JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS COMMITTEE

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RULES AND PROJECTS COMMITTEE

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))

THIS MEETING IS BEING RECORDED

Date: April 16, 2015
Time: 11:00 a.m.
Public Call-In Number: 1-877-820-7831/passcode: 4653278 (listen only)

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

Call to Order and Roll Call

II. DISCUSSION AND POSSIBLE ACTION ITEMS

CRIMINAL

Item 1

Criminal Procedure: Petition and Order for Dismissal (revise forms CR-180 and CR-181) (Action Required – Approval for circulation for comment)

Presenter: Eve Hershcopf

Item 2

Criminal Procedure: Petition and Order for Dismissal (Military Personnel) (approve forms CR-183 and CR-184) (Action Required – Approval for circulation for comment)

Presenter: Eve Hershcopf

Item 37

Criminal Procedure: Update Judicial Council Misdemeanor Domestic Violence Plea Form Citations (revise form CR-102) (Action Required – Recommendation to Judicial Council)

Presenter: Eve Hershcopf

PROBATE

Item 3

Probate Conservatorship: Judicial Council forms to implement the California Conservatorship Jurisdiction Act (revise form GC-310; adopt forms GC-360, GC-361, and GC-362) (Action Required – Approval for circulation for comment)

Presenter: Douglas C. Miller

PROBATE and FAMILY/JUVENILE

Item 4

Special Immigrant Juvenile Predicate Findings (adopt rule 7.1020; adopt forms FL-317, FL-357/GC-224/JV-357, GC-220, and JV-317; revoke forms GC-224 and JV-224) (Action Required – Approval for circulation for comment)

Presenter: Douglas C. Miller, Corby Sturges

FAMILY/JUVENILE

Item 5

Family and Juvenile Law: Juvenile Court Final Custody Orders (amend rules 5.475, 5.620, 5.700, 5.790; approve form JV-206; revise forms JV-200 and JV-205) (Action Required – Approval for circulation for comment)

Presenter: Corby Sturges

Item 6

Family Law: New Form and Revisions to Forms for Stepparent and Additional-Parent Adoptions (approve form ADOPT-205; revise forms ADOPT-050, ADOPT-200, ADOPT-210, and ADOPT-215) (Action Required – Approval for circulation for comment)

Presenter: Kyanna Williams

Item 7

Juvenile Law: Sealing of Records (adopt rule 5.840; amend rule 5.830; adopt forms JV-595, JV-595-INFO, and JV-596; revise forms JV-590 and JV-600) (Action Required – Approval for circulation for comment)

Presenter: Tracy Kenny

Item 8

Juvenile Law: Extended Foster Care (amend rules 5.555, 5.707, 5.812, and 5.906; revise forms JV-367, JV-464-INFO, JV-466, JV-470, and JV-472) (Action Required – Approval for circulation for comment)

Presenter: Tracy Kenny

Item 9

Juvenile Delinquency: Documenting Wobbler Determination (revise form JV-665) (Action Required – Approval for circulation for comment)

Presenter: Audrey Fancy

Item 10

Juvenile Law: Proceedings Before a Referee (amend rule 5.538) (Action Required – Approval for circulation for comment)

Presenter: Audrey Fancy

Item 11

Juvenile Law: Detention (amend rules 5.502, 5.760, and 5.790; revise forms JV-642 and JV-667) (Action Required – Approval for circulation for comment)

Presenter: Kerry Doyle

Item 12

Juvenile Law: Substance Abuse Treatment Facilities and Placement (amend rules 5.674, 5.676, 5.678, and 5.708) (Action Required – Approval for circulation for comment)

Presenter: Kerry Doyle

Item 13

Juvenile Law: Sibling Visitation (amend rules 5.570, 5.708, and 5.810; revise forms JV-183, JV-185, and JV-403) (Action Required – Approval for circulation for comment)

Presenter: Kerry Doyle

FAMILY/JUVENILE and TRIBAL COURT–STATE COURT FORUM

Item 14

Family and Juvenile Law: Transfers of Indian Child Welfare Act (ICWA) proceedings to Tribal Court (amend rules 5.483, 5.590, and 8.406; adopt rule 8.418; amend forms ICWA-060 and JV-800) (Action Required – Approval for circulation for comment)

Presenter: Ann Gilmour

DOMESTIC VIOLENCE

Item 15

Domestic Violence—Request to Modify or Terminate Domestic Violence Restraining Orders; Family Law—Changes to Request for Order Rules and Forms (amend rules 5.12, 5.62, 5.63, 5.92, 5.94, 5.151; adopt forms DV-400, DV-400-INFO, FL-303, and FL-320-INFO; revise forms DV-130, DV-200, DV-250, FL-300, FL-300-INFO, FL-305, FL-306, FL-311, FL-312, FL-320, FL-336, FL-337, FL-341, FL-341(B), FL-341(C), FL-341(D), andFL-341(E)) (Action Required – Approval for circulation for comment)

Presenter: Gabrielle Selden

Item 16

Domestic Violence Law—Get Ready for the Restraining Order Court Hearing (revise DV-520-INFO) (Action Required – Approval for circulation for comment)

Presenter: Julia Weber

APPELLATE

Item17

Appellate Procedure: Record on Appeal–Civil Cases (revise forms APP-003, APP-010, APP-103, and form APP-110) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

Item 18

Electronic Service: Authorization of Electronic Service on Trial and Appellate Courts (amend rules 2.251 and 8.71) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson, Tara Lundstrom

Item 19

Appellate Procedure: Access to Electronic Appellate Court Records (adopt rules 8.80 – 8.85) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

Item 20

Appellate Procedure: Prehearing Conferences (amend rule 8.248) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

Item 21

Appellate Procedure: Contents of Normal Record in Felony Appeals (amend rules 8.320 and 8.324) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

Item 22

Appellate: Appendixes (amend rule 8.124) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

Item 23

Appellate Procedure: Costs on Appeal (amend rule 8.278, and revise form MC-013) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson

APPELLATE and CIVIL

Item 24

Small Claims Writs: New Procedures to Implement Code of Civil Procedure section 116.798 (amend rule 8.930; adopt rules 8.970-8.977; revise forms APP-150 INFO and APP-151 and adopt forms SC-300 and 300 INFO) (Action Required – Approval for circulation for comment)

Presenter: Heather Anderson, Anne Ronan

Item 25

Civil Practice and Procedure: Evidentiary Objections in Summary Judgment Proceedings (amend rules 3.1350 and 3.1354) (Action Required – Approval for circulation for comment)

Presenter: Susan McMullan

CIVIL

Item 26

Civil Cases: Continued Suspension of Case Management Rule (amend rule 3.720) (Action Required – Approval for circulation for comment)

Presenter: Anne Ronan

Item 27

Civil Forms: Proof of Service (revise POS-040) (Action Required – Approval for circulation for comment)

Presenter: Anne Ronan

Item 36

Telephone Appearances: Notice for Ex Parte Appearances and Notice Form (amend rule 3.670; revise form CIV-020) (Action Required – Approval for circulation for comment)

Presenter: Anne Ronan

Item 28

Civil Forms: Gun Restraining Orders (amend rule 3.1152, and adopt forms EPO-002, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-130, GV-200, GV-200 INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800, and GV-800-INFO) (Action Required – Approval for circulation for comment)

Presenter: Anne Ronan

CIVIL JURY INSTRUCTIONS (CACI)

Item 29

California Civil Jury Instructions (Action Required – Approve recommended changes)

Presenter: Bruce Greenlee

Item 30

California Civil Jury Instructions (Action Required – Recommendation to Judicial Council)

Presenter: Bruce Greenlee

COURT ADMINISTRATION

Item 31

Temporary Judges: Reporting on Use of Attorneys as Court-Appointed Temporary Judges (amend rules 2.810 and 10.742) (Status report – no materials)

Presenter: Hon. Brian McCabe and Mr. Richard Feldstein

Item 32

Trial Court Management: Public Access to Administrative Decisions of Trial Courts (amend rule 10.620) (Action required – Approval for circulation for comment)

Presenter: Hon. Brian McCabe and Mr. Richard Feldstein

Item 33

Trial Courts: Permanent Authorization for Remote Video Proceedings in Traffic Infraction Cases (amend rule 4.220; revise form TR-500-INFO) (Action Required – Approval for circulation for comment)

Presenter: Courtney Tucker, Tara Lundstrom

Item 34

Rules Modernization Project: Modernize the Rules of Court to Facilitate E-Business, E-Filing, and E-Service (Action Required – Approval for circulation for comment)

Presenter: Tara Lundstrom, Patrick O'Donnell

Item 35

Judicial Branch Administration: Changes to Replace the Names "Administrative Office of the Courts" and "AOC" (Action Required – Approval for circulation for comment)

Presenter: Susan McMullan

Item 38

Judicial Administration: Rule for Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch (amend rule 10.63) (Action Required – Approval for circulation for comment)

Presenter: Susan McMullan

III. ADJOURNMENT

Adjourn

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Criminal Justice Realignment: Petition and Order for Dismissal

Committee or other entity submitting the proposal:

Criminal Law Advisory Committee

Staff contact (Name, phone and e-mail):

Eve Hershcopf, 415-865-7961
eve.hershcopf@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2014
Item 3: Criminal Justice Realignment: Consider rule, form, and legislative proposals to facilitate court implementation of criminal justice realignment.

If requesting July 1 or out of cycle, explain:

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

Dismissals for Victims of Human Trafficking Under Penal Code section 1203.49 as a result of recent legislation, AB 1585 (Alejo; Stats. 2014, ch. 708). Provides victims of human trafficking with a process for dismissal relief.

Forms CR-180 and CR-181

No substantial arguments or opposition are expected.

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR15-__

Title Criminal Procedure: Petition and Order for Dismissal	Action Requested Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes Revise forms CR-180 and CR-181	Proposed Effective Date January 1, 2016
Proposed by Criminal Law Advisory Committee Hon. Tricia Ann Bigelow, Chair	Contact Eve Hershcopf, 415-865-7961 eve.hershcopf@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes revisions to the *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181) in response to recent legislation that provides dismissal relief to certain victims of human trafficking and defines the maximum sentence for misdemeanors.

Background

The *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181) are used by petitioners and courts to facilitate the dismissal procedures authorized by Penal Code sections 1203.4, 1203.4a, and 1203.41. These are two of the most heavily used optional criminal law forms and are frequently submitted by unrepresented petitioners.

Recent legislation[1] added Penal Code section 1203.49 to authorize a defendant who has been convicted of misdemeanor solicitation or prostitution under Penal Code section 647(b), and who has completed a term of probation for that conviction, to petition the court for dismissal relief. If the defendant can establish by clear and convincing evidence that the conviction was the result of his or her status as a victim of human trafficking, the legislation authorizes the court to issue an order that (1) finds that the petitioner was a victim of human trafficking when he or she committed the crime, (2) orders any of the relief described in Penal Code section 1203.4, and (3)

[1] Assem. Bill 1585 (Alejo); Stats. 2014, ch. 708.

notifies the Department of Justice both that the petitioner was a victim of human trafficking and of the relief ordered.[2]

The Proposal

The Criminal Law Advisory Committee proposes the following revisions to the *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181) to incorporate the new statutory basis for relief by adding:

- A reference to Penal Code section1203.49 to the caption and footer of both forms;
- Item 4 to form CR-180, for petitioners to request relief under Penal Code section 1203.49;
- A check box for Penal Code section 1203.49 to the petitioner's final request for relief on form CR-180;
- Six references to Penal Code section 1203.49 to the body of form CR-181 to incorporate the new basis for relief in the order for dismissal;
- Item 5 to form CR-181 for the court to specify the relief granted under Penal Code section 1203.49; and
- Item 7 to form CR-181 to notify the Department of Justice, when the order is granted under Penal Code section 1203.49, that the petitioner was a victim of human trafficking and the relief ordered.

Alternatives Considered

The committee alternatively considered postponing or declining to propose revisions to the *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181) in consideration of the additional burden that any form change places on the courts. The committee, however, decided to propose these revisions because they are required by recent legislation and would reduce confusion, promote efficiencies, and facilitate court implementation of new criminal procedures.

Implementation Requirements, Costs, and Operational Impacts

As optional forms, expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

[2] The legislation also amends the Penal Code and Family Code to prohibit the Department of Justice from disseminating the petitioner's record of conviction when the information is to be used for employment, licensing, or certification purposes under Penal Code section 11105, or used in connection with an adoption application under Family Code sections 8712, 8811, or 8908.

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?
- Are the proposed revisions an effective way to address the legislation that added Penal Code section 1203.49?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms CR-180 and CR-181, at pages 4–7
2. Assem. Bill 1585 (Alejo); Stats. 2014, ch. 708

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	**DRAFT** **Not Approved by the Judicial Council**
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	CASE NUMBER:
PETITION FOR DISMISSAL **(Pen. Code, §§ 17(b), 1203.4, 1203.4a, 1203.41, 1203.49)**	***FOR COURT USE ONLY*** Date: Time: Department:

1. On *(date):* _____, the petitioner *(the defendant in the above-entitled criminal action)* was convicted of a violation of the following:

Offense *(Specify each offense in the case noted above.)*	**Code**	**Section**	**Type of offense:** *(Felony; Misdemeanor; Infraction)*	**Eligible for reduction to misdemeanor under Penal Code § 17(b)** *(Yes or No)*

If additional space is needed for listing offenses, use *Attachment to Judicial Council Form* (form MC-025).

2. ☐ **Felony or misdemeanor with probation granted *(Pen. Code, § 1203.4)***
Probation was granted on the terms and conditions set forth in the docket of the above-entitled court; the petitioner is not serving a sentence for any offense, nor on probation for any offense, nor under charge of commission of any crime, and the petitioner (*check all that apply*):
   a. ☐ has fulfilled the conditions of probation for the entire period thereof;
   b. ☐ has been discharged from probation prior to the termination of the period thereof;
   c. ☐ should be granted relief in the interests of justice. *(Please note: You must explain why granting a dismissal would be in the interests of justice. You may complete and attach the* Attached Declaration *(form MC-031) or submit other relevant documents.)*

3. ☐ **Misdemeanor or infraction with sentence other than probation *(Pen. Code, § 1203.4a)***
Probation was not granted; more than one year has elapsed since the date of pronouncement of judgment. The petitioner has complied with the sentence of the court and is not serving a sentence for any offense or under charge of commission of any crime; and the petitioner *(check one)*:
   a. ☐ has lived an honest and upright life since pronouncement of judgment and conformed to and obeyed the laws of the land; ***or***
   b. ☐ should be granted relief in the interests of justice. *(Please note: You must explain why granting a dismissal would be in the interests of justice. You may complete and attach the* Attached Declaration *(form MC-031) or submit other relevant documents.)*

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

4. ☐ **Misdemeanor conviction under Penal Code section 647(b) *(Pen. Code, § 1203.49)***
The petitioner has completed a term of probation for a conviction under Penal Code section 647(b).
The petitioner should be granted relief because the petitioner can establish by clear and convincing evidence that the conviction was the result of his or her status as a victim of human trafficking. *(Please note: You may complete and attach the Attached* Declaration *(form MC-031) or submit other relevant documents to establish that the conviction was the result of your status as a victim of human trafficking.)*

5. ☐ **Felony county jail sentence under Penal Code section 1170(h)(5) *(Pen. Code, § 1203.41)***
The petitioner is not under supervision under Penal Code section 1170(h)(5)(B) and is not serving a sentence for, on probation for, or charged with the commission of any offense, and should be granted relief in the interests of justice, and *(check one:)*
a. ☐ more than one year has elapsed since petitioner completed the felony county jail sentence **with** a period of mandatory supervision imposed under Penal Code section 1170(h)(5)(B); ***or***
b. ☐ more than two years have elapsed since petitioner completed the felony county jail sentence **without** a period of mandatory supervision imposed under Penal Code section 1170(h)(5)(A).

(*Please note: You must explain why granting a dismissal would be in the interests of justice. You may complete and attach the* Attached Declaration *(form MC-031) or submit other relevant documents.)*

Petitioner requests that the eligible felony offenses listed above be reduced to misdemeanors under Penal Code section 17(b).

Petitioner requests that he/she be permitted to withdraw the plea of guilty, or that the verdict or finding of guilt be set aside and a plea of not guilty be entered and the court dismiss this action under section:

☐ 1203.4, ☐ 1203.4a, ☐ 1203.41, or ☐ 1203.49 of the Penal Code.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on: _____ ▶ _____
(DATE) (SIGNATURE OF PETITIONER OR ATTORNEY)

_____ _____ _____ _____
(ADDRESS, PETITIONER) (CITY) (STATE) (ZIP CODE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	**DRAFT** **Not Approved by the Judicial Council**
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	
ORDER FOR DISMISSAL **(Pen. Code, §§ 17(b), 1203.4, 1203.4a, 1203.41, 1203.49)**	CASE NUMBER:

The court finds from the records on file in this case, and from the foregoing petition, that the petitioner *(the defendant in the above-entitled criminal action)* is eligible for the following requested relief:

1. The court **GRANTS** the petition for reduction of a felony to a misdemeanor under Penal Code section 17(b) and reduces the following felony convictions to misdemeanors.
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

2. The court **DENIES** the petition for reduction of a felony to a misdemeanor under Penal Code section 17(b) for:
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

3. The court **GRANTS** the petition for dismissal regarding the following convictions under Penal Code ☐ § 1203.4, or ☐ § 1203.4a, or ☐ § 1203.41, or ☐ § 1203.49, and it is ordered that the pleas, verdicts, or findings of guilt be set aside and vacated and a plea of not guilty be entered and that the complaint be, and is hereby, dismissed for:
   - ☐ ALL CONVICTIONS in the above-entitled action; or
   - ☐ Only the following convictions in the above-entitled action *(specify charges and date of conviction)*:

4. The court **DENIES** the petition for dismissal regarding the following convictions under Penal Code ☐ § 1203.4, or ☐ § 1203.4a, or ☐ § 1203.41, or ☐ § 1203.49 for:
   - ☐ ALL CONVICTIONS in the above-entitled action; or
   - ☐ Only the following convictions in the above-entitled action *(specify charges and date of conviction)*:

5. In granting this order under the provisions of Penal Code section 1203.49:
   a. The court finds that the petitioner was a victim of human trafficking when he or she committed the crime.
   b. ☐ The court orders the relief described in section 1203.4; or
      ☐ The court orders the relief described in section 1203.4, with the following exceptions:

Form Approved for Optional Use
Judicial Council of California
CR-181 [Rev. January 1, 2016]

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

6. If this order is granted under the provisions of Penal Code section 1203.4 or 1203.41:
   a. The petitioner is required to disclose the above conviction in response to any direct question contained in any questionnaire or application for public office, or for licensure by any state or local agency, or for contracting with the California State Lottery Commission.
   b. Dismissal of the conviction does not *automatically* relieve petitioner from the requirement to register as a sex offender. (See, e.g., Pen. Code, § 290.5.)
   c. The petitioner may also be eligible to obtain a certificate of rehabilitation and pardon under the procedure set forth in Penal Code section 4852.01 et seq.

