeals of transfer of jurisdiction orders.

The proposed new and amended rules and revised forms are attached at pages 9–23.

Relevant Previous Council Action

The Judicial Council adopted California Rules of Court, rules 5.766, 5.768, and 5.770 effective January 1, 1991, as rules 1480, 1481, 1482, and 1483 respectively, and they were renumbered effective January 1, 2007. These rules have been amended numerous times, most recently effective May 22, 2017, to implement the changes enacted by Proposition 57.

Juvenile Fitness Hearing Order (Welfare and Institutions Code, § 707) (form JV-710) was adopted by the council effective January 1, 2006, and made optional effective January 1, 2012. It was significantly revised effective May 22, 2017, to implement the changes enacted by Prop. 57. *Notice of Appeal—Juvenile* (form JV-800) was adopted effective January 1, 1993, and revised numerous times, most recently effective September 1, 2020, to implement council-sponsored legislation clarifying procedures for accessing juvenile court records during an appeal of the matter.

The Judicial Council adopted a rules and forms proposal to implement the provisions of SB 1391 on September 24, 2019, with an effective date of January 2, 2020. The council then revoked that action on November 25, 2019, after the Court of Appeal, Second Appellate District, filed an opinion on September 30, 2019, finding that the provisions of SB 1391 were not consistent with the voters' intent in enacting Prop. 57 and thus holding that the amendments to section 707 were an unconstitutional exercise of legislative authority.[1]

Analysis/Rationale

Background

On November 8, 2016, the people of the State of California enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016, effective November 9, 2016. Proposition 57 amended existing law to require that the juvenile court consider a motion by the district attorney or other appropriate prosecuting officer to transfer the minor to the jurisdiction of the criminal court before a juvenile can be prosecuted in a criminal court. To that end, the proposition repealed Welfare and Institutions Code section 602(b),[2] which had provided that certain serious and violent felonies were to be prosecuted in criminal court, as well as section 707(d), which had authorized the district attorney to directly file an accusatory pleading involving certain minors in criminal court. In addition, the proposition eliminated a set of presumptions that applied in determining whether a case should be transferred and instead provided the court with broad discretion to determine whether the minor should be transferred to a court of criminal jurisdiction, taking into account numerous factors and criteria.

SB 1391 further amended these provisions to limit the transfer of cases involving 14 and 15 year old juveniles to those in which the alleged offender is not apprehended until after reaching adulthood, and the offense is one listed in section 707(b). On February 25, 2021, the California Supreme Court resolved a split of opinion within the Courts of Appeal and upheld the constitutionality of SB 1391 in *O.G. v. Superior Court*, 11 Cal.5th 82, making clear that the legislation's age limitations on transfer of minor to criminal court jurisdiction were permissible amendments to Prop. 57.

In 2021, the Legislature enacted section 801 to provide a right to an immediate appeal for minors subject to an order for transfer of jurisdiction from juvenile court to criminal court provided that the notice of appeal is filed within 30 days of the transfer order.[3] That legislation requires the council to adopt rules of court to ensure that such minors are advised of their appellate rights, the record is promptly prepared and transmitted after a notice of appeal is filed, and adequate time requirements allow counsel and court personnel to comply with the objectives of the section. Subdivision (e) of section 801 states: "It is the intent of the Legislature that this section

[1] *O.G. v. Superior Court* (2019) 40 Cal.App.5th 626.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

[3] Assem. Bill 624 (Bauer-Kahan; Stats. 2021, ch. 195).

provides for an expedited review on the merits by the appellate court of an order transferring the minor from the juvenile court to a court of criminal jurisdiction."

Transfer rules 5.766, 5.768, and 5.770

The current rules of court governing the process for transfer of jurisdiction from juvenile to criminal court provide that transfer can occur when the subject of the petition is 14 or 15 years of age and is alleged to have committed an offense listed in Welfare and Institutions Code section 707(b), or is 16 years of age or older and is alleged to have committed a felony. To be consistent with the statutory changes made by SB 1391, these rules must be amended to state that, for those who were 14 or 15 years of age at the time of the offense, a transfer petition may be considered only when the individual who is the subject of the petition was apprehended after the end of juvenile court jurisdiction.

In addition, the changes to section 707 require that code references be updated to reflect the new structure of the statute. The proposal would also update rule 5.770 to include the requirement that the court make specific findings for each of the transfer criteria in section 707(a)(3) as provided in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009. All three rules are also proposed to be amended to use the term "youth" instead of "child," consistent with rule 5.502(46).[4] Finally, the committee recommends revising rule 5.776 to correct a typographical error in the most recent version approved by the council.

Transfer order form JV-710

Order to Transfer Juvenile to Criminal Court Jurisdiction (form JV-710), for optional use, would be revised to update item 3 to include the limitation on transferring individuals who were age 14 or 15 at the time of the offense to those situations in which apprehension of the subject of the petition occurred after the end of juvenile court jurisdiction; and to update item 4 to correct the statutory reference to 707(a)(2) and make it 707(a)(3), consistent with the changes enacted by SB 1391. In addition, the form is recommended to be revised to use the term "youth" instead of "child."

Amendments to rule 5.770 to implement new appellate rights

Section 801 provides minors subject to an order transferring jurisdiction with the right to an immediate appeal if a notice of appeal is filed within 30 days of the transfer order and requires that the juvenile court grant a stay of the criminal court proceedings upon request of the minor if an appeal is filed. In addition, it requires the court to advise the such minors of their appellate rights, the steps and time for taking an appeal, and the right to appointed counsel. Based on the comments, this advisement now also includes information about the right to a stay of the proceedings pending the appeal. Finally, it requires that the court prepare the record and transmit it to the Court of Appeal in a timely manner so that the appeal can be heard expeditiously.

[4] This provision defines the term youth for the rules of court and specifies that a youth is a person who is least 14 years of age and not yet 21 years of age. In this report the term youth is used when referencing the rules of court and court forms, while minor is used when discussing statutory provisions that use that term.

Notice of Appeal—Juvenile (form JV-800)

Notice of Appeal—Juvenile (form JV-800), for optional use, would be revised to allow it to be used for the appeal of orders transferring jurisdiction from the juvenile court to the criminal court. To accomplish this, the revised form would include a new notice alerting appellants that they must file a notice of appeal within 30 days of the order, as well as a new item 7(h) to indicate that the appeal is from a transfer order under section 707. The form would also be revised to delete a generic "other" check box, and to convert the item for "other appealable orders relating to wardship," to "other appealable orders relating to juvenile justice." Because the form already has an item for "other appealable orders relating to dependency," it should, as proposed, be usable for all appealable juvenile matters without requiring a nonspecific "other" item.

Appellate rules

New rule 8.417

To ensure that appeals from transfer orders are resolved expeditiously, the committees recommend a new rule that would govern these proceedings. New rule 8.417 is modeled on rule 8.416, the rule governing fast-track dependency appeals. The new rule would:

- require that the cover of the record on appeal be labeled to identify the appeal as entitled to preference;
- specify the items to be included in the record
- require the record to be prepared within 20 days and sent immediately;
- containrequirements for:
    - augmenting and correcting the record
    - the time to file briefs
    - the showing a party must make to support a request for an extension of time, and
    - the length of the grace period following a notice of failure to file a brief; and
- provide time periods for requesting and holding oral argument and submission if argument is waived.

Amended rules 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412

Section 801 provides for an appeal from an order granting transfer if the notice of appeal is filed within 30 days. This is different from the normal time of 60 days in juvenile appeals. Rule 8.406 would be amended to add the 30-day time limit for filing a notice of appeal from a transfer order. The proposed amendments specify when the 30-day time begins to run if the matter is heard by a referee not acting as a temporary judge and if an application for rehearing of an order of a referee not acting as a temporary judge is denied.

The committees also propose adding an advisory committee comment to rule 8.404. The rule provides: "The court must not stay an order or judgment pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child." For clarification and to avoid any confusion with the rules in title 5, a new comment would read: "This rule does not apply to a court's order under rule 5.770(e)(2) staying the criminal court proceedings during the

pendency of an appeal of an order transferring the minor from juvenile court to a court of criminal jurisdiction."

The other rules included in this proposal, rules 8.50, 8.60, 8.63, 8.409, and 8.412, would be amended to add cross-references to new rule 8.417 to the text of the rule or to the advisory committee comments, and to make minor style and punctuation changes.

Policy implications

While juvenile transfer proceedings are relatively uncommon (data from the Department of Justice suggests that fewer than 80 motions were heard in 2020, and only 25 were granted and thus subject to the expedited appellate process[5]), they have significant consequences for the youth who are subject to them, and it is critical that the rules of court set forth clear, accurate, and comprehensive procedures to ensure that these proceedings provide due process and allow for appropriate appellate review. The changes proposed by the committees seek to provide that structure and guidance so that these proceedings can conclude in a just and timely manner.

Comments

This proposal was circulated for public comment from April 1 to May 13, 2019, as part of the regular spring comment cycle. Seven organizations submitted comments on this proposal. Five commenters agreed with the proposal. Two organizations agreed if the proposal was modified. A chart with the full text of the comments received and the committees' responses is attached at pages 24–41.

Maintain timing provisions for review of transfer decisions by juvenile referees

The committees sought specific comment on the necessity of including provisions in the rules to take into account the possibility that a juvenile referee heard a transfer motion in a subordinate judicial officer capacity, rather than as a temporary judge. Two commenters indicated that in at least one court, there are transfer cases heard by referees who do not obtain stipulations from the parties to allow them to serve as temporary judges. In those cases, there would be a right to request a rehearing by a juvenile court judge. Although it appears that it is unusual and perhaps unintended that referees would hear transfer motions sitting as referees, the committees determined that rules 5.770 and 8.406 should take this possibility into account to ensure that youth have an opportunity to seek a juvenile court rehearing before seeking appellate review in these cases. For clarity, the rule 8.406(a) provisions regarding time to appeal when the matter was heard by a referee have been renumbered as subordinate to the provisions regarding time to appeal when the matter was heard by a judge of the juvenile court.

Language to incorporate the holding of* C.S. v. Superior Court *into rule 5.770

When the proposal to implement SB 1391 was circulated for comment in 2019, the Family and Juvenile Law Advisory Committee sought specific comment on whether rule 5.770 should articulate the holding in *C.S. v. Superior Court* that trial court judges considering a motion to transfer must make detailed findings and fully explain their reasoning for granting or denying the

[5] *Juvenile Justice in California, 2020, California Department of Justice, p. 38.*

motion. The comments in that cycle generally favored such amendment to the rule, and the amended rule initially approved by the council in 2019 included the following language:

> The court must document on the record the basis for its decision, detailing how it weighed the evidence and identifying the specific facts that persuaded the court to reach its decision, notwithstanding that the decision must be based on the totality of the circumstances and the child need not be found amenable on each of the five criteria in order to remain in juvenile court.

In this cycle, the committee opted to truncate this language somewhat in the version that circulated for comment to read:

> The court must state on the record the basis for its decision, detailing how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision.

Two commenters supported including this language, but suggested that it be augmented to read:

> The court must state on the record the basis for its decision, by explicitly articulating its evaluative process, detailing how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision.

The committees ultimately determined that the clearest approach would be to revise the sentence to read:

> The court must state on the record the basis for its decision, including how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision.

The committees also recommend adding a sentence to the Advisory Committee Comment for the rule to read:

> Under subdivision (b)(2), the court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009.

In addition, the committees adopted changes to the proposal suggested by commenters to change the word "delinquency" to "juvenile justice" on form JV-800 to reflect the current council preference, and to require the juvenile court to include the right to a stay of the proceedings in its advisement about appellate review in a transfer proceeding.

Alternatives considered

The Family and Juvenile Law Advisory Committee considered not including the requirements of *C.S. v. Superior Court* in rule 5.770(b) but determined that the holding was important to ensuring

that the record in a transfer matter is sufficiently detailed and indicates how the court weighed each factor.

The Appellate Advisory Committee considered a narrow approach that would have involved amending only the rule regarding the time for filing a notice of appeal, rule 8.406. The committee concluded that a broader approach, including a new rule with expedited timing at several steps of the appeal, would better reflect the legislative intent that these appeals be determined as soon as reasonably practicable after the notice of appeal is filed.

The committees did not consider the alternative of proposing no rule amendments because section 801 creates a new right of appeal and requires the Judicial Council to adopt implementational rules.

Fiscal and Operational Impacts

The restrictions on transfers to criminal court for juvenile offenders ages 14 and 15 will result in the filing of fewer transfer petitions for these youth and, thus, fewer hearings on those petitions. These impacts are the result of legislative changes. Similarly, the new appellate rights in section 801 will likely result in more appeals being filed in the Courts of Appeal, also the result of the legislative change rather than the provisions of this proposal. Courts noted during the comment period that implementation of these changes would require training for staff and judicial officers, changes to case management systems, and workload impacts on clerks who prepare the records on appeal. As noted above, these cases are relatively few in number so the statewide impact should be modest.

Attachments and Links

1. Cal. Rules of Court, rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, 8.412, and 8.417, at pages 9–20
2. Forms JV-710 and JV-800, at pages 21–23
3. Chart of comments, at pages 24–41
4. Link A: Senate Bill 1391, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1391*
5. Link B: Assembly Bill 624, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB624*

Rule 8.417 of the California Rules of Court is adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412 are amended, effective January 1, 2023, to read:

Rule 5.766. General provisions

(a) Hearing on transfer of jurisdiction to criminal court (§ 707)

A ~~child~~ youth who is the subject of a petition under section 602 and who was 14 years or older at the time of the alleged felony offense may be considered for prosecution under the general law in a court of criminal jurisdiction. The district attorney or other appropriate prosecuting officer may make a motion to transfer the ~~child~~ youth from juvenile court to a court of criminal jurisdiction, in one of the following circumstances:

(1) The ~~child~~ youth was 14 or 15 years ~~or older~~ of age at the time of the alleged offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction.

(2) The ~~child~~ youth was 16 years or older at the time of the alleged felony offense.

(b) * * *

(c) Prima facie showing

On the ~~child~~ youth's motion, the court must determine whether a prima facie showing has been made that the offense alleged is an offense that makes the ~~child~~ youth subject to transfer as set forth in subdivision (a).

(d) Time of transfer hearing—rules 5.774, 5.776

The transfer of jurisdiction hearing must be held and the court must rule on the request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance under rule 5.776 or the ~~child~~ youth's waiver of the statutory time period to commence the jurisdiction hearing, the jurisdiction hearing must begin within the time limits under rule 5.774.

Rule 5.768. Report of probation officer

(a) Contents of report (§ 707)

The probation officer must prepare and submit to the court a report on the behavioral patterns and social history of the ~~child~~ youth being considered. The report must include information relevant to the determination of whether the ~~child~~ youth should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)~~(2)~~(3). The report must also include any written or oral statement offered by the victim pursuant to section 656.2.

(b) Recommendation of probation officer (§§ 281, 707)

If the court, under section 281, orders the probation officer to include a recommendation, the probation officer must make a recommendation to the court as to whether the ~~child~~ youth should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court.

(c) Copies furnished

The probation officer's report on the behavioral patterns and social history of the ~~child~~ youth must be furnished to the ~~child~~ youth, the parent or guardian, and all counsel at least two court days before commencement of the hearing on the motion. A continuance of at least 24 hours must be granted on the request of any party who has not been furnished the probation officer's report in accordance with this rule.

Rule 5.770. Conduct of transfer of jurisdiction hearing under section 707

(a) * * *

(b) Criteria to consider (§ 707)

Following receipt of the probation officer's report and any other relevant evidence, the court may order that the ~~child~~ youth be transferred to the jurisdiction of the criminal court if the court finds:

(1) The ~~child~~ youth was 16 years or older at the time of any alleged felony offense, or the ~~child~~ youth was 14 or 15 years of age at the time of an alleged felony offense listed in section 707(b) and was not apprehended prior to the end of juvenile court jurisdiction; and

(2) The ~~child~~ youth should be transferred to the jurisdiction of the criminal court based on an evaluation of all the criteria in section 707(a)~~(2)~~(3) as provided in that section. The court must state on the record the basis for its decision, including how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision.

(c) * * *

(d) Procedure following findings

(1) If the court finds the ~~child~~ youth should be retained within the jurisdiction of the juvenile court, the court must proceed to jurisdiction hearing under rule 5.774.

(2) If the court finds the ~~child~~ youth should be transferred to the jurisdiction of the criminal court, the court must make orders under section 707.1 relating to bail and to the appropriate facility for the custody of the ~~child~~ youth, or release on own recognizance pending prosecution. The court must set a date for the ~~child~~ youth to appear in criminal court and dismiss the petition without prejudice upon the date of that appearance.

(3) When the court rules on the request to transfer the ~~child~~ youth to the jurisdiction of the criminal court, the court must advise all parties present ~~that~~ regarding appellate review of the order ~~must be by petition for extraordinary writ~~ as provided in subdivision (g) of this rule. The advisement may be given orally or in writing when the court makes the ruling. The advisement must include the time for filing the notice of appeal or the petition for extraordinary writ as set forth in subdivision (g) of this rule. The court must advise the youth of the right to appeal, of the necessary steps and time for taking an appeal, of the right to the appointment of counsel if the youth is unable to retain counsel, and the right to a stay.

(e) Continuance ~~to seek~~ or stay pending review

(1) If the prosecuting attorney informs the court orally or in writing that a review of the court's decision not to transfer jurisdiction to the criminal court will be sought and requests a continuance of the jurisdiction hearing, the court must grant a continuance for not less than two judicial days to allow time within which to obtain a stay of further proceedings from the reviewing judge or appellate court.

(2) If the youth informs the court orally or in writing that a notice of appeal of the court's decision to transfer jurisdiction to the criminal court will be filed and requests a stay, the court must issue a stay of the criminal court proceedings until a final determination of the appeal. The court retains jurisdiction to modify or lift the stay upon request of the youth.

(f) Subsequent role of judicial officer

Unless the ~~child~~ youth objects, the judicial officer who has conducted a hearing on a motion to transfer jurisdiction may participate in any subsequent contested jurisdiction hearing relating to the same offense.

(g) Review of determination on a motion to transfer jurisdiction to criminal court

(1) An order granting a motion to transfer jurisdiction of a youth to the criminal court is an appealable order subject to immediate review. A notice of appeal must be filed within 30 days of the order transferring jurisdiction or 30 days after the referee's

order becomes final under rule 5.540(c) or after the denial of an application for rehearing of the referee's decision to transfer jurisdiction of the youth to the criminal court. If a notice of appeal is timely filed, the court must prepare and submit the record to the Court of Appeal within 20 days.

(2) An order ~~granting or~~ denying a motion to transfer jurisdiction of a ~~child~~ youth to the criminal court is not an appealable order. Appellate review of the order is by petition for extraordinary writ. Any petition for review of a judge's order denying a motion to transfer jurisdiction of the child to the criminal court, or denying an application for rehearing of the referee's determination not to transfer jurisdiction of the child to the criminal court, must be filed no later than 20 days after ~~the child's first arraignment on an accusatory pleading based on the allegations that led to the transfer of jurisdiction order~~ the judge's order is entered, or the referee's order becomes final under rule 5.540(c).

