



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 12, 2014

Title	Agenda Item Type
Criminal Justice Realignment: Imposition of Mandatory Supervision	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 4.411 and 4.411.5; adopt rule 4.415	January 1, 2015
Recommended by	Date of Report
Criminal Law Advisory Committee Hon. Tricia A. Bigelow, Chair	November 4, 2014
	Contact
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Executive Summary

The Criminal Law Advisory Committee recommends amendments to rules 4.411 and 4.411.5 of the California Rules of Court and adoption of a new rule to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5), including criteria for court consideration and the contents and requirements for related probation reports, as required by recent legislation that mandates adoption of these rules by January 1, 2015.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2015:

1. Adopt rule 4.415 of the California Rules of Court to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5), including criteria for court consideration when determining the length and conditions of supervision and whether to deny supervision in the interests of justice;

2. Amend rule 4.411 of the California Rules of Court to apply existing requirements for presentence probation reports to cases in which the defendant is eligible for a term of imprisonment in county jail under Penal Code section 1170(h); and
3. Amend rule 4.411.5 of the California Rules of Court to require presentence probation reports to include recommendations regarding the appropriate term of imprisonment in county jail under Penal Code section 1170(h), the denial of mandatory supervision in the interests of justice, and the length and conditions of mandatory supervision.

The text of the new and amended rules is attached at pages 7–12.

Previous Council Action

Rule 4.411 was originally adopted as rule 418, effective July 1, 1977, and rule 4.411.5 was originally adopted as rule 419, effective July 1, 1981. Both rules were most recently amended effective January 1, 2007. This is the first time they are being amended to reflect the advent of criminal justice realignment.

Rationale for Recommendation

Criminal justice realignment implemented broad changes to felony sentencing laws, including replacing prison sentences with county jail sentences for certain felonies and authorizing courts to impose a period of mandatory supervision upon release from county jail. Recent realignment-related legislation¹ amended several statutory provisions that govern the imposition of mandatory supervision and require the Judicial Council to adopt rules of court.

New rule 4.415

Penal Code section 1170(h)(5)(A) was amended, effective January 1, 2015, to require courts to impose mandatory supervision for all felony terms of imprisonment in county jail unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Penal Code section 1170.3(a) was also amended to require the Judicial Council, effective January 1, 2015, to adopt rules of court to prescribe criteria for the court to consider when deciding whether to deny a period of mandatory supervision “in the interests of justice” under Penal Code section 1170(h)(5)(A) and when determining the appropriate period and conditions of mandatory supervision.

In response, the committee recommends adoption of rule 4.415. The new rule is designed to emphasize the new statutory presumption in favor of the imposition of mandatory supervision, prescribe the requisite criteria for court consideration, and require courts to state reasons for a denial of a period of mandatory supervision in the interests of justice. An advisory committee comment is included to explain the statutory bases for specific provisions.

¹ Assem. Bill 1468 (Comm. on Budget); Stats. 2014, ch. 26.

Content of presentence probation reports

Two existing rules govern the use and contents of presentence probation reports. Rule 4.411 prescribes the purpose and requirements for use and rule 4.411.5 establishes the requisite content and sequential presentation of the information contained in the reports. Penal Code section 1170.3(b) was amended to require the Judicial Council to adopt rules of court to standardize the content and sequential presentation of information regarding the imposition of mandatory supervision in presentence probation reports submitted to the court.

In response, the committee recommends several amendments to rule 4.411 that are designed to apply existing report requirements to cases in which the defendant is eligible for a term of imprisonment under Penal Code section 1170(h). The committee also recommends amendments to rule 4.411.5 to ensure that the reports include recommendations regarding the appropriate term of imprisonment, denials of mandatory supervision in the interests of justice, and the length and conditions of mandatory supervision. To enhance the information and recommendations contained in the reports, the amendments also require reports to include information from any available risk/needs assessments² conducted by the probation department.

Comments, Alternatives Considered, and Policy Implications

This proposal circulated for public comment on an expedited basis from August 22, 2014, to September 19, 2014, yielding a total of 14 comments. Of those, 2 agreed with the proposal, including the Superior Court of Los Angeles County; 11 agreed with the proposal if modified, including the American Civil Liberties Union, the California District Attorneys Association, California Public Defenders Association, Chief Probation Officers of California, California Department of Justice (DOJ), and the Superior Courts of Orange and San Diego Counties; and 1 disagreed with the proposal. A chart with all comments received and committee responses is attached at pages 13–58. Attachments to specific comments made by DOJ are also provided after the comment chart.