7. If the order is granted under the provisions of Penal Code section 1203.49, the Department of Justice is hereby notified that the petitioner was a victim of human trafficking when he or she committed the crime, and the relief ordered.

8. If the order is granted under the provisions of either Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.49, the petitioner is released from all penalties and disabilities resulting from the offense except as provided in Penal Code sections 29800 and 29900 (formerly sections 12021 and 12021.1) and Vehicle Code section 13555. In any subsequent prosecution of the petitioner for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The dismissal does not permit a person to own, possess, or have in his or her control a firearm if prevented by Penal Code sections 29800 or 29900 (formerly sections 12021 and 12021.1). Dismissal of a conviction does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

9. In addition, as required by Penal Code section 299(f), relief under Penal Code sections 17(b), 1203.4, 1203.4a, 1203.41, or 1203.49 does *not* release petitioner from the separate administrative duty to provide specimens, samples, or print impressions under the DNA and Forensic Identification Database and Data Bank Act (Pen. Code, § 295 et seq.) if petitioner was found guilty by a trier of fact, not guilty by reason of insanity, or pled no contest to a qualifying offense as defined in Penal Code section 296(a).

FOR COURT USE ONLY

Date:

_____

(JUDICIAL OFFICER)

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Criminal Justice Realignment: Petition and Order for Dismissal (Military Personnel)

Committee or other entity submitting the proposal:

Criminal Law Advisory Committee

Staff contact (Name, phone and e-mail):

Eve Hershcopf, 415-865-7961
eve.hershcopf@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2014
Item 5: Dismissals for Veterans Under Penal Code section 1170.9(h) as a result of recent legislation, AB 2371 (Butler; Status. 2012, ch. 403). Authorizes courts to order dismissal relief to certain defendants who acquired a criminal record due to a mental health disorder stemming from service in the United States military.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
New Forms CR-183 and CR-184
Forms CR-180 and CR-181

No substantial arguments or opposition are expected.

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title	Action Requested
Criminal Procedure: Petition and Order for Dismissal (Military Personnel)	Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes	**Proposed Effective Date**
Approve forms CR-183 and CR-184	January 1, 2016
Proposed by	**Contact**
Criminal Law Advisory Committee Hon. Tricia Ann Bigelow, Chair	Eve Hershcopf, 415-865-7961 eve.hershcopf@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes two new optional forms, a *Petition for Dismissal (Military Personnel)* (form CR-183) and an *Order for Dismissal (Military Personnel)* (form CR-184) in response to recent legislation that authorizes courts to order dismissal relief to certain defendants who acquired a criminal record due to a mental health disorder stemming from service in the United States military. The proposed forms would incorporate the new statutory basis for relief.

Background

Recent legislation[1] added Penal Code section 1170.9(h) to authorize a defendant to petition the court for dismissal relief if the defendant was, or currently is, a member of the United States military, acquired a criminal record due to a mental health disorder stemming from service in the military, was granted probation, and has substantially complied with the conditions of probation.

For the defendant to receive dismissal relief, section 1170.9(h) requires a trial court or a court monitoring the defendant's probation to find that the defendant:

1. Is a current or former member of the United States military who acquired a criminal record due to a mental health disorder stemming from service in the military, was granted probation and, at the time probation was granted, was suffering from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of that service;

[1] Assem. Bill 2371 (Butler); Stats. 2012, ch. 403.

2. Is in substantial compliance with the conditions of probation;

3. Has successfully participated in court-ordered treatment and services to address the problems stemming from military service;

4. Does not represent a danger to the health and safety of others; and

5. Has demonstrated significant benefit from court-ordered education, treatment, or rehabilitation to clearly show that granting restorative relief would be in the interests of justice.

In determining whether granting restorative relief is in the interests of justice, the court may consider, among other factors, the defendant's completion and degree of participation in education, treatment, and rehabilitation; development of career potential; leadership and personal responsibility efforts; and contribution of service in support of the community.

If the court finds that the defendant satisfies each of the requirements noted above, section 1170.9(h) authorizes the court, by a written order setting forth the reasons for so doing, to:

1. Deem all conditions of probation, other than court-ordered victim restitution, to be satisfied, including fines, fees, assessments, and programs, and terminate probation prior to the expiration of the term of probation;

2. Reduce eligible felonies to misdemeanors pursuant to Penal Code section 17(b); and

3. Grant relief in accordance with section 1203.4.

Penal Code section 1170.9(h) dismissal distinguished from section 1203.4 dismissal

The *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181) are used by petitioners and courts to facilitate the dismissal procedures authorized by Penal Code sections 1203.4, 1203.4a, and 1203.41. It is anticipated that dismissal procedures authorized by Penal Code section 1203.49 will soon be added to these forms. Although the eligibility requirements and available relief differ to some extent with each of the subdivisions noted above, they are sufficiently similar to be contained in a single *Petition* form and a single *Order* form. The same is not true for dismissals authorized by Penal Code section 1170.9(h).

A dismissal under Penal Code section 1170.9(h) differs from the dismissals provided by sections 1203.4, 1203.4a, 1203.41, and 1203.49 in two significant ways: the manifold, explicit criteria the defendant must meet in order to be eligible for section 1170.9(h) relief, and the somewhat more extensive relief provided to those eligible defendants. Under section 1170.9(h), the defendant is released from all penalties and disabilities resulting from the conviction, with certain exceptions:

- The court has discretion to order the sealing of police records of the arrest and court records of the dismissed action, which are thereafter viewable by the public only in accordance with a court order;

- The defendant is not obligated to disclose the arrest or the set-aside conviction when information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise, except in response to a direct question in a questionnaire or application for any law enforcement position; and

- The dismissal is a bar to any future action based on the conduct in the dismissed action, though the set-aside conviction may be pleaded and proved as a prior conviction in any subsequent prosecution or for administratively revoking or suspending the defendant's driving privilege.

However, if dismissal is granted under section 1170.9(h), the defendant's DNA sample remains in the DNA databank, and the defendant is not authorized to own, possess, or have a firearm in his or her custody or control.

The Proposal

The Criminal Law Advisory Committee proposes two new optional forms, a *Petition for Dismissal (Military Personnel)* (form CR-183) and an *Order for Dismissal (Military Personnel)* (form CR-184) to incorporate the new statutory basis for relief under Penal Code section 1170.9(h) by including:

- In the caption of both forms, a reference to Penal Code section 1170.9(h);

- In item 2 of the *Petition for Dismissal (Military Personnel)*, the mandatory eligibility criteria as delineated in section 1170.9(h)(1);

- In item 3 of the *Petition for Dismissal (Military Personnel)*, the criteria for the court to consider in determining whether granting restorative relief is in the interests of justice, as delineated in section 1170.9(h)(2);

- In item 4 of the *Petition for Dismissal (Military Personnel)*, the various types of relief the court may provide as delineated in section 1170.9(h)(3);

- In item 1 of the *Order for Dismissal (Military Personnel)*, an option for the court to deem all conditions of probation to be satisfied;

- In item 2 of the *Order for Dismissal (Military Personnel)*, an option for the court to terminate probation prior to the expiration of probation;

- In items 5 and 6 of the *Order for Dismissal (Military Personnel)*, a reference to section 1170.9(h) specifying that the court grants or denies dismissal of the *felony* convictions;

- In item 7 of the *Order for Dismissal (Military Personnel)*, an option for the court to seal the police records of the arrest and the court records of the dismissed action; and

- In item 8 of the *Order for Dismissal (Military Personnel)*, the various types of relief that are automatically provided to the petitioner when the order is granted under section 1170.9(h), including certain exceptions.

By providing forms that specifically detail the requirements for a dismissal under Penal Code section 1170.9(h), and the relief available, the proposed forms will facilitate court implementation of a new procedure with unique procedural requirements, promote access to justice for self-represented defendants with military histories, and facilitate the requirement that court orders be in writing and set forth the reasons for providing the relief granted.

Alternatives Considered

In consideration of the additional burden that any new forms or form changes place on the courts, the committee considered postponing or declining to propose new forms to implement the provisions of Penal Code section 1170.9(h), and alternatively considered implementing the provisions through revisions to the *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181). The committee determined, however, that it was appropriate to propose the creation of new forms to implement the provisions of Penal Code section 1170.9(h) because implementation is required by recent legislation. Given the significant differences in eligibility and relief between Penal Code section 1170.9(h) and dismissals under sections 1203.4, 1203.4a, 1203.41, and 1203.49, the committee determined that establishing a separate set of forms for conviction dismissals for military personnel will reduce confusion and assist courts in providing dismissal relief for eligible defendants who were, or are, members of the United States military.

Implementation Requirements, Costs, and Operational Impacts

Because the forms are optional, expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

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?
- Are the proposed new forms, *Petition for Dismissal (Military Personnel*) (form CR-183) and *Order for Dismissal (Military Personnel)* (CR-184), an effective way to address the legislation adding Penal Code section 1170.9(h)?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms *Petition for Dismissal (Military Personnel*) (form CR-183) and *Order for Dismissal (Military Personnel)* (form CR-184), at pages 6–9
2. *Petition for Dismissal* (form CR-180) and *Order for Dismissal* (form CR-181), at pages 10–13
3. Assem. Bill 2371 (Butler); Stats. 2012, ch. 403

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**
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	
PETITION FOR DISMISSAL (Military Personnel) **(Pen. Code, §§ 17(b), 1170.9(h))**	CASE NUMBER:

INSTRUCTIONS

Before filing this form, petitioner should consult local rules and court staff to schedule the hearing in item 1.

1. **HEARING INFORMATION:** A hearing on this petition for dismissal has been scheduled as follows:

Date:	Time:	Department:
Location *(if different than court address above):*		

If an interpreter is needed, please specify language:

2. On *(date):* _____, the petitioner *(the defendant in the above-entitled criminal action)* was convicted of a violation of the following:

Offense *(Specify each offense in the case noted above.)*	**Code**	**Section**	**Type of offense:** *(Felony; Misdemeanor; Infraction)*	**Eligible for reduction to misdemeanor under Penal Code § 17(b)** *(Yes or No)*

If additional space is needed for listing offenses, use *Attachment to Judicial Council Form* (form MC-025).

3. **Felony or misdemeanor with probation granted (Penal Code § 1170.9(h)):**

Petitioner was granted probation on the terms and conditions set forth in the docket of the above-entitled court. At the time probation was granted, the petitioner was a person described in Penal Code section 1170.9(a) (a member of the United States military suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service) and the petitioner:

- is in substantial compliance with the conditions of that probation;
- has successfully participated in court-ordered treatment and services to address the sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from military service;
- does not represent a danger to the health or safety of others; and
- has demonstrated significant benefit from court-ordered education, treatment, or rehabilitation to clearly show that granting restorative relief would be in the interests of justice.

(Please note: You may complete and attach the Attached Declaration *(form MC-031) or submit other relevant documents in support of one or more of the above statements.)*

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

4. **The petitioner has *(check all that apply):***
   a. ☐ participated in education, treatment, and rehabilitation as ordered by the court (indicate the degree of participation and whether it was completed).
   b. ☐ progressed in formal education.
   c. ☐ developed career potential.
   d. ☐ demonstrated leadership and personal responsibility efforts.
   e. ☐ contributed service in support of the community.
   f. ☐ other factors.

   (Please note: You may complete and attach the Attached Declaration *(form MC-031) or submit other relevant documents in support of one or more of the statements checked above to explain why granting a dismissal would be in the interests of justice.)*

5. **The petitioner requests that the court order *(check all that apply):***
   a. ☐ deem all conditions of probation, other than victim restitution, to be satisfied, including fines, fees, assessment, and programs, and terminate probation prior to the expiration of the term of probation.
   b. ☐ reduce the eligible felony offenses listed above to misdemeanors under Penal Code section 17(b).
   c. ☐ permit the petitioner to withdraw the plea of guilty, or set aside the verdict or finding of guilt and enter a plea of not guilty, and the court dismiss this action and grant relief in accordance with Penal Code section 1170.9(h).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on: _____ ▶ _____
(DATE) (SIGNATURE OF PETITIONER OR ATTORNEY)

_____ _____ _____ _____
(ADDRESS, PETITIONER) (CITY) (STATE) (ZIP CODE)

Form Approved for Optional Use
Judicial Council of California
CR-183 [Rev. January 1, 2016]

PETITION FOR DISMISSAL
(Military Personnel)

Penal Code, §§ 17(b), 1170.9(h)
www.courts.ca.gov

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**
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	
ORDER FOR DISMISSAL (Military Personnel) **(Pen. Code, §§ 17(b), 1170.9(h))**	CASE NUMBER:

The court finds from the records on file in this case, and from the foregoing petition, that granting restorative relief is in the interests of justice, and that the petitioner *(the defendant in the above-entitled criminal action)* is eligible for the following requested relief:

1. ☐ The court deems all conditions of probation, other than victim restitution, to be satisfied, including fines, fees, assessments, and programs.

2. ☐ The court terminates probation prior to the expiration of the term of probation, if the term of probation has not yet expired.

3. The court **GRANTS** the petition for reduction of a felony to a misdemeanor under Penal Code section 17(b) and reduces the following felony convictions to misdemeanors:
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

4. The court **DENIES** the petition for reduction of a felony to a misdemeanor under Penal Code section 17(b) for the following felony convictions:
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

5. The court **GRANTS** the petition for dismissal regarding the following felony convictions under Penal Code § 1170.9(h), and it is ordered that the pleas, verdicts, or findings of guilt be set aside and vacated and a plea of not guilty be entered and that the complaint be, and is hereby, dismissed:
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

6. The court **DENIES** the petition for dismissal regarding the following felony convictions under Penal Code § 1170.9(h):
   - ☐ ALL FELONY CONVICTIONS in the above-entitled action; or
   - ☐ Only the following felony convictions in the above-entitled action *(specify charges and date of conviction)*:

7. The court ☐ ORDERS, or ☐ DOES NOT ORDER the sealing of police records of the arrest and court records of the dismissed action, thereafter viewable by the public only in accordance with a court order.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

8. If this order is granted under the provisions of Penal Code section 1170.9(h):
   a. The petitioner is released from all penalties and disabilities resulting from the offense(s) of which he or she has been convicted in the dismissed action.
   b. Dismissal of the conviction does not *automatically* relieve a person from the requirement to register as a sex offender under Penal Code section 290. (See, e.g., Pen. Code, § 290.5.)
   c. The petitioner is not obligated to disclose the arrest on the dismissed action, or the conviction that was set aside when information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise, except when he or she is required to disclose the arrest, the conviction that was set aside, and the dismissed action in response to any direct question contained in any questionnaire or application for any law enforcement position.
   d. The dismissal of the action shall be a bar to any future action based on the conduct charged in the dismissed action.
   e. In any subsequent prosecution for any other offense, a conviction that was set aside in the dismissed action may be pleaded and proved as a prior conviction and shall have the same effect as if the dismissal had not been granted.
   f. A conviction that was set aside in the dismissed action may be considered a conviction for the purpose of administratively revoking or suspending or otherwise limiting the petitioner's driving privilege on the ground of two or more convictions.
   g. The petitioner's DNA sample and profile in the DNA data bank shall not be removed by a dismissal.
   h. Dismissal of an accusation, information, or conviction does not authorize a petitioner to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction pursuant to Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.
   i. Dismissal of the conviction does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

9. In addition, as required by Penal Code section 299(f), relief under Penal Code sections 17(b) or 1170.9(h) does *not* release petitioner from the separate administrative duty to provide specimens, samples, or print impressions under the DNA and Forensic Identification Database and Data Bank Act (Pen. Code, § 295 et seq.) if he or she was found guilty by a trier of fact, not guilty by reason of insanity, or pled no contest to a qualifying offense as defined in Penal Code section 296(a).

FOR COURT USE ONLY

Date:

_____

(JUDICIAL OFFICER)

Item number: 03

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Probate Conservatorship: Judicial Council forms to implement the California Conservatorship Jurisdiction Act
Revise form GC-310; adopt forms GC-360, GC-361, and GC-362

Committee or other entity submitting the proposal:
Probate and Mental Health Advisory Committee

Staff contact (name, phone and e-mail): Douglas C. Miller, (818) 558-4178, douglas.c.miller@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 10, 2014
Project description from annual agenda: # 5: Develop and propose revision of one Judicial Council form and adoption of three new forms necessary to implement provisions of the California Conservatorship Jurisdiction Act (Chapter 8 of Part 3 of Division 4 of the Probate Code, commencing with section 1980), added by SB 940 (Stats. 2014, ch. 553), § 20.

If requesting July 1 or out of cycle, explain:
N/A

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Probate Conservatorship: Judicial Council forms to implement the California Conservatorship Jurisdiction Act

Proposed Rules, Forms, Standards, or Statutes
Revise form GC-310; adopt forms GC-360, GC-361, and GC-362

Proposed by
Probate and Mental Health Advisory Committee
Hon. John H. Sugiyama, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Douglas C. Miller, 818-558-4178
douglas.c.miller@jud.ca.gov

Executive Summary and Origin

Legislation enacted in 2014 added the California Conservatorship Jurisdiction Act (CCJA) to the Probate Code, effective January 1, 2016.[1] This legislation requires the Judicial Council to develop forms to implement the act. To comply with this legislative requirement, the committee is proposing the revision of an existing form and the adoption of three new forms.