(h) * * *

Advisory Committee Comment

Subdivision (b). This subdivision reflects changes to section 707 as a result of the passage of Senate Bill 382 (Lara; Stats. 2015, ch. 234) and Proposition 57, the Public Safety and Rehabilitation Act of 2016. SB 382 was intended to clarify the factors for the juvenile court to consider when determining whether a case should be transferred to criminal court by emphasizing the unique developmental characteristics of children and their prior interactions with the juvenile justice system. Proposition 57 provided that its intent was to promote rehabilitation for juveniles and prevent them from reoffending, and to ensure that a judge makes the determination that a ~~child~~ youth should be tried in a criminal court. Consistent with this intent, the committee urges juvenile courts—when evaluating the statutory criteria to determine if transfer is appropriate—to look at the totality of the circumstances, taking into account the specific statutory language guiding the court in its consideration of the criteria.

Under subdivision (b)(2), the court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009.

Subdivision (c). * * *

Rule 8.50. Applications

(a) * * *

(b) Contents

The application must state facts showing good cause—or making an exceptional showing of good cause, when required by these rules—for granting the application and must identify any previous application filed by any party.

(c) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.60. Extending time

(a) * * *

(b) Extending time

Except as these rules provide otherwise, for good cause—or on an exceptional showing of good cause, when required by these rules—the Chief Justice or presiding justice may extend the time to do any act required or permitted under these rules.

(c) Application for extension

(1) * * *

(2) The application must state:

(A)–(C) * * *

(D) Good cause—or an exceptional showing of good cause, when required by these rules—for granting the extension, consistent with the factors in rule 8.63(b).

(d)–(f) * * *

Advisory Committee Comment

Subdivisions (b) and (c)~~:~~. An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.63. Policies and factors governing extensions of time

(a) Policies

(1) The time limits prescribed by these rules should generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice.

(2) The effective assistance of counsel to which a party is entitled includes adequate time for counsel to prepare briefs or other documents that fully advance the party's interests. Adequate time also allows the preparation of accurate, clear, concise, and complete submissions that assist the courts.

(3) For a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within the time specified in the rules of court. To balance the competing policies stated in (1) and (2), applications to extend time in the reviewing courts must demonstrate good cause—or an exceptional showing of good cause, when required by these rules—under (b). If good cause is shown, the court must extend the time.

(b) Factors considered

In determining good cause—or an exceptional showing of good cause, when required by these rules—the court must consider the following factors when applicable:

(1)–(11) * * *

Advisory Committee Comment

An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.404. Stay pending appeal

The court must not stay an order or judgment pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child.

Advisory Committee Comment

This rule does not apply to a court's order under rule 5.770(e)(2) staying the criminal court proceedings during the pendency of an appeal of an order transferring the minor from juvenile court to a court of criminal jurisdiction.

Rule 8.406. Time to appeal

(a) Normal time

(1) Except as provided in (2) and (3), (A), (B), and (2), a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.

~~(2)~~ (A) In matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee's order becomes final under rule 5.540(c).

~~(3)~~ (B) When an application for rehearing of an order of a referee not acting as a temporary judge is denied under rule 5.542, a notice of appeal from the referee's order must be filed within 60 days after that order is served under rule 5.538(b)(3) or 30 days after entry of the order denying rehearing, whichever is later.

(2) To appeal from an order transferring a minor to a court of criminal jurisdiction:

(A) Except as provided in (B) and (C), a notice of appeal must be filed within 30 days of the making of the order.

(B) If the matter is heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 30 days after the referee's order becomes final under rule 5.540(c).

(C) When an application for rehearing of an order of a referee not acting as a temporary judge is denied under rule 5.542, a notice of appeal from the referee's order must be filed within 30 days after entry of the order denying rehearing.

(b)–(d) * * *

Rule 8.409. Preparing and sending the record

(a) Application

This rule applies to appeals in juvenile cases except cases governed by rules 8.416 and 8.417.

(b) * * *

(c) Preparing and certifying the transcripts

Except in cases governed by rule 8.417, within 20 days after the notice of appeal is filed:

(1) The clerk must prepare and certify as correct an original of the clerk's transcript and one copy each for the appellant, the respondent, the child's Indian tribe if the tribe has intervened, and the child if the child is represented by counsel on appeal or if a recommendation has been made to the Court of Appeal for appointment of counsel for the child under rule 8.403(b)(2) and that recommendation is either pending with or has been approved by the Court of Appeal but counsel has not yet been appointed; and

(2) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (1) requires of the clerk's transcript.

(d)–(e) * * *

Advisory Committee Comment

Subdivision (a). Subdivision (a) calls litigants' attention to the fact that ~~a~~ different rules ~~(rule 8.416)~~ govern~~s~~ the record in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417).

Subdivision (b). * * *

Subdivision (c). Subdivision (c) calls litigants' attention to the fact that a different rule (rule 8.417) governs the record in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction.

Subdivision (e). * * *

Rule 8.412. Briefs by parties and amici curiae

(a) * * *

(b) Time to file

(1) Except in appeals governed by rules 8.416 and 8.417, the appellant must serve and file the appellant's opening brief within 40 days after the record is filed in the reviewing court.

(2) The respondent must serve and file the respondent's brief within 30 days after the appellant's opening brief is filed.

(3) The appellant must serve and file any reply brief within 20 days after the respondent's brief is filed.

(4) In dependency cases in which the child is not an appellant but has appellate counsel, the child must serve and file any brief within 10 days after the respondent's brief is filed.

(5) Rule 8.220 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days.

(c) Extensions of time

The superior court may not order any extensions of time to file briefs. Except in appeals governed by rules 8.416 and 8.417, the reviewing court may order extensions of time for good cause.

(d) Failure to file a brief

(1) Except in appeals governed by rules 8.416 and 8.417, if a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party's counsel or the party, if not represented, in writing that the brief must be filed within 30 days after the notice is sent and that failure to comply may result in one of the following sanctions:

(A)–(B) * * *

(2)–(3) * * *

(e) * * *

Advisory Committee Comment

Subdivision (b). Subdivision (b)(1) calls litigants' attention to the fact that ~~a~~ different rules ~~(rule 8.416(e))~~ govern~~s~~ the time to file an appellant's opening brief in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416(e)), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(f)).

Subdivision (c). Subdivision (c) calls litigants' attention to the fact that ~~a~~ different rules ~~(rule 8.416(f))~~ governs the showing required for extensions of time to file briefs in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416(f)), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(g)).

Subdivision (d). Subdivision (d) calls litigants' attention to the fact that different rules govern the time period specified in the notice of failure to timely file an appellant's opening brief or a respondent's brief in appeals from judgments or orders terminating parental rights, in dependency appeals in certain counties (rule 8.416(g)), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(h)).

Rule 8.417. Appeals from orders transferring a minor from juvenile court to a court of criminal jurisdiction

(a) Application

This rule governs appeals from orders of the juvenile court granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction.

(b) Form of record

(1) The clerk's and reporter's transcripts must comply with rules 8.45–8.47, relating to sealed and confidential records, and, except as provided in (2), with rule 8.144.

(2) The cover of the record must prominently display the title "Appeal from Order Transferring a Minor from Juvenile Court to a Court of Criminal Jurisdiction Under Welfare and Institutions Code Section 801."

(c) Record on appeal

(1) In addition to the items listed in rule 8.407(a), the clerk's transcript must contain:

(A) Any report by the probation officer on the behavioral patterns and social history of the minor, including any oral or written statement offered by the victim under Welfare and Institutions Code section 656.2;

(B) Any other probation report or document filed with the court on the petition under Welfare and Institutions Code section 602; and

(C) Any document in written or electronic form submitted to the court in connection with the prima facie showing under rule 5.766(c) or the motion to transfer jurisdiction.

(2) In addition to the items listed in rule 8.407(b), any reporter's transcript must contain the oral proceedings at any hearings on the prima facie showing under rule 5.766(c) and the motion to transfer jurisdiction.

(d) Preparing, certifying, and sending the record

(1) Within 20 court days after the notice of appeal is filed:

(A) The clerk must prepare and certify as correct an original of the clerk's transcript and one copy each for the appellant, the respondent, and the district appellate project; and

(B) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (A) requires of the clerk's transcript.

(2) When the clerk's and reporter's transcripts are certified as correct, the clerk must immediately send:

(A) The original transcripts to the reviewing court by the most expeditious method, noting the sending date on each original; and

(B) One copy of each transcript to the district appellate project and to the appellate counsel for the following, if they have appellate counsel, by any method as fast as United States Postal Service express mail:

(i) The appellant; and

(ii) The respondent.

(3) If appellate counsel has not yet been retained or appointed for the minor, when the transcripts are certified as correct, the clerk must send that counsel's copies of the transcripts to the district appellate project.

(e) Augmenting or correcting the record

(1) Except as provided in (2) and (3), rule 8.410 governs any augmentation or correction of the record.

(2) An appellant must serve and file any motion for augmentation or correction within 15 days after receiving the record. A respondent must serve and file any such motion within 15 days after the appellant's opening brief is filed.

(3) The clerk and the reporter must prepare any supplemental transcripts within 20 days, giving them the highest priority.

(4) The clerk must certify and send any supplemental transcripts as required by (d).

(f) Time to file briefs

(1) The appellant must serve and file the appellant's opening brief within 30 days after the record is filed in the reviewing court.

(2) Rule 8.412(b) governs the time for filing other briefs.

(g) Extensions of time

The superior court may not order any extensions of time to prepare the record or to file briefs; the reviewing court may order extensions of time but must require an exceptional showing of good cause.

(h) Failure to file a brief

Rule 8.412(d) applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 15 days.

(i) Oral argument and submission of the cause

(1) Unless the reviewing court orders otherwise, counsel must serve and file any request for oral argument no later than 15 days after the appellant's reply brief is filed or due to be filed. Failure to file a timely request will be deemed a waiver.

(2) The court must hear oral argument within 60 days after the appellant's last reply brief is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

(3) If counsel waive argument, the cause is deemed submitted no later than 60 days after the appellant's reply brief is filed or due to be filed.

Advisory Committee Comment

Subdivision (d). Under rule 8.71(c), the superior court clerk may send the record to the reviewing court in electronic form.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council** **JV-710.V7.030722.ja**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Case Name:	
ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION **(Welfare and Institutions Code, § 707)**	CASE NUMBER:

1. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present:
      ☐ Youth ☐ Youth's attorney *(name):*
      ☐ Deputy District Attorney *(name):* ☐ Other:

2. ☐ The court has read and considered ☐ the petition and report of the probation officer ☐ other relevant evidence.

3. **THE COURT FINDS** *(check one)*
   Welfare and Institutions Code section 707
   a. ☐ The youth was 16 years old or older at the time of the alleged felony offense; or
   b. ☐ The individual was 14 or 15 years of age at the time of the alleged offense, the alleged offense is an offense listed in Welfare and Institutions Code section 707(b), and the individual was not apprehended before the end of juvenile court jurisdiction.

4. **AFTER CONSIDERING EACH OF THE TRANSFER OF JURISDICTION CRITERIA, THE COURT ALSO FINDS AND ORDERS:**
   The court has considered each of the criteria in section 707(a)(3) and has documented its findings on each of the criteria on the record, and based on those findings makes the following orders:
   a. ☐ The transfer motion is denied. The youth is retained under the jurisdiction of the juvenile court.
      The next hearing is on *(date):* at *(time):*
      for *(specify):*

   b. ☐ The transfer motion is granted. The prosecutor has shown by a preponderance of the evidence that the youth should be transferred to the jurisdiction of the criminal court.
      (1) ☐ The matter is referred to the District Attorney for prosecution under the general law.
      (2) ☐ The youth is ordered to appear in criminal court on *(date):* at *(time):*
      in Department:
      (3) ☐ The petition filed on *(date):* is dismissed without prejudice on the appearance date in (2).
      (4) ☐ The youth is to be detained in ☐ juvenile hall ☐ county jail (section 207.1).
      (5) ☐ Bail is set in the amount of: $
      (6) ☐ The youth is released ☐ on own recognizance ☐ to the custody of:

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-710 [Rev. January 1, 2023]

ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION
(Welfare and Institutions Code, § 707)

Welfare and Institutions Code, §§ 207.1, 389(c), 707, 781(d);
Cal. Rules of Court, rules 5.504, 5.770
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by** **the Judicial Council** **JV-800.v6.071122.ja**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
NOTICE OF APPEAL—JUVENILE	CASE NUMBER:

— INSTRUCTIONS —

- You or your attorney **must** fill in items 1 and 2 and sign this form at the bottom of the page. If possible, to help process your appeal, fill in items 5–7 on the reverse of this form.
- For most appeals, you must file a written notice of appeal within **60** days after rendition of the judgment or the making of the order being appealed or, in matters heard by a referee, within **60** days after the order of the referee becomes final. Read rule 8.406 of the California Rules of Court.
- To appeal an order transferring jurisdiction to the criminal court, you must file the notice of appeal within **30** days. Read rules 5.770(g) and 8.406(a)(4).
- To file an appeal of an order for transfer to a tribal court, you (1) may ask the juvenile court to stay (delay the effective date of) the transfer order and (2) must file the appeal before the transfer to tribal jurisdiction is finalized. Read rule 5.483 and the advisory committee comment.
- If you are not the county welfare department, district attorney, child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291- INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.g/forms.

1. I appeal from the findings and orders of the court *(specify date of order or describe order):*

2. This appeal is filed by
   a. Appellant *(name):*
   b. Address: c. Phone number:
   d. Name, address, and phone number of person to be contacted *(if different from appellant):*

   e. ☐ Appellant has been granted access to specified records in the juvenile case file, and a copy of the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on *Order After Judicial Review on Petition for Access to Juvenile Case File* (form JV-574), if available, is attached.

3. ☐ I request that the court appoint an attorney on appeal. I ☐ was ☐ was not represented by an appointed attorney in the superior court.

4. Items 5–7 on the reverse are ☐ completed ☐ not completed.

Date:

TYPE OR PRINT NAME

SIGNATURE OF ☐ APPELLANT ☐ ATTORNEY

Form Approved for Optional Use
Judicial Council of California
JV-800 [Rev. January 1, 2023]

Cal. Rules of Court, rules 5.770. 8.400, 8.401, 8.405, 8.406
Welfare and Institutions Code, §§ 395, 800, 801
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

5. Appellant is the
   a. ☐ child.
   b. ☐ mother.
   c. ☐ father.
   d. ☐ legal guardian.
   e. ☐ de facto parent.
   f. ☐ county welfare department.
   g. ☐ district attorney.
   h. ☐ child's tribe.
   i. ☐ other *(state relationship to child or interest in the case):*

6. This notice of appeal pertains to the following child or children *(specify number of children included):*
   a. Name of child:
      Child's date of birth:
   b. Name of child:
      Child's date of birth:
   c. Name of child:
      Child's date of birth:
   d. Name of child:
      Child's date of birth:
      ☐ Continued in Attachment 6.

7. The order appealed from was made under Welfare and Institutions Code *(check all that apply):*
   a. ☐ **Section 305.5** (transfer to tribal court)
      ☐ Granting transfer to tribal court ☐ Denying transfer to tribal court
      Dates of hearing *(specify):*
   b. ☐ **Section 360** (declaration of dependency) ☐ Removal of custody from parent or guardian ☐ Other orders
      ☐ with review of section 300 jurisdictional findings
      Dates of hearing *(specify):*
   c. ☐ **Section 366.26** (selection and implementation of permanent plan)
      ☐ Termination of parental rights ☐ Appointment of guardian ☐ Planned permanent living arrangement
      Dates of hearing *(specify):*
   d. ☐ **Section 366.28** (order designating a specific placement after termination of parental rights in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
      Dates of hearing *(specify):*
   e. ☐ **Section 388** (request to change court order)
      Dates of hearing *(specify):*
   f. ☐ Other appealable orders relating to dependency *(specify):*
      Dates of hearing *(specify):*
   g. ☐ **Section 725** (declaration of wardship and other orders)
      ☐ with review of section 601 jurisdictional findings
      ☐ with review of section 602 jurisdictional findings
      Dates of hearing *(specify):*
   h. ☐ **Section 707** (order transferring jurisdiction to criminal court)
      Dates of hearing *(specify):*
   i. ☐ Other appealable orders relating to juvenile justice *(specify):*
      Dates of hearing *(specify):*

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
1	First District Appellate Project by Jonathan Soglin, Executive Director On Behalf of: Lynelle Hee, Executive Director, Appellate Defenders, Inc. Patrick McKenna, Executive Director Sixth District Appellate Program Rick Lennon, Executive Director California Appellate Project, Los Angeles Laurel Thorpe, Executive Director Central California Appellate Program	AM	**Appellate Projects' Interest in Item SPR22-14** The Court of Appeal projects are non-profit corporations created pursuant to California Rules of Court, rule 8.300(e), which contract with the Courts of Appeal through the Judicial Council of California, Appellate Court Services, to oversee the system of court-appointed counsel on appeal in their respective districts. The central goal of the offices is to improve the quality of indigent representation on appeal, assist the Court of Appeal in administering criminal, juvenile, and limited civil appeals by indigents who are entitled to the appointment of counsel at public expense. Their caseload covers criminal, juvenile delinquency and dependency, and civil commitment appeals, certain writs, and other proceedings requiring appointed counsel in the appellate courts.[FN 1: The Court of Appeal projects include the First District Appellate Project (FDAP), located in Oakland; California Appellate Project, Los Angeles (CAP-LA), serving the Second District; Central California Appellate Program (CCAP), located in Sacramento and serving the Third and Fifth Districts; Appellate Defenders, Inc. (ADI), located in San Diego and serving the Fourth District; and the Sixth District Appellate Program (SDAP), in San Jose.] These comments begin with responses to the Request for Specific Comments on page 6 of the Invitation to	The committees note the commenter's support for the proposal and appreciates the information on the role and perspective of the appellate projects.

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

	Commenter	Position	Comment	Committee Response
			Comment, followed by our suggestions for changes in the proposed language in specific rules.	
			• **Does the proposal appropriately address the stated purpose?** Yes. The proposal appropriately addresses the stated twofold purpose of the proposed rules: (1) to amend transfer rules implementing Senate Bill 1391; and (2) to adopt rules of court implementing newly-enacted Welfare and Institutions Code [FN 2: All further statutory references are to the Welfare and Institutions Code unless otherwise noted.] section 801 which provides for appeal of transfer orders.	The committees appreciate this response to its request for specific comments.
			Rules amending transfer rules implementing Senate Bill 1391.	
			We agree with the Committees' proposed amendment of rules implementing Senate Bill 1391. The modifications to rules 5.766 and 5.770 closely track the language of the new law, permitting a transfer petition for a person who was 14 or 15 years of age at the time of a section 707(b) offense only when that person was not apprehended until after the end of juvenile court jurisdiction.	The committees appreciate this response to its request for specific comments.
			We are also in agreement with amending all three rules to employ the term "youth" instead of "child," rendering them consistent with rule 5.502(46) which already defines "youth" as "a	The committees note the commenters' support for the change in terminology.