In addition, the Trial Court Presiding Judges and Court Executives Joint Rule Working Group (JRWG) provided additional feedback on the proposal after the comment period. A discussion of these comments is included in the two sections that immediately follow.

Notable changes in response to comments

The committee revised the proposal in response to the following notable comments:

- ***Order of considerations.*** As originally circulated, the proposal listed factors related to the length and conditions of supervision before the factors related to denials of supervision in the interests of justice. To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of rule 4.411.5 (related to the content of probation reports) and subdivisions (b)

² The Criminal Law Advisory Committee is separately developing rules of court and standards of judicial administration to provide guidance regarding the use of risk/needs assessments by courts at sentencing.

and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision.

- ***Factors for denying supervision were overly broad.*** As originally circulated, the factors related to decisions to deny a period of mandatory supervision in the interests of justice included several broad considerations, including any factor “reasonably related to the court’s determination.” To address concerns that the factors were overly broad and would frustrate the intent of the statutory presumption *against* denials of supervision, the committee amended rule 4.415 to:
 - Emphasize the limited scope of the statutory authority to deny supervision by adding the following sentence to subdivision (a): “Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, **denials of a period of mandatory supervision should be limited**”³;
 - Narrow the list of criteria in subdivision (b) for denying supervision in the interests of justice by deleting the following two factors: “The likelihood that the defendant will be a danger to others if not imprisoned” and “Any other factor reasonably related to the court’s determination that mandatory supervision is not appropriate in the interests of justice”; and
 - Replace factors related to the nature of the case and the defendant’s suitability for supervision with the following factor under subdivision (b)(4): “Whether the nature, seriousness, or circumstances of the case or the defendant’s past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant’s successful reentry into the community upon release from custody.” The new factor is designed to underscore the importance of supervision in the successful reintegration of defendants into the community upon release from custody by encouraging courts to limit denials of supervision only to circumstances that substantially outweigh the benefits of supervision.

³ The committee initially proposed the following amendment: “Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory supervision.” The JRWG, however, raised concerns that the proposed language could be read to limit the exercise of judicial discretion: “A judge should not limit exercising discretion, but should proceed with caution. The proposed language seems to take away the judge’s power to decide. Instead, the proposed language should make clear that denials should not be routine.” In response, the committee revised the provision as explained above to clarify that the rule is intended to emphasize the limited nature of *denials* of supervision, *not* to limit the exercise of discretion.

- **Additional factors.** In recognition that some defendants may *lack* the need for supervision upon release from custody, the committee added the following factor under rule 4.415(b)(3) for courts to consider when deciding whether to deny supervision: “Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody.” To encourage courts to consider the full impacts of incarceration when deciding the length and conditions of supervision, the committee also added the following factor to rule 4.415(c)(9): “The likely effect of extended imprisonment on the defendant and any dependents.”

The committee also made several nonsubstantive changes, including amendments to more accurately track the statutory language of Penal Code section 1170(h)(5), add cross-references to other rule provisions, and clarify the purpose of factors related to restitution and custody credits.

Notable alternatives declined

The committee declined to revise the proposal in response to the following notable comments:

- **Waivers of reports.** Current rule 4.411(a) discourages waivers of presentence reports. Although the committee did not originally propose any changes to this provision, some commentators raised concerns about the burdens associated with requiring reports in all cases eligible for terms of imprisonment in county jail under section 1170(h). In response, the committee initially decided to amend rule 4.411(a) as follows to emphasize that court authority to allow waivers would remain unchanged: “~~Waivers of~~ Although courts may waive the presentence report, waivers should not be accepted except in unusual circumstances.”

The JRWG later raised concerns that the proposed amendment would imply that waivers are made by courts, as opposed to the parties, and suggested that the rule should allow waivers in “appropriate circumstances” instead of “unusual circumstances,” as stated in the current rule. Upon reflection, the committee decided *not* to recommend the proposed amendment in favor of preserving the waiver provision as currently stated in the rule. Because the proposal is designed to apply *existing* requirements for presentence probation reports, including longstanding waiver requirements, the committee decided that the proposed amendment is unnecessary and would inadvertently cause confusion.