Background

The CCJA is a California version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, a uniform law now enacted in 39 states; Washington, DC; and Puerto Rico. This law addresses, among many other things, jurisdictional disputes between states and between states and tribal courts of federally recognized Indian tribes, concerning what in California are conservatorship proceedings under the Probate Code. The law contains provisions that authorize a conservator appointed in one jurisdiction to register with courts of other jurisdictions and thereafter to act in those jurisdictions without court appointment or reappointment there.

New Probate Code Section 2023,[2] part of the CCJA, requires the Judicial Council, effective January 1, 2016, to "develop court rules and forms as necessary for the

[1] The CCJA was enacted by Senate Bill 940 (Stats. 2014, ch. 553) and signed by the Governor on September 25, 2014. It is located in a new chapter 8 of part 3 of division 4 of the Probate Code, commencing with section 1980.

[2] All code references are to the Probate Code unless otherwise specified.

implementation of this chapter." This section also specifies that the materials developed pursuant to this section must include:

> (1) A cover sheet for registration of a conservatorship under Section 2011 (conservatorship of the person), 2012(conservatorship of the estate), or 2013 (conservatorship of the person and estate).
>
> (2) A form for an attestation to prove registration of a foreign conservatorship which gives the foreign conservator eligibility to act in this state. The statute also permits the Judicial Council to include this attestation in the registration cover sheet.
>
> (3) A form for providing advance notice of intent to register a conservatorship; and
>
> (4) A form for a conservator to acknowledge receipt of the *Handbook for Conservators.*

The Proposal

This proposal consists of four forms: a revised *Petition for Appointment of Conservator* (form GC-310) and three new forms, *Conservatorship Registration Cover Sheet and Attestation of Conservatee's Nonresidence in California* (form GC-360), *Notice of Intent to Register Conservatorship* (form GC-361), and *Conservatorship Registrant's Acknowledgment of Receipt of* Handbook For Conservators (form GC-362).

Form GC-310

The CCJA contains directions to the Judicial Council to revise the *Petition for Appointment of Conservator* (form GC-310) to inquire about a proposed conservatee's possible connection with a federally recognized Indian tribe. To comply with this direction, this proposal would revise form GC-310 to add new item 4d on page 4 of the form, as follows:

> d. [The proposed conservatee] [ ] is [ ] is not so far as is known to petitioner, a member of a federally recognized Indian tribe.
>
> *(If you answered "is," complete the following item):*
>
> (1) Name of Tribe
>
> (2) Location of tribe *(if the tribe is located in more than one state, the state that is the tribe's principal location)*:
>
> (3) The proposed conservatee [ ] does [ ] does not reside on tribal land.*

(4) So far as known to petitioner, the proposed conservatee [ ] owns [ ] does not own property on tribal land.

The asterisk at the end of paragraph (d)(3) draws attention to the statutory definition of tribal land for purposes of the CCJA at the bottom of the page:

* "Tribal land" is land that is, with respect to a specific Indian tribe and the members of that tribe, "Indian country," as defined in 18 U.S.C. § 1151. (See § 2031(c).)

Form GC-360

The proposed new *Conservatorship Registration Cover Sheet and Attestation of Conservatee's Nonresidence in California* (form GC-360) is the basic registration document required by the CCJA for foreign conservators to file with California courts to register their conservatorships in this state under new Probate Code sections 2011 (conservatorship of the person), 2012 (conservatorship of the estate), or 2013 (conservatorship of the person and estate). The proposed form includes all of the specific elements that the CCJA requires be included in this form.[3] As permitted by section 2023(b)(2), the form also includes the registration attestation form required by section 2017(a)(3). The attestation is on the lower portion of page 2 of the form.

This proposed form calls for the identification of the registrant's California attorney, if any, at the top of the form. It also calls for necessary information about the foreign conservatorship, including the title of the court, the department where the matter is assigned, the title of the proceeding, and the case number in the other jurisdiction. The proposed form also states the basic requirements for registration of foreign conservatorships under the CCJA, including that the conservatee cannot be a resident of California unless his or her conservatorship order was made by a court of a California Indian tribe, an exception required by section 2019(a).

The form includes space for recording information. The CCJA (§ 2018(a)) authorizes recordation of a file-stamped copy of the registration documents in the office of any county recorder in California.

[3] Section 2023 states in part as follows:

> The cover sheet shall explain that a proceeding may not be registered under Section 2011, 2012, or 2013 if the proceeding relates to a minor. The cover sheet shall further explain that a proceeding in which a person is subjected to involuntary mental health care may not be registered under Section 2011, 2012, or 2013. The cover sheet shall require the conservator to initial each of these explanations. The cover sheet shall also prominently state that when a conservator acts pursuant to registration, the conservator is subject to the law of this state governing the action, including, but not limited to, all applicable procedures, and is not authorized to take any action prohibited by the law of this state. Except as provided in subdivision (c), the cover sheet shall also prominently state that the registration is effective only while the conservatee resides in another jurisdiction and does not authorize the conservator to take any action while the conservatee is residing in this state. Directly beneath these statements, the cover sheet shall include a signature box in which the conservator attests to these matters.

Form GC-361

Proposed new *Notice of Intent to Register Conservatorship* (form GC-361) is the required form for giving advance notice of registration. The proposed form includes all of the specific elements that the CCJA requires to be included in this form.[4]

This form is not filed with the court, except perhaps as an exhibit. Therefore, it does not contain the usual spaces at the top of the first page for a court filing stamp and California case number.

Form GC-362

Proposed new *Conservatorship Registrant's Acknowledgment of Receipt of* Handbook for Conservators (form GC-362) is a form that the CCJA requires to be filed by registrants. That requirement mimics regular conservatorship practice for new conservators and the form in turn mimics the Acknowledgment of Receipt section of the current *Duties of Conservator and Acknowledgment of Receipt of Handbook for Conservators (Probate—Guardianships and Conservatorships)* (form GC-348).

Alternatives Considered

No alternatives to the revised and proposed new forms were considered because their revision or adoption is specifically required by statute.

Implementation Requirements, Costs, and Operational Impacts

The entire new registration process authorized by the CCJA for foreign conservatorships will likely impose considerable implementation requirements, costs, and impacts. These are attributable to the registration process itself, not to the forms proposed here. The entire CCJA,

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[4] Sections 2014(b)(1)–(3) and (c) establish the following requirements for this form:

> (1) The notice shall prominently state that when a conservator acts pursuant to this article, the conservator is subject to the law of this state governing the action, including, but not limited to, all applicable procedures, and is not authorized to take any action prohibited by the law of this state.
>
> (2) The notice shall explain that if a conservatorship is registered pursuant to this article, and the conservator later proposes to take a specific action pursuant to this article, which, under the law of this state, requires court approval or other action in court, the conservator will be required to notify the recipient of the request for court approval or other court action, and the recipient will have an opportunity to object or otherwise participate at that time, in the same manner as other persons are entitled to object or otherwise participate under the law of this state.
>
> (3) The notice shall advise the recipient that information about a conservator's rights, duties, limitations, and responsibilities under the law of this state is available, free of charge, on an Internet Web site maintained by the Judicial Council. The notice shall explain specifically how to locate that information on the Judicial Council's Internet Web site.
>
> (c) Except as provided in subdivision (c) of Section 2023, each notice provided pursuant to subdivision (a) shall also prominently state that the registration is effective only while the conservatee resides in another jurisdiction and does not authorize the conservator to take any action while the conservatee is residing in this state.

including its registration provisions, will require significant judicial officer, court staff, and probate bar training and education.

To offset at least some of these costs the CCJA established a fee of $30 for registration.[5] Any additional filings that are required by the CCJA to seek court approval of proposed actions under California law would require the payment of the same filing fees as are charged for those matters in domestic conservatorships.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

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

- Would the forms proposal, as opposed to the entire foreign conservatorship registration process required by the CCJA, 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?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed new and revised forms GC-310, GC-360, GC-361, and GC-362, at pages 6–20
2. The California Conservatorship Jurisdiction Act, Senate Bill 940, at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB940&search_keywords=*

[5] See new Government Code section 70663.

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
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF *(name):* (PROPOSED) CONSERVATEE	
PETITION FOR APPOINTMENT OF ☐ SUCCESSOR PROBATE CONSERVATOR OF THE ☐ PERSON ☐ ESTATE ☐ **Limited Conservatorship**	CASE NUMBER: HEARING DATE AND TIME: DEPT.:

1. **Petitioner *(name):*** **requests that**

   a. *(Name):* *(Telephone):*
   (Address):

   be appointed ☐ successor ☐ conservator ☐ limited conservator of the PERSON of the (proposed) conservatee and Letters issue upon qualification.

   b. *(Name):* *(Telephone):*
   (Address):

   be appointed ☐ successor ☐ conservator ☐ limited conservator of the ESTATE of the (proposed) conservatee and Letters issue upon qualification.

   c. (1) ☐ bond not be required ☐ because the proposed ☐ successor conservator is a corporate fiduciary or an exempt government agency. ☐ for the reasons stated in Attachment 1c.

   (2) ☐ bond be fixed at: $ to be furnished by an authorized surety company or as otherwise provided by law. *(Specify reasons in Attachment 1c if the amount is different from the minimum required by Probate Code section 2320.)*

   (3) ☐ $ in deposits in a blocked account be allowed. Receipts will be filed.
   (Specify institution and location):

   d. ☐ orders authorizing independent exercise of powers under Probate Code section 2590 be granted. Granting the proposed ☐ successor conservator of the estate powers to be exercised independently under Probate Code section 2590 would be to the advantage and benefit and in the best interest of the conservatorship estate. *(Specify orders, powers, and reasons in Attachment 1d.)*

   e. ☐ orders relating to the capacity of the (proposed) conservatee under Probate Code section 1873 or 1901 be granted. *(Specify orders, facts, and reasons in Attachment 1e.)*

   f. ☐ orders relating to the powers and duties of the proposed ☐ successor conservator of the person under Probate Code sections 2351–2358 be granted. *(Specify orders, facts, and reasons in Attachment 1f.)*

   g. ☐ the (proposed) conservatee be adjudged to lack the capacity to give informed consent for medical treatment or healing by prayer and that the proposed ☐ successor conservator of the person be granted the powers specified in Probate Code section 2355. *(Complete item 9 on page 6.)*

Do NOT use this form for a temporary conservatorship.

Form Adopted for Mandatory Use
Judicial Council of California
GC-310 [Rev. January 1, 2016]

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR
(Probate—Guardianships and Conservatorships)

Probate Code, §§ 1820, 1821, 2680–2682
www.courts.ca.gov

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

1. h. ☐ *(for limited conservatorship only)* orders relating to the powers and duties of the proposed limited ☐ successor * conservator of the person under Probate Code section 2351.5 be granted. *(Specify orders, powers, and duties in Attachment 1h and complete item 1j.)*

   i. ☐ *(for limited conservatorship only)* orders relating to the powers and duties of the proposed limited ☐ successor * conservator of the estate under Probate Code section 1830(b) be granted. *(Specify orders, powers, and duties in Attachment 1i and complete item 1j.)*

   j. ☐ *(for limited conservatorship only)* orders limiting the civil and legal rights of the (proposed) limited conservatee be granted. *(Specify limitations in Attachment 1j.)*

   k. ☐ orders related to dementia placement or treatment as specified in the *Attachment Requesting Special Orders Regarding Dementia* (form GC-313) under Probate Code section 2356.5 be granted. A *Capacity Declaration—Conservatorship* (form GC-335) and *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A), executed by a licensed physician or by a licensed psychologist acting within the scope of his or her licensure with at least two years experience diagnosing dementia, ☐ are filed herewith. ☐ will be filed before the hearing.

   ☐ (appointment of successor conservator only) will not be filed because an order relating to dementia placement or treatment was filed on *(date):* . That order has neither expired by its terms nor been revoked.

   l. ☐ other orders be granted. *(Specify in Attachment 1*l*.)*

2. (Proposed) conservatee is *(name):* *(Telephone):*
   (Present address):

3. a. ☐ **Jurisdictional facts** *(initial appointment only)* The proposed conservatee has no conservator in California and is a
   (1) ☐ resident of California and
   (a) ☐ a resident of this county.
   (b) ☐ not a resident of this county, but commencement of the conservatorship in this county is in the best interests of the proposed conservatee for the reasons specified in Attachment 3a.
   (2) ☐ nonresident of California but
   (a) ☐ is temporarily living in this county, or
   (b) ☐ has property in this county, or
   (c) ☐ commencement of the conservatorship in this county is in the best interest of the proposed conservatee for the reasons specified in Attachment 3a.

   b. **Petitioner** *(answer items (1) and (2) and check all other items that apply)*
   (1) ☐ is ☐ is not a **creditor** or an agent of a creditor of the (proposed) conservatee.
   (2) ☐ is ☐ is not a **debtor** or an agent of a debtor of the (proposed) conservatee.
   (3) ☐ is the proposed ☐ successor conservator.
   (4) ☐ is the (proposed) conservatee. *(If this item is* **not** *checked, you must also complete item 3f.)*
   (5) ☐ is the spouse of the (proposed) conservatee. *(You must also complete item 6.)*
   (6) ☐ is the domestic partner or former domestic partner of the (proposed) conservatee. *(You must also complete item 7.)*
   (7) ☐ is a relative of the (proposed) conservatee as *(specify relationship):*
   (8) ☐ is an interested person or friend of the (proposed) conservatee.
   (9) ☐ is a state or local public entity, officer, or employee.
   (10) ☐ is the guardian of the proposed conservatee.
   (11) ☐ is a bank ☐ is other entity authorized to conduct the business of a trust company.
   (12) ☐ is a professional fiduciary within the meaning of Business and Professions Code section 6501(f) who is licensed by the Professional Fiduciaries Bureau of the Department of Consumer Affairs. Petitioner's license number is provided in item 1 on page 1 of the attached Professional Fiduciary Attachment. *(Use form GC-210(A-PF)/GC-310(A-PF) for this attachment. You must also complete item 2 on page 2 of that form and item 3d below.)*

*** See item 5b on page 4.**

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

3. c. **Proposed** ☐ **successor** **conservator** is *(check all that apply)*

(1) ☐ a nominee. *(Affix nomination as Attachment 3c(1).)*
(2) ☐ the spouse of the (proposed) conservatee. *(You must also complete item 6.)*
(3) ☐ the domestic partner or former domestic partner of the (proposed) conservatee. *(You must also complete item 7.)*
(4) ☐ a relative of the (proposed) conservatee as *(specify relationship):*
(5) ☐ a bank. ☐ other entity authorized to conduct the business of a trust company.
(6) ☐ a nonprofit charitable corporation that meets the requirements of Probate Code section 2104.
(7) ☐ a professional fiduciary, as defined in Business and Professions Code section 6501(f). His or her statement concerning licensure or exemption is provided in item 1 on page 1 of the attached *Professional Fiduciary Attachment. (Use form GC-210(A-PF)/GC-310(A-PF) for this attachment.)*
(8) ☐ other *(specify):*

d. ☐ Engagement and prior relationship with petitioning professional fiduciary *(complete this item if petitioner is licensed by the Professional Fiduciaries Bureau.)*

(1) ☐ Statements of who engaged petitioner, or how petitioner was engaged to file this petition, and a description of any prior relationship petitioner had with the (proposed) conservatee or his or her family or friends, are provided in item 2 on page 2 of the attached *Professional Fiduciary Attachment. (Use form GC-210(A-PF)/ GC-310(A-PF) for this attachment.)*

(2) ☐ A petition for appointment of a temporary conservator is filed with this petition. That petition contains statements of who engaged petitioner, how petitioner was engaged to file this petition, and a description of any prior relationship petitioner had with the (proposed) conservatee or his or her family and friends.

e. **Character and estimated value of the property of the estate** *(complete items (1) or (2) and (3), (4), and (5)):*

(1) ☐ (For appointment of successor conservator only, if complete Inventory and Appraisal filed by predecessor):
Personal property: $, per Inventory and Appraisal filed in this proceeding on
(specify dates of filing of all inventories and appraisals):

(2) ☐ Estimated value of personal property: $

(3) Annual gross income from
(a) real property: $
(b) personal property: $
(c) pensions: $
(d) wages: $
(e) public assistance benefits: $
(f) other: $ _____

(4) **Total** of (1) or (2) and (3): $ _____

(5) Real property: $
(a) ☐ per Inventory and Appraisal identified in item (1).
(b) ☐ estimated value.

f. ☐ Due diligence *(complete this item if the (proposed) conservatee is not a petitioner):*

(1) Efforts to find the (proposed) conservatee's relatives or reasons why it is not feasible to contact any of them are described on Attachment 3f(1).

(2) Statements of the (proposed) conservatee's preferences concerning the appointment of any (successor) conservator and the appointment of the proposed (successor) conservator or reasons why it is not feasible to ascertain those preferences are contained on Attachment 3f(2).

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

4. **(Proposed) conservatee**

a. ☐ is ☐ is not a patient in or on leave of absence from a state institution under the jurisdiction of the California Department of Mental Health or the California Department of Developmental Services *(specify state institution):*

b. ☐ is receiving or entitled to receive ☐ is neither receiving nor entitled to receive benefits from the U.S. Department of Veterans Affairs *(estimate amount of monthly benefit payable):*

c. ☐ is ☐ is not able to complete an affidavit of voter registration.

d. ☐ is ☐ is not, so far as is known to petitioner, a member of a federally recognized Indian tribe. *(If you answered "is," complete items (1)–(4)):*

(1) Name of tribe:

(2) Location of tribe *(if the tribe is located in more than one state, the state that is the tribe's principal location):*

(3) The proposed conservatee ☐ does ☐ does not reside on tribal land.*

(4) So far as known to petitioner, the proposed conservatee ☐ owns ☐ does not own property on tribal land.

5. a. ☐ Proposed conservatee *(initial appointment of conservator only)*

(1) ☐ is an adult.
(2) ☐ will be an adult on the effective date of the order *(date):*
(3) ☐ is a married minor.
(4) ☐ is a minor whose marriage has been dissolved.

b. ☐ Vacancy in office of conservator *(appointment of successor conservator only. A petition for appointment of a limited conservator after the death of a predecessor is a petition for initial appointment. (Prob. Code, § 1860.5(a)(1).)*

There is a vacancy in the office of conservator of the ☐ person ☐ estate for the reasons ☐ specified in Attachment 5b. ☐ specified below.