	Commenter	Position	Comment	Committee Response
			person who is at least 14 years of age and not yet 21 years of age."	
			We are in favor of the proposed new language in rule 5.770(b) to incorporate the holding in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009 that a trial court considering a motion to transfer must make detailed findings and fully explain its reasoning for granting or denying the motion. Incorporating the *C.S.* holding will helpfully remind the bench to make adequate rulings. (We do, however, recommend changes below to more accurately reflect the language of the holding in that case.)	The committees concur that language incorporating the holding in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009 is of value and address the specific suggestion below.
			Adoption of rules implementing section 801.	
			The Committees' proposed rules faithfully implement section 801 providing for an appeal of an order transferring jurisdiction if a notice of appeal is filed within 30 days and requiring that the juvenile court grant a stay of the criminal court proceedings upon request.	The committees appreciate this feedback.
			Is the new advisory committee comment to rule 8.404 regarding stays helpful? **Yes.** Rule 8.404, governing stays in ordinary juvenile cases, prohibits a court from staying an order pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child. The advisory comment states: "This rule does not apply to a court's order under rule	The committees appreciate this feedback and recommend adding the new advisory committee comment.

	Commenter	Position	Comment	Committee Response
			5.770(e)(2) staying the criminal court proceedings during the pendency of an appeal of an order transferring the minor from juvenile court to a court of criminal jurisdiction." The comment is helpful to prevent confusion with newly-enacted rule 5.770(e)(2) governing stays in transfer proceedings.	
			Does proposed new rule 8.417(c) appropriately specify the items to be included in the record on appeal? **Yes.** We believe the proposed rule is broad enough to capture all items which should be included in the record on appeal. We are particularly pleased with the all-encompassing language of 8.417(c)(1)(C), which specifies "[a]ny document in written or electronic form." Transfer hearings often involve a wide variety of documentary evidence (i.e. reports by experts, doctor evaluations/assessments; PowerPoint presentations, and emails to or from the court related to the case, etc.) which justifies such a broad rule	The committees appreciate this feedback and information regarding the types of documentary evidence that may be involved.
			Do juvenile referees hear transfer motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge, or can those provisions be removed from the rules? (See rules 5.770(g) and 8.406(a).)	The committees note that there appear to be differences in practice among the courts regarding whether referees hear these motions in a capacity other than as temporary judges, but have concluded that it is preferable to accommodate this possibility in the rule.

	Commenter	Position	Comment	Committee Response
			Yes, juvenile referees do hear transfer motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge. We conducted an informal email survey of defenders in counties across California. Of those defenders who responded, most reported that their counties do not have juvenile referees at all. Of those counties that use referees, only one county—Los Angeles County—reported that juvenile referees hear transfer motions in a capacity other than as a temporary judge. That apparently one county reportedly has referees hearing transfer motions in a non-temporary judge capacity is ample reason for retaining proposed rules 5.770(g)(1) and 8.406(a). Another reason is that counties that do not currently employ referees at transfer hearings in a capacity other than as a temporary judge could do so in the future.	
			A. Implementation of the new jurisdictional provisions of Senate Bill 1391, amending rules 5.766, 5.768, and 5.770.	
			We agree with the Committees' proposed rule amendments implementing SB 1391. The modifications to rules 5.766 and 5.770 closely track the language of the new law, permitting a transfer petition for a person who was 14 or 15 years of age at the time of a Welfare and Institutions Code section 707(b) offense only	The committees note the commenters' support for the implementation of the limits on transfer eligibility.

	Commenter	Position	Comment	Committee Response
			when that person was not apprehended until after the end of juvenile court jurisdiction.	
			For the sake of precision, we are also in agreement with amending all three rules to employ the term "youth" instead of "child." As noted, rule 5.502(46) defines "youth" as "a person who is at least 14 years of age and not yet 21 years of age."	The committees note the commenters' support for the change in terminology.
			We are grateful that the committees have included new language in rule 5.770(b)(2) incorporating the holding in *C.S. v. Superior Court(2018) 29 Cal.App.5th 1009 (C.S.). This amendment will helpfully remind the bench that in deciding a motion to transfer, it must make detailed findings and fully explain its reasoning for granting or denying the motion. However, we recommend using the language of C.S.*[FN 4: "[W]e hold that the foregoing principles require a juvenile court to clearly and explicitly 'articulate its evaluative process' by detailing 'how it weighed the evidence' and by 'identify[ing] the specific facts which persuaded the court' to reach its decision. ([In re] Pipinos [(1982)] 33 Cal.3d [189,]198.)" (C.S. v. Superior Court (2018) 29 Cal.App.5th at p. 1029.)] which is more exacting, and recommend modifying the proposed language, as follows: The court must state on the record the basis for its decision. It must clearly and explicitly articulate its evaluative process, by detailing how it weighed	The committees appreciate this suggestion but think the requirement of the *C.S. v. Superior Court* holding can be more plainly stated as follows:: "The court must state on the record the basis for its decision, including how it weighed the evidence, and identifying the specific factors on which the court relied to reach its decision." To ensure that this intent of this provision of the rule is clearly understood, the committees also recommend adding the following to the Advisory Committee Comment: "Under subdivision (b)(2), the court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., C.S. v. Superior Court (2018) 29 Cal.App.5th 1009."

	Commenter	Position	Comment	Committee Response
			the evidence and by identifying the specific facts which persuaded the court to reach its decision.	
			B. Implementation of the appellate provisions of section 801, creating rule 8.417 and amending rule 5.770 and several appellate rules. We agree with the Committees' proposed amendment of rules creating rule 8.417 and amending rule 5.770 and several appellate rules. We recommend a slight change to rule 5.770(d)(3) regarding advisement of rights after a finding that a youth should be transferred to criminal court jurisdiction. As now proposed, the rule does not advise of the right under rule 5.770(e)(2) to a stay of a transfer order pending appeal. We suggest adding that advisement, as follows: […] The court must advise the youth of the right to appeal, of the necessary steps and time for taking an appeal, the right to a stay, and of the right to the appointment of counsel if the youth is unable to retain counsel. We believe that adding this advisement would helpfully inform litigants at the earliest opportunity of the availability of a stay of a transfer order pending appeal.	The committees agree that the advisement should include the right to a stay and have modified the rule accordingly.
			C. Notice of Appeal—Juvenile We agree with the Committee's proposed modifications to the form JV-800 notice of appeal.	The committees appreciate the concern for comprehensive instructions but given that use of a referee is very uncommon and that all parties to

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
			We suggest modifications to the proposed instructions on page 20, specifying deadlines governing appeals from a referee's decision to transfer jurisdiction to the criminal court. We also suggest adding information about the availability of a stay of transfer orders. To appeal an order transferring jurisdiction to the criminal court, you must file the notice of appeal within 30 days. Read rules 5.770(g) and 8.406(a)(4). If the matter is heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 30 days after the referee's order becomes final or after the denial of an application for rehearing of the referee's decision to transfer jurisdiction to the criminal court. Read rules 5.770(g) and 8.406(a)(4). You may ask for a stay of transfer proceedings pending the appeal. Read rule 5.770(e)(2). Specifying deadlines governing appeals from a referee's decision to transfer jurisdiction would avert filing errors and be consistent with the immediately-preceding section on ordinary appeals which specifies deadlines for matters heard by a referee. We believe that an advisement of the availability of a stay during the pendency of a transfer appeal would be helpful to litigants in light of the recentness of this rule.	these cases are represented by counsel the committees are not adding in this specific language on the timing when the case is heard by a referee because it will rarely apply and would make the instructions unnecessarily long. The committees concur that adding in the ability to request a stay is of value in most cases and have made this change to the form.
2	Orange County Bar Association	A	[No specific comment provided.]	No response required.

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

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
	by Daniel S. Robinson, President			
3	Pacific Juvenile Defender Center by Marketa Sims, Executive Board Member	A	PJDC's Interest PJDC is a regional affiliate of the Washington, D.C. -based National Juvenile Defender Center (NJDC) (Recently renamed "the Gault Center.") PJDC provides support to more than 1600 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers throughout California and across the country. PJDC works to improve the quality of legal representation for youth and promote the development of law and policies that increase the success of system involved youth and that reduce unnecessary confinement. PJDC is active in the Legislature and as amicus counsel before the California Courts of Appeal and the California Supreme Court.	The committees appreciate the expertise that PJDC brings to bear on this proposal.
			In response to the Judicial Council's Request for Specific Comments, PJDC comments as follows.	
			1. The proposal does appropriately address the stated purpose.	The committees appreciate the support for the proposal meeting its objectives.
			2. The new advisory committee comment to rule 8.404 is helpful because it clarifies that pursuant to Welfare & Institutions Code section 801(b), the minor has the right to a stay upon request and without further inquiry.	The committees appreciate this feedback.
			3. Proposed new rule 8.417(c) does appropriately specify the items to be included in the record on	The committees appreciate this insight and feedback.

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

	Commenter	Position	Comment	Committee Response
			appeal and does so broadly enough to make it clear that exhibits are to be included in the record, which is important given the often informal procedures in juvenile court.	
			4. Yes, in Los Angeles County, juvenile referees hear transfer motions in a capacity other than as a temporary judge. That is, juvenile referees routinely hear transfer motions without an express stipulation by the minor that the juvenile referee is acting as a temporary judge. Roughly a third of the juvenile bench officers are referees, who require a stipulation to act as a temporary judge. Since these bench officers in Los Angeles are "cross-designated" as both referees and temporary judges by blanket order, confusion often arises as to whether referees have purported to act as temporary judges without a proper stipulation. In Los Angeles, there is no regular procedure by the juvenile referees to obtain a stipulation to act as a temporary judge and the referees do not comply with Cal. Rule of Court, rule 2.816, requiring notice to the minor that the referee is acting as a temporary judge and notice that the minor has the right to have the transfer motion heard by a judge of the superior court. Further, juvenile referees have refused to respond when asked by minor's counsel to put on the record whether they are purporting to act as referees or temporary judges. Many referees also do not comply with Welfare & Institutions Code section 248(a), requiring a	The committees note that there appear to be some differences among the courts as to the use of referees in these proceedings, and agree that the the rule should include the time for trial court review of a decision by a referee.

	Commenter	Position	Comment	Committee Response
			juvenile referee to provide the minor with written findings on the transfer order. As a result of this noncompliance with Cal. Rules of Court, rule 2.816 and Welfare & Institutions Code 248(a), whether the referee has acted as a referee or a temporary judge may, itself, be a contested issue, which should be resolved in the first instance by a superior court judge. Indeed, prior to the enactment of AB 624 the issue of the adequacy of notice by a juvenile referee of his intent to act as a temporary judge at a transfer hearing was raised by petition for writ of mandate in the court of appeal, but not resolved. Accordingly, in light of the widespread practice in Los Angeles County of referees hearing transfer motions, it is necessary to build in time for the minor to seek review of the transfer decision by a superior court judge pursuant to Welfare & Institutions Code section 252 in proposed rules of court 5.770(g) and 8.406(a.)	
			Additional Comments	
			1. PJDC suggests that Rule 5.770(b)(2) be further amended to clearly state the holding of C.S. v. Superior Court (2018) 29 Cal.App.5th that a trial judge considering a motion to transfer must make detailed findings and fully explain its reasoning for granting or denying the motion, as stated at p. 3 of the Invitation of the Comment. Specifically, PJDC suggests that the rule read:	The committees appreciate this suggestion but think the requirement of the *C.S. v. Superior Court* holding can be more plainly stated as follows:: "The court must state on the record the basis for its decision, including how it weighed the evidence, and identifying the specific factors on which the court relied to reach its decision." To ensure that this intent of this provision of the rule is clearly

	Commenter	Position	Comment	Committee Response
			The youth should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the criteria in section 707(a)(3) as provided in that section. The court must state on the record the basis for its decision, by explicitly articulating its evaluative process, detailing how it weighed the evidence, and identifying the specific factors on which the court relied to reach its decision.	understood, the committees also recommend adding the following to the Advisory Committee Comment: "Under subdivision (b)(2), the court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., C.S. v. Superior Court (2018) 29 Cal.App.5th 1009."
			2. PJDC further suggests that rule 5.770(d)(3) be amended to add "and the right to a stay" to the advisement the juvenile court gives to the youth upon a decision to transfer the youth's case for prosecution in adult court. This would ensure that both the youth and counsel are apprised that the youth has a right to a stay upon request. Thus the last line of the rule would read: The court must advise the youth of the right to appeal, of the necessary steps and time for taking an appeal, of the right to the appointment of counsel if the youth is unable to retain counsel, and the right to a stay.	The committees agree that it would be beneficial to include the right to a stay in the advisement and have modified the rule accordingly.
4	Superior Court of Los Angeles County by Bryan Borys,	A	Is the new advisory committee comment to rule 8.404 regarding stays helpful? Yes.	The committees appreciate this feedback.

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

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
			Does proposed new rule 8.417(c) appropriately specify the items to be included in the record on appeal? Yes.	The committees appreciate this feedback.
			Do juvenile referees hear transfer motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge, or can those provisions be removed from the rules? (See rules 5.770(g) and 8.406(a).) No, a referee does not hear transfer motions in a capacity other than a temporary judge.	The committees appreciate this information, but note that there are differences in practice among the courts as to whether referees always sit as temporary judges when hearing transfer motions. Therefore, the committees have kept the rule timing explicit on this point to ensure that there is enough time to seek a review by a judge of a referee's decision before filing a notice of appeal.
5	Superior Court Riverside County by Susan Ryan, Chief Deputy of Legal Services	A	Does the proposal appropriately address the stated purpose? Yes, the proposal seems to address the jurisdictional provisions of SB 1391 and the appellate issues from Section 801.	The committees appreciate the support for the proposal meeting its objectives.
			Is the new advisory committee comment to rule 8.404 regarding stays helpful? Yes, the comment is helpful.	The committees appreciate this feedback.
			Does the proposed new rule 8.417(c) appropriately specify the items to be included in the record on appeal? Yes, the new rule is helpful and provides specific items.	The committees appreciate this feedback.
			Do juvenile referees hear transfer motions in a capacity other than as a temporary	The committees appreciate this feedback and note that, while it does appear uncommon to have

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

	Commenter	Position	Comment	Committee Response
			judge such that the rules need to include timing for review of their orders by a superior court judge, or can those provisions be removed from the rules? (See rules 5.770(g) and 8.406(a)). This is not applicable to our court, as we do not have juvenile referees.	referees hear transfer motions, it may be the practice in some jurisdictions. Thus it would be unwise to remove the referee specific provisions of the rules.
			Would the proposal provide cost savings? If so, please quantify. No.	The committees note that no cost savings are likely.
			What would the implementation requirements be for courts-for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Some training for appeals staff would be necessary. New codes for the new JV-800 form would be needed. Court staff and judges would need to be made aware of the changes.	The committees have noted these likely impacts on the courts in their report to the council and note that they are largely a result of the change in the statute rather than the proposal itself.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes	The committees note that the timing appears to be sufficient to allow for implementation of the proposal.
			How will would this proposal work in courts of different sizes? The changes seem minimal and should work for courts of any size.	The committees appreciate that the changes in the proposal which are designed to comply with the new appellate rights are not overly burdensome on courts of any size.

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

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
6	Superior Court of San Diego County by Mike Roddy, Court Executive Officer	AM	Does the proposal appropriately address the stated purpose? **Yes.**	The committees appreciate the support for the proposal meeting its objectives.
			Is the new advisory committee comment to rule 8.404 regarding stays helpful? **Yes. WIC 801 requires the stay if requested by the youth.**	The committees appreciate this feedback.
			Does proposed new rule 8.417(c) appropriately specify the items to be included in the record on appeal? **Yes.**	The committees appreciate this feedback.
			Do juvenile referees hear transfer motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge, or can those provisions be removed from the rules? (See rules 5.770(g) and 8.406(a).) **Referees do not hear transfer motions in San Diego County.**	The committees appreciate this feedback and note that while it does appear uncommon to have referees hear transfer motions, it may be the practice in some jurisdiction and thus it would be unwise to remove the referee specific provisions of the rules.
			Would the proposal provide cost savings? If so, please quantify. **No, but it is required to implement the new law.**	The committees note that no cost savings are likely and appreciate the recognition that the proposal is required to implement the law.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case	The committees have noted these likely impacts on the courts in their report to the council.

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

SPR 22-14

Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court and Appeal from Transfer Orders

(Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.404, 8.406, 8.409, and 8.412; and revise forms JV-710 and JV-800)

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

	Commenter	Position	Comment	Committee Response
			management systems, or modifying case management systems? **Train judicial officers and clerks, particularly the appeals clerks, on the new timelines and requirements. We may need some new minute order codes.**	
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	The committees note that the timing appears to be sufficient to allow for implementation of the proposal.
			How well would this proposal work in courts of different sizes? **It should work in San Diego County.**	The committees appreciate that the changes in the proposal which are designed to comply with the new appellate rights are not overly burdensome on courts of any size.
			Other Comments **JV-800, item 7i:** It should read "juvenile justice" instead of "juvenile delinquency."	The committees appreciate this suggestion to update the terminology to reflect the preferred language of the council and have made this revision.
7	Superior Court of Stanislaus County by Sandy Almansa, Court Supervisor, Juvenile Dependency Division	A	Does the proposal appropriately address the stated purpose? Yes	The committees appreciate the support for the proposal meeting its objectives.
			Does proposed new rule 8.417(c) appropriately specify the items to be included in the record on appeal? Yes	The committees appreciate this feedback.
			Do juvenile referees hear transfer motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge, or can those	The committees appreciate this feedback and note that while it does appear uncommon to have referees hear transfer motions, it may be the practice in some jurisdictions and thus it would be

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

	Commenter	Position	Comment	Committee Response
			provisions be removed from the rules? (See rules 5.770(g) and 8.406(a).) Referees do not hear juvenile cases in this court.	unwise to remove the referee specific provisions of the rules.
			Would the proposal provide cost savings? If so, please quantify. No	The committees note that no cost savings are likely.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? There will need to be significant procedural rewrites in the juvenile justice clerk's office and in the juvenile appellate clerk's assignments. Staffing for appellate clerks may need to be increased due to the expedited timeline (20 days for clerks/reporters transcripts) and expectation that the new rights will likely result in more appeals being filed, per page 5-"Fiscal and Operational Impacts." Both the expedited timeline and the new rights will increase the number of filings and decrease the time for the record to be filed in the Appellate Court. We will need to assign additional staff to be trained on juvenile delinquency appeals to be able to absorb the	The committees have noted these likely impacts on the courts in their report to the council. The committees also note that in terms of the workload for the expedited timeline the impact on any specific court is likely to be small as in 2020, only 25 transfer motions were granted statewide, and this is the pool of youth who would be eligible to seek appellate review under the new rule provisions.

	Commenter	Position	Comment	Committee Response
			increase in filings and the shortened time for filing.	
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Possibly	The committees have taken note of the uncertainty about the time required to implement the proposal and note that these cases are relatively uncommon statewide which should provide courts with some breathing room to implement without undue burden.
			How well would this proposal work in courts of different sizes? Unknown. In a court with limited resources, it could be difficult to manage the increased workload under expedited so it may impact staffing levels depending on the number of appeals filed.	The committees appreciate that there is always uncertainty around the impact of procedural change, but as noted above, there were only 25 of these motions granted in 2020. Thus small courts are likely to have few if any of these appeals to manage.