- **Statement of Reasons.** Although rule 4.412 generally exempts courts from stating reasons for sentencing decisions when the parties have negotiated a plea agreement,⁴ rule 4.415(d) would require courts to state reasons for denying mandatory supervision “[n]otwithstanding rule 4.412(a).” A few commentators raised concerns that the

⁴ Rule 4.412(a) states: “It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.”

requirement to state reasons even though the parties have negotiated a plea agreement may result in improper judicial plea bargaining and inadvertently frustrate the plea bargaining process.

The committee considered but declined to delete the requirement. Plea agreements do not divest courts of inherent sentencing discretion. Courts must ensure that all sentences are lawful and all plea agreements are subject to court approval before imposition. Under Penal Code section 1170(h)(5)(A), denials of mandatory supervision are prohibited unless “the court finds that, in the interests of justice, it is not appropriate *in a particular case*.” (Emphasis added.) Accordingly, lawful denials of mandatory supervision require the exercise of judicial discretion on a case-by-case basis, even when the parties have agreed to the sentence. A statement of reasons is necessary to demonstrate the lawfulness of the sentence, memorialize the basis for the exercise of judicial discretion, and aid appellate review.

Implementation Requirements, Costs, and Operational Impacts

No significant costs or operational impacts are expected. Notably, the JRWG raised concerns that the new report requirements, including discussions of additional factors for courts to consider, may cause delays in the preparation of probation reports, resulting in an increase of continuances of sentencing hearings. The new report requirements, however, are required by statute. The committee expects that probation reports will include as much relevant information about the new factors as the probation officer can gather in the allotted time, consistent with reporting practices for the *numerous* existing factors under current law. In addition, as noted above, courts will retain authority to waive probation reports when appropriate. The proposal is designed to enable courts to fold the new requirements into existing report practices, including waiver protocols. As such, court implementation requirements are expected to be limited to judicial and court staff training.

Attachments

1. Cal. Rules of Court, rules 4.411, 4.411.5, and 4.415, at pages 7–12
2. Comment chart, at pages 13–58
3. Attachment A: *Attachment A to Comments on SP14-08*, attached as an exhibit to the comments from DOJ
4. Attachment B: *Attachment B to Comments on SP14-08*, attached as an exhibit to the comments from DOJ

1 Rules 4.411 and 4.411.5 of the California Rules of Court are amended, and rule 4.415 is
2 adopted, effective January 1, 2015, to read:

3
4
5 **Rule 4.411. Presentence investigations and reports**

6
7 **(a) Eligible defendant**

8
9 If the defendant is eligible for probation or a term of imprisonment in county jail
10 under section 1170(h), the court must refer the matter to the probation officer for a
11 presentence investigation and report. Waivers of the presentence report should not
12 be accepted except in unusual circumstances.

13
14 **(b) Ineligible defendant**

15
16 Even if the defendant is not eligible for probation or a term of imprisonment in
17 county jail under section 1170(h), the court should refer the matter to the probation
18 officer for a presentence investigation and report.

19
20 **(c) Supplemental reports**

21
22 The court must order a supplemental probation officer's report in preparation for
23 sentencing proceedings that occur a significant period of time after the original
24 report was prepared.

25
26 **(d) Purpose of presentence investigation report**

27
28 Probation officers' reports are used by judges in determining the appropriate term
29 of imprisonment in length of a prison or county jail sentence under section 1170(h)
30 and by the Department of Corrections and Rehabilitation, Division of Adult
31 Operations in deciding on the type of facility and program in which to place a
32 defendant. ~~The reports are~~ also used by courts in deciding whether probation
33 is appropriate, whether a period of mandatory supervision should be denied in the
34 interests of justice under section 1170(h)(5)(A), and the appropriate length and
35 conditions of probation and mandatory supervision. Section 1203c requires a
36 probation officer's report on every person sentenced to prison; ordering the report
37 before sentencing in probation-ineligible cases will help ensure a well-prepared
38 report.