***"Tribal land" is land that is, with respect to a specific Indian tribe and the members of that tribe, "Indian country," as defined in 18 U.S.C. § 1151.**

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

5.c. **(Proposed) conservatee** requires a conservator and is

(1) ☐ unable to properly provide for his or her personal needs for physical health, food, clothing, or shelter.
Supporting facts are ☐ specified in Attachment 5c(1) ☐ as follows:

(2) ☐ substantially unable to manage his or her financial resources or to resist fraud or undue influence.
Supporting facts are ☐ specified in Attachment 5c(2) ☐ as follows:

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

5. d. ☐ (Proposed) conservatee voluntarily requests the appointment of a ☐ successor conservator. *(Specify facts showing good cause in Attachment 5(d).)*
   e. ☐ *Confidential Supplemental Information* (form GC-312) is filed with this petition. *(Initial appointment of conservator only. All petitioners must file this form except banks and other entities authorized to do business as a trust company.)*
   f. (**Proposed) conservatee** ☐ is ☐ is not developmentally disabled as defined in Probate Code section 1420. Petitioner is aware of the requirements of Probate Code section 1827.5. *(Specify the nature and degree of the alleged disability in Attachment 5f).*

6. ☐ **Petitioner or proposed** ☐ **successor conservator is the spouse of the (proposed) conservatee.**
   (If this statement is true, you must answer a or b.)
   a. ☐ The (proposed) conservatee's spouse is not a party to any action or proceeding against the (proposed) conservatee for legal separation, dissolution of marriage, annulment, or adjudication of nullity of their marriage.
   b. ☐ Although the (proposed) conservatee's spouse is a party to an action or proceeding against the (proposed) conservatee for legal separation, dissolution, annulment, or adjudication of nullity of their marriage, or has obtained a judgment in one of these proceedings, it is in the best interest of the (proposed) conservatee that:
      (1) ☐ a ☐ successor conservator be appointed.
      (2) ☐ the spouse be appointed as the ☐ successor conservator.
      (If you checked item 6b(1) or (2) or both, specify the facts and reasons in Attachment 6b.)

7. ☐ **Petitioner or proposed** ☐ **successor conservator is the domestic partner or former domestic partner of the (proposed) conservatee.** *(If this statement is true, you must answer a or b.)*
   a. ☐ The domestic partner of the (proposed) conservatee has not terminated and does not intend to terminate the domestic partnership.
   b. ☐ Although the domestic partner or former domestic partner of the (proposed) conservatee intends to terminate or has terminated the domestic partnership, it is in the best interest of the (proposed) conservatee that
      (1) ☐ a ☐ successor conservator be appointed.
      (2) ☐ the domestic partner or former domestic partner be appointed as the ☐ successor conservator.
      (If you checked item 7b(1) or (2) or both, specify the facts and reasons in Attachment 7b.)

8. **(Proposed) conservatee** *(check all that apply)*
   a. ☐ will attend the hearing AND ☐ is the petitioner ☐ is not the petitioner AND ☐ has ☐ has not nominated the proposed ☐ successor conservator.
   b. ☐ *(initial appointment of conservator only)* is able but unwilling to attend the hearing AND ☐ does ☐ does not wish to contest the establishment of a conservatorship, ☐ does ☐ does not object to the proposed conservator, AND ☐ does ☐ does not prefer that another person act as conservator.
   c. ☐ *(initial appointment of conservator only):* is unable to attend the hearing because of medical inability. A *Capacity Declaration—Conservatorship* (form GC-335), executed by a licensed medical practitioner or an accredited religious practitioner ☐ is filed with this petition. ☐ will be filed before the hearing.
   d. ☐ *(initial appointment of conservator only)* is not the petitioner, is out of state, and will not attend the hearing.
   e. ☐ *(appointment of successor conservator only)* will not attend the hearing.

9. ☐ **Medical treatment of (proposed) conservatee**
   a. There is no form of medical treatment for which the (proposed) conservatee has the capacity to give an informed consent.
   b. A *Capacity Declaration—Conservatorship* (form GC-335) executed by a licensed physician or by a licensed psychologist acting within the scope of his or her licensure, stating that the (proposed) conservatee lacks the capacity to give informed consent for any form of medical treatment and giving reasons and the factual basis for this conclusion,
      ☐ is filed with this petition. ☐ will be filed before the hearing. ☐ will not be filed for the reason stated in c.
   c. ☐ *(appointment of successor conservator only)* The conservatee's incapacity to consent to any form of medical treatment was determined by order filed in this matter on *(date):*
      That order has neither expired by its terms nor been revoked.
   d. (Proposed) conservatee ☐ is ☐ is not an adherent of a religion that relies on prayer alone for healing, as defined in Probate Code section 2355(b).

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

10. ☐ **Temporary conservatorship**
Filed with this petition is a *Petition for Appointment of Temporary Conservator* (form GC-111).

11. **(Proposed) conservatee's relatives**

The names, residence addresses, and relationships of the spouse or registered domestic partner and the second-degree relatives of the (proposed) conservatee (his or her parents, grandparents, children, grandchildren, and brothers and sisters), so far as known to petitioner, are

a. ☐ listed below.

b. ☐ not known, or no longer living, so the (proposed) conservatee's deemed relatives under Probate Code section 1821(b)(1)–(4) are listed below.

	Name and relationship to conservatee	Residence address
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
(10)		
(11)		
(12)		
(13)		
(14)		
(15)		
(16)		

☐ Continued on Attachment 11.

CONSERVATORSHIP OF *(name):* CONSERVATEE	CASE NUMBER:

12. ☐ **Confidential conservator screening form**

Submitted with this petition is a *Confidential Conservator Screening Form* (form GC-314) completed and signed by the proposed ☐ successor conservator. *(Required for all proposed conservators except banks and trust companies.)*

13. ☐ **Court investigator**

Filed with this petition is a proposed *Order Appointing Court Investigator* (form GC-330).

14. Number of pages attached:

Date:

(TYPE OR PRINT NAME OF ATTORNEY FOR PETITIONER)

▶ (SIGNATURE OF ATTORNEY FOR PETITIONER)

(All petitioners must also sign (Prob. Code, § 1020; Cal. Rules of Court, rule 7.103).)

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 OF PETITIONER)

▶ (SIGNATURE OF PETITIONER)

(TYPE OR PRINT NAME OF PETITIONER)

▶ (SIGNATURE OF PETITIONER)

GC-360

CALIFORNIA ATTORNEY OR REGISTRANT WITHOUT CALIFORNIA ATTORNEY *(Name, address, and State Bar number):*

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:

FOR RECORDER'S USE ONLY

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF

(Name):

CONSERVATEE

CALIFORNIA REGISTRATION NUMBER:

CONSERVATORSHIP REGISTRATION COVER SHEET AND ATTESTATION OF CONSERVATEE'S NONRESIDENCE IN CALIFORNIA

(California Conservatorship Jurisdiction Act)

FOR COURT USE ONLY

Draft
Not Approved by the Judicial Council

JURISDICTION WHERE CONSERVATORSHIP OR ADULT GUARDIANSHIP CASE FILED:

COURT:	DEPT.:	CASE NUMBER:

TITLE OF PROCEEDING:

INFORMATION AND INSTRUCTIONS FOR REGISTRANTS

The California Conservatorship Jurisdiction Act (Prob. Code. §§1980–2300) is California's modified version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Terms and phrases used in this Cover Sheet that are defined in California Probate Code sections 1982 or 2031 are in italics and have the meanings provided in those sections; all further statutory references are to that code. A *conservator of the person* in California is a fiduciary that is referred to in many other states or jurisdictions as the guardian of the person of an adult; a *conservator of the estate* in California is a person who is referred to in many other states or jurisdictions as the guardian of the estate of an adult or a person authorized by law to preserve and manage the property and finances of a protected person, who is a person for whom a court has issued a protective order; a *conservator of the person and estate* in California is a person who has the combined powers and authority of a *conservator of the person* and a *conservator of the estate* of an adult person, who is referred to in California as the *conservatee*. A *conservator* may be a conservator of the person, of the estate, or of the person and estate of a *conservatee*.

A *conservator* appointed by a court of a state other than California; or by a court of the District of Columbia, Puerto Rico, United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States; or by a court of an *Indian tribe with jurisdiction*, including a *California tribe*, may register the *conservatorship order* with a California superior court in accordance with sections 2011 *(conservatorship of the person),* 2012 *(conservatorship of the estate),* or 2013 *(conservatorship of the person and estate)*. Registration is accomplished, after giving notice as required by section 2014, by **filing a signed and initialed copy of this Cover Sheet together with proof of notice** and **certified copies of (1) the appointing court's *conservatorship order*, (2) Letters of Conservatorship or other letters of office, and (3) any surety bond** with an appropriate California superior court identified in sections 2011, 2012, or 2013.

Upon registration and receipt of the written information concerning a *conservator's* rights, duties, limitations, and responsibilities in California described in sections 1835 and 2015, and the filing of the *conservator's* written acknowledgement of receipt of that information, the *conservator* may, while the *conservatee* resides outside of California or if the *conservatorship order* was made by the court of a *California tribe,* exercise in any county of this state all of the powers authorized in the *conservatorship order,* except as prohibited by the law of California, including maintaining actions and proceedings in this state (subject to any conditions imposed on nonresident parties if the *conservator* is not a resident of California). See section 2016.

*** Court where registration is made *(prepare separate cover sheet for each court where registration is to be made).***

Form Adopted for Mandatory Use
Judicial Council of California
GC-360 [New January 1, 2016]

CONSERVATORSHIP REGISTRATION COVER SHEET AND ATTESTATION OF CONSERVATEE'S NONRESIDENCE IN CALIFORNIA
(Probate—Guardianships and Conservatorships)

Probate Code, §§ 2011—2013, 2017, 2023;
www.courts.ca.gov

CONSERVATORSHIP OF *(Name):* CONSERVATEE	CALIFORNIA REGISTRATION NUMBER:

Registration may be available if **all** of the following facts are true:

1. The *conservatee* is over the age of 18 years *(place your initials here):* _____;

2. Under the law under which his or her *conservator* was appointed, the *conservatee* may not be involuntarily committed to a mental health facility or subjected to other involuntary mental health care that is similar to the California mental health proceedings listed in section 1981(b) *(place your initials here):* _____; and

3.There is no petition pending in a California state court for the appointment of a *conservator* for the *conservatee.*

EFFECT OF CALIFORNIA LAW AND CONSERVATEE'S RESIDENCE IN CALIFORNIA

A *conservator* acting under the authority of a registration under sections 2011, 2012, or 2013 is subject to the law of California governing the action, including all applicable court procedures, and is not authorized to take any action prohibited by that law. If a California law, including sections 2356.5, 2540, 2543, 2545, or 2591.5, or article 2 (commencing with section 1880) of chapter 4 of part 3 of division 4 of the code, mandates compliance with special requirements to exercise a particular power or take a particular step, a *conservator* registered under sections 2011, 2012, or 2013 may not exercise that power or take that step without first complying with those requirements. If the requirement is to obtain court approval or take other action in court, the *conservator* must seek that approval or otherwise proceed as needed in an appropriate California state court. California law also includes limitations on the authority of fiduciaries who are not authorized to practice law in California, including *conservators*, to appear in California state courts without attorneys so authorized.

Except in the case of the registration of a *conservatorship order* of a *California tribe*, registration is effective only while the *conservatee* resides outside California and does not authorize the *conservator* to take any action while the *conservatee* resides in California.

CONSERVATOR'S ATTESTATION OF CONSERVATEE'S NONRESIDENCE IN CALIFORNIA
(Probate Code section 2017)

I am the registrant named below and the conservator of the conservatee named above.

☐ The conservatee does not reside in the State of California as of the date shown below.

☐ The conservatee resides in California as of the date shown below. My appointment as conservator was made by a court of a *California tribe*, which is an *Indian tribe with jurisdiction* under the California Conservatorship Jurisdiction Act (chapter 8 of part 3 of division 4 of the Probate Code, commencing with section 1980). (See section 1982.)

I promise to notify promptly any person to whom I have delivered a copy of this Conservatorship Registration Cover Sheet and Attestation of Conservatee's Non-Residence in California if the conservatee becomes a resident of the State of California. This promise does not apply to a conservatee who resides in California if his or her conservator was appointed by a court of a *California tribe* that is an *Indian tribe with jurisdiction* under the California Conservatorship Jurisdiction Act.

I declare under penalty of perjury under the laws of the State of California that I have read and understand the foregoing and that it is true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF REGISTRANT)

CALIFORNIA ATTORNEY OR INTENDED REGISTRANT WITHOUT CALIFORNIA ATTORNEY *(name, address, and State Bar number):*

TELEPHONE NO.: FAX NO. :

E-MAIL ADDRESS:

ATTORNEY FOR *(Name):*

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF

(Name):

CONSERVATEE

NOTICE OF INTENT TO REGISTER CONSERVATORSHIP*

(California Conservatorship Jurisdiction Act)

JURISDICTION WHERE CONSERVATORSHIP OR ADULT GUARDIANSHIP CASE FILED:

COURT:	DEPT.:	CASE NUMBER:

TITLE OF PROCEEDING:

1. NOTICE is given that *(name):*
(specify fiduciary or representative capacity):
intends to register the conservatorship proceeding identified above with the following California superior court:
Superior Court, County of , on or after *(specify date**):* .

2. NOTICE is further given that:

a. A conservator in a conservatorship registered in California under the California Conservatorship Jurisdiction Act (chapter 8 of part 3 of division 4 of the Probate Code, commencing with section 1980) taking an action under the Act is fully subject to the law of California governing the action, including all applicable court procedures concerning the action, and is not authorized to take any action prohibited by that law.

b. If a conservator in a conservatorship registered in California under the Act proposes to take a specific action that requires court approval or other action in court under California law, the conservator will be required to notify any person entitled to receive a copy of this Notice of the request for court approval or other court action. The person notified will have an opportunity to object or otherwise participate in the court proceeding at that time, in the same manner as other persons are entitled to object or otherwise participate under the law of California.

c. Information about a conservator's rights, duties, limitations, and responsibilities under California law may be found in a publication titled *Handbook for Conservators,* which is posted on the Judicial Council of California's website at: *www.courts.ca.gov/documents/handbook.pdf.*

d. Except in the case of a conservatorship filed in and supervised by the court of a California Indian tribe with jurisdiction, registration of a conservatorship in California is effective only while the conservatee resides outside California and does not authorize the conservator to take any action while the conservatee resides in California.

*** Prepare and serve (deliver) a separate *Notice of Intent to Register Conservatorship* for each court in which you intend to register this conservatorship.**

**** The date of registration must be 15 or more days after this notice is mailed or personally delivered (Prob. Code, § 2014(a)) .**

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF

(Name):

CONSERVATEE

INSTRUCTIONS FOR DELIVERY OR SERVICE OF NOTICE OF INTENT TO REGISTER

A copy of this *Notice of Intent to Register Conservatorship* must be delivered, at least 15 days before registration of the conservatorship in California, to (1) the court that is supervising the conservatorship or guardianship proceeding in the state or other jurisdiction other than California shown on the first page of this form; (2) each person who has the right under the law of that jurisdiction to notice of the date, time, and place of a court hearing on a petition for the appointment of a guardian of an adult or a conservator; and (3) each person who would be entitled to notice of the date, time, and place of a court hearing on a petition for the appointment of a conservator in California (see Prob. Code §§ 1821–1824). These copies may be delivered by mail. However, copies of this Notice may be personally delivered instead of mailed. The registrant (the person who intends to register the conservatorship in California) must show the court that copies of this Notice have been delivered in compliance with applicable law. The registrant does this by performing the delivery and completing and signing a proof of delivery. The Notice is then combined with certified copies of the conservatorship appointment order, Letters of Conservatorship or other letters of office, any surety bond, and the original signed *Conservatorship Registration Cover Sheet and Attestation of Conservatee's Nonresidence in California* (form GC-360) for filing in the California court selected for registration (see Prob. Code §§ 2011– 2013).

Pages 2–4 of this form contain a proof of delivery that may be used only to show delivery by mail. To show personal delivery, each person who performs the delivery must complete and sign a proof of personal delivery or service, and each signed copy of that proof must be attached to this Notice when it is delivered to the court to complete registration. You may use form number POS-020(P) to show personal delivery of this Notice. A fillable copy of that form (and all other forms, listed by their form numbers) may be found on the Judicial Council's Internet website, at *www.courts.ca.gov/formnumber.htm.*

PROOF OF DELIVERY BY MAIL

1. I am over the age of 18 years. I am a resident of or employed in the county where the mailing occurred.
2. My residence or business address is *(specify):*

3. I delivered the foregoing *Notice of Intent to Register Conservatorship* on each person named below by enclosing a copy in an envelope addressed as shown below AND
   a. ☐ depositing the sealed envelope with the United States Postal Service on the date and at the place shown in item 4 with the postage fully prepaid.
   b. ☐ placing the envelope for collection and mailing on the date and at the place shown in item 4 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
4. a. Date mailed: b. Place mailed *(city, state):*

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 OF PERSON COMPLETING THIS FORM) (SIGNATURE OF PERSON COMPLETING THIS FORM)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

Name and Relationship to Conservatee	Address *(number, street, city, state, and zip code)*
1. Appointing or Supervising Court	
2. Conservatee or Ward	

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF

(Name):

CONSERVATEE

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

Name and Relationship to Conservatee	Address *(number, street, city, state, and zip code)*

3. Persons Entitled to Notice of Hearing of Petition for Appointment of Conservator or Guardian in Appointing Court

☐ Additional persons listed on Attachment 3 (you may use form POS-30(P) for this purpose).

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF

(Name):

CONSERVATEE

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

Name and Relationship to Conservatee	Address *(number, street, city, state, and zip code)*

4. Persons Entitled to Notice of Hearing of Petition for Appointment of Conservator in California (Prob. Code, § § 1821–1824)*

☐ Additional persons listed on Attachment 4 (you may use form POS-30(P) for this purpose).