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Rules Committee Meeting Date: August 18, 2022

Title of proposal: Juvenile Law: Housing and Food Security for Youth Exiting Foster Care

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Revise forms JV-362, JV-363, and JV-365

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Kerry Doyle, 415-865-8791, kerry.doyle@ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: Annual Agenda: November 2, 2021
Project description from annual agenda: Family and Juvenile Law Advisory Committee Annual Agenda: Item 1: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration and will take action only where necessary to allow courts to implement the legislation efficiently.
Item 1k. AB 546 (Maienschein) Dependent children: documents: housing (Ch. 519, Stats. of 2021)
Expands the information about the housing assistance efforts a county welfare department must provide to a foster youth who is on the cusp of aging out of the system that the department must report to the juvenile court.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:* n/a
- *List any new forms that require translation by statute or that you will request to be translated:* n/a

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 16
For business meeting on September 20, 2022

Title
Juvenile Law: Housing and Food Security for Youth Exiting Foster Care

Rules, Forms, Standards, or Statutes Affected
Revise forms JV-362, JV-363, and JV-365

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 21, 2022

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Executive Summary

To conform to recent statutory changes, the Family and Juvenile Law Advisory Committee recommends revising, on three forms, (1) the information that must be provided to the juvenile court about a youth's housing plans when exiting foster care, enacted by Assembly Bill 546; and (2) the written information that must be provided to the youth at the review hearing before the youth turns 18 years old, enacted by Assembly Bill 674.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2023, revise:

1. *Review Hearing for Youth Approaching 18 Years of Age—Information, Documents, and Services* (form JV-362) and *Review Hearing for Youth 18 Years of Age or Older—Information, Documents, and Services* (form JV-363) to include items about the youth's housing plans and information about CalFresh food benefits; and

2. *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365) to include items about the youth's housing plans and information about CalFresh food benefits, and to correct statutory references.

The revised forms are attached at pages 6–12.

Relevant Previous Council Action

Forms JV-362 and JV-363 were adopted for mandatory use effective January 1, 2021. Form JV-365 is a mandatory form and was most recently revised effective January 1, 2021.

The 2021 adoption of and revisions to these forms were to conform to the statutory mandate of Assembly Bill 718 (Eggman; Stats. 2019, ch. 438) that child welfare agencies provide key information, documents, and services to youth in foster care beginning at age 16, rather than at the end of juvenile court jurisdiction. Before the passage of AB 718, the law required the provision of certain information, documents, and services only to a youth in foster care 18 years of age or older before termination of juvenile court jurisdiction over that youth. (Welf. & Inst. Code, § 391.)[1]

Consistent with the intent of AB 718 to increase the access that youth in foster care have to various information, documents, and services as they transition to adulthood and greater levels of independence, the council approved the extension of the provisions in that bill to youth in foster care in the juvenile justice (delinquency) system as well as in the dependency system. The council amended California Rules of Court, rule 5.810, effective January 1, 2021, to apply the section 391 requirements regarding the information, documents, and services that must be provided to dependent children to youth in foster care under the juvenile justice (delinquency) jurisdiction of the court. The council also amended rule 5.810 to require the use of forms JV-362, JV-363, and JV-365 for youth in foster care under juvenile justice (delinquency) jurisdiction.

Analysis/Rationale

The recommended revisions to the forms will implement increased court oversight of the department's efforts and provided more support to youth in foster care by helping the youth secure housing and CalFresh benefits. before the court terminates jurisdiction.

Assembly Bill 546

AB 546 (Maienschein; Stats. 2021, ch. 519) amends section 391(c) and requires county welfare departments to report to the court at certain review hearings on whether housing referrals or assistance have been successful at securing housing for the youth; and if not, what different or additional services the department has provided that are intended to secure housing.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The Chief Justice's Work Group on Homelessness

In October 2020, Chief Justice Tani G. Cantil-Sakauye established the Work Group on Homelessness to study and recommend ways the judicial branch can further assist people experiencing homelessness or facing the possibility of losing their homes. Among other things, the Work Group assessed whether changes in laws, regulations, or rules would help address homelessness or provide enhanced services. In its report, the Work Group recommended prioritizing "the creation and implementation of long-range plans for housing security for youth and nonminor dependents involved in the foster care system," explaining that:

> Minors who have never been involved in the child welfare system are more likely to have a support system that assists them with housing, housing expenses, and transitioning to becoming self-supporting adults. But when the state and the juvenile court determine that minors need to be removed from their families, the minors enter into the care of the court and the foster care system. Courts should assure, insofar as possible, that the transition from court care to independence does not result in homelessness.[2]

The advisory committee agrees with the recommendation of the Work Group, and the recommendation has informed and influenced the decisions of the committee for this proposal.

Assembly Bill 674

AB 674 (Bennett; Stats. 2021, ch. 524) amends section 391(b) to require that the report submitted by the county welfare department at the last regularly scheduled hearing before the youth reaches age 18 include verification that the youth was provided with written information notifying them that they may be eligible to receive CalFresh benefits and where the youth can apply for those benefits.[3]

Policy implications

The committee considered how to best implement AB 546's statutory mandates that child welfare agencies provide the court with information about the youth's housing plans when exiting foster care and AB 674's statutory mandates to provide information to youth about CalFresh benefits. The recommended revisions are intended to provide the court with this information.

Comments

This proposal circulated for comment as part of the spring 2022 invitation-to-comment cycle from April 1 through May 13, 2022, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators,

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[2] Judicial Council of Cal., Work Group on Homelessness, *Report to the Chief Justice* (2021), p. 25, *hwg_work-group-report.pdf (ca.gov)*.

[3] CalFresh, known federally as the Supplemental Nutrition Assistance Program, or SNAP, provides monthly food benefits to individuals and families with low income. The program issues monthly benefits on an Electronic Benefit Transfer (EBT) card. Food may be purchased at any grocery store or farmers market that accepts EBT cards.

trial court presiding judges, trial court executive officers, judges, trial court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. Six organizations, including four superior courts, provided comment: two agreed with the proposal, one agreed with the proposal if modified, and three did not indicate a position. A chart with the full text of the comments received and the committee's responses is attached at pages 13–22.

The committee sought specific comment on whether the proposal should include youth in foster care under the juvenile justice (delinquency) jurisdiction of the court. All five commenters who answered this question agreed that it should.

The committee also sought specific comment on whether an item on all three forms listing housing resources should include any other county agencies or departments. Item 19(b) on form JV-362, item 10(b) on form JV-363, and item 7(b) on form JV-365 list county departments or agencies, "other than the child welfare or probation department," that the youth can be given as a referral or for assistance or services intended to prevent the youth from being or becoming homeless. One commenter, a large court, suggested that the probation department and Bureau of Indian Affairs should be added. The committee agreed with adding the Bureau of Indian Affairs to the list on the forms. The probation department was not added because the list is of entities "other than the child welfare or probation department."[4] One commenter, another large court, stated that the lists did not seem helpful, and suggested they be deleted and replaced with the instruction "describe in detail, including specific referrals." The committee considered this suggestion but concluded that examples would be helpful for the court's understanding of potential sources of assistance and could improve court oversight of this vital service to youth. The committee agreed with the suggestion to add the phrase "in detail, including specific referrals" to the instruction "describe" and has incorporated it into the revisions on the forms that it is recommending for adoption.

Alternatives considered

The committee considered limiting this proposal to youth in foster care under the dependency jurisdiction of the court, and not including those youth who are in foster care under the juvenile justice (delinquency) jurisdiction of the court. So limiting the proposal, however, would result in youth in foster care in the juvenile justice (delinquency) system receiving different treatment than youth in foster care in the dependency system. The legislative history of both bills clearly provides that the bills, respectively, are intended to help youth who exit foster care obtain stable housing and be informed of their potential eligibility for CalFresh.[5] The committee found it both

[4] See form JV-362, item 19(b); form JV-363, item 10(b); and form JV-365, item 7(b)

[5] Assem. Com. on Human Services, Analysis of Assem. Bill No. 546 (2021–2022 Reg. Sess.) Apr. 7, 2021, p. 3; Assem. Com. on Human Services, Analysis of Assem. Bill No. 674 (2021–2022 Reg. Sess.) Apr. 7, 2021, pp. 2–4.

fair and logical that this proposal, like the implementation of AB 718, help all youth in foster care receive these important services to successfully prepare for their transition to independence.

The housing inquiry is statutorily required at the hearing before a youth turns 18 and at the hearing to terminate juvenile court jurisdiction over a nonminor.[6] The CalFresh notification requirement is statutorily required at only one hearing—the hearing before a youth turns 18.[7] The committee considered limiting this proposal to only those hearings but, given the importance of housing and food security, elected to add both requirements to the Judicial Council forms that are mandated for use at the review hearings after a youth turns 18 and the hearing to terminate juvenile court jurisdiction over a nonminor.

Fiscal and Operational Impacts

The proposal includes an added requirement that social workers and probation officers provide information to the court about a youth's housing plans when exiting foster care and written information notifying the youth that they may be eligible to receive CalFresh benefits and where to apply for those benefits. This requirement will increase workload but is mandated for social workers by recent statutory amendments. As discussed above, the committee concluded that this benefit should also be provided to youth in foster care under the juvenile justice (delinquency) jurisdiction of the court; thus, the proposal includes a slight increase in workload for probation officers. In implementing the new and revised forms, courts will incur standard reproduction costs.

Attachments and Links

1. Forms JV-362, JV-363, and JV-365, at pages 6–12
2. Chart of comments, at pages 13–22
3. Link A: Assem. Bill 546, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB546*
4. Link B: Assem. Bill 674, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB674*

[6] Welf. & Inst. Code, § 391(c)(6)(E), (h)(8).

[7] Welf. & Inst. Code, § 391(b)(10).

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council** **JV-362.v14.071822.ja**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
YOUTH'S NAME: DATE OF BIRTH:	
REVIEW HEARING FOR YOUTH APPROACHING 18 YEARS OF AGE—INFORMATION, DOCUMENTS, AND SERVICES	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 18, complete items 19 and 20, attach or submit to the court documents as required, and sign and date the form.

Directions for the youth *(if the youth is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 18. Sign your initials on the lines after items 1 through 18 ***only if*** you received the information, documents, or services described in those items. Then sign and date the form. You should give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

An attached report or report submitted to the court verifies that the youth has received the following information, documents, and services (*check all that apply*):

1. ☐ Social security card _____
2. ☐ Certified copy of the youth's birth certificate _____
3. ☐ California identification card or driver's license _____
4. ☐ Medi-Cal Benefits Identification Card _____
5. ☐ A letter prepared by the county welfare department that includes the youth's name and date of birth, the dates within which the youth was within the jurisdiction of the juvenile court, and a statement that the youth was a foster youth in compliance with state and federal financial aid documentation requirements _____
6. ☐ The death certificate of the youth's parent or parents, if applicable _____
7. ☐ Proof of citizenship or legal residence, if applicable _____
8. ☐ An advance health care directive form _____
9. ☐ A copy of each of the following: *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO), a blank *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), and a blank *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) _____
10. ☐ Assistance in obtaining employment _____
11. ☐ Assistance in applying for, or preparing to apply for, admission to college or a vocational training program or other educational institution, and in obtaining financial aid _____
12. ☐ Written information notifying the youth that state agencies, when hiring for internships and student assistant positions, must give preference to qualified applicants up to 26 years of age who are or have been dependent children in foster care, homeless youth, or formerly incarcerated youth _____
13. ☐ Written notice informing the youth that youth exiting foster care at 18 years of age or older are eligible for Medi-Cal until they reach 26 years of age, regardless of income, and are not required to apply _____

Form Adopted for Mandatory Use
Judicial Council of California
JV-362 [Rev. January 1, 2023]

Welfare & Institutions Code, §§ 391, 607.2, 607.3;
Gov. Code, § 18220;
Cal. Rules of Court, rules 5.740, 5.810
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER:

14. ☐ Written notice informing the youth of any financial literacy programs or other available resources provided through the county or other community organizations to help the youth obtain financial literacy skills, including but not limited to banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____

15. ☐ Help maintaining relationships with individuals important to the youth, consistent with their best interests *(required only if the youth has been in an out-of-home placement for six months or longer)* _____

16. ☐ The whereabouts of any siblings under the jurisdiction of the juvenile court, unless the court determines that sibling contact would jeopardize the safety or welfare of either sibling _____

17. ☐ Written notice informing the youth that they may be eligible to receive CalFresh food benefits and where the youth can apply for CalFresh benefits _____

18. ☐ Referrals to transitional housing, if available, or assistance in securing other housing _____

19. **Housing**

a. Have the referrals or assistance in item 18 resulted in housing being secured for the youth?

(1) ☐ Yes *(specify duration of housing)*

(a) ☐ Start date of housing: ; end date of housing:

(b) ☐ Duration of housing unknown

(2) ☐ No. The different or additional referrals or assistance that the department has provided to help secure housing are *(describe):*

b. Has the youth been given additional referrals, assistance, or services provided by county departments or agencies other than the child welfare or probation department that are intended to prevent the youth from becoming homeless if juvenile court jurisdiction is terminated? Additional county departments or agencies may include, but are not limited to, the county social services agency, public social services agency, state and county public assistance programs, mental health agency, regional center, office of community and economic development, homeless services agency, the youth's tribe and the Bureau of Indian Affairs (if the Indian Child Welfare Act applies), and other relevant government agencies and community-based service providers.

(1) ☐ Yes. *(describe in detail including specific referrals):*

(2) ☐ No.

20. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information, documents, and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF YOUTH)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by** **the Judicial Council** **JV-363.v13.071922.ja**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
YOUTH'S NAME: DATE OF BIRTH:	
REVIEW HEARING FOR YOUTH 18 YEARS OF AGE OR OLDER—INFORMATION, DOCUMENTS, AND SERVICES	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 9, complete items 10 and 11, attach or submit to the court documents as required, and sign and date the form.

Directions for the youth *(if the youth is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 9. Sign your initials on the lines after items 1 through 9 ***only if*** you received the information, documents, or services described in those items. Then sign and date the form. You should give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

An attached report or report submitted to the court verifies that the youth has received the following information, documents, and services (*check all that apply*):

1. ☐ Assistance in obtaining employment _____
2. ☐ Assistance in applying for, or preparing to apply for, admission to college or a vocational training program or other educational institution, and in obtaining financial aid _____
3. ☐ Written information notifying the youth that state agencies, when hiring for internships and student assistant positions, must give preference to qualified applicants up to 26 years of age who are or have been dependent children in foster care, homeless youth, or formerly incarcerated youth _____
4. ☐ Written information notifying the youth that youth exiting foster care at 18 years of age or older are eligible for Medi-Cal until they reach 26 years of age, regardless of income, and are not required to apply _____
5. ☐ Written notice informing the youth of any financial literacy programs or other available resources provided through the county or other community organizations to help the youth obtain financial literacy skills, including but not limited to banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____
6. ☐ Help maintaining relationships with individuals important to the youth, consistent with their best interests *(required only if the youth has been in an out-of-home placement for six months or longer)* _____
7. ☐ The whereabouts of any siblings under the jurisdiction of the juvenile court, unless the court determines that sibling contact would jeopardize the safety or welfare of either sibling _____
8. ☐ Written notice informing the youth that they may be eligible to receive CalFresh food benefits and where the youth can apply for CalFresh benefits _____
9. ☐ Referrals to transitional housing, if available, or assistance in securing other housing _____
10. **Housing**
    a. Have the referrals or assistance in item 9 resulted in housing being secured for the youth?
       (1) ☐ Yes *(specify duration of housing)*
          (a) ☐ Start date of housing: ; end date of housing:
          (b) ☐ Duration of housing unknown

Form Adopted for Mandatory Use
Judicial Council of California
JV-363 [Rev. January 1, 2023]

Welfare & Institutions Code, §§ 391, 607.2, 607.3;
Gov. Code, § 18220;
Cal. Rules of Court, rule 5.555
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER:

10. a. (2) ☐ No. The different or additional referrals or assistance that the department has provided to help secure housing are *(describe):*

b. Has the youth been given additional referrals, assistance, or services provided by county departments or agencies other than the child welfare or probation department that are intended to prevent the youth from becoming homeless if juvenile court jurisdiction is terminated? Additional county departments or agencies may include, but are not limited to, the county social services agency, public social services agency, state and county public assistance programs, mental health agency, regional center, office of community and economic development, homeless services agency, the youth's tribe and the Bureau of Indian Affairs (if the Indian Child Welfare Act applies) and other relevant government agencies and community-based service providers.

(1) ☐ Yes *(describe in detail including specific referrals):*

(2) ☐ No.

11. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information, documents, and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF YOUTH)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council** **JV-365.v15.071922.ja**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME: NONMINOR'S DATE OF BIRTH: HEARING DATE AND TIME:	
TERMINATION OF JUVENILE COURT JURISDICTION—NONMINOR	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 6, complete items 7 and 8, attach or submit to the court documents as required, and sign and date the form.