39
40 **Advisory Committee Comment**

41
42 Section 1203 requires a presentence report in every felony case in which the defendant is eligible
43 for probation. Subdivision (a) requires a presentence report in every felony case in which the

1 defendant is eligible for a term of imprisonment in county jail under section 1170(h). Because
2 such a probation investigation and report are valuable to the judge and to the jail and prison
3 authorities, waivers of the report and requests for immediate sentencing are discouraged, even
4 when the defendant and counsel have agreed to a prison sentence or a term of imprisonment in
5 county jail under section 1170(h).
6

7 Notwithstanding a defendant's statutory ineligibility for probation or term of imprisonment in
8 county jail under section 1170(h), a presentence investigation and report should be ordered to
9 assist the court in deciding the appropriate sentence and to facilitate compliance with section
10 1203c.

11
12 This rule does not prohibit pre-conviction, pre-plea reports as authorized by section 1203.7.

13
14 Subdivision (c) is based on case law that generally requires a supplemental report if the defendant
15 is to be resentenced a significant time after the original sentencing, as, for example, after a
16 remand by an appellate court, or after the apprehension of a defendant who failed to appear at
17 sentencing. The rule is not intended to expand on the requirements of those cases.

18
19 The rule does not require a new investigation and report if a recent report is available and can be
20 incorporated by reference and there is no indication of changed circumstances. This is particularly
21 true if a report is needed only for the Department of Corrections and Rehabilitation because the
22 defendant has waived a report and agreed to a prison sentence. If a full report was prepared in
23 another case in the same or another jurisdiction within the ~~preceeding~~preceding six months,
24 during which time the defendant was in custody, and that report is available to the Department of
25 Corrections and Rehabilitation, it is unlikely that a new investigation is needed.

26
27
28 **Rule 4.411.5. Probation officer's presentence investigation report**

29
30 **(a) Contents**

31
32 A probation officer's presentence investigation report in a felony case must include
33 at least the following:

34
35 (1)–(7) * * *

36
37 (8) Any available, reliable risk/needs assessment information.

38
39 ~~(8)~~(9) An evaluation of factors relating to disposition. This section must include:

40
41 (A) A reasoned discussion of the defendant's suitability and eligibility for
42 probation, and, if probation is recommended, a proposed plan including

1 recommendations for the conditions of probation and any special need
2 for supervision;

3
4 (B) If a prison sentence or term of imprisonment in county jail under
5 section 1170(h) is recommended or is likely to be imposed, a reasoned
6 discussion of aggravating and mitigating factors affecting the sentence
7 length; ~~and~~

8
9 (C) If denial of a period of mandatory supervision in the interests of justice
10 is recommended, a reasoned discussion of the factors prescribed by rule
11 4.415(b);

12
13 (D) If a term of imprisonment in county jail under section 1170(h) is
14 recommended, a reasoned discussion of the defendant's suitability for
15 specific terms and length of period of mandatory supervision, including
16 the factors prescribed by rule 4.415(c); and

17
18 ~~(C)~~(E) A reasoned discussion of the defendant's ability to make restitution,
19 pay any fine or penalty that may be recommended, or satisfy any
20 special conditions of probation that are proposed.

21
22 Discussions of factors (A) through (D) affecting suitability for probation and
23 affecting the sentence length must refer to any sentencing rule directly
24 relevant to the facts of the case, but no rule may be cited without a reasoned
25 discussion of its relevance and relative importance.

26
27 ~~(9)~~(10) The probation officer's recommendation. When requested by the
28 sentencing judge or by standing instructions to the probation department, the
29 report must include recommendations concerning the length of any prison or
30 county jail term under section 1170(h) that may be imposed, including the
31 base term, the imposition of concurrent or consecutive sentences, and the
32 imposition or striking of the additional terms for enhancements charged and
33 found.

34
35 ~~(10)~~(11) Detailed information on presentence time spent by the defendant in
36 custody, including the beginning and ending dates of the period or periods of
37 custody; the existence of any other sentences imposed on the defendant
38 during the period of custody; the amount of good behavior, work, or
39 participation credit to which the defendant is entitled; and whether the sheriff
40 or other officer holding custody, the prosecution, or the defense wishes that a
41 hearing be held for the purposes of denying good behavior, work, or
42 participation credit.

1 ~~(11)~~(12) A statement of mandatory and recommended restitution, restitution
2 fines, other fines, and costs to be assessed against the defendant, including
3 chargeable probation services and attorney fees under section 987.8 when
4 appropriate, findings concerning the defendant's ability to pay, and a
5 recommendation whether any restitution order should become a judgment
6 under section 1203(j) if unpaid.