*** You do not need to repeat names, relationships to Conservatee, and addresses of persons listed in item 3.**

CALIFORNIA ATTORNEY OR REGISTRANT WITHOUT CALIFORNIA ATTORNEY *(Name, address, and State Bar number):*	*FOR COURT USE ONLY*
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: *** Court where registration is filed.**	
CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name):* CONSERVATEE	

CONSERVATORSHIP REGISTRANT'S ACKNOWLEDGMENT OF RECEIPT OF *HANDBOOK FOR CONSERVATORS* *
(California Conservatorship Jurisdiction Act)

CALIFORNIA REGISTRATION NUMBER:

JURISDICTION WHERE CONSERVATORSHIP OR ADULT GUARDIANSHIP CASE FILED:

COURT:	DEPT.:	CASE NUMBER:

TITLE OF PROCEEDING:

I acknowledge that I have received the *Handbook for Conservators* adopted by the California Judicial Council.

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 CONSERVATORSHIP REGISTRANT)

*** File this form with each California superior court where you registered the conservatorship proceeding identified above.**

Form Adopted for Mandatory Use
Judicial Council of California
GC-362 [New January 1, 2016]

CONSERVATORSHIP REGISTRANT'S ACKNOWLEDGMENT OF RECEIPT OF *HANDBOOK FOR CONSERVATORS*
(Probate—Guardianships and Conservatorships)

Probate Code, §§ 1835, 2015, 2023;
www.courts.ca.gov

*Item number*_____

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Family, Juvenile, and Probate Guardianship Law: Special Immigrant Juvenile Findings

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee, Hon. Jerilyn L. Borack & Hon. Mark A. Juhas, Cochairs
Probate and Mental Health Advisory Committee, Hon. John H. Sugiyama, Chair

Staff contact (Name, phone and e-mail):
Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov; Douglas C. Miller, 818-558-4178, douglas.c.miller@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2014
Project description from annual agenda: Special Immigrant Juvenile Status
Family and Juvenile Law Advisory Committee
To enrich recommendations to the council and to avoid duplication of efforts, the committee will collaborate with the Probate and Mental Health Advisory Committee and the CJER Governing Committee to implement Senate Bill 873 (Stats. 2014, ch. 685) and other issues related to service of process in international child custody proceedings (Hague Service Convention, the Inter-American Convention on Letters Rogatory and Additional protocol (IACAP); subject matter jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)) and develop rules and forms, educational events, informational materials, and other resources to aid judges and court staff as well as justice partners and court users accessing the court system.

Probate and Mental Health Advisory Committee
The committee must coordinate activities and work with the Family and Juvenile Law Advisory Committee in areas of common concern and interest. (Rule 10.44(b).)

Implement, in probate guardianship proceedings, the directives contained in SB 873 (Stats. 2014, ch. 685) § 1, which added Chapter 7 to Title 1 of Part 1 of the Code of Civil Procedure, commencing with section 155, concerning findings in state court proceedings involving qualified minors that would support their applications for favored immigration status as Special Immigrant Juveniles.

If requesting July 1 or out of cycle, explain:

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

RUPRO ACTION REQUEST FORM

Continued from previous page

Title:

Family, Juvenile, and Probate Guardianship Law: Special Immigrant Juvenile Findings

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JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title
Family, Juvenile, and Probate Guardianship Law: Special Immigrant Juvenile Findings

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 7.1020; adopt Judicial Council forms FL-317, FL-357/GC-224/JV-357, GC-220, and JV-317; revoke forms GC-224 and JV-224

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Probate and Mental Health Advisory Committee
Hon. John H. Sugiyama, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
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Executive Summary and Origin

The Family and Juvenile Law Advisory Committee and the Probate and Mental Health Advisory Committee recommend adopting a California Rule of Court, adopting four Judicial Council forms, including a joint findings form, and revoking two existing standalone findings forms. The rule and forms are needed to implement Senate Bill 873 (Stats. 2014, ch. 685), which clarified the superior court's authority to make predicate findings to enable an undocumented child to petition the federal government for classification as a Special Immigrant Juvenile and incorporated relevant elements of the federal Immigration and Nationality Act into California law. The proposed rule and forms are intended to specify the process for requesting Special Immigrant Juvenile predicate findings from a court in a family law, probate guardianship, juvenile dependency, or juvenile delinquency proceeding, and to supply the court with a sufficient factual basis to make accurate, just, and effective findings if warranted under California law.

Background

Federal Law

Special Immigrant Juvenile (SIJ) status was created by federal law in 1990 in response to concerns raised at the national level by the Santa Clara County Department of Family and Children's Services and Board of Supervisors that state court child custody and child welfare determinations—especially permanent placements in juvenile dependency proceedings—were being undermined, and that the health, safety, and welfare of undocumented children were being placed in jeopardy by the risk of these children's deportation. To mitigate that risk by permitting abused, neglected, or abandoned immigrant children to remain in safe, stable, court-ordered placements in the United States, Congress amended the Immigration and Nationality Act (INA)[1] to include specified immigrant children within the class of "special immigrants," eligible for admission to the United States and authorized to apply for adjustment to lawful permanent resident (LPR) status.[2]

The INA defines an SIJ as an immigrant child,[3] present in the United States, (1) "who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States"; (2) whose reunification with one or both of his or her parents is not viable because of abuse, neglect, abandonment, or a similar basis under state law; and (3) for whom it has been determined by a juvenile court or authorized administrative agency that it would not be in his or her best interest to be returned to his or her country of nationality or last habitual residence.[4]

To be eligible to apply for SIJ classification, a child must first obtain and attach to his or her application a "juvenile court order" finding that the applicant satisfies each of the three elements of the statutory SIJ definition.[5] The INA relies on predicate findings regarding these elements by state courts, made in proceedings under state law, in recognition of the fact that the federal immigration agencies are neither authorized to make child custody and child welfare decisions nor competent to resolve issues of abuse, neglect, abandonment, or a child's best interest.

The SIJ implementing regulations have, from their initial adoption, broadly defined a "juvenile court" as "a court located in the United States having jurisdiction to make judicial determinations about the custody and care of" children.[6] A straightforward application of this definition to California courts would include not only superior court divisions with jurisdiction over dependency and delinquency proceedings under the Juvenile Court Law (Welf. & Inst. Code, §§

[1] Pub.L. No. 82-414 (June 27, 1952) 66 Stat. 163, codified as amended at 8 U.S.C. § 1101 et seq.

[2] Immigration Act of 1990 (Pub.L. No. 101-649 (Nov. 29, 1990) 104 Stat. 4978), § 153.

[3] For purposes of the INA, a child is an unmarried person under 21 years old.

[4] INA, 8 U.S.C. § 1101(a)(27)(J).

[5] See 8 C.F.R. § 204.11(d)(2).

[6] *Id.*, at § 204.11(a); 58 Fed.Reg. 42843, 42850 (Aug. 12, 1993).

200–987), but also court divisions with jurisdiction over proceedings brought under the Family Code[7] and under the guardianship provisions of the Probate Code.[8] The original statutory definition of an SIJ, however, required the child to have been declared a dependent of the state court and deemed eligible for long-term foster care.[9] These provisions restricted requests for SIJ findings in California to juvenile dependency proceedings. Amendments to the INA by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 expanded the SIJ definition so that all California courts fitting the broad definition of "juvenile court" in the regulations now have jurisdiction to make determinations that could serve as predicates for an SIJ petition.[10]

To help protect immigrant child victims of human trafficking, the TVPRA expanded the INA's definition of an SIJ in two significant ways. First, it expanded the types of state court order that a child could use to satisfy the first SIJ criterion to include (1) an order committing a child to the custody of a state agency or department and (2) an order placing the child under the custody of an individual or entity appointed by the court.[11] The addition of an order of commitment opened the possibility that a ward of the juvenile court under section 602 of the Welfare and Institutions Code would qualify for the findings.[12] And the inclusion of an order placing the child in or under the custody of an individual or entity opened the possibility that a child placed in the custody of a legal guardian or in the sole custody of one parent would also qualify.[13]

Second, the TVPRA eliminated the requirement that the child be eligible for long-term foster care, with its implication that the child not be able to reunify with any parent. In its place, the TVPRA inserted the requirement that the child not be able to reunify with "1 or both" parents because of "abuse, neglect, abandonment, or a similar basis" under state law.[14] The United States Citizenship and Immigration Services (USCIS) consistently adjudicates SIJ petitions of children placed in the custody of one parent, but unable to reunify with another parent because of abuse, neglect, abandonment, or similar conduct by the latter parent.[15]

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[7] See Fam. Code, §§ 200, 3020–3048.

[8] See Prob. Code, §§ 800, 1510–1516.

[9] Immigration Act of 1990, *supra* note 2, at §153. To curb perceived abuses, the definition was further restricted in 1997 to children deemed eligible for long-term foster care "due to abuse, neglect, or abandonment." Pub.L. No. 105-119, § 113 (Nov. 26, 1997) 111 Stat. 2440, 2460–2461.

[10] Pub.L. No. 110-457 (Dec. 23, 2008), 122 Stat. 5044; see *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 349 (*Leslie H.*).

[11] *Id.*, at § 235(d)(1)(A).

[12] See *Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622. (The INA no longer requires a child to be a dependent of the court; commitment to a state agency or department is sufficient to satisfy the first SIJ criterion.)

[13] See *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621, 627–629 (*B.F.*). (The order appointing a guardian under the Probate Code was a "juvenile court" custody determination placing the children in the custody of an individual appointed by the court.)

[14] TVPRA, *supra* note 10, at § 235(d)(1)(A).

[15] See *In re Israel O.* (Jan. 16, 2015, A142080), at pp. 10–11, __ Cal.App.4th __ (*Israel O.*) (citing United States Citizenship and Immigration Services, *Immigration Relief for Abused Children: Information for Juvenile Court Judges, Child Welfare Workers, and Others Working With Abused Children* (April 2014)).

The TVPRA also added protection against "aging out" of the jurisdiction of the state court and the age of eligibility for SIJ classification.[16] Today, USCIS will not, based on age or custody status, deny an SIJ petition if, *at the time of filing*, the petitioner was under 21 years of age and was the subject of a valid state court order that was later terminated based on age.[17]

California Law

In response to the increase in unaccompanied, undocumented children entering the southwestern United States and released to sponsors around the country,[18] as well as perceived uncertainty regarding the authority of the superior courts to make SIJ predicate findings, California enacted a new law regarding immigrant children, effective September 27, 2014.[19] New section 155 of the Code of Civil Procedure incorporates many of the provisions of the federal SIJ statute as interpreted by the California Court of Appeal. Subdivision (a) codifies the holding in *B.F.*, *supra* note 13, that the superior court has jurisdiction to make the SIJ predicate findings in appropriate proceedings. Subdivision (b) requires the superior court to make those findings when requested if there is sufficient evidence to support them and provides that the evidence may consist of, but is not limited to, a credible declaration by the child who is the subject of the requested findings. Subdivision (b) also incorporates, almost verbatim, the elements of the federal SIJ definition that require documentation by state court findings. Subdivision (e) of section 155 specifically requires the Judicial Council to adopt any rules of court and forms needed to implement the new section.

The Proposal

The rule and forms in this proposal are intended to fulfill the Judicial Council's statutory mandate under Code of Civil Procedure section 155.

As discussed more fully below, the committees propose adopting rule 7.1020 of the California Rules of Court[20] to specify procedural requirements for seeking SIJ predicate findings in probate guardianship proceedings. The committees believe that procedures for seeking SIJ predicate findings in juvenile and family court proceedings are adequately specified by the proposed Judicial Council forms in the context of current statutes and rules of court. The committees also propose three new forms for requesting the SIJ predicate findings in different types of superior

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[16] TVPRA, *supra* note 10, at § 235(d)(6).

[17] See Donald Neufeld & Pearl Chang, USCIS, *Memorandum: Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (Mar. 24, 2009; HQOPS 70/8.5), at pp. 2–3; United States Immigration and Citizenship Services, *Policy Memorandum: Implementation of the Special Immigrant Juvenile* Perez-Olano *Settlement Agreement* (Apr. 4, 2011; PM 602-0034), at p. 2.

[18] Of the 68,541 unaccompanied children detained entering the U.S. in federal fiscal year 2014, 53,550 of those children were released from custody to private sponsors. A sponsor may be an adult relative (parent, aunt or uncle, sibling, cousin), family friend, or volunteer. 5,842 unaccompanied children were released to sponsors in California, more than half of those in Los Angeles County.

[19] Stats. 2014, ch. 685 (Sen. Bill 873), §§ 1–2, 12–13, 15–16, 20. A copy of material sections of SB 873 is attached to this Invitation to Comment, at pages 24–30.

[20] All subsequent rule references are to the California Rules of Court unless otherwise specified.

court proceedings: *Petition for Special Immigrant Juvenile Predicate Findings* (form GC-220), *Request for Special Immigrant Juvenile Predicate Findings—Family Law* (form FL-317), and *Request for Special Immigrant Juvenile Predicate Findings—Juvenile* (form JV-317).The committees further propose the adoption of a mandatory joint form for courts to use to make SIJ predicate findings in all types of custody proceedings: *Special Immigrant Juvenile Predicate Findings* (form FL-357/GC-224/JV-357).

Finally, the committees propose revoking the existing standalone SIJ findings forms for probate guardianship proceedings, form GC-224; and for juvenile proceedings, form JV-224.

Rule 7.1020

Other than form GC-224, adopted last year, no statewide guidance has been developed for requesting or making SIJ findings in guardianship proceedings. The Probate and Mental Health Advisory Committee has developed proposed rule 7.1020 to provide that guidance.

The rule would require a request for SIJ predicate findings to be made by verified petition, not as a motion supported by declarations (rule 7.1020(b)(2)(A)). Whether filed concurrently with a petition for the appointment of a guardian or later in the guardianship proceeding, the SIJ petition must be filed separately, not as an attachment to the guardianship petition (rule 7.1020(b)(2)(B)).

The majority of requests for SIJ findings come before the probate court in uncontested guardianship proceedings. In that context, the probate court would receive the verified petition in evidence (Prob. Code, § 1022, and rule 7.1020(e)(5)) and decide whether to make the requested findings based on the facts and circumstances alleged in the petition. However, the committee believes that if evidence is taken in a contested matter in support of or opposition to the requested findings of the court, it should be heard and weighed in open court subject to cross-examination, and not simply in declarations (see rule 7.1020(e)(4)).

Any person eligible to petition for the appointment of a guardian under Probate Code section 1510, including the minor if over the age of 12 years, may file the request for SIJ findings (rule 7.1020(b)(1)). In a case with multiple minors, each minor could file a petition only for him- or herself; however, his or her petition could be heard and determined with the SIJ petitions of other qualified wards in the same guardianship proceeding (rule 7.1020(b)(1)(A), (e)(2)). The rule would also confirm the court's authority under Probate Code section 1003 to appoint a guardian ad litem to file a request for SIJ findings for a minor in a guardianship proceeding or to represent the interest of such a minor concerning a petition filed on his or her behalf by another (rule 7.1020(b)(1)(B)).

The rule would require notice of a hearing on the petition to be served by mail, with a copy of the petition, on the minor's parents and the persons listed in Probate Code section 1460(b) (rule 7.1020(c)). Any person entitled to notice of the petition may object or file an opposition to it (rule 7.1020(d)). The court would have authority under Probate Code section 1470 to appoint counsel for the minor in connection with a request under the rule (rule 7.1020(b)(1)(B)).

In cases involving more than one (proposed) ward seeking SIJ findings, the court would need to issue separate findings for each qualified minor in the case (rule 7.1020(f)). Separate findings are advisable because the immigration court proceedings for all qualified minors in the same state court guardianship case may not necessarily be similarly combined.

Forms for Requesting SIJ Predicate Findings

Proposed new *Petition for Special Immigrant Juvenile Predicate Findings* (form GC-220), *Request for Special Immigrant Juvenile Predicate Findings—Family Law* (form FL-317), and *Request for Special Immigrant Juvenile Predicate Findings—Juvenile* (form JV-317) provide a format for requesting SIJ predicate findings. All of these forms elicit the information necessary for the superior court to make the SIJ findings if supported by sufficient evidence.

Format

The probate guardianship petition form follows the text of rule 7.1020 and is somewhat more formal in tone and structure than the family and juvenile forms in keeping with the procedural requirements of the Probate Code and title 7 of the California Rules of Court. The form must be filed as a separate, verified petition. Item 1 on the form tracks the requirements of Probate Code section 1510 and proposed rule 7.1020(a)(2) as to the identity of the petitioner or petitioners.

The family law request form is styled as an attachment to a *Request for Order* (form FL-300) or related forms. It enumerates in item 3 the range of Family Code actions that may underlie a request for SIJ findings. The common denominator of these actions is that all may support a request for child custody under Division 8 (beginning with section 3000) of the Family Code.

On the other hand, the juvenile law request form is intended to stand alone. A child or person on behalf of the child may request SIJ findings at any point in the proceedings after the court has made the necessary underlying order. In family law and probate guardianship proceedings, on the other hand, the request for findings may be filed concurrently with or after the initial petition.

First finding

The first required finding—that the child has been declared a dependent of the court *or* committed to or placed under the custody of a state agency or department or an individual or entity appointed by the court—depends on the court's decision in the underlying state law proceeding. The forms, therefore, ask the person requesting the findings to document that the necessary relief has been requested and to state whether that request is pending or has been granted. If the court has granted the underlying relief at the time the request is filed, the forms also require the requesting person to document the underlying court order. The forms specify the nature of the relief that would warrant the court making the first finding.

The family and juvenile law request forms go on to request expressly that the court make the first finding. The probate guardianship form leaves that request implicit in the statement in item 4.

Second finding

The forms next provide the opportunity to request the second finding of fact needed to enable a child to file a federal petition for SIJ classification: that reunification of the child with one or both of his or her parents is not viable because of abuse, neglect, abandonment, or a similar basis under California law.[21] The forms provide space for detailed statements of facts in support of this finding to allow the court to make an accurate and just decision.