Directions for the nonminor *(if nonminor is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 6. If the box checked in item 1 is wrong, check the correct box and sign your initials next to the box. Sign your initials on the lines after items 2a–i, 3a–*l*, 4, 5a–b, and 6a–i ***only if*** you received the information, documents, or services described in those items. Then sign and date the form. You should give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

1. a. ☐ The nonminor wants to attend the termination hearing ☐ in person ☐ by telephone.
   b. ☐ The nonminor does not want to attend the termination hearing. The petitioner has attached verification that the nonminor has been informed of the potential consequences of failure to attend the termination hearing.
   c. ☐ The nonminor is unavailable or has refused to sign this form. Documentation of reasonable efforts to locate the nonminor and to obtain the nonminor's signature is attached.
2. An attached report or report submitted to the court verifies that the nonminor has received the following written information about the nonminor's juvenile court case *(check all that apply):*
   a. ☐ The nonminor's Indian heritage or tribal connections. _____
   b. ☐ The nonminor's family history. _____
   c. ☐ The nonminor's placement history. _____
   d. ☐ The nonminor's educational history and medical history. _____
   e. ☐ Any photographs of the nonminor or the nonminor's family in the possession of the county welfare department or probation department, other than forensic photographs. _____
   f. ☐ Contact information for all siblings under juvenile court jurisdiction, unless the court determines that sibling contact would jeopardize the safety or welfare of either sibling. _____
   g. ☐ Instructions on how the nonminor may exercise the right to inspect and receive a copy their juvenile case file, including how to access sealed records (see Welf. & Inst. Code, §§ 389(a), 781(a)(4), 786(g)(1)(F), 826.6, 827; Cal. Rules of Court, rule 5.552). _____
   h. ☐ If the nonminor requests, assistance in completing a voluntary reentry agreement for care and placement under Welfare and Institutions Code section 11400(z) and in filing a petition under Welfare and Institutions Code section 388(e) to resume dependency jurisdiction. _____
   i. ☐ The date on which the jurisdiction of the court would be terminated. _____
3. The nonminor has been provided with the following documents *(check all that apply):*
   a. ☐ A certified copy of the nonminor's birth certificate _____
   b. ☐ A social security card _____
   c. ☐ A California identification card or driver's license _____
   d. ☐ Proof of citizenship or lawful permanent resident status (if applicable) _____
   e. ☐ A copy of the death certificate of the nonminor's parent or parents (if applicable) _____
   f. ☐ A Health and Education Passport _____

NONMINOR'S NAME:	CASE NUMBER:

3. g. ☐ A blank advance health care directive form _____

   h. ☐ A letter prepared by the county welfare department that includes the nonminor's name and date of birth, the dates during which the nonminor was within the jurisdiction of the juvenile court, and a statement that the nonminor was a foster child in compliance with state and federal financial aid documentation requirements _____

   i. ☐ Written information notifying the nonminor of any financial literacy programs or other available resources provided through the county or other community organizations to help the nonminor obtain financial literacy skills, including but not limited to banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____

   j. ☐ Written information notifying the nonminor that state agencies, when hiring for internships and student assistant positions, must give preference to qualified applicants up to 26 years of age who are or have been dependent children in foster care, homeless youth, or formerly incarcerated youth _____

   k. ☐ The nonminor's 90-day Transition Plan _____

   l. ☐ A copy of each of the following: *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO), a blank *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), and a blank *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) _____

4. ☐ The nonminor continues to be eligible for services or accommodations under the Individuals with Disabilities Education Act, the Americans with Disabilities Act, or section 504 of the Rehabilitation Act of 1973, and the nonminor has been provided with the most recent service or accommodation plan. _____

5. ☐ The nonminor has been receiving services as provided in the Individuals with Disabilities Education Act (see 34 C.F.R. §§ 300.320(b)–(c) & 300.321(b)), and

   a. ☐ has received a copy of their transition service plan. _____

   b. ☐ has been informed of the rights that will transfer to them under this act. _____

6. The nonminor received the following assistance or services *(check all that apply):*

   a. ☐ Written verification of continued enrollment in Medi-Cal with no interruption in coverage _____ and provision of

      1. ☐ a Medi-Cal Benefits Identification Card _____
      2. ☐ information about eligibility for extended Medi-Cal benefits until age 26 _____

   b. ☐ Help applying to college, a vocational training program, or another educational or employment program _____

   c. ☐ Help obtaining financial aid for college, a vocational training program, or another educational or employment program _____

   d. ☐ Assistance obtaining employment or other financial support _____
      ☐ including completing enrollment in CalFresh _____

   e. ☐ Help maintaining relationships with individuals important to the nonminor, consistent with their best interests *(required only if the nonminor has been in an out-of-home placement for six months or longer)* _____

   f. ☐ Help accessing the Independent Living Aftercare Program in the nonminor's county of residence _____

   g. ☐ Written notice informing the nonminor that they may be eligible to receive CalFresh food benefits and where the nonminor can apply for CalFresh benefits _____

   h. ☐ Referrals to transitional housing, if available, or assistance in securing other housing _____

   i. ☐ Other services ordered by the court *(specify):*

7. **Housing**

   a. Have the referrals or assistance in item 6h resulted in housing being secured for the youth?

      (1) ☐ Yes *(specify duration of housing)*

         (a) ☐ Start date of housing: ; end date of housing:

         (b) ☐ Duration of housing unknown

NONMINOR'S NAME:	CASE NUMBER:

7. a. (2) ☐ No. The different or additional referrals or assistance that the department has provided to help secure housing are *(describe):*

b. Has the youth been given additional referrals, assistance, or services provided by county departments or agencies other than the child welfare or probation department that are intended to prevent the youth from becoming homeless if juvenile court jurisdiction is terminated? Additional county departments or agencies may include, but are not limited to, the county social services agency, public social services agency, state and county public assistance programs, mental health agency, regional center, office of community and economic development, homeless services agency, the youth's tribe and the Bureau of Indian Affairs (if the Indian Child Welfare Act applies) and other relevant government agencies and community-based service providers.

(1) ☐ Yes. *(describe in detail including specific referrals):*

(2) ☐ No.

8. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information, documents, and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF NONMINOR)

SPR 22-15
Juvenile Law: Housing and Food Security for Youth Exiting Foster Care (Revise forms JV-362, JV-363, and JV-365)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Daniel S. Robinson, President	A	No specific comment.	No response required.
2.	Superior Court of Los Angeles County by Brian Borys	A	*Should the proposal include youth in foster care under the delinquency jurisdiction of the court?* Yes, this proposal should include Dependency as well as Delinquency jurisdiction of minors in foster care.	The committee appreciates this input and agrees to continue to recommend that this proposal include youth in foster care under the delinquency jurisdiction of the court.
			Should other county departments or agencies be added to form JV-362, item 19(b); form JV-363, item 10(b); and form JV-365, item 7(b)? Yes, the Probation Department and the Bureau of Indian Affairs for the ICWA minors.	The committee agrees with the suggestion to include the Bureau of Indian Affairs and has incorporated it into the revisions that it is recommending for adoption. The committee is not adding the probation department as the list is of departments or agencies other than the child welfare or probation department.
3.	Superior Court of Orange County by Vivian Tran, Operations Analyst	NI	*Does the proposal appropriately address the stated purpose?* Yes, the proposal appropriately addresses the stated purpose	No response required.
			Should the proposal include youth in foster care under the delinquency jurisdiction of the court? Yes, it should include both delinquency and dependency case types.	The committee appreciates this input and agrees to continue to recommend that this proposal include youth in foster care under the delinquency jurisdiction of the court.
			Should other county departments or agencies be added to form JV-362, item 19(b); form JV-363, item 10(b); and form JV-365, item 7(b)?	The committee agrees with another commenter and will add the Bureau of Indian Affairs to the list of other county departments or agencies that the youth can potentially be given as referral,

			No, the other county departments or agencies should not be added to those forms.	assistance, or services intended to prevent the youth from homelessness.
			Would the proposal provide cost savings? If so, please quantify. No, the proposal does not appear to provide cost savings	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Agenda item at meeting to inform staff of revisions.	The committee appreciates this information. No response is required.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months is sufficient time for implementation.	No response required.
			How well would this proposal work in courts of different sizes? This proposal would work for Orange County.	No response required.
4.		NI	Does the proposal appropriately address the stated purpose?	No response required.

	Superior Court of Riverside Countyby Susan Ryan, Chief Deputy of Legal Services,		Yes, the revisions to JV-362, JV-363 and JV-365 seem to provide the required information to the court regarding the youths housing and CalFresh benefits.	
			Should the proposal include youth in foster care under the delinquency jurisdiction of the court? Yes. AB718 requires this information also be provided to the court for youth in foster care placement under the juvenile justice jurisdiction of the courts. The probation officers may provide this information in reports as opposed to using the forms, but it would be helpful to include juvenile justice on the forms as well.	The committee appreciates this input and agrees to continue to recommend that this proposal include youth in foster care under the delinquency jurisdiction of the court.
			Would the proposal provide cost savings? If so, please quantify. None.	No response required.
			What would the implementation requirements be for courts-for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Minimal implementation requirements. The court would just need to update the departments and judges of the changes to the forms.	The committee appreciates this information. No response required.

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

			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?? Yes.	No response required.
			How will would this proposal work in courts of different sizes? This should work the same for courts of any size.	No response required.
5.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	Should the proposal include youth in foster care under the ~~delinquency~~ juvenile justice jurisdiction of the court? **Yes.**	The committee appreciates this input and agrees to continue to recommend that this proposal include youth in foster care under the delinquency jurisdiction of the court. The committee appreciates the commenter's use of the term "juvenile justice" as a substitute for "delinquency." Since not all courts use the term "juvenile justice," the committee has used both terms in its report to the council, with the term "delinquency" in parentheticals.
			Should other county departments or agencies be added to form JV-362, item 19(b); form JV-363, item 10(b); and form JV-365, item 7(b)? **The lists do not seem helpful, and it is recommended they be deleted and replaced with "describe in detail, including specific referrals."**	The committee considered this suggestion but concluded that examples would be helpful for the court's understanding of potential sources of assistance and could improve court oversight of this vital service to youth. The committee agrees with the suggestion to add the phrase "in detail, including specific referrals" to the instruction "describe" and has incorporated it into the revisions that it is recommending for adoption.

			Would the proposal provide cost savings? If so, please quantify. **Not necessarily, but it will ensure [1] the court makes findings that will benefit the youths and [2] the youths receive the services they need to succeed in adulthood.**	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Notify judicial officers and court staff of the changes.**	The committee appreciates this information. No response is required.
			Would 3 months from approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	No response required.
			How well would this proposal work in courts of different sizes? **It should work well. It's not as complicated and/or comprehensive as some of the other proposals for juvenile cases. It should work in San Diego County.**	No response required.
			JV-362, item 19: For consistency with other JV forms (e.g., forms in ITC SPR22-13), suggest the subcategories in 19a and 19b be designated with numerals and letters in parentheses, e.g., "(1)" and "(a)"?	The committee agrees with these suggestions and has incorporated them into the revisions that it is recommending for adoption.

			Suggested edits – a. The referrals or assistance … ~~1.~~ (1) Yes (*specify duration of housing below*): ~~a.~~ (a) Start date of housing ~~b.~~ (b) End date of housing (c) Duration of housing unknown ~~2.~~ (2) No. The different or additional referrals … b. Has the youth been given … ~~1.~~ (1) Yes (*describe*): ~~2.~~ (2) No.	
			JV-363, item 10: Under WIC § 391(c)(6)(E), "The information described in subparagraphs (B) to (D), inclusive, [i.e., the information requested in item 10] is required only for reports submitted at the last regularly scheduled review hearing held pursuant to [§ 366.3(d)] **before** a dependent child attains 18 years of age." Because form JV-363 is for review hearings held for youth **18 years of age or older**," the information in item 10 is not statutorily required. It can be left in the form, however, if the Committee feels it would be as helpful as the CalFresh notification (also not required for youth 18 or older, but included on the JV-363.)	The committee considered this comment and decided that while the information about the youth's housing is statutorily mandated at the review hearing held before a child turn 18 years of age and at the hearing to terminate juvenile court jurisdiction, and the CalFresh notification requirement is statutorily mandated only at the review hearing held before a child turn 18 years of age, given the importance of ensuring housing and food security, the committee will continue to recommend adding items about housing and food security to the forms that are mandated for use at the review hearings for youth 18 years of age and older, and for termination of juvenile court jurisdiction over a nonminor.
			JV-363, item 10: Also, see comment and suggested edits above for JV-362, item 19, regarding numerals and letters in parentheses.	The committee agrees with these suggestions and has incorporated them into the revisions that it is recommending for adoption.

			JV-365, item 2h: Change "1140" to "11400(z)."	The committee agrees with this suggestion and has incorporated it into the revisions that it is recommending for adoption.
			JV-365, item 7: See comment and suggested edits above for JV-362, item 19, regarding numerals and letters in parentheses.	The committee agrees with these suggestions and has incorporated them into the revisions that it is recommending for adoption.
			Legislative Note: WIC § 607.3(f) should be amended to review to subdivision (c), not subdivision (e), of WIC § 391.	The committee appreciates the commenter's noting the incorrect statutory reference and will provide this information to the council's Governmental Affairs office.
6.	Youth Law Center by Jenny Pokemper	NI	**Does the proposal appropriately address the stated purpose?** The proposal addresses, in large part, the stated purposes identified in the proposal. We would make the following recommendations to ensure that the purposes of AB 546 and 674–to ensure effective transition planning–are achieved:	No response required.
			Comment 1: In the "Directions for Youth" section on JV 362, 363, and 365, we recommend that the words "if the youth is available" be deleted. In the alternative, we recommend that the words "if the youth is available" are replaced with "unless the youth cannot be located" to set the expectation that the form are completed with the young person unless it is not possible **Rationale**: Federal and state law require that the court and case work team engage the youth in transition planning. 42 U.S.C.A. 675 (1)(B)(consultation and engagement in the case plan) &(5)(C)(consultation by the court). The engagement of the youth or non-minor	Because this suggestion would entail important substantive changes to the proposal, the committee believes public comment should be sought before it is considered for adoption. The committee may consider this suggestion during a future rules cycle.

			dependent is central for effective planning and to ensure accountability.	
			Comment 2: Add the following new numbered inquiries on JV 362 and 363: □ Documentation that the youth has been notified in an age-appropriate way of the option to remain in foster care pursuant to WIC 11403. □ Documentation as to whether the youth has decided to participate in extended foster care consistent with WIC 11403. **Rationale:** We recommend the inclusion of these two prompts to ensure that notification of extended foster care has been provided to youth and to provide context for the items that are included in the form. For example, if the youth does participate in extended foster care, the inquiries related to housing are likely to look different than for a youth who is discharging from care. Providing information on the youth's status related to extended foster care in these two forms will assist the court and the case planning team in identifying the key supports the youth needs and the urgency of each.	Because this suggestion would entail important substantive changes to the proposal that go beyond what is required in statute, the committee believes public comment should be sought before it is considered for adoption. The committee may consider this suggestion during a future rules cycle.
			Comment 3: Revise questions related to housing security to ensure that referrals are at least made to specific programs for which youth aging out of foster care are eligible. **Proposed language:** **Add a new question 19** A referral for a Family Unification Program Vouchers or Foster Youth to Independence Voucher has been made. □ Yes □ No	Because this suggestion would entail important substantive changes to the proposal that go beyond what is required in statute, the committee believes public comment should be sought before it is considered for adoption. The committee may consider this suggestion during a future rules cycle.

			Add the identical prompt in question 10 on JV 363 and question 9 on JV 365.	
			Add a new question 20 A referral to provide Chafee room and board funds consistent with 42 USCA 677 has been made. □ Yes □ No Add the identical prompt in question 11 on JV 363 and question 10 on JV 365 **Rationale**: These added programs and funding streams are programs for which young people in and leaving foster care are categorically eligible. The rules should prompt their referral or an explanation as to why referrals were not made. We think this will help the rule fulfill the purpose of the new law, which is to help ensure housing stability and prevent homelessness upon discharge from foster care.	Because this suggestion would entail important substantive changes to the proposal that go beyond what is required in the controlling California statute, the committee believes public comment should be sought before it is considered for adoption. The committee may consider this suggestion during a future rules cycle.
			Should the proposal include youth in foster care under the delinquency jurisdiction of the court? We agree that the rules and forms should include youth in foster care who are also under the delinquency jurisdiction of the court. In fact, we believe the inclusion of these youth is required by current law. *See e.g.* WIC 727.25. The review hearings for all nonminor foster youth supervised by a department of probation are to be conducted pursuant to WIC 366.31, which requires compliance with WIC 391. Additionally, WIC 391 must be interpreted to apply to all nonminor dependents who meet the definition of WIC 11400(v). The law intended to cover all youth in foster care regardless of whether they are also	The committee appreciates this input and agrees to continue to recommend that this proposal include youth in foster care under the delinquency jurisdiction of the court.

			involved in the delinquency system. To ensure equitable treatment and effective transition planning, which is required by current law, we believe that applying the rule to youth in the delinquency system is required.	
			We also agree with the decision to provide the notification of CalFresh eligibility at the hearing prior to turning age 18 and all review hearings until termination of jurisdiction. This frequency mirrors the current structure and hearing requirements laid out in WIC 391. The frequency helps ensure that timely transition planning is done and that the youth, child welfare agency and related agencies have sufficient time to take the steps needed for good planning. Food security and housing stability are critical elements of the transition plan and require ongoing and consistent action and attention to ensure that a good plan results.	The committee appreciates this input and will continue to recommend adding items about housing and food security to the forms that are mandated for use at the review hearings for youth 18 years of age and older, and for termination of juvenile court jurisdiction over a nonminor.
			Should other county departments or agencies be added to form JV-362, item 19(b); form JV-363, item 10(b); and form JV-365, item 7(b)? We agree that these agencies should be referenced. Effective transition planning requires interagency collaboration and coordination and is not just the responsibility of the child welfare agency. This addition is also consistent with existing law that allows joinder.	The committee appreciates this input and will continue to recommend that the item that includes a list of county agencies that could help the youth secure housing remains on the forms. The committee concluded that examples would be helpful for the court's understanding of potential sources of assistance and could improve court oversight of this vital service to youth.

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Remove Reporting Requirement for Courts with Mandatory Electronic Filing

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 2.253

Committee or other entity submitting the proposal:
Information Technology Advisory Committee

*Staff contact (*name, phone and e-mail*): Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): N/A Approved by Technology Committee 12/13/21
Project description from annual agenda: Amend rule 2.253(b)(7) of the California Rules of Court to remove the requirement that courts with mandatory electronic filing make semi-annual reports to the Judicial Council.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 20, 2022

Title
Rules and Forms: Remove Reporting Requirement for Courts with Mandatory Electronic Filing

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 2.253

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

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 27, 2022

Contact
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Executive Summary

The Information Technology Advisory Committee recommends amending a rule of the California Rules of Court that requires trial courts with mandatory electronic filing to submit reports about their electronic filing programs to the Judicial Council. The committee recommends amending the rule to remove the requirement because the reports are no longer needed.

Recommendation

The Information Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2023, amend rule 2.253 of the California Rules of Court to remove subdivision (b)(7) from the rule.

The text of the proposed amended rule is attached at page 4.

Relevant Previous Council Action

The Judicial Council adopted rule 2.253 of the California Rules of Court effective July 1, 2013.[1]

Analysis/Rationale

Rule 2.253 authorizes trial courts to require parties, by local rule, to file electronically in civil cases subject to conditions enumerated in the rule. One condition is that courts "report semiannually to the Judicial Council on the operation and effectiveness of the court's [mandatory electronic filing] program."[2] The proposal would eliminate this reporting requirement. The Information Technology Advisory Committee (ITAC) determined the reports are no longer needed for the reasons identified below.

When the Judicial Council adopted the reporting requirement, the purpose was to "provide a basis for evaluating different practices and procedures and for making future recommendations, including recommendations about what should be the effective time of electronic filing."[3] The issue of "what should be the effective time of electronic filing" is now resolved. In 2017, the Judicial Council sponsored Assembly Bill 976, which, among other things, established that a document filed between 12:00 a.m. and 11:59:59 p.m. on a court day is deemed to have been filed that court day.[4] The bill passed, and the updated effective time of electronic filing has been law since January 1, 2018.

In 2017, the Legislature passed an additional bill, Assembly Bill 103, to amend Code of Civil Procedure section 1010.6 to require the Judicial Council to submit four reports to the Legislature containing specific information about electronic filing and electronic service in the trial courts.[5] Unlike rule 2.253, Code of Civil Procedures section 1010.6's reporting requirement encompasses all electronic filing, not just mandatory electronic filing, as well as electronic service.[6] Accordingly, the Judicial Council is currently gathering information about electronic filing in the trial courts. In addition, to gather information about electronic filing in the future or beyond what is statutorily required, the Judicial Council can collect data on an as-needed basis without semiannual reports from the courts about mandatory electronic filing. [7] For example, ITAC can survey the courts to collect data to evaluate practices and procedures and make recommendations.

[1] All further references to rules are to the California Rules of Court.

[2] Rule 2.253(b)(7).

[3] Link A, p. 7.

[4] See Link B.

[5] See Link C. Three reports were due in 2018, 2019, and 2021. The remaining report is due in 2023.

[6] Code Civ. Proc., § 1010.6(h)(5).