7
8 **(b)–(c)** * * *

9
10
11 **Rule 4.415. Criteria affecting the imposition of mandatory supervision**

12
13 **(a) Presumption**

14
15 When imposing a term of imprisonment in county jail under section 1170(h), the
16 court must suspend execution of a concluding portion of the term to be served as a
17 period of mandatory supervision unless the court finds, in the interests of justice,
18 that mandatory supervision is not appropriate in a particular case. Because section
19 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a
20 period of mandatory supervision in all applicable cases, denials of a period of
21 mandatory supervision should be limited.

22
23 **(b) Criteria for denying mandatory supervision in the interests of justice**

24
25 In determining that mandatory supervision is not appropriate in the interests of
26 justice under section 1170(h)(5)(A), the court's determination must be based on
27 factors that are specific to a particular case or defendant. Factors the court may
28 consider include:

- 29
30 (1) Consideration of the balance of custody exposure available after imposition
31 of presentence custody credits;
32
33 (2) The defendant's present status on probation, mandatory supervision,
34 postrelease community supervision, or parole;
35
36 (3) Specific factors related to the defendant that indicate a lack of need for
37 treatment or supervision upon release from custody; and
38
39 (4) Whether the nature, seriousness, or circumstances of the case or the
40 defendant's past performance on supervision substantially outweigh the
41 benefits of supervision in promoting public safety and the defendant's
42 successful reentry into the community upon release from custody.

1
2 **(c) Criteria affecting conditions and length of mandatory supervision**

3
4 In exercising discretion to select the appropriate period and conditions of
5 mandatory supervision, factors the court may consider include:

- 6
7 (1) Availability of appropriate community corrections programs;
8
9 (2) Victim restitution, including any conditions or period of supervision
10 necessary to promote the collection of any court-ordered restitution;
11
12 (3) Consideration of length and conditions of supervision to promote the
13 successful reintegration of the defendant into the community upon release
14 from custody;
15
16 (4) Public safety, including protection of any victims and witnesses;
17
18 (5) Past performance and present status on probation, mandatory supervision,
19 postrelease community supervision, and parole;
20
21 (6) The balance of custody exposure after imposition of presentence custody
22 credits;
23
24 (7) Consideration of the statutory accrual of post-sentence custody credits for
25 mandatory supervision under section 1170(h)(5)(B) and sentences served in
26 county jail under section 4019(a)(6);
27
28 (8) The defendant's specific needs and risk factors identified by a validated
29 risk/needs assessment, if available; and
30
31 (9) The likely effect of extended imprisonment on the defendant and any
32 dependents.
33

34 **(d) Statement of reasons for denial of mandatory supervision**

35
36 Notwithstanding rule 4.412(a), when a court denies a period of mandatory
37 supervision in the interests of justice, the court must state the reasons for the denial
38 on the record.
39

40 **Advisory Committee Comment**

41
42 Penal Code section 1170.3 requires the Judicial Council to adopt rules of court that prescribe
43 criteria for the consideration of the court at the time of sentencing regarding the court's decision

1 to “[d]eny a period of mandatory supervision in the interests of justice under paragraph (5) of
2 subdivision (h) of Section 1170 or determine the appropriate period of and conditions of
3 mandatory supervision.”

4
5 **Subdivision (a).** Penal Code section 1170(h)(5)(A): “Unless the court finds, in the interests of
6 justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant
7 to paragraph (1) or (2) of this subdivision, shall suspend execution of a concluding portion of the
8 term for a period selected at the court’s discretion.”

9
10 **Subdivisions (b)(3), (b)(4), and (c)(3).** The Legislature has declared that “[s]trategies supporting
11 reentering offenders through practices and programs, such as standardized risk and needs
12 assessments, transitional community housing, treatment, medical and mental health services, and
13 employment, have been demonstrated to significantly reduce recidivism among offenders in other
14 states.” (Pen. Code, § 17.7(a).)

15
16 **Subdivision (c)(7).** Under Penal Code section 1170(h)(5)(B), defendants serving a period of
17 mandatory supervision are entitled to day-for-day credits: “During the period when the defendant
18 is under such supervision, unless in actual custody related to the sentence imposed by the court,
19 the defendant shall be entitled to only actual time credit against the term of imprisonment
20 imposed by the court.” In contrast, defendants serving terms of imprisonment in county jails
21 under Penal Code section 1170(h) are entitled to conduct credits under Penal Code section
22 4019(a)(6).

23