The finding that family reunification is not viable includes two parts: (a) that reunification is not viable; and (b) that abuse, neglect, abandonment, or conduct fitting a similar description under California law is the basis for that finding. With respect to reunification, an order denying or terminating reunification services in a juvenile dependency or delinquency foster care case would almost certainly be sufficient. Other juvenile dispositional orders, such as placement with a previously noncustodial parent or appointment of a guardian, with or without declaring dependency, might also suffice. The juvenile request form requires the attachment of any orders relevant to the viability of the child's reunification with one or both parents.

In family and probate guardianship law, the precise meaning of reunification is less firmly established than in juvenile law. Because orders may be modified on a showing that the circumstances requiring the initial order have changed and that modification would be in the child's best interest, no family court custody order or guardianship is ever truly final or permanent.[22] Reunification—in the sense of the child's return to the physical custody of the noncustodial parent—is never completely foreclosed. However, part 2 of Division 8 of the Family Code (beginning with section 3020), which governs both family law custody and probate guardianship determinations, provides a clue to the effect of a guardianship or custody order on the prospects of family reunification. Specifically, Family Code section 3026 expressly prohibits the court from ordering reunification services in the context of a child custody or visitation proceeding.[23] The court must base its custody determination not on the child's short-term best interest, but on his or her overall, long-term best interest. Thus, a reunification, even under a plan agreed on by the parties, is outside the scope of the family or probate court's authority and, therefore, arguably not viable with a parent who is not awarded custody or guardianship of the child as long as that order remains in effect.[24]

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[21] Until this year, it was uncertain whether a child, placed with one parent but unable to reunify with the other parent because of abuse, neglect, or abandonment by that parent, qualified for this finding under California law. Two recent appellate cases, *Israel O.*, *supra* note 14, in the First Appellate District, and *Eddie E. v. Superior Court* (Feb. 11, 2015, G049637) __ Cal.App.4th __ (*Eddie E. 2*), in the Fourth Appellate District, have made clear that a child in those circumstances does qualify for this finding.

[22] This is also true in juvenile proceedings unless parental rights have been terminated. See Welf. & Inst. Code, §§ 366.26, 366.3, 388.

[23] See *In re Kaylee J.* (1997) 55 Cal.App.4th 1425, 1430–1433 ("Once a … guardianship is established and a nonparent guardian is appointed …, the court has no authority to take steps to return custody to a parent" while the guardianship is in effect.)

[24] *Id.*

If facts constituting abuse, neglect, abandonment, or a similar basis for denying custody to one or more parents have not been shown to the court's satisfaction in the underlying guardianship, custody, dependency, or delinquency proceeding, the requesting party will need to show that reunification is not viable on one of those grounds. Under California law, many different definitions of abuse, neglect, or abandonment exist.[25] For purposes of supporting the SIJ finding, parental conduct falling within any of those definitions would seem to suffice. In addition, other grounds under California law, such as a finding that placement with a parent would be detrimental to the child's health, safety, or welfare under Family Code section 3041, may supply a sufficiently similar basis for the finding. Persons requesting findings should be prepared to include detailed statements of facts supporting the reasons that reunification is not viable.

Third finding

The third predicate finding, as indicated above, is that it is not in the child's best interest to be returned to his or her, or his or her parents', country of nationality or last habitual residence. Under California law, all determinations affecting child custody, whether in family, juvenile, or probate court, are guided by the standard of the best interest of the child. An award of custody under California law to an individual or entity located in the United States could be understood to imply that the child's best interest will not be served by removing the child from that custodial placement and returning him or her to his or her country of nationality. Nevertheless, the person requesting this finding should be prepared to introduce evidence of conditions in the child's country of nationality or last habitual residence in the event that the court has occasion to question the basis for this finding.

Form for Making SIJ Predicate Findings

The committees propose adopting a joint form for the superior court in a family law custody proceeding, a probate guardianship proceeding, a juvenile dependency proceeding, or a juvenile delinquency proceeding to make the SIJ predicate findings when requested, warranted under California law, and supported by sufficient evidence. This joint form, *Special Immigrant Juvenile Predicate Findings* (form FL-357/GC-224/JV-357), would replace the existing standalone SIJ findings forms *Order Regarding Eligibility for Special Immigrant Juvenile Status—Probate Guardianship* (form GC-224) and *Order Regarding Eligibility for Special Immigrant Juvenile Status* (form JV-224), which would be revoked.

In addition to combining the guardianship and juvenile SIJ findings forms into a single multipurpose form, the new form would give the family court a platform for making the SIJ findings. The use of a joint form would ensure that California forms submitted to USCIS in support of a federal SIJ petition would share a common format and would articulate a reasonable factual basis for the judicial findings.

[25] See, e.g., Fam. Code, §§ 6203, 6211, 7822–7823; Pen. Code §§ 270 et seq., 11165.1–11165.6; Welf. & Inst. Code, §§ 300, 361, 361.5.

The joint findings form would give the court room to make detailed findings and to specify the grounds for each of its findings. In addition, the trial court, if it has "reason to doubt the petitioner's good faith," may seize the opportunity urged on it by the Fourth Appellate District in *Eddie E. 2*, *supra* note 22, to "include findings of any relevant facts that the court deems pertinent to the federal government's inquiry." (*Id.*, at p. 16.)

Alternatives Considered

The committees considered whether existing rules and forms were adequate to address the mandates of SB 873, and determined that a new rule and new and modified forms are needed. The current "order" forms, GC-224 and JV-224, elicit only conclusions from the court without providing sufficient opportunities for the court to specify the factual bases for its conclusions. Furthermore, the absence of forms for requesting SIJ findings leads to great variation in the structure and content of the requests. The proposed standard request forms would encourage parties to frame their requests to bring material issues to the court's attention by tying relevant supporting evidence and information to the specific findings requested.

The Family and Juvenile Law Advisory Committee considered proposing the adoption of rules of court to specify procedures for requesting SIJ predicate findings in family and juvenile court proceedings. The committee determined that the proposed request and findings forms elicit the information required for the court to make determinations necessary for the findings, and that requests may be filed under existing request for order procedures in family and juvenile law proceedings. The committees have requested specific comment on whether rules of procedure in these proceedings would nevertheless be useful.

In 2012, the Probate and Mental Health Advisory Committee considered proposing forms to request SIJ predicate findings in the form of a motion, as an attachment to a petition for appointment of a guardian. The application would have been accompanied by supporting declarations and a memo of points and authorities. The general unsuitability of Judicial Council forms for motion practice, including forms for points and authorities and for declarations that would be largely generic skeleton forms with no significant content, resulted in a decision by the committee not to proceed with that approach.

Implementation Requirements, Costs, and Operational Impacts

Implementation of this proposal should require only modest implementation and training costs. The adoption of standard forms for requesting SIJ findings that elicit the required information, in formats familiar to the divisions receiving the requests, should reduce overall court costs by narrowing the issues, ensuring that relevant evidence is linked to those issues, and reducing the need for contested hearings. Implementing the requirements of Code of Civil Procedure section 155 without the structural guidance of the proposed forms, in the face of an anticipated increase in requests for SIJ findings, would almost certainly be less efficient and effective.

The forms will require some training of family, juvenile, and probate court staff. Family law and probate divisions will require training on processing requests and proposed SIJ findings in any

event. Juvenile court staff familiar with SIJ findings will need training only in processing the forms. The joint findings form will promote uniformity in the content of the findings in the trial courts and should enhance the effectiveness of the underlying state court order by preventing its vitiation by inconsistent federal immigration rulings.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Would rules of procedure for requesting SIJ findings in juvenile and family court proceedings, analogous to proposed rule 7.1020, be useful to courts, counsel, and litigants? If so, what ambiguities should those rules attempt to clarify?
- Would an informational form to accompany form FL-317 or any other of the forms in this proposal be useful, for example, to explain the process for requesting SIJ findings?

The advisory committees also seek 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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- Would this proposal have different effects on courts of different sizes? How so?

Attachments and Links

1. Rule 7.1020 of the California Rules of Court, at pages 11–13
2. *Petition for Special Immigrant Juvenile Predicate Findings* (form GC-220), at pages 14–17
3. *Request for Special Immigrant Juvenile Predicate Findings—Family Law* (form FL-317), at pages 18–19
4. *Request for Special Immigrant Juvenile Predicate Findings—Juvenile* (form JV-317), at pages 20–21
5. *Special Immigrant Juvenile Predicate Findings* (form FL-357/GC-224/JV-357), at pages 22–23
6. SB 873 (Stats. 2014, ch. 685), material provisions, at pages 24–30 (for full text, see *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB873&search_keywords*)

Rule 7.1020 of the California Rules of Court would be adopted, effective January 1, 2016, to read:

Rule 7.1020. Special Immigrant Juvenile Predicate Findings in Guardianship Proceedings

(a) Application

This rule applies to a request by or on behalf of a minor who is a ward or a proposed ward in a probate guardianship proceeding for judicial findings needed as a predicate to filing a petition for classification as a Special Immigrant Juvenile (SIJ) under federal immigration law. The term "request under this rule" as used in this rule refers exclusively to such a request. This rule also applies to any opposition to a request under this rule, any hearing on such a request and opposition, and any findings of the court in response to such a request.

(b) Request for findings

(1) *Who may file request*

Any person or entity authorized under Probate Code section 1510 to petition for the appointment of a guardian of the person of a minor, including the ward or proposed ward if 12 years of age or older, may file a request for findings regarding the minor under this rule.

(A) If there is more than one ward or proposed ward in the proceeding, a minor eligible to file a request for findings under this rule may do so only for himself or herself.

(B) The court may appoint a guardian ad litem under Probate Code sections 1003 and 1003.5 or an attorney under Probate Code section 1470 to file and present a request for findings under this rule for a minor or to represent the interests of a minor in a proceeding to decide a request filed on the minor's behalf by another.

(2) *Form of request*

(A) A request for findings under this rule must be made by verified petition. A separate request must be filed for each minor seeking SIJ predicate findings.

(B) A request for findings under this rule by or on behalf of a minor filed concurrently with a petition for the appointment of a guardian of the person of the minor must be prepared and filed as a separate petition, not as an attachment to the petition for appointment.

(c) Notice of hearing

Notice of a hearing of a request for findings under this rule, and a copy of the request, must be sent to the minor's parents and the persons listed in section 1460(b) of the Probate Code, in the manner and within the time provided in that section, subject to the provisions of subdivision (e) of that section and sections 1202 and 1460.1 of that code.

(d) Opposition to request

Any of the persons who must be given notice of hearing of a request for findings under this rule may file an objection or other opposition to the request.

(e) Hearing on request

(1) A request for findings under this rule by or on behalf of a minor filed concurrently with a petition for the appointment of a guardian of the person of the minor may be heard and determined together with the petition for appointment of a guardian of the person for the minor involved.

(2) Hearings on separate requests for findings under this rule by or on behalf of more than one ward or proposed ward in the same guardianship proceeding may be consolidated on the motion of any party or on the court's own motion.

(3) Hearings on requests for findings under this rule by or on behalf of minors who are siblings or half-siblings and are wards or proposed wards in separate guardianship proceedings may be consolidated on the motion of any party in either proceeding or on the motion of the court in either proceeding. If multiple departments of a single court or courts in more than one county are involved, they may communicate with each other on consolidation issues in the manner provided for inter-court communications on venue issues in guardianship and family law matters under section 2204 of the Probate Code and rule 7.1014.

(4) Hearings on contested requests for findings under this rule must be conducted in the same manner as hearings on other contested petitions under the Probate Code, not as law and motion matters.

(5) Probate Code section 1022 applies to uncontested requests for findings under this rule.

(f) Separate findings in multi-ward cases under this rule

The court must issue separate predicate findings for each minor in a guardianship proceeding in which more than one minor is the subject of a request under this rule.

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**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
GUARDIANSHIP OF THE PERSON ☐ AND ESTATE OF *(Name):* ☐ MINOR ☐ MINORS	
PETITION FOR SPECIAL IMMIGRANT JUVENILE PREDICATE FINDINGS	CASE NUMBER:

Petitioner *(name each):* alleges:

1. Petitioner is *(check all that apply to a single petitioner or to more than one petitioner):*
   a. ☐ The proposed guardian of the person or the person and estate of the minor named in item 2. This petition is filed concurrently with the petition for my appointment as guardian.
   b. ☐ The guardian of the person or the person and estate of the minor named in item 2. The order appointing me was filed in this case on *(date):* . Letters of Guardianship were issued on *(date):* .
   c. ☐ The minor named in item 2. I am at least 12 years of age. I was born on *(date):* .
   If there are two or more wards or proposed wards in this case, I am asking the court for an order only for myself.
   d. ☐ The *guardian ad litem* for the minor named in item 2. A certified or conformed copy of the *Order Appointing Guardian Ad Litem—Probate* is attached to this petition as Attachment 1d.
   e. ☐ An adult relative *(specify relationship):* or other person on behalf of the minor named in item 2.
2. *(Name of Minor):**
   was born in *(country):* and is a national of that country.
3. This court has jurisdiction under California law "to make judicial determinations about the custody and care of juveniles" within the meaning of section 101(a)(27)(J) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(27)(J), and 8 C.F.R. § 204.11(a). The minor named in item 2 will be (or now is) under this court's jurisdiction and will remain under that jurisdiction if the court appoints (or has appointed) a guardian of his or her person in this proceeding.
4. If a guardian of the person of the minor named in item 2 is (or has been) appointed and qualifies (or has qualified) in this proceeding, the minor will be (or is) placed under the custody of an individual or entity appointed by a California state or juvenile court located in the United States within the meaning of INA section 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

**** (In a guardianship case involving more than one ward, prepare a separate petition for each ward for whom you are seeking predicate findings.)***

GUARDIANSHIP OF *(Name):* ☐ MINOR ☐ MINORS	CASE NUMBER:

Requested Findings

5. Reunification of the minor named in item 2 with ☐ one parent ☐ both parents is not viable because of

   ☐ Abuse

   ☐ Neglect

   ☐ Abandonment

   ☐ A similar basis under California law *(specify):*

   Facts in support of this finding are stated below *(for each parent with whom reunification is not viable, state the reasons that apply to that parent):*

   ☐ Additional facts are stated on Attachment 5 to this petition. *(You may use* Attachment to Judicial Council Form *(form MC-25) for this purpose.)*

GUARDIANSHIP OF *(Name):* ☐ MINOR ☐ MINORS	CASE NUMBER:

6. It is not in the best interest of the minor named in item 2 to be returned to his or her, or his or her parents', previous country of nationality or country or countries of last habitual residence. (*name of country or countries):*

Facts in support of this finding are stated below:

☐ Additional facts are stated on next page.

GUARDIANSHIP OF *(Name):* ☐ MINOR ☐ MINORS	CASE NUMBER:

6. *(continued):*

☐ Additional facts are stated on Attachment 6 to this petition. *(You may use* Attachment to Judicial Council Form *(form MC-25) for this purpose.)*

7. All attachments to this form are incorporated by this reference as though placed here in this form. There are ____ pages attached.

Date:

(TYPE OR PRINT NAME OF ATTORNEY)

▶ (SIGNATURE OF ATTORNEY*)

*** All petitioners must also sign (Prob. Code, § 1020).**

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 PETITIONER)

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PETITIONER)

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PETITIONER)

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

REQUEST FOR SPECIAL IMMIGRANT JUVENILE FINDINGS—FAMILY LAW
—This is not a court order—

Attachment to:

☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**

☐ Other *(specify):*

1. I am the ☐ petitioner ☐ respondent ☐ other parent or party.

2. Child's name:*
   was born in *(country):* on *(date of birth):*
   and is a national of that country.

3. A petition has been filed ☐ at the same time as this request ☐ earlier in this proceeding ☐ in a different family law case *(specify court and case number):*

   a. ☐ *Petition to Establish Parental Relationship* (form FL-200), asking for sole custody.

   b. ☐ *Petition—Marriage/Domestic Partnership* (form FL-100), asking for sole custody.

   c. ☐ *Petition for Custody and Support of Minor Children* (form FL-260), asking for sole custody.

   d. ☐ *Request for Domestic Violence Restraining Order* (form DV-100), asking for sole custody.

   e. ☐ *Adoption Request* (form ADOPT-200).

   f. ☐ Another request for sole custody of the child. *(specify):*

4. ☐ The case in 3 is pending. ☐ An order about sole child custody was made on *(date):* .
   (Attach a copy of the order.)

5. If the court grants (or has granted) the orders requested in 3, the child will be (or now is) placed under the custody of an individual appointed by this court. The child will be (or now is) under this court's jurisdiction. This court will have (or has) continuing jurisdiction to modify or terminate the orders on a sufficient showing until the child reaches 18 years of age.

6. I understand that section 3026 of the Family Code prohibits the court from ordering reunification services as part of a child custody proceeding. If the court has ordered (orders) sole custody, reunification of the child with (that is, return of the child to the custody of) any parent not awarded custody will not be viable (is not viable) while the order is in effect.

***** (***Prepare a separate request for each child for whom you are seeking Special Immigrant Juvenile findings.)***

Form Adopted for Mandatory Use
Judicial Council of California
FL-317 [New January 1, 2016]

Code Civ. Proc., § 155; Fam. Code, §§ 3020-3031;
8 U.S.C. § 1101(a)(27)(J);
8 C.F.R. § 204.11
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

I REQUEST THAT THE COURT MAKE THE FOLLOWING FINDINGS:

7. The child has been placed in the custody of *(name of parent):* , who is an individual appointed by the court as described in the order granting the request in 3.

8. Reunification of the child with ☐ the petitioner ☐ the respondent ☐ the other parent is not viable because of
   - ☐ Abuse
   - ☐ Neglect
   - ☐ Abandonment
   - ☐ A similar basis under California law *(specify):*

   .

   Facts and circumstances supporting this finding *(specify):*

   ☐ Continued on Attachment 7.

9. It is not in the best interest of the child to be returned to his or her, or his or her parents', country of nationality or country of last habitual residence. Name of country *(specify):*

   Facts and circumstances supporting this finding *(specify):*

   ☐ Continued on Attachment 8.

I declare under penalty of perjury under the laws of the State of California that the information on this form is true and correct.