[7] Cal. Const., art. VI, § 6(d), (f).

Policy implications
The proposal raises no significant policy implications and was noncontroversial.

Comments
The proposal circulated for public comment from April 1 through May 13, 2022. Four commenters responded to the invitation to comment. Three agreed with the proposal, and one did not indicate a position. Two commenters, including the one that did not indicate a position, agreed that the proposal appropriately addresses its stated purpose. There were no detailed substantive comments. The chart of comments is attached at page 5.

Alternatives considered
The alternative to removing the reporting requirement would be to take no action. However, the ITAC did not consider this a preferable alternative as the reporting requirement would necessitate courts to take on unnecessary workload.

Fiscal and Operational Impacts

The proposal is not expected to result in any costs.

Attachments and Links

1. Cal. Rules of Court, rule 2.253, at page 4
2. Chart of comments, at page 5
3. Link A: Judicial Council of Cal., Advisory Com. Rep., *Electronic Filing and Service: Rules Allowing the Superior Courts to Mandate Electronic Filing and Service in Civil Cases* (June 21, 2013), *https://www.courts.ca.gov/documents/jc-20130628-itemC.pdf*
4. Link B: Assembly Bill 976 (Stats. 2017, ch. 319), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB976
5. Link C: Assembly Bill 103 (Stats. 2017, ch. 17), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB103
6. Link D: Code of Civil Procedure section 1010.6, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6&lawCode=CCP

Rule 2.253 of the California Rules of Court is amended, effective January 1, 2023, to read:

Rule 2.253. Permissive electronic filing, mandatory electronic filing, and electronic filing by court order

(a) * * *

(b) Mandatory electronic filing by local rule

A court may require parties by local rule to electronically file documents in civil actions directly with the court, or directly with the court and through one or more approved electronic filing service providers, or through more than one approved electronic filing service provider, subject to the conditions in Code of Civil Procedure section 1010.6, the rules in this chapter, and the following conditions:

(1)–(6) * * *

~~(7) A court that adopts a mandatory electronic filing program under this subdivision must report semiannually to the Judicial Council on the operation and effectiveness of the court's program.~~

(c) * * *

SPR22-25

Rules and Forms: Remove Reporting Requirement for Courts with Mandatory Electronic Filing (amend Cal. Rules of Court, rule 2.253)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association By Daniel S. Robinson, President	A	* In response to a request for specific comments about whether the proposal appropriately addresses the stated purpose, the comment replied that it does.	No response required.
2.	Superior Court of Orange County by Iyana Doherty, Courtroom Operations Supervisor	A	No specific comment.	No response required.
3.	Superior Court of Orange County, Family Law Division (no name provided)	NI	* In response to a request for specific comments about whether the proposal appropriately addresses the stated purpose, the comment replied that it does.	No response required.
4.	Superior Court of Placer County by Jake Chatters, Executive Officer	A	No specific comment.	No response required.

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and Habeas Corpus Resource Center

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540

Committee or other entity submitting the proposal:
Information Technology Advisory Committee

*Staff contact (*name, phone and e-mail*): Andrea L. Jaramillo, 916-263-0991, andrea.jaramillo@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): N/A Approved by Technology Committee 12/13/22 (minor revision to add Habeas Corpus Resource Center approved 02/14/22)
Project description from annual agenda: Consider amending the California Rules of Court on remote access to electronic records to authorize remote access by appellate courts, and appellate projects contracted to run appointed appellate counsel programs, and the Habeas Corpus Resource Center.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 20, 2022

Title
Rules and Forms: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and Habeas Corpus Resource Center

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540

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

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 27, 2022

Contact
Andrea L. Jaramillo, 916-263-0991
andrea.jaramillo@jud.ca.gov

Executive Summary

The Information Technology Advisory Committee recommends amending four rules of the California Rules of Court to authorize trial courts to provide remote access to electronic records to administrators contracted to run appellate appointed counsel programs, the Courts of Appeal, and the Habeas Corpus Resource Center. The proposal will help organizations serving parties entitled to appointed counsel on appeal obtain access to needed electronic records without visiting a courthouse. The proposal originated with a recommendation from staff of the Sixth District Appellate Program, which is one of the contracted administrators.

Recommendation

The Information Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2023:

1. Amend rule 2.515 of the California Rules of Court to add authorized persons working for an appellate appointed counsel administrator to the rule;

2. Amend rule 2.521 of the California Rules of Court to add authorized persons working for an appellate appointed counsel administrator to the rule, define what the administrators are and who persons working for them are, and delineate terms of remote access;

3. Amend rule 2.523 of the California Rules of Court to add appellate appointed counsel administrators to the rule and describe their responsibilities related to remote access; and

4. Amend rule 2.540 of the California Rules of Court to add the Courts of Appeal and the Habeas Corpus Resource Center to the rule and specify to which electronic records they may have remote access.

The text of the proposed amended rules is attached at pages 10–14.

Relevant Previous Council Action

Effective July 1, 2002, the Judicial Council adopted rules of the California Rules of Court[1] that address public access to trial court electronic records, including remote access. The rules did not address access to electronic records by a subset of persons who are not the public at large such as a party, a party's attorney, or a person working for a government entity.

In 2017, nine advisory committees formed a joint ad hoc subcommittee to develop a rule proposal on remote access to provide statewide structure, guidance, and authority on remote access to electronic records in the trial courts by a party, a party's designee, a party's attorney, an authorized person working for the same legal organization as a party's attorney, an authorized person working in a qualified legal services project, court-appointed persons, and persons working for government entities. Effective January 1, 2019, the Judicial Council adopted the subcommittee's final proposal.

Analysis/Rationale

The proposed rule amendments authorize trial courts to provide remote access to appellate appointed counsel administrators (also known as "appellate projects"), the Courts of Appeal, and the Habeas Corpus Resource Center. The proposal originated with a recommendation from staff of the Sixth District Appellate Program, which is one of the administrators, who noted that in-person service for court record access was backlogged at courthouses resulting in long wait times at many trial courts. This backlog was having a significant impact on programs like the Sixth District Appellate Program and clients being served through them because it hindered the programs' ability to act on behalf of clients and delayed the movement of cases through the appellate courts. Additional details concerning time spent to review or copy files in person are provided in the Comments section below.

[1] All further references to rules are to the California Rules of Court.

Remote access by appellate appointed counsel administrators

Under rule 8.300, the Courts of Appeal are required to "adopt procedures for appointing appellate counsel for indigents not represented by the State Public Defender in all cases in which indigents are entitled to appointed counsel."[2] The Courts of Appeal are also required to evaluate the qualifications of appointed counsel, match appointed counsel with cases, and evaluate the performance of appointed counsel.[3] Rather than administering appointed counsel programs themselves, the Courts of Appeal are authorized to "contract with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed."[4] Currently, contract administrators operate programs in all six appellate districts.[5] Criminal matters constitute the bulk of the work for appointed appellate counsel, although they also handle juvenile justice, child welfare, and civil commitment cases. In addition, there is one administrator—the California Appellate Project–San Francisco—that provides similar services as other appellate appointed counsel administrators, but only for indigent defendants sentenced to death.

The current rules do not provide a mechanism for appellate appointed counsel administrators to obtain remote access to electronic records. While the rules currently authorize remote access to a party's electronic records by the party's attorney, including an attorney who was not the attorney of record in the trial court,[6] this is insufficient to address the administrators' needs. An administrator may need access to court records before counsel is appointed or when appointed counsel becomes unavailable. For example, a potential client may contact an administrator and the administrator would need access to records to determine if the client is entitled to appointed counsel. As a second example, if a criminal defendant files an appeal following a guilty plea, which requires a certificate of probable cause to appeal,[7] but there is no certificate, the administrator may need to work with the defendant and view the defendant's court records to resolve the certificate of probable cause issue before counsel can be appointed. As a third example, as part of their obligations, administrators need to view court records as part of their evaluation of the performance of appointed appellate counsel.[8] As a final example, appointed counsel may become unavailable during the appeal and, if that occurs, the administrator may need to access court records to act on behalf of the client before new counsel can be appointed or facilitate transferring information to new counsel.

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[2] Rule 8.300(a)(1).

[3] Rule 8.300(b) & (c).

[4] Rule 8.300(e)(1).

[5] A list of the administrators is available on the California Courts website at *www.courts.ca.gov/13714.htm*.

[6] Rule 2.519(c).

[7] Pen. Code, § 1237.5.

[8] See rule 8.300(d) (obligation to "review and evaluate the performance of each appointed counsel to determine whether counsel's name should remain on the list at the same level, be placed on a different level, or be deleted from the list").

Remote access by the Courts of Appeal

The Courts of Appeal are responsible for operating a program for appellate appointed counsel under rule 8.300. However, as noted previously, that rule authorizes that work to be contracted to an administrator, which is the current practice in all appellate districts. A Court of Appeal that uses a contract administrator is responsible for providing "the administrator with the information needed to fulfill the administrator's duties."[9] Extending remote access to the Courts of Appeal should help facilitate information sharing with administrators if the administrators lack needed information. In addition, should a Court of Appeal choose to operate its own appointed counsel program rather than contracting with an administrator, the rule would facilitate the Court of Appeal meeting its rule 8.300 obligations. The proposal includes remote access to case types in which a party is entitled to appointed counsel on appeal.

Remote access by the Habeas Corpus Resource Center

Like the California Appellate Project–San Francisco, the Habeas Corpus Resource Center only represents indigent defendants sentenced to death. In addition, it "recruits and trains attorneys to expand the pool of private counsel qualified to accept appointments in death penalty habeas corpus proceedings and serves as a resource to appointed counsel."[10] Unlike the administrators discussed previously, the Habeas Corpus Resource Center is a government entity. Accordingly, the proposal includes it within the scope of rule 2.540, which addresses remote access by government entities. The proposal includes remote access to criminal electronic records and habeas corpus electronic records. During the development of the proposal, Habeas Corpus Resource Center staff indicated these were the case types to which remote access would provide a benefit to the organization.[11]

Policy implications

The proposal is consistent with the goals and objectives of the judicial branch's strategic and tactical plans for technology. The strategic plan identifies four high-level goals for information technology. One of the goals is to "promote the modernization of statutes, rules, and procedures to facilitate the use of technology in court operations and the delivery of court services."[12] The tactical plan incorporates this goal and specifies that objectives include continuing "modernization of statutes, rules, and procedures to permit and enhance the use of technology in court operations and the delivery of court services" and developing and updating "rules, standards, and guidelines in areas in which new technologies affect court operations and access to the courts."[13] The proposal will provide courts authority to use technology solutions to

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[9] Rule 8.300(e)(2).

[10] Habeas Corpus Resource Center, *www.hcrc.ca.gov*.

[11] According to Habeas Corpus Resource Center staff, courts vary in how habeas corpus records are categorized. Some include them with underlying criminal records while others have a distinct habeas corpus case type.

[12] *Strategic Plan for Technology 2019–2022*, p. 4, *www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf*.

[13] *Tactical Plan for Technology 2021–2022*, p. 40, *www.courts.ca.gov/documents/jctc-Court-Technology-Tactical-Plan.pdf*.

provide remote access to electronic records by authorized users from appellate appointed court administrators, the Courts of Appeal, and the Habeas Corpus Resource Center, reducing the need for in-person service.

Comments

The proposal circulated for public comment from April 1 through May 13, 2022. The proposal received five comments from 10 commenters. The six appellate appointed counsel administrators submitted a joint comment. Nine commenters agreed with the proposal, and one commenter agreed if modified. Comments covered topics including benefits of the proposal, whether the rule should expressly name the administrators, and areas for potential future rule development. The chart of comments is attached at pages 15–22. In addition, at its June 29, 2022, meeting, ITAC also discussed an ITAC member's concerns about the increasing complexity of the remote access rules and whether a better approach would be to provide universal remote access to public electronic records for all users.

Comments by the administrators on the benefits of the proposal

The appellate appointed counsel administrators included detailed comments about the impact remote access would have on them and appointed counsel. It would significantly reduce the need to visit courthouses to view court records and reduce time spent on the phone trying to locate information. This is discussed in more detail in the Fiscal and Operational Impacts section, below.

Responses to a request for specific comments about expressly naming the administrators

The Information Technology Advisory Committee (ITAC) asked for specific comments about whether rule 2.521(a)(2)(B) should include both the general definition of "appellate appointed counsel administrators" as "organizations contracted with the Courts of Appeal or Judicial Council to administer programs for appointed counsel on appeal" and the list of current administrators by name.

The administrators commented that both the general definition and the list of names should be included. In particular, listing the names should help "avoid confusion over whether an entity seeking remote access is one of the appellate projects contemplated by the rules. Given that some appeals are transferred to other districts, it is possible that superior court staff may not be familiar with the names of each of the appellate projects that might seek access, especially on only rare occasions." The Superior Court of Orange County commented that "[t]he list of names of each organization makes the rule clear and concise." The Orange County Bar Association indicated that the names should not be listed in the rule and that "the definition and the Advisory Committee Comment indicating where the list can be found are sufficient." The Joint Rules Subcommittee of the Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee recommended removing the specific names if they are not required, as "[t]he rule would need to be updated if the names of the appellate appointed counsel changed." Before the proposal circulated, the Technology Committee raised the same concern as the Joint Rules Subcommittee.

ITAC determined that expressly listing the administrators by name was the clearest option. Of particular concern to committee members was the audience of court staff that would be tasked with developing system updates to implement the rule. These staff may be unfamiliar with program administrators for appointed counsel on appeal; therefore, including the names of the administrators would make the rule easier to implement and not require additional work or allow room for error. As one ITAC member noted, the list of administrators represents a "small, unique group of service providers" and including their names in the rule would help ensure that only those service providers would get remote access.

An advisory committee comment provides a link to more details about each administrator, including the districts in which they operate, on the California Courts website. ITAC considered including these details in the advisory committee comment, but determined the link was sufficient. While one option was to not list the administrators in the rule and rely only on the link, ITAC did not think that was as clear as simply listing them in the rule without the need to click on a link unless more information about them was needed.

Although amending the rule would be necessary if an administrator changed, the committee concluded that the benefits of a rule that is clear for court personnel to follow outweighed any concerns that amending the rule might be burdensome. One member was concerned about the time needed to effectuate a rule change to remove, add, or change an administrator's name. Other members noted that the administrators have been established for a long time[14] and that if a new contract was to be established with a new administrator, that would be known well in advance, making it easier to timely amend the rule. ITAC also considered that amending the rule to reflect the name of a new administrator could potentially be expedited as a technical rule change. In considering this issue, ITAC noted the California Appellate Project–San Francisco is included by name in several existing rules.[15] Thus, there is precedent to include the specific names of such organizations in the rules of court.

Comments on areas for potential future rule development

Some of the commenters recommended changes beyond the scope of the proposal or that would otherwise be best addressed through a future rule proposal. First, the appellate appointed counsel administrators commented that the rules should specify that no user fees should be charged for the administrators to access electronic records remotely. Addressing fees is beyond the proposal's scope, but it is a topic the committee may consider in a future rulemaking process. Second, the Superior Court of Riverside County recommended further amending rule 2.540 to add more case types for remote access by county child welfare agencies. In addition, the court recommended adding adult protective services and regional centers to the rule. The court commented that the "lack of this access causes operational issues for trial courts." Adding additional case types for county child welfare agencies and adding adult protective services and regional centers to rule 2.540 is beyond the proposal's scope, but it is another topic the

[14] All the administrators have been operating since the 1980s.

[15] See, e.g., rules 4.315(a), 8.603(a), and 8.619(f)(1)(B).

committee may consider for future rule development. Third, the appellate appointed counsel administrators commented that the Courts of Appeal have broad authority to appoint counsel, so it may be prudent to add more case types to which they would have access. The committee may consider this in the future if a need arises. The list of government entities and case types in rule 2.540 does not and cannot account for every possible scenario in which a need for remote access may arise. However, subdivision (b)(1)(Q) of rule 2.540 allows a trial court to provide remote access to a government entity for a case type not listed when there is good cause to do so.

Finally, the Superior Court of Orange County commented that the Habeas Corpus Resource Center should be authorized to access electronic records related to mental health. The proposal specifies access to criminal electronic records and habeas corpus electronic records, consistent with a request from the Habeas Corpus Resource Center staff early in the rule development process. ITAC staff contacted the Habeas Corpus Resource Center in light of the court's comment. Habeas Corpus Resource Center staff agreed that they regularly need to access mental health court records, as well as juvenile court records, in the course of their work. However, they did not realize it may be possible to remotely access electronic records of these types. Habeas Corpus Resource Center staff explained that they deal primarily with older records only available on paper and microfiche. ITAC observed that as a practical matter, courts may not have some records in an electronic format, such as older records, but that the rule could provide authority to access them if and when they are available in an electronic format in the future. ITAC may consider adding additional case types for Habeas Corpus Resource Center remote access in a future rulemaking cycle.

ITAC member comments on the increasing complexity of the remote access rules and the possibility of providing universal remote access

At ITAC's June 29, 2022, meeting, one member raised concerns that the remote access rules are becoming too complex with too many provisions tailored to specific users. The member noted that more and more users are allowed remote access to public electronic records and that it could be a problem to continue to exclude the public from remote access to certain electronic records. The member commented that the committee should consider amending the rules to provide for universal remote access for all users to public court records. The member cast the lone no vote against the proposal. Another member agreed that universal remote access is something the committee should consider, but at a future time.

Alternatives considered

ITAC considered taking no action but determined that was not a desirable approach given the significant impact reported by the Sixth District Appellate Project that requiring in-person services had on appellate appointed program administrators and clients erved through them.

Rather than adding appellate appointed counsel administrators to rule 2.521, ITAC considered drafting a separate, standalone rule for appellate appointed counsel administrators. However, to maintain the logical flow of the rules, it would have had to renumber several rules to add a standalone rule. ITAC decided it would be preferable and less confusing to amend an existing rule. ITAC determined that rule 2.521, which relates to remote access by court-appointed

persons, is topically similar to the proposed amendments for appellate appointed counsel administrators and would be the appropriate place to bring the administrators into the remote access rules.

ITAC had considered providing a more general definition of "appellate appointed counsel administrator" rather than listing each administrator by name but determined that specifying the administrators by name made the rule clearer, as discussed in more detail in the Comments section, above.

Fiscal and Operational Impacts

Courts may need to make system updates or execute new agreements to allow remote access by the new users described in the proposed amendments. Courts may need to train staff regarding which electronic records the new users described in the proposed amendments may remotely access. Under rule 2.516, courts are required to authorize remote access by specified users only to the extent it is feasible to do so. Financial and technological limitations may affect the feasibility of providing remote access. Costs and specific implementation requirements would vary across the courts depending on each court's current capabilities and approach to providing services. One court, the Superior Court of Orange County, commented that it would be able to implement the proposal now.

The appellate appointed counsel administrators commented on impacts to them and to appointed counsel. The administrators explained that in "the 10-year period end[ing] June 30, 2020, panel attorneys statewide claimed compensation for review of superior court records in more than 11,000 appeals—more than 13% of all court appointed counsel appeals during that time period." In addition, several of the administrators "offer the service of having project staff review superior court records for the benefit of appointed panel attorneys" and all of them have staff who

> regularly have contact with the superior court clerks regarding the superior court records on matters being appealed. Whether the time is spent visiting the superior court in person or on the telephone with superior court clerical staff to acquire information, valuable [administrator] staff and superior court staff time would be saved if the appellate projects were given direct access to the electronic superior court records as described in the proposed amendments.

Based on the above, the ability to access electronic records remotely could have a significant impact on the operation of the appellate appointed counsel programs as it would reduce time spent viewing records in person or trying to find information over the phone. It could also reduce the need for court staff to provide in-person services at counters or over the phone.

Attachments and Links

1. Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540, at pages 9–13
2. Chart of comments, at pages 14–21

Rules 2.515, 2.521, 2.523, and 2.540 of the California Rules of Court are amended, effective January 1, 2023, to read:

Article 3. Remote Access by a Party, Party's Designee, Party's Attorney, Court-Appointed Person, or Authorized Person Working in a Legal Organization, ~~or~~ in a Qualified Legal Services Project, or for an Appellate Appointed Counsel Administrator

Rule 2.515. Application and scope

(a) * * *

(b) Who may access

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

(1) A person who is a party;

(2) A designee of a person who is a party;

(3) A party's attorney;

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

(5) An authorized person working in a qualified legal services project providing brief legal services; ~~and~~

(6) A court-appointed person~~.~~; and

(7) An authorized person working for an appellate appointed counsel administrator.

Advisory Committee Comment

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

Under the rules in article 3, a party, a party's attorney, an authorized person working in the same legal organization as a party's attorney, ~~or~~ a person appointed by the court in the proceeding, or an authorized person working for an appellate appointed counsel administrator ~~basically~~ has essentially the same level of access to electronic records remotely that ~~he or she~~ the person would

have if ~~he or she~~ the person were to seek to inspect the records in person at the courthouse. Thus, if ~~he or she~~ the person is legally entitled to inspect certain records at the courthouse, that person could view the same records remotely; on the other hand, if ~~he or she~~ the person is restricted from inspecting certain court records at the courthouse (e.g., because the records are confidential or sealed), that person would not be permitted to view the records remotely. In some types of cases, such as unlimited civil cases, the access available to parties and their attorneys is generally similar to the public's but in other types of cases, such as juvenile cases, it is much more extensive (see Cal. Rules of Court, rule 5.552).

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

Rule 2.521. Remote access by a court-appointed person or person working for an appellate appointed counsel administrator

(a) Remote access generally permitted

(1) *Remote access by a court-appointed person*

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

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

(2) *Remote access by a person working for an appellate appointed counsel administrator*

(A) A court may grant a person working for an appellate appointed counsel administrator remote access to electronic records.

(B) Appellate appointed counsel administrators are organizations contracted with the Courts of Appeal or the Judicial Council of California to administer programs for appointed counsel on appeal. The appellate appointed counsel administrators are:

(i) Appellate Defenders, Inc.;

(ii) California Appellate Project—Los Angeles;

(iii) California Appellate Project—San Francisco;

(iv) Central California Appellate Program;

(v) First District Appellate Project; and

(vi) Sixth District Appellate Program.

(C) Persons "working for an appellate appointed counsel administrator" under this rule include attorneys, employees, contractors, and volunteers.

(D) An appellate appointed counsel administrator must designate which persons it authorizes to have remote access, and must certify that the authorized persons work for the appellate project.

(b) Level of remote access

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

(c) Terms of remote access

(1) *Remote access only for purposes of fulfilling responsibilities*

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

(B) A person working for an appellate appointed counsel administrator may remotely access electronic records only for purposes of fulfilling the administrator's responsibilities.

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

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

(4) A court-appointed person or person working for an appellate appointed counsel administrator must comply with any other terms of remote access required by the court.

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

Advisory Committee Comment

Subdivision (a)(2)(B). A list of appellate appointed counsel administrators, including physical and web addresses and contact information, is available on the California Courts website at *www.courts.ca.gov/13714.htm*.

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

(a)–(c) * * *

(d) Responsibilities of the legal organizations, ~~or~~ qualified legal services projects, and appellate appointed counsel administrators

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

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

(e) * * *

Rule 2.540. Application and scope

(a) * * *

(b) Level of remote access

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

(A)–(P) * * *

(Q) California Courts of Appeal: child welfare electronic records, criminal electronic records, juvenile justice electronic records, and mental health electronic records.

(R) Habeas Corpus Resource Center: criminal electronic records and habeas corpus electronic records.

~~(Q)~~(S) For good cause, a court may grant remote access to electronic records in particular case types to government entities beyond those listed in ~~(b)(1)(A)–(P)~~ (A)–(R). For purposes of this rule, "good cause" means that the government entity requires access to the electronic records in order to adequately perform its legal duties or fulfill its responsibilities in litigation.

~~(R)~~(T) All other remote access for government entities is governed by articles 2 and 3.

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

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

(c) * * *

SPR22-26

Rules and Forms: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and the Habeas Corpus Resource Center (Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540)

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

	Commenter	Position	Comment	Committee Response
1.	Appellate Defenders, Inc., California Appellate Project—Los Angeles, California Appellate Project—San Francisco, Central California Appellate Program, First District Appellate Project, and Sixth District Appellate Program by Laurel Thorpe, Executive Director, Central California Appellate Program	A	The appellate projects strongly support the proposed amendments recommended by the Information Technology Advisory Committee to Rules of Court, rules 2.515, 2.521, 2.523, and 2.540.	No response required.
			The quantity of appellate project staff contacts with the superior courts for information contained in superior court records, and time associated with it, is not data that the appellate projects specifically track. But the number of cases in which compensation is claimed by panel attorneys for reviewing superior court records (whether in electronic form or not) in person at the superior court is tracked, giving at least some context on how often it is necessary to review superior court records once an appeal has been initiated. In the 10-year period ended June 30, 2020, panel attorneys statewide claimed compensation for review of superior court records in more than 11,000 appeals--more than 13% of all court appointed counsel appeals during that time period. That data does not include other instances where there was direct communication with superior court staff but did not involve the full review of the records at the superior court, as that activity is claimed under a category that includes a variety of tasks. Several of the appellate projects offer the service of having project staff review superior court records for the benefit of appointed panel attorneys, but all of the appellate projects do	The committee appreciates the quantification of data indicating the significant amount of time appointed counsel and staff of the appellate projects/appointed appellate counsel administrators spend at courthouses to view court records or spend over the phone talking to court staff for information. It appears the administrators and appointed counsel may realize significant time efficiencies from remote access. The committee will include this information in its final report.

	Commenter	Position	Comment	Committee Response
			regularly have contact with the superior court clerks regarding the superior court records on matters being appealed. Whether the time is spent visiting the superior court in person or on the telephone with superior court clerical staff to acquire information, valuable project staff and superior court staff time would be saved if the appellate projects were given direct access to the electronic superior court records as described in the proposed amendments. Even before counsel is appointed, such access would allow the appellate projects to determine whether there are problems with the notice of appeal at an early stage that can be resolved before the jurisdictional time for the filing of a notice of appeal expires. For example, the appellate projects would be able to contact trial attorney for the filing of an amended notice of appeal, or to file an application for a certificate of probable cause where needed. Or where there appears to be a question of appealability, the appellate projects would be able to examine the superior court records to determine whether the order is appealable and the appellate project should proceed to arrange for appointment of counsel, or does not appear to be appealable (which triggers different actions among the appellate projects, depending on the practice expected by the relevant district or division of the Courts of Appeal).	

SPR22-26
Rules and Forms: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and the Habeas Corpus Resource Center (Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			* In response to the question from the invitation to comment, “Does the proposal appropriately address the state purpose?” the commenter indicated it appears to.	No response required.
			[T]he appellate projects are aware of rule 2.506(a), which reads, in pertinent part, "The court may impose fees for the costs of providing public access to its electronic records, under Government Code section 68150(l)." A review of section 68150, subdivision (l) reveals that "Reasonable provision shall be made for duplicating the records at cost." It might be helpful to include a provision in the proposed amendments that clarifies that there shall be no fee charged by the superior courts for remote access to the superior court electronic records by the appellate projects except to the extent permitted for duplication of records at cost, within the meaning of Government Code section 58150, subdivision (l). This distinguishes the access from other court services, such as the PACER system used in the federal courts that charges a fee simply for electronic access (in excess of a threshold) in the absence of obtaining a specific exemption from the court itself. The projects assume that "duplication of records" refers to the reproduction of the records in paper form. The projects would prefer that there be no fee charged even for duplication of records, of course, because any duplication of record would be for the benefit of the indigent defendant, who is entitled to a free transcript on appeal, and the	Amending rule 2.506(a) of the California Rules of Court or otherwise including language in the rules about fees is beyond the scope of the proposal. However, it is a topic the committee may consider for a future rule cycle.

	Commenter	Position	Comment	Committee Response
			appellate projects are not reimbursed for fees charged for access.	
			* **Rule 2.521(a)(2)(B)(i):** The commenter recommends the administrators be listed by name "as it will avoid confusion over whether an entity seeking remote access is one of the appellate projects contemplated by the rules. Given that some appeals are transferred to other districts, it is possible that superior court staff may not be familiar with the names of each of the appellate projects that might seek access, especially on only rare occasions. By having the individual projects expressly named in the rules, the project seeking access need only point to the appropriate rule to show its authorization for access." The commenter further noted that "[t]echnically, the California Appellate Project is a single corporation with one contract to serve as administrator within the meaning of rule 8.300(e) for the Court of Appeal in the Second District, and with a separate contract to serve as appellate project on capital cases. In the jargon at the level of the appellate courts, they are referred to separately, and identifying them separately certainly clarifies for all that "both" are included within the provisions of the proposed amendments."	The committee appreciates the comment addressing the request for comments on whether the names of the appellate appointed counsel administrators should appear expressly in the rule. The committee agrees with the comment that the administrators should be expressly listed by name as they are shown in the proposal to assist court staff, who may be unfamiliar with the administrators, in implementing the rule.
			* **Rule 2.540:** In considering whether there are additional case types that should be included for the Court of Appeal, the comment noted, "the	The committee may consider adding more case types in the future as the need arises. The rule does not and cannot account for every situation where a

	Commenter	Position	Comment	Committee Response
			Court of Appeal has broad authority to appoint counsel in possibly any type of case where the Court believes appointment of counsel would serve the interest of justice or avoid unconstitutional consequences. (See *Salas v. Cortez* (1979) 24 Cal.3d 22; *Payne v. Superior Court* (1976) 17 Cal.3d 908.) Permitting the Court of Appeal to have remote access to superior court electronic records in other types of cases that do not normally involve appointment of counsel may aid in its determination whether counsel should nonetheless be appointed. (Appellate project attorneys have occasionally been requested by the Court of Appeal to represent, for example, a court reporter who must respond to an order to show cause related to the court reporter's failure to timely prepare and file a reporter's transcript.)"	government entity may need remote access to an electronic court record. Accordingly, to nonetheless allow remote access in atypical situations, subdivision (b)(1)(Q) of rule 2.540 allows a trial court to provide remote access to a government entity for a case type not listed when there is good cause to do so.
2.	Joint Rules Subcommittee of the Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee	A	Under proposed rule 2.521(a)(2)(B) – Are the names of the appellate appointed counsel required? If the specific names are not required, we would recommend removing the specific names. The rule would need to be updated if the names of the appellate appointed counsel changed.	The committee appreciates the comment on whether the names of the appellate appointed counsel administrators should appear expressly in the rule. The committee has decided to keep the rule as proposed with names of the administrators listed. While the committee agrees the rule would need to be amended if one of the administrators changed, that would be a simple amendment. Such an amendment is also unlikely to be needed frequently as the current administrators have been in place since the 1980s. In addition, the committee considered the fact that one administrator—the California Appellate Project-San Francisco—is already listed by name elsewhere in the California Rules of Court.

SPR22-26
Rules and Forms: Remote Access to Electronic Records by Appellate Appointed Counsel Administrators, Courts of Appeal, and the Habeas Corpus Resource Center (Cal. Rules of Court, rules 2.515, 2.521, 2.523, and 2.540)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
				Furthermore, as a practical matter, the committee considered expressly listing the names to be the clearest option and the easiest to follow for the court staff implementing the rule.
3.	Orange County Bar Association by Daniel S. Robinson, President	AM	* **Rule 2.521(a)(2)(B):** The commenter indicated that the list of current appellate appointed counsel administrators should not be listed in the rule and "the definition and the Advisory Committee Comment indicating where the list can be found are sufficient."	The committee appreciates the comment on whether the names of the appellate appointed counsel administrators should appear expressly in the rule. The committee considered the matter and decided to keep the rule as proposed with the list of administrators. See the response to comment 2.
4.	Superior Court of Orange County by Iyana Doherty, Courtroom Operations Supervisor	A	The list of names of each organization makes the rule clear and concise. The specific organizations listed does not allow anyone else to decide if another appellate project should fall within the realm of contracted organizations.	The committee appreciates the comment on whether the names of the appellate appointed counsel administrators should appear expressly in the rule. The committee agrees with the comment that the administrators should be expressly listed by name. The committee determined this would be clearest for court staff implementing the rule and avoid confusion over which organizations are included.
			* The commenter indicated that Courts of Appeal and the Habeas Corpus Resource Center should have access to probate electronic records as "many criminal cases, defendants have been evaluated by mental health providers."	The proposal includes "mental health electronic records" within the scope of access for Courts of Appeal, which should encompass any relevant probate electronic records. In light of the commenter's suggestions, the committee contacted the Habeas Corpus Resource Center (HCRC), which indicated these are the types of records HCRC regularly needs. However, HCRC staff did not realize it could be possible to obtain the records through remote electronic

	Commenter	Position	Comment	Committee Response
				means because HCRC typically views older records only available on paper and microfiche. The committee notes that as a practical matter, courts may not have certain records in an electronic format, but that the rule could provide authority to access them if and when they are available in an electronic format in the future. Because adding these case types to the rule for HCRC would necessitate an additional comment period, the committee may consider it for a future rule process while allowing the current proposal to move forward. Rule 2.540(b)(1)(Q) ["good cause" remote access for government entities] and rule 2.519 [remote access by a party's attorney] may provide alternatives in the interim.
			It appears to provide cost savings for the counsel programs. Superior courts would also no longer have to budget for paper boxes, postage, and staffing hours.	The committee appreciates the insight into potential cost savings for both the administrators and the courts. The committee will include this information in its final report.
			Some kind of validation would need to be in place to ensure only authorized persons could access the records. Where will the request be to and who can request a confidential or sealed record. Case Processing Department clerks will need to be trained on how to retrieve the request if it is made electronically, which judicial officer will be tasked with granting or denying the request and	The committee agrees that remote users will need to be validated. Under rule 2.523(d) of the California Rules Court, organizations like the appellate appointed counsel administrators would be required to verify identities and provide the court with that information. The committee appreciates the insight into the training requirements and IT resource needs and will include that information in its final report.

	Commenter	Position	Comment	Committee Response
			determining the delivery of the document to said organization. The courts IT Department will have to work in conjunction with the organization's IT staff to ensure compatibility, authorization of users and deletion of users, and IT support for the organizations. A system-generated docket code will have to be created if the request is made and accepted electronically. Orange County Superior Court can implement this practice at present. All our criminal records are digitized. We do not foresee any barriers; however, recognize there will be issues with each organization's software program being compatible with the courts to retrieve documents.	
5.	Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	A	We suggest that Rule 2.540 be further expanded to allow the following entities to have the access indicated: (b)(K) County child welfare agency: child welfare electronic records, family electronic records, and probate electronic records; County Adult Protective Services: family electronic records and probate electronic records; Regional Centers: family electronic records and probate electronic records. The lack of this access causes operational issues for trial courts.	The committee appreciates the suggestion. While it is beyond the scope of the currently proposed amendments, the committee will review the matter further and may consider it for a future rule cycle. Note also that rule 2.540(b)(1)(Q) allows government entities not on the list to obtain remote access with there is good cause to do so, which may provide an option for these entities in the interim.

Item number: 15

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: August 18, 2022

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Rules and Forms: Remote Access by Attorneys to Criminal Electronic Records

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 2.519

Committee or other entity submitting the proposal:
Information Technology Advisory Committee

*Staff contact (*name, phone and e-mail*): Andrea L. Jaramillo, 916-263-0991, andrea.jaramillo@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): N/A Approved by Technology Committee on 02/14/22
Project description from annual agenda: Consider amending the California Rules of Court on remote access to criminal electronic records to provide parity between private defense attorneys and public defenders.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 20, 2022

Title
Rules and Forms: Remote Access by Attorneys to Criminal Electronic Records

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 2.519

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

Agenda Item Type
Action Required

Effective Date
January 1, 2023

Date of Report
July 29, 2022

Contact
Andrea L. Jaramillo, 916-263-0991
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Executive Summary

The Information Technology Advisory Committee recommends amending a rule of the California Rules of Court to authorize trial courts to provide private criminal defense attorneys broader remote access to criminal electronic records. The proposal originates with the California Attorneys for Criminal Justice, an advocacy organization comprised of criminal defense lawyers and associated professionals. The purpose of the proposal is to improve parity of remote access in criminal cases between private defense counsel and public defenders and prosecutors.

Recommendation

The Information Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2023, amend rule 2.519 of the California Rules of Court to authorize trial courts to provide attorneys representing defendants in criminal cases with remote access to any criminal electronic records that they would have otherwise been able to view at a courthouse.

The text of the proposed amended rule is attached at pages 8–9.

Relevant Previous Council Action

Effective July 1, 2002, the Judicial Council adopted rules of the California Rules of Court[1] that address public access to trial court electronic records, including remote access. The rules did not address access to electronic records by a subset of persons who are not the public at large, such as a party, a party's attorney, or a person working for a government entity.

In 2017, nine advisory committees formed a joint ad hoc subcommittee to develop a rule proposal on remote access to provide statewide structure, guidance, and authority on remote access to electronic records in the trial courts by specified persons including a party, a party's designee, and a person working for a government entity. Effective January 1, 2019, the Judicial Council adopted the final proposal.

Analysis/Rationale

The purpose of the proposal is to ensure the rules on remote access to criminal electronic records treat private criminal defense counsel on par with public defenders and prosecutors. Under the remote access rules, criminal electronic records are available to specified users, including district attorneys, public defenders, and private criminal defense attorneys, but private attorneys are currently limited to remotely accessing their clients' records only. For example, the current rules would not allow a private attorney to remotely access electronic records in cases of witnesses or codefendants. California Attorneys for Criminal Justice, an advocacy organization comprised of criminal defense lawyers and associated professionals, recommended the rules be changed, as parity between private defense counsel and public defenders is necessary to ensure remote access is fair. The Information Technology Advisory Committee (ITAC) considered the issue and agreed that amending the rules to provide private defense counsel with parity of remote access to criminal electronic records is fair and appropriate. As discussed in more detail in the Comments section below, commenters on the proposal agreed.