Date:

▶ _____

(SIGNATURE)

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**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
REQUEST FOR SPECIAL IMMIGRANT JUVENILE PREDICATE FINDINGS—JUVENILE	CASE NUMBER:

1. The child *(name):**
   was born in *(country):* on *(date of birth):*
   and is a national of that country.

2. Parents *(name each):* ☐ Mother ☐ Father ☐ Other parent
   ☐ Mother ☐ Father ☐ Other parent
   ☐ Mother ☐ Father ☐ Other parent

3. The court found that the child was described by section ☐ 300 ☐ 602 and assumed jurisdiction over the child on *(date):* . The child remains under the court's jurisdiction.
   (Attach a copy of the court's jurisdictional findings.)

4. The child was *(check all that apply):*
   ☐ declared a dependent child of the court on *(date):*
   ☐ ordered committed to the custody of *(name of agency or department):*
   on *(date):* for a term of months. The commitment order remains in effect.
   ☐ ordered placed under the custody of *(name and relationship of individual or entity, unless confidential foster care placement):*
   on *(date):* . The placement or custody order remains in effect.
   (Attach a copy of the underlying juvenile court order.)

5. The court *(check all that apply):*
   ☐ ordered the child removed from the custody of *(name(s) of parent(s):* on *(date):*
   ☐ declined to place the child in the custody of *(name of parent):* on *(date):*
   ☐ denied services to *(name(s) of parent(s)):* on *(date):*
   ☐ terminated services to *(name(s) of parent(s)):* on *(date):*
   ☐ appointed *(name):* as the child's guardian on *(date):*
   ☐ terminated parental rights and ordered a permanent plan of adoption on *(date):*
   ☐ finalized the child's adoption on *(date):*
   (Attach a copy of the underlying juvenile court order(s).)

(Prepare a separate request for each child for whom you are seeking Special Immigrant Juvenile predicate findings.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-317 [New January 1, 2016]

Code Civ. Proc., § 155;
8 U.S.C. § 1101(a)(27)(J);
8 C.F.R. § 204.11
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

I REQUEST THAT THE COURT MAKE THE FOLLOWING FINDINGS:

6. The child has been *(check all that apply):*
   - ☐ declared a dependent of the court
   - ☐ committed to the custody of *(name of state agency or department):*
   - ☐ placed in or under the custody of *(name and relationship of individual or entity, unless confidential):*

   by virtue of the court order referenced in 4, above.

7. Reunification of the child with *(name):* ☐ mother ☐ father ☐ other parent is not viable because of
   - ☐ abuse
   - ☐ neglect
   - ☐ abandonment
   - ☐ a similar basis under California law *(specify):*

   Facts and circumstances supporting this finding *(specify):*

   ☐ Continued on Attachment 7.

8. It is not in the best interest of the child to be returned to his or her, or his or her parents', country of nationality or country of last habitual residence. Name of country *(specify):*

   Facts and circumstances supporting this finding *(specify):*

   ☐ Continued on Attachment 8.

I declare under penalty of perjury under the laws of the State of California that the information on this form is true and correct.

Date:

▶ _____
(SIGNATURE)

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**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
SPECIAL IMMIGRANT JUVENILE PREDICATE FINDINGS	CASE NUMBER:

1. Child's name:

The court has reviewed the evidence and finds the following:

2. Notice of the underlying proceeding was given as required by law.

3. a. ☐ The child was declared a dependent of the juvenile court of the county of *(specify):*
on ***(date):***
and remains under the juvenile court's jurisdiction.

OR

b. ☐ The child was legally committed to or placed under the custody of
☐ a state agency or department *(name):*
☐ an individual or entity appointed by this court or another state or juvenile court *(name, unless a confidential foster care placement):*
Relationship of individual or entity to child *(specify):*
on ***(date):*** . The commitment or custody order remains in effect.

4. Reunification of the child with his or her *(check all that apply):* ☐ mother ☐ father ☐ other parent is not viable because of parental ☐ abuse ☐ neglect ☐ abandonment or ☐ a similar basis under California law *(specify):*

, as established on ***(date):*** , for the following reasons *(for each parent with whom reunification is not viable, state the reasons that apply to that parent):*

☐ Continued on Attachment 4.

Form Adopted for Mandatory Use
Judicial Council of California
FL-357/GC-224/JV-357 [New January 1, 2016]

Code Civ. Proc., § 155;
8 U.S.C. § 1101(a)(27)(J),
8 C.F.R. § 204.11
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

5. It is not in the child's best interest to be returned to the child's or parent's country of nationality or country of last habitual residence *(specify country or countries):*
for the following reasons:

☐ Continued on Attachment 5.

Date:

JUDICIAL OFFICER

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

Provisions of Senate Bill 873 Impacting Undocumented Immigrant Children (SB 873; Stats. 2014, ch. 685, §§ 1–2, 12–13, 15–16, 20.)[1]

Enrolled September 3, 2014

An act to add Chapter 7 (commencing with Section 155) to Title 1 of Part 1 of the Code of Civil Procedure, to add Section 757 to the Evidence Code …, and to add Chapter 5.6 (commencing with Section 13300) to Part 3 of Division 9 of, the Welfare and Institutions Code …, to take effect immediately, [as a] bill related to the budget.

LEGISLATIVE COUNSEL'S DIGEST

SB 873, Committee on Budget and Fiscal Review. Human services.

(1) Existing federal law, the Immigration and Nationality Act, establishes a procedure for classification of certain aliens as special immigrants who have been declared dependent on a juvenile court, and authorizes those aliens who have been granted special immigrant juvenile status to apply for an adjustment of status to that of a lawful permanent resident within the United States. Under federal regulations, state juvenile courts are charged with making a preliminary determination of the child's dependency, as specified. Existing federal regulations define juvenile court to mean a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.

Existing law establishes the jurisdiction of the juvenile court, which may adjudge a minor to be a dependent or ward of the court. Existing law also establishes the jurisdiction of the probate court. Existing law regulates the establishment and termination of guardianships in probate court, and specifies that a guardian has the care, custody, and control of a ward. Existing law establishes the jurisdiction of the family court, which may make determinations about the custody of children.

This bill would provide that the superior court, including the juvenile, probate, or family court division of the superior court, has jurisdiction to make judicial determinations regarding the custody and care of juveniles within the meaning of the federal Immigration and Nationality Act. The bill would require the superior court to make an order containing the necessary findings regarding special immigrant juvenile status pursuant to federal law, if there is evidence to support those findings. The bill would require records of these proceedings that are not otherwise protected by state confidentiality laws to remain confidential, and would also authorize the sealing of these records. The bill would require the Judicial Council to adopt any rules and forms needed to implement these provisions.

[1] This abridged version of SB 873 includes all sections related to undocumented children in the legal process. Not all of these sections are discussed in the Invitation to Comment.

(2) Existing federal law, Title VI of the federal Civil Rights Act of 1964 and the Safe Streets Act of 1968, prohibit national origin discrimination by recipients of federal assistance.

The California Constitution provides that a person unable to understand English who is charged with a crime has the right to an interpreter throughout the proceedings. Existing law requires that court interpreters' fees or other compensation be paid by the court in criminal cases, and by the litigants in civil cases, as specified. Existing law requires, in any action or proceeding under specified provisions of the Family Code relating to domestic violence, an interpreter to be provided by the court for a party who does not proficiently speak or understand the English language to interpret the proceedings in a language that the party understands and to assist communication between the party and his or her attorney.

This bill would state that existing law and authority to provide interpreters in civil court includes providing an interpreter for a child in a proceeding in which a petitioner requests an order from the superior court to make the findings regarding special immigrant juvenile status.

(3)–(7) * * *

(8) Existing federal law, the Homeland Security Act of 2002, empowers the Director of the Office of Refugee Resettlement of the federal Department of Health and Human Services with functions under the immigration laws of the United States with respect to the care of unaccompanied alien children, as defined, including, but not limited to, coordinating and implementing the care and placement of unaccompanied alien children who are in federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each child, as provided. Existing law designates the State Department of Social Services as the single agency with full power to supervise every phase of the administration of public social services, except health care services and medical assistance.

This bill would require the State Department of Social Services, subject to the availability of funding, to contract with qualified nonprofit legal services organizations to provide legal services to unaccompanied undocumented minors, as defined, who are transferred to the care and custody of the federal Office of Refugee Resettlement and who are present in this state. The bill would require that the contracts awarded meet certain conditions.

(9) * * *

(10) This bill would provide that its provisions are severable.

(11) Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

(12)–(14) * * *

(15) This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 7 (commencing with Section 155) is added to Title 1 of Part 1 of the Code of Civil Procedure, to read:

CHAPTER 7. Special Immigrant Juvenile Findings

155. (a) A superior court has jurisdiction under California law to make judicial determinations regarding the custody and care of children within the meaning of the federal Immigration and Nationality Act (8 U.S.C. Sec. 1101(a)(27)(J) and 8 C.F.R. Sec. 204.11), which includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court. These courts may make the findings necessary to enable a child to petition the United States Citizenship and Immigration Service[s] for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

(b)(1) If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code, and there is evidence to support those findings, which may consist of, but is not limited to, a declaration by the child who is the subject of the petition, the court shall issue the order, which shall include all of the following findings:

(A) The child was either of the following:

(i) Declared a dependent of the court.
(ii) Legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by the court. The court shall indicate the date on which the dependency, commitment, or custody was ordered.

(B) That reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law. The court shall indicate the date on which reunification was determined not to be viable.

(C) That it is not in the best interest of the child to be returned to the child's, or his or her parent's, previous country of nationality or country of last habitual residence.

(2) If requested by a party, the court may make additional findings that are supported by evidence.

(c) In any judicial proceedings in response to a request that the superior court make the findings necessary to support a petition for classification as a special immigrant juvenile, information regarding the child's immigration status that is not otherwise protected by state confidentiality laws shall remain confidential and shall be available for inspection only by the court, the child who is the subject of the proceeding, the parties, the attorneys for the parties, the child's counsel, and the child's guardian.

(d) In any judicial proceedings in response to a request that the superior court make the findings necessary to support a petition for classification as a special immigrant juvenile, records of the proceedings that are not otherwise protected by state confidentiality laws may be sealed using the procedure set forth in California Rules of Court 2.550 and 2.551.

(e) The Judicial Council shall adopt any rules and forms needed to implement this section.

SEC. 2. Section 757 is added to the Evidence Code, to read:

757. Pursuant to this chapter, other applicable law, and existing Judicial Council policy, including the policy adopted on January 23, 2014, existing authority to provide interpreters in civil court includes the authority to provide an interpreter in a proceeding in which a petitioner requests an order from the superior court to make the findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

SECS. 3–11. * * *

SEC. 12. The Legislature finds and declares that the number of unaccompanied, undocumented minors in California has surged in recent months, often overwhelming the agencies and organizations that care for these minors and help to determine their immigration status. Legal representation for unaccompanied undocumented minors in California is important to assist these minors in navigating through federal immigration proceedings as well as related state court actions.

SEC. 13. Chapter 5.6 (commencing with Section 13300) is added to Part 3 of Division 9 of the Welfare and Institutions Code, to read:

CHAPTER 5.6. Legal Counsel for Unaccompanied Undocumented Minors

13300. (a) Subject to the availability of funding in the act that added this chapter or the annual Budget Act, the department shall contract, as described in Section 13301, with qualified nonprofit legal services organizations to provide legal services to unaccompanied undocumented minors who are transferred to the care and custody of the federal Office of Refugee Resettlement and who are present in this state.

(b) Legal services provided in accordance with subdivision (a) shall be for the sole purpose of providing legal representation to unaccompanied undocumented minors who are in the physical custody of the federal Office of Refugee Resettlement or who are residing with a family member or other sponsor.

(c) For purposes of this chapter, the term "unaccompanied undocumented minors" means unaccompanied alien children as defined in Section 279(g)(2) of Title 6 of the United States Code.

(d) For purposes of this chapter, the term "legal services" includes culturally and linguistically appropriate services provided by attorneys, paralegals, interpreters and other support staff for state court proceedings, federal immigration proceedings, and any appeals arising from those proceedings.

13301. Contracts awarded pursuant to Section 13300 shall fulfill all of the following:

(a) Be executed only with nonprofit legal services organizations that meet all of the following requirements:

(1) Have at least three years of experience handling asylum, T-Visa, U-Visa, or special immigrant juvenile status cases and have represented at least 25 individuals in these matters.

(2) Have experience in representing individuals in removal proceedings and asylum applications.

(3) Have conducted trainings on these issues for practitioners beyond their staff.

(4) Have experience guiding and supervising the work of attorneys whom themselves do not regularly participate in this area of the law but nevertheless work pro bono on the types of cases described in paragraph (1).

(5) Are accredited by the Board of Immigration Appeals under the United States Department of Justice's Executive Office for Immigration Review or meet the requirements to receive funding from the Trust Fund Program administered by the State Bar of California.

(b) Provide for legal services to unaccompanied undocumented minors on a fee-per-case basis, as determined by the department, which shall include all administrative and supervisory costs and court fees.

(c) Require reporting, monitoring, or audits of services provided, as determined by the department.

(d) Require contractors to coordinate efforts with the federal Office of Refugee Resettlement Legal Access Project in order to respond to and assist or represent unaccompanied undocumented minors who could benefit from the services provided under this chapter.

(e) Require contractors to maintain adequate legal malpractice insurance and to indemnify and hold the state harmless from any claims that arise from the legal services provided pursuant to this chapter.

13302. Notwithstanding any other law:

(a) Contracts awarded pursuant to this chapter shall be exempt from the personal services contracting requirements of Article 4 (commencing with Section 19130) of Chapter 5 of Part 2 of Division 5 of Title 2 of the Government Code.

(b) Contracts awarded pursuant to this chapter shall be exempt from the Public Contract Code and the State Contracting Manual, and shall not be subject to the approval of the Department of General Services.

(c) The client information and records of legal services provided pursuant to this chapter shall be subject to the requirements of Section 10850 and shall be exempt from inspection under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Part 1 of the Government Code).

(d) The state shall be immune from any liability resulting from the implementation of this chapter.

SEC. 14. * * *

SEC. 15. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 16. The Legislature finds and declares that Section 1 of this act, which adds Chapter 7 (commencing with Section 155) to Part 1 of Title 1 to the Code of Civil Procedure, and Section 13 of this act, which adds Chapter 5.6 (commencing with Section 13300) to Part 3 of Division 9 of the Welfare and Institutions Code, impose a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

(a) In order to protect the privacy interests of those minors who are seeking special immigrant juvenile status, it is essential to maintain the confidentiality of the records described in Section 1 of this act.

(b) In order to protect the privacy interests of unaccompanied undocumented minors and to protect records covered by the attorney client privilege, it is essential to maintain the confidentiality of the records described in Section 13 of this act.

SECS. 17–19. * * *

SEC. 20. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Family and Juvenile Law: Juvenile Final Custody Orders

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, cochair
Hon. Mark A. Juhas, cochair
Staff contact (Name, phone and e-mail):
Mr. Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: [year] 2014-2015
Project description from annual agenda: Juvenile Custody Orders
Both family and juvenile courts have expressed frustration at the inability of the current Custody Order—Juvenile—Final Judgment (form JV-200) and Visitation Order—Juvenile (form JV-205) to capture the juvenile court's findings and orders to the extent needed for compliance with the terms of the orders by the parties and for the enforcement or modification of the orders by the family court. The committee will propose and recommend circulation of revisions to the forms designed to reduce the number of enforcement and modification disputes filed in family court and to promote more efficient resolution of any such disputes that do arise by increasing the level of specificity solicited by the forms and incorporating language more familiar to the family court bench and bar.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title
Family and Juvenile Law: Juvenile Final Custody Orders

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.475, 5.620, 5.700, 5.790; approve form JV-206; revise forms JV-200 and JV-205

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
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Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending four rules of court, approving one optional Judicial Council form, and revising two forms to clarify the procedures and requirements that apply when the juvenile court terminates its jurisdiction over a child and returns custody of the child to one or more parents on terms ordered by the court. The proposed amendments, revisions, and approval are intended to provide a family court, to which a request for modification or termination of the order is made, with sufficient information to determine whether there has been a significant change of circumstances and, if so, whether the requested modification is in the best interest of the child. The proposed amendments and revisions would also update references to current statutes and rules, incorporate gender-neutral language consistent with Assembly Bill 1403 (Stats. 2013, ch. 510) when appropriate, conform to recent case law, and maintain consistency with recent and proposed revisions to the Judicial Council forms for family court custody orders.

Prior Circulation

Rule 5.475 was adopted in 2006 and last amended effective January 1, 2013. Rule 5.620 was adopted as rule 1429.1 in 2000 and last amended effective January 1, 2014. Rule 5.700 was adopted as rule 1457 in 1990 and last amended effective January 1, 2007. And rule 5.790 was adopted as rule 1493 in 1991 and last amended effective January 1, 2015, to implement statutory family-finding requirements.

Custody Order—Juvenile—Final Judgment (form JV-200) was adopted for mandatory use in 1990 and has been revised multiple times, most recently effective July 1, 2014, to implement statutory amendments affecting the priority of enforcement of restraining orders.

Visitation Order—Juvenile (form JV-205) was adopted for mandatory use in 2000 and has been revised multiple times, most recently effective July 1, 2014, to implement statutory amendments affecting the priority of enforcement of restraining orders.

The Proposal

When the juvenile court terminates jurisdiction over a dependent child or ward of the court and places the child with one or more of his or her parents, the court may issue final custody and visitation orders, sometimes known as "exit orders," under section 362.4 or 726.5 of the Welfare and Institutions Code.[1] These custody orders must be filed in any pending superior court proceeding related to the custody of the child, including dissolution, parentage, Domestic Violence Protection Act, and other family law proceedings as well as probate guardianship proceedings. If no custody proceeding is pending, the juvenile court may order its clerk to transmit the custody orders to the superior court of the county where the parent given physical custody resides. If the juvenile court orders transmission, the clerk of the receiving court must immediately open a file, assign a case number, and file the order.

These juvenile court orders continue in effect until and unless modified by another superior court order. Thus, they govern the custody and visitation of the child indefinitely. The orders need to provide specific direction to the parents and other parties to facilitate compliance and reduce the potential for conflict, especially regarding the parenting time orders and the mechanics of transferring the child from one parent to another.