Policy implications

Proposal is consistent with judicial branch strategic and tactical plans for technology

The proposal is consistent with the goals and objectives of the judicial branch's strategic and tactical plans for technology. The strategic plan identifies four high-level goals for information technology. One of the goals is to "promote the modernization of statutes, rules, and procedures to facilitate the use of technology in court operations and the delivery of court services."[2] The tactical plan incorporates this goal and specifies that objectives include continuing "modernization of statutes, rules, and procedures to permit and enhance the use of technology in court operations and the delivery of court services," and developing and updating "rules, standards, and guidelines in areas in which new technologies affect court operations and access

[1] All further references to rules are to the California Rules of Court.

[2] *Strategic Plan for Technology 2019–2022*, p. 4, www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf.

to the courts."[3] The proposal will provide courts authority to use technology solutions to provide remote access to criminal electronic records to criminal defense counsel, reducing the need for in-person service.

Practical obscurity of criminal electronic records was a concern given the large pool of potential users

Practical obscurity is a concept used to protect private information in public records from broad disclosure through practical barriers to obtaining the information. With respect to electronic court records, a trip to the courthouse to view or print a record involves substantially more time and effort than remotely accessing the record. When adopting the public access rules, the Judicial Council considered this issue and built practical obscurity into the rules by prohibiting *public* remote access to certain types of electronic records, including criminal electronic records, and limiting the viewing of such records to the courthouse. This was intentional to help prevent widespread public dissemination of such records, which can contain highly sensitive personal information.

The pool of potential remote users under the proposal would be any attorneys representing criminal defendants. While this would be a much smaller pool than the public at large, it would still be a significant number of people. ITAC considered the issue of practical obscurity given this large pool of potential remote users in deciding whether to recommend amending the rule. ITAC determined that given that the proposed amendment is limited in scope (since it applies only to attorneys representing parties in criminal cases, and attorneys are bound by professional obligations of candor toward the courts and by the terms of remote access described in rules), the proposed amendments should strike an appropriate balance between privacy and access to provide private criminal defense counsel with access on par with that of public defenders. Two commenters commented on this issue: the Superior Court of Los Angeles County and the Orange County Bar Association. Both agreed that the proposal strikes an appropriate balance and would aid representation of criminal defendants.

Comments

The proposal circulated for public comment from April 7 through May 20, 2022. Seven commenters responded to the invitation to comment. Five agreed with the proposal, and two did not indicate a position. The chart of comments is attached at pages 10–16. In addition to comments received through the public comment process, ITAC received comments from the Criminal Law Advisory Committee, which discussed the proposal at its April 4, 2022 meeting. Finally, at its June 29, 2022 meeting, ITAC also discussed an ITAC member's concerns about the need for the rule and the increasing complexity of the remote access rules.

Comments on the benefits of the proposal

One private attorney, the Orange County Bar Association, and the Joint Rules Subcommittee of the Court Executives Advisory Committee and Trial Court Presiding Judges Advisory

[3] *Tactical Plan for Technology 2021–2022*, p. 40, www.courts.ca.gov/documents/jctc-Court-Technology-Tactical-Plan.pdf.

Committee commented on the impact on defense counsel and the benefits of providing remote access. These benefits include ensuring defense counsel can access the most current information, check if information is accurate, promptly seek correction of errors, and verify court dates so clients do not miss court appearances. The Orange County Bar Association noted that clients often do not understand some court orders and mix up their court dates. The bar association further stated, "Remote access immediately solves such common problems and can cut down on needless court continuances." The Joint Rules Subcommittee noted that the proposal should be implemented "because it enhances the fairness and effectiveness of the criminal process." In addition to the public comments received during the public comment period, ITAC solicited internal comments from the Criminal Law Advisory Committee. The members were supportive of the proposal, and one member remarked that the proposal would be a "huge benefit to the criminal justice system."

Responses to a request for specific comments about sanctions for violations of the rule

ITAC asked for specific comments about whether there should be additional consequences, beyond termination of remote access, that should be specifically identified in the rule for failure to comply with the terms of remote access. The Orange County Bar Association commented that this was unnecessary: "Suffice it to say that the trial court may sanction counsel. Sanctions may thus be applied by the court on a case by case basis depending on the severity of noncompliance." One court commented that failure to comply was a breach of trust and incidents of violations "should be accessible to potential future clients and other courts (maybe through Bar Association?)." ITAC agreed with the Orange County Bar Association that listing more possible sanctions in the rule is unnecessary because judges have the power to sanction and would be in the best position to determine appropriate sanctions tailored to specific sets of circumstances. In addition, ITAC also noted that user agreements provide another mechanism to address misuse of remote access. Courts have the authority to define the conditions of remote access through user agreements and may terminate remote access if a user violates an agreement. (Rule 2.527.)

Comments that were beyond the scope of the proposal

Three of the commenters recommended changes beyond the scope of the proposal. Two commenters recommended authorizing remote access to criminal electronic records by victim's counsel. One commenter recommended expanding the search terms attorneys can use when searching electronic records. While these comments are beyond the scope of the current proposal, they are topics ITAC can consider when developing its next annual agenda.

ITAC member comments on the need for the rule and increasing complexity of the remote access rules

At ITAC's June 29, 2022 meeting, one member questioned whether the proposal was necessary and raised concerns that the remote access rules are becoming too complex and increasingly challenging to manage in the courts; the proposal would add another layer of complexity to the existing rules. The member cast the lone no vote against the proposal. Another member acknowledged that providing remote access could present difficulties but commented that

providing remote access was a worthy goal in the context of this proposal, not only to meet user expectations about the ability to access the court remotely but also to ensure the rules offer a level playing field for remote access to criminal electronic records.

Alternatives considered

ITAC considered maintaining the status quo, language proposed by California Attorneys for Criminal Justice, limiting access by public defenders, and providing attorneys with remote access to any electronic record they could access at the courthouse.

The status quo

ITAC considered taking no action. The problem with the status quo is that a private attorney would still need to visit a courthouse to access certain criminal court records, for example, the criminal court records of a codefendant, whereas a public defender or prosecutor would not. This was a concern because it could impact the quality of representation of a criminal defendant if needed records are burdensome to obtain. During the comment period, ITAC received comments on the benefits of the proposal on representation including ensuring defense counsel can access the most current information, check if information is accurate, promptly seek correction of errors, and verify court dates so clients do not miss court appearances.

The benefit of the status quo is that it promotes practical obscurity and limits the potential online dissemination of criminal electronic records. This is discussed in detail in the Policy Implications section, above.

Language proposed by California Attorneys for Criminal Justice

California Attorneys for Criminal Justice proposed amending rule 2.540 to include private counsel within its scope. However, rule 2.540 specifically addresses remote access by persons working for government entities only and is in an article of the rules exclusive to government entities. As such, ITAC determined the proposed changes would be more suitable in amendments to rule 2.519, which includes private attorneys within its scope. Accordingly, ITAC developed a revised proposal to amend rule 2.519 instead of rule 2.540.

Limiting remote access by public defenders

Instead of expanding the scope of electronic records that private counsel can access remotely, one alternative to provide parity of remote access with public defenders would be limiting the scope of public defenders' remote access to only those clients represented by the public defender's office.

ITAC considered this approach undesirable for a few reasons. First, it may be impractical and controversial, especially for courts that have already established remote access for public defenders because courts that had already made computer system updates providing broad remote access consistent with the rules would need to expend resources to further modify the systems or block public defender access to the systems until modifications could be made. Second, it would also create a new parity issue: all criminal defense attorneys would have remote access that is less than what prosecutors could have under the rules. Even if prosecutors were

limited to the cases they were prosecuting, they would practically have greater access than defense counsel in each county because there is one district attorney's office in each county but multiple defense counsel. Thus, remote users from the district attorney's office would be able to access significantly more criminal electronic records than public and private defense counsel. As such, there would be a parity issue since district attorneys would have the ability to remotely access criminal electronic records in cases of witnesses or codefendants, while defense counsel would not necessarily have the same access. Accordingly, this was the least desirable alternative to the proposed amendments and the status quo.

Providing attorneys remote access to any electronic record they could access at the courthouse
ITAC considered whether there was a broader issue of providing attorneys remote access to *any* electronic records that they could access at the courthouse. Given the broad pool of remote users, this also raised concerns about practical obscurity. Ultimately, ITAC decided to keep the scope of the proposal limited in order to address the specific problem identified by California Attorneys for Criminal Justice. ITAC may explore broader access to other case types in the future with the participation of other Judicial Council advisory committees as the issue is raised by stakeholders seeking remote access.

Fiscal and Operational Impacts

While the proposed rule amendment would authorize courts to allow remote access to electronic criminal records by private criminal defense counsel, courts would need to implement appropriate technological updates in their systems to provide remote access and ensure staff were trained on the update. The rules recognize that courts have varying financial means, security resources, or technical capabilities to allow them to implement remote access systems.[4] Thus, implementation is only required to the extent it is feasible for a court to do so.[5]

The Superior Court of Orange County and the Joint Rules Subcommittee commented on operational impacts on existing automated systems. The court detailed some of the necessary steps for a court to update technology systems and noted that it was possible for that court to implement the proposal. The Joint Rules Subcommittee commented that there "would potentially be significant fiscal impacts on those courts without the existing IT infrastructure" but that the rules account for feasibility, and courts only need to implement the rule to the extent feasible to do so considering the court's resources and technical capability. In addition to the public comments received, ITAC solicited internal comments from the Criminal Law Advisory Committee. One member commented that building an online portal would require considerable cost and administrative effort to allow remote access as proposed.

In addition to the above, the Superior Court of Orange County commented that some costs related to the production of paper copies of court records would be reduced, such as the cost of paper, ink cartridges, and wear and tear on printing equipment. Similarly, when providing

[4] Rule 2.516.

[5] *Ibid.*

internal comments, one of the Criminal Law Advisory Committee members noted there could be a reduction in costs associated with fewer people coming into the courthouses to access court records.

Attachments and Links

1. Cal. Rules of Court, rule 2.519, at pages 8–9
2. Chart of comments, at pages 10–16

Rule 2.519 of the California Rules of Court is amended, effective January 1, 2023, to read:

Rule 2.519. Remote access by a party's attorney

(a) Remote access generally permitted

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

(2) If a court notifies an attorney of the court's intention to appoint the attorney to represent a party in a criminal, juvenile justice, child welfare, family law, or probate proceeding, the court may grant remote access to that attorney before an order of appointment is issued by the court.

(b) Level of remote access

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

(2) An attorney representing a party in a criminal action may be provided remote access to any electronic criminal records that the attorney would be legally entitled to view at the courthouse.

(c) Terms of remote access applicable to an attorney who is not the attorney of record

Except as provided in (b)(2), an attorney who represents a party, but who is not the party's attorney of record in the party's actions or proceedings, may remotely access the party's electronic records, provided that the attorney:

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

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

(d) Terms of remote access applicable to all attorneys

(1) ~~A party's~~ An attorney may remotely access the electronic records only for the purpose of assisting ~~the~~ a party with ~~the~~ that party's court matter.

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

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

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

SPR22-27
Rules and Forms: Remote Access to Criminal Electronic Records (amend Cal. Rules of Court, rule 2.519)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Victims Legal Resource Center by Mariam El-menshawi, Director Sacramento, CA	NI	* The commenter recommended victim's counsel be granted remote access to electronic criminal records and included amendment language to that effect.	Adding victim's counsel is beyond the scope of the current proposal. However, the committee appreciates the issue being raised and this is a topic the committee may consider for development in a future rule cycle.
2.	Joint Rules Subcommittee (JRS) of the Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee	A	The JRS notes that this proposal should be implemented because it enhances the fairness and effectiveness of the criminal process.	The committee agrees.
			The JRS notes the following impact to court operations: • Impact on existing automated systems. There would potentially be significant fiscal impacts on those courts without the existing IT infrastructure to provide this access, except that the Rule 2.516 already makes the following exception: "To the extent feasible, a court that maintains records in electronic form must provide remote access to those records to the users described in rule 2.515, subject to the conditions and limitations stated in this article and otherwise provided by law."	The committee appreciates the potential for significant fiscal impacts to update technology systems and will note that in the final report. The committee agrees that feasibility will impact whether a court can implement the technological solutions to allow access described in the rule.
3.	Loyola Law School Rights In Systems Enforced (RISE) Clinic by Stephanie Richard, Director Los Angeles, CA	NI	* The commenter recommended victim's counsel be granted remote access to electronic criminal records and included amendment language to that effect.	Adding victim's counsel is beyond the scope of the current proposal. However, the committee appreciates the issue being raised and this is a topic the committee may consider for development in a future rule cycle.

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

4.	Marc McBride Attorney Santa Ana, CA	A	I fail to see the potential harm with allowing private defense attorneys to have the same electronic access that they would get if either (1) they were Public Defenders or (2) they physically walked into a courthouse clerk's office. However, denying this access leads to the potential that interests of a client will be compromised because, for instance, the lawyer has a delay in finding out that a case has been filed or an arrest warrant was issued. It can cause problems where court dates are missed because the lawyer cannot quickly verify that courts/clerks have inputted information accurately. It also makes it more difficult to determine whether, for instance, a client's name has been misspelled which could result in additional warrants. I just see absolutely no downside and significant areas that count as an upside.	The comments about the impact on representation of criminal defendants are helpful for the committee's understanding of the issue.
5.	Orange County Bar Association by Daniel S. Robinson, President	A	* In response to the invitation to comment's question, "Does the proposal appropriately address its stated purpose?", the commenter responded: "Yes, the proposal appropriately addresses the stated purpose and is long overdue."	No response required.
			Immediate and timely access to comprehensive electronic criminal records by private defense counsel is part of access to justice for their clients. There is absolutely no practical or ethical reason why only government lawyers should have special electronic access to court files. The continuing limited facility access brought on by Covid-19, the downsizing of many clerk's offices, the electronic filing of criminal motions and the expansion of remote appearances in criminal cases underscores	The comments about the impact on representation of criminal defendants are helpful for the committee's understanding of the issue.

			the need to provide remote access to electronic criminal records. Private criminal defense attorneys frequently represent clients throughout California. For example, it is not uncommon for a lawyer to have their office in southern California yet be retained to represent a defendant in Northern California. While attorney services do exist for lawyers to have criminal records pulled and copied from a particular Superior Court jurisdiction, such services are expensive. In counties that do not have comprehensive electronic record systems, the physical pulling of a court file and the actual copying of records by the clerk's office can also be costly, unduly time consuming and is simply inefficient for both the lawyer and the court. Many defendants do not retain private counsel until they have first appeared in court. Often defendants are misinformed or do not understand what they are charged with or by any special orders the court has made with regard to them. They frequently are wrong about the next appearance date the court has ordered or if any outstanding warrants have been issued. Appearance notices issued by Sheriff's Departments upon release from jail are often lost. Remote access immediately solves such common problems and can cut down on needless court continuances. Sometimes, court clerks inadvertently enter the wrong term which the court has not ordered. Where counsel has electronic access to court records, counsel can review such entries and if an	

			error exists seek immediate amelioration of the mistake. The list of potential impacts is endless as to privately retained clients no matter how diligent a defense counsel tries to be. Even appellate counsel has need for immediate remote access to the complete record of what occurred in the trial court when preparing an appeal in a criminal case. One need only compare the amount of information available to counsel by the outstanding Criminal Defense Attorney Portal maintained by the Orange County Superior Court and compare it with the embarrassing paucity of that offered for a fee by the Los Angeles Superior Court. The OC Criminal Defense Attorney Portal should be the model for all trial court jurisdictions to adopt.	
			* In response to the invitation to comment's question, "Does the proposal appropriately address its stated purpose?" the commenter stated, "A proper balance is struck. Even where counsel has not been retained remote access is still possible (c) and (d)."	No response required.
			* In response to the invitation to comment's question, "Should remote access be broader than what the proposal provides?" the commenter stated: The proposed rule does not delineate exactly which court records will be available remotely. Different counties who already provide some form of access vary in how much information is available remotely. Some only provide court dates while others permit access to all minute orders of	The committee agrees that it would be more effective if all the criminal court records counsel could view at the courthouse were available remotely. However, what courts are able to provide remotely depends on their resources and technical capability. Accordingly, there will be variability on what is available remotely from each court.

			the court, charging documents, motions, witnesses called, jury instructions etc.. As a practical matter to be effective, the electronic records available remotely should be the same as counsel could view at the courthouse.	
			Additionally, although not part of the rule per se, the remote electronic records should [be] searchable by private counsel not only [by] case number but also by an individual's name and birth date.	Rule 2.252 of the California Rules of Court currently limits searches to case caption or case number. Amending the rules to allow for additional search terms is beyond the scope of the current proposal. However, it is a topic the committee may consider for a future rule cycle.
			* In response to the invitation to comment's question, "Should remote access be narrower than what the proposal provides?", the commenter stated, "No."	No response required.
			* In response to the invitation to comment's question, "Should there be any additional consequences identified in the rule for failure to comply with the terms of remote access? If yes, what consequences should be included?" the commenter stated, "Identification of individual sanctions for noncompliance need not be listed by the rule. Suffice it to say that the trial court may sanction counsel. Sanctions may thus be applied by the court on a case by case basis depending of the severity of noncompliance."	The committee agrees that listing more sanctions in the rule is unnecessary since judges have the power to sanction and would be in the best position to determine appropriate sanctions tailored to specific sets of circumstances.
6.	Superior Court of Los Angeles County by Bryan Borys	A	If the rule is not amended, the quality of representation by private counsel may be impacted if they are forced to make greater efforts to obtain records, even though they would not completely be denied access to them.	The committee appreciates the response to its request for comments on the impact on representation. The committee agrees that regardless of the proposal, court records would not be denied to private counsel as they would still be

				accessible at the courthouse or remotely within the limitations of the current version of rule 2.519.
			The proposal adequately strikes a balance between the privacy of the subject of the record and accessibility of the record for private counsel. Because the records would be accessible if the attorney made an in-person request, the privacy concern is not increased simply because of remote accessibility. Moreover, the attorney would still be bound by rules of ethics and professional responsibility.	No response required.
			At a minimum, notice of termination of remote access as a sanction for non-compliance should be explicitly stated. We take no position as to whether additional consequences should be identified.	Rule 2.519(d)(4) includes express provision of termination of access for non-compliance as a possible sanction.
7.	Superior Court of Orange County by Iyana Doherty, Courtroom Operations Supervisor		Failure to comply is a breach of trust with the defendant and with the court. Violation incidents should be accessible to potential future clients and other courts (maybe through Bar Association?)	The committee agrees that violating the rules is a breach of trust. The committee determined though that it is unnecessary to detail more possible sanctions in the rule since judges have the power to sanction and would be in the best position to determine appropriate sanctions tailored to specific sets of circumstances.
			The courts would save about $55.00 for each paper box. Less money would be spent on ink cartridges and minor wear and tear of the printer.	The committee appreciates the information potential cost savings and will include it in the final report.
			An implementation requirement for the courts would be to have technological updates to their case management systems. Each county would have to secure its software program for technical	The committee appreciates the information about the technological implementation requirements and will include it in the final report.

			capabilities and security. The court's IT Department would set its process by verifying the user, having a California bar number, and accepting the court's disclaimer to access records remotely. Each court should have a strategy if any counsel cannot retrieve confidential or sealed documents. Each court's website should provide instructions on gaining remote access to records for counsel.	
			It is currently possible for Orange County Superior Court to implement at present. The court already has a process in place for private counsel and government entities.	No response required.