Juvenile final custody orders also need to provide sufficient detail and use language familiar to the family law bench and bar to permit the court to enforce them if a dispute does arise or to modify or terminate the orders if circumstances change significantly and modification would be in the best interest of the child. The information included in the juvenile court order must address the circumstances that led to the juvenile court's child custody and parenting time orders to enable a family court to determine whether circumstances have changed to a degree that justifies considering whether the requested modification is in the best interests of the child. The child custody orders need to serve these functions without disclosing juvenile case information that should remain confidential, because juvenile court child custody orders are not themselves confidential.

The proposal would address these issues by revising *Custody Order—Juvenile—Final Judgment* (form JV-200) and *Visitation Order—Juvenile* (form JV-205) to provide the juvenile court with

[1] All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified. All rule references are to the California Rules of Court.

the opportunity to describe more thoroughly the circumstances underlying its custody and visitation orders. The revisions seek to solicit more information on the face of the form orders and to clarify that certain family law custody and visitation attachments may be used. Further revisions would give the juvenile court the option of referring to specific parts of the juvenile court record in its orders. Under section 827(a)(1)(L)–(M), the record is available without a juvenile court order for inspection by family court judicial officers and staff, as well as guardianship investigators, who are actively participating in a custody proceeding. The committee also proposes approving an optional statewide Judicial Council form, *Reasons for No or Supervised Visitation—Juvenile* (form JV-206), to give the juvenile court specific options for explaining the reasons and circumstances underlying an order denying or limiting visitation or parenting time for a parent with a child.

Finally, the proposal would amend rules 5.475, 5.620, 5.700, and 5.790 to clarify the responsibilities of the juvenile and family courts and clerks when issuing, transmitting, or receiving juvenile court custody orders and to more clearly distinguish the process for issuing custody orders at termination of juvenile court jurisdiction from the process for issuing custody orders and retaining jurisdiction.

In a separate proposal, the committee also proposes revising family court child custody and visitation attachment forms (FL-341(B), FL-341(C), FL-341(D), and FL-341(E)) to indicate that the juvenile court may attach those forms to form JV-200 or JV-205 to add additional detail to its final custody orders.[2]

The committee proposes the following specific amendments to the rules of court and revisions to the Judicial Council forms:

- Amend rule 5.475 to more clearly and accurately describe the statutory duties of a superior court clerk who receives a final custody order transmitted from the juvenile court and to make technical changes.
- Amend rule 5.620(a) to specify the juvenile court's exclusive jurisdiction under section 304 to establish a guardianship after a dependency petition is filed until the petition is dismissed or jurisdiction is terminated and to make technical changes.
- Amend rule 5.620(c) to distinguish the process for issuing juvenile court custody orders subject to continuing jurisdiction from the process for issuing custody orders and terminating jurisdiction.
- Amend rule 5.700 to clarify that it applies only when the juvenile court issues final custody orders and terminates jurisdiction, to describe the effect of juvenile final custody orders, and to describe the statutory duties of a superior court clerk who receives a final custody order transmitted from the juvenile court.

[2] Please refer to Invitation to Comment, *Domestic Violence—Request to Modify or Terminate Domestic Violence Restraining Orders; Family Law—Changes to Request for Order Rules and Forms,* item SPR15-___.

- Amend rule 5.790(c) to distinguish between the process when the juvenile court issues custody or visitation orders and retains delinquency jurisdiction and the process when the court issues those orders and terminates its delinquency jurisdiction.
- Revise *Custody Order—Juvenile—Final Judgment* (form JV-200) to use gender neutral language where possible and to add space for identification of and orders directed to additional parents.
- Revise form JV-200 to permit the juvenile court to specify a minimum amount of visitation if it otherwise permits the parents to arrange shared parenting time.
- Revise form JV-200 to give the court opportunities to make more detailed custody orders, to solicit on the form the reasons for limitations on custody or visitation, to use language in common with the family law custody forms and attachments, and to cross-reference those attachments where appropriate.
- Revise *Visitation Order—Juvenile* (form JV-205) to use gender-neutral language where possible, to simplify the form's structure, to add detail about supervised visitation and travel with children, to cross-reference family law attachments where appropriate, and to rename it.
- Approve *Reasons for No or Supervised Visitation—Juvenile* (form JV-206) to give the court options for explaining an order denying or limiting visitation or parenting time with a child.

Alternatives Considered

The committee considered not revising the forms or amending the rules but elected to proceed with the proposal because of the frequently expressed need for clearer and more detailed juvenile final custody orders. The committee considered simply cross-referencing all family law custody and visitation orders and attachments, but some of those forms were not appropriate for use in juvenile court proceedings. Instead, the committee has proposed incorporating certain details from the principal family law custody order attachment (form FL-341) into the juvenile forms and cross-referencing other family law custody or visitation/parenting time attachments where appropriate. The committee elected to amend the rules to bring them into conformity with current statutory requirements and to clarify the procedures for issuing, transmitting, and filing juvenile court custody orders.

Implementation Requirements, Costs, and Operational Impacts

The committee anticipates that this proposal will result in some costs incurred by the courts to revise forms, to train court staff about the changes to the rules and forms included in this proposal, and possibly to revise local court rules and forms so they are consistent with the changes adopted by the Judicial Council. However, the committee expects that the changes will save resources for the courts by clarifying and simplifying procedures and improving communication between the juvenile court and the family court.

Request for Specific Comments

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

- Are there specific changes that would improve the rules and forms in this proposal? (If so, please specify the individual rule or form, and the particular recommended changes.)
- Will the approval of proposed form JV-206 provide an effective and efficient method for the juvenile court to convey the reasons for its custody and visitation orders to the family court?
- Should the council explore effective means of serving notice of the filing of the order other than first-class mail?

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

- Would the proposal provide cost savings? If so please quantify.
- What are the implementation requirements 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?
- Keeping in mind that rule 5.504(c) grants courts one year from their effective date to implement production of new and revised mandatory juvenile forms, would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- Would this proposal affect small courts differently from large courts? If so, please explain.

Attachments and Links

1. Rules 5.475, 5.620, 5.700, and 5.790, at pages 6–9
2. Forms JV-200, JV-205, and JV-206, at pages 10−16

Rules 5.475, 5.620, 5.700, and 5.790 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.475. Custody and visitation orders following termination of a juvenile court proceeding or probate court guardianship proceeding

(a) Custody and visitation order from other court divisions

A juvenile court or probate court may transmit a custody or visitation order to a family court for inclusion in a pending family law proceeding or to open a new family law case file~~,~~ after termination of ~~a~~ juvenile court ~~proceeding~~jurisdiction under rule 5.700 or termination of a probate guardianship ~~proceeding~~ under rule~~s 5.700 and~~ 7.1008.

(1) *Procedure for filing custody or visitation orders from juvenile or probate court*

(A) On receiving the custody or visitation order of a juvenile court or the visitation order of a former guardian, the clerk of the superior court must file the order ~~must be filed~~ in any pending nullity, dissolution, legal separation, ~~paternity~~parentage, Domestic Violence Prevention Act, or other family law proceeding, or in any probate guardianship proceeding ~~which~~that affects custody or visitation of the child.

(B) If no dependency, family law, or probate guardianship proceeding affecting custody or visitation of the child is pending, the order may be used as the sole basis ~~to open a file and assign a family law case number~~ for opening a file in the superior court of the county in which the parent given physical custody resides.

~~(C)~~ On receiving the order, the clerk must immediately open a file without a filing fee, assign a case number, and file the ~~custody or visitation order, without a filing fee, in the file of any family law proceeding affecting the custody and visitation of the child~~order.

(2) * * *

(b) Modification of former guardian visitation orders—custodial parent

When a parent ~~of the child~~ has custody of the child following termination of a probate guardianship, ~~proceedings~~ a request for modification of the probate court visitation order, including an order denying visitation, must be ~~determined~~ brought in a proceeding under the Family Code.

(c) * * *

Rule 5.620. Orders after filing under section 300

(a) Exclusive jurisdiction (§ 304)

Once a petition has been filed ~~in juvenile court~~ alleging that a child is described by ~~a subsection of~~ section 300, and until the petition is dismissed or dependency is terminated, the juvenile court has ~~sole and~~ exclusive jurisdiction ~~over matters~~ to hear proceedings relating to the custody of the child and visitation with the child and establishing a guardianship for the child.

(b) * * *

(c) Custody and visitation (§ 361.2)

If the court sustains a petition, ~~and~~ finds that the child is described by section 300, and removes physical custody from a parent or guardian, it may ~~enter findings and orders~~ order the child placed in the custody of a previously noncustodial parent as described in rule 5.695(a)(7)(A) ~~and~~ or (B).

(1) ~~These findings and~~ This order~~s~~ may be entered at the dispositional hearing ~~under rule 5.700~~, ~~or~~ at any subsequent review hearing under rule ~~5.710(g) or 5.715(d)(2) or rule 5.720(b)(1)(B)~~5.708(k), or on ~~the~~ granting ~~of~~ a ~~motion~~request under section 388 for custody and visitation orders.

(2) If the court orders legal and physical custody to the noncustodial parent and terminates jurisdiction under rule 5.695(a)(7)(A), the court must proceed under rule 5.700.

(3) If the court orders custody to the noncustodial parent subject to the continuing supervision of the court, the court may order services provided to either parent or to both parents under section 361.2(b)(3). If the court orders services to both parents, it must review its custody determination at each subsequent hearing held under section 366 and rule 5.708.

(d)–(e) * * *

Rule 5.700. Termination of jurisdiction—custody and visitation orders ~~Order determining custody~~ (§§ 302, 304, 361.2, 362.4, 726.5)

~~(a) Order determining custody—termination of jurisdiction~~

When the juvenile court terminates its jurisdiction over a dependent or ward of the court and places the child in the home of a parent, it may issue an order determining the rights to custody of and visitation with the child. ~~If the juvenile court orders custody to a parent and terminates jurisdiction, the court may make orders for visitation with the other parent.~~ The court may also issue ~~orders to either parent enjoining any action specified in Family Code section 2045~~protective orders as provided in section 213.5 or as described in Family Code section 6218.

(a) Effect of order

Any order issued under this rule continues in effect until modified or terminated by a later order of the superior court. The order may be modified or terminated only if the superior court finds both that:

(1) There has been a significant change of circumstances since the juvenile court issued the order, and

(2) Modification or termination of the order is in the best interest of the child.

(~~1~~b) ~~Modification of existing custody~~ Filing of orders—new case filings

(1) The order of the juvenile court must be filed in any existing nullity, dissolution, legal separation, guardianship, ~~or paternity~~parentage, or other family law custody proceeding and, when filed, becomes a part of that proceeding.

(2) If no ~~custody~~ proceeding described in (1) is ~~filed or~~ pending, the order may be used as the sole basis to open a family court file.

(~~2~~c) Preparation and transmission of order

The order must be prepared on *Custody Order—Juvenile—Final Judgment* (form JV-200). The court may direct the parent, parent's attorney, county counsel, or ~~the~~ clerk to:

(~~A~~1) Prepare the order for the court's signature; and

(~~B~~2) Transmit the order within 10 calendar days after the order is signed to ~~the~~any superior court ~~of the county~~ where a ~~custody~~ proceeding described in (b)(1) is pending ~~has already been commenced~~ or, if no~~ne~~ such proceeding exists, to

the superior court of the county in which the parent who has been given physical custody resides.

(~~3~~d) Procedures for filing order—receiving court

~~After receipt of the~~On receiving a juvenile court custody order transmitted under (c)(2), the ~~superior court~~ clerk of the receiving ~~county~~court must immediately file the juvenile court order in ~~the~~any existing proceeding described in (b)(1) or, if no such proceeding exists, immediately open a file, without a filing fee, and assign a case number.

(4e) * * *

~~**(b) Order determining custody—continuation of jurisdiction**~~

~~If the court orders custody to a parent subject to the continuing jurisdiction of the court, with services to one or both parents, the court may direct the order be prepared and filed in the same manner as described in (a).~~

Rule 5.790. Orders of the court

(a)–(b) * * *

(c) Custody and visitation (§ 726.5)

(1) At any time ~~while the~~ when a child is a ward of the juvenile court, the court may issue an order determining the custody of or visitation with the child. An order issued under this subdivision will continue in effect until modified or terminated by a later order of the juvenile court.

(2) ~~or~~ At the time wardship is terminated, the court may issue an order determining custody of~~,~~ or visitation with~~,~~ the child as described in rule 5.700.

(d)–(j) * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY (STATE BAR NUMBER:) 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:	
CASE NAME:	
CUSTODY ORDER—JUVENILE—FINAL JUDGMENT	CASE NUMBER: JUVENILE: FAMILY *(existing, if applicable; otherwise new):*

Date of hearing: Dept.:

Judicial officer *(name):*

THE COURT FINDS AND ORDERS

1. a. **Jurisdiction.** This court has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act (Family Code sections 3400–3465).

   b. **Notice and opportunity to be heard.** The parties were given notice and an opportunity to be heard as provided by the laws of the State of California.

   c. **Country of habitual residence**. The country of habitual residence of the child or children in this case is

   ☐ the United States ☐ other *(specify):*

   d. **Penalties for violating this order**. If you violate this order, you may be subject to civil or criminal penalties or both.

2. a. **Name:** ☐ Mother ☐ Father

   b. **Name:** ☐ Mother ☐ Father

   c. **Name:** ☐ Mother ☐ Father

   are the parents of the children listed in item 3. Parents ☐ are ☐ are not married. Parents ☐ do ☐ do not reside together.

3. **Custody.** Custody of the minor children is ordered as follows:

Child's name	Date of birth	Legal custody to *(name:)*	Physical custody to *(name:)*	Primary residence with *(name:)*

   ☐ Additional children listed on Attachment 3.

4. ☐ **Visitation rights of** *(name of parent):* . This parent may visit the children as follows:

   ☐ All children listed in item 3 ☐ The following children *(name each):*

   a. ☐ As arranged by the parents, but no less than *(minimum):* hour(s), times per *(time period):* .

   b. ☐ As stated on the attached form JV-205.

   c. ☐ No visitation is ordered for the reasons stated ☐ on the attached form JV-206 ☐ on Attachment 4c.

5. ☐ **Visitation rights of** *(name of other parent):* . This parent may visit the children as follows:

   ☐ All children listed in item 3 ☐ The following children *(name each):*

   a. ☐ As arranged by the parents, but no less than *(minimum):* hour(s), times per *(time period):* .

   b. ☐ As stated on the attached form JV-205.

   c. ☐ No visitation is ordered for the reasons stated ☐ on the attached form JV-206 ☐ on Attachment 5c.

Form Adopted for Mandatory Use
Judicial Council of California
JV-200 [Rev. January 1, 2016]

Family Code, § 3020 et seq.; Penal Code, § 136.2; Welfare & Institutions Code, §§ 302(d), 304, 361.2, 362.4, 726.5; Cal. Rules of Court, rule 5.700
www.courts.ca.gov

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

6. ☐ This order reflects a change in the physical custody of the child or children to the custody of a formerly noncustodial parent.

7. ☐ **Child abduction prevention.** There is a risk that one parent will take the children out of California without the other parent's permission. *Child Abduction Prevention Order Attachment* (form FL-341(B)) is attached and must be obeyed.

8. ☐ **Change of residence.** Under Family Code section 3024, unless there is prior written agreement to the change, any parent planning to change the residence of the child(ren) for longer than 30 days must provide notice to the other parent(s) at least 45 days before the proposed change to the extent feasible to allow time for mediation of a new plan.

9. ☐ **Parentage.** *(Name):* was declared or adjudged the ☐ biological ☐ presumed parent of *(names):*

by court order *(specify county and case number):*

☐ juvenile court ☐ family court ☐ other *(specify):*

on *(date):*

10. a. ☐ A criminal protective order on form CR-160 relating to the parties in this case is currently valid and in effect
in case number *(specify):*
in *(specify court, if known):* .
The order is scheduled to expire on *(expiration date):* .

b. ☐ A Domestic Violence Prevention Act protective order on form DV-110, DV-116, DV-130, or DV-730 relating to the parties in this case is currently valid and in effect in case number *(specify):*
in *(specify court, if known):* .
The order is scheduled to expire on *(expiration date):* .

c. ☐ Restraining order (form JV-250, JV-255, or JV-257) is attached.

Instruction for Law Enforcement

Conflicting Orders—Priorities for Enforcement.

If more than one restraining order has been issued protecting the protected person from the restrained person, the orders must be enforced in the following order (see Pen. Code, § 136.2, and Fam. Code, §§ 6383(h)(2), 6405(b).):

1. *EPO:* If one of the orders is an *Emergency Protective Order* (form EPO-001) and it is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders.
2. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.
3. *Criminal Order:* If none of the orders includes a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
4. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

11. ☐ **Additional physical custody provisions**. The parents will follow the physical custody provisions listed in the schedule
    - ☐ on Attachment 11.
    - ☐ on *Visitation (Parenting Time) Order—Juvenile* (form JV-205).
    - ☐ on *Additional Provisions—Physical Custody Attachment* (form FL-341(D)).

12. ☐ **Holiday schedule**. The children will spend holiday time as listed in the schedule
    - ☐ on Attachment 12.
    - ☐ on *Children's Holiday Schedule Attachment* (form FL-341(C)).

13. ☐ **Joint legal custody**. The parents will share joint legal custody as listed in the plan
    - ☐ on Attachment 13.
    - ☐ on *Joint Legal Custody Attachment* (form FL-341(E)).

14. ☐ **Other findings and orders** *(specify circumstances, at time the of the order, underlying any limits on custody or visitation):*

☐ Continued on the attached form JV-206.
☐ Continued on Attachment 13.

NOTICE

The juvenile court has terminated jurisdiction over the children listed in 3.
All requests for modification or termination of these orders must be brought in the family court case in which these orders are filed.

Date:

JUDICIAL OFFICER OF THE JUVENILE COURT

THIS IS A COURT ORDER.

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

15. The ☐ clerk of the juvenile court ☐ parent given physical custody ☐ parent's attorney ☐ county counsel must transmit this order within 10 calendar days to the clerk of the court of any county in which a proceeding described in rule 5.700(a)(1) involving the child is pending or, if no such case exists, to the clerk of the court of the county in which the parent given physical custody resides. The clerk of the receiving court must, immediately on receiving this order, file the order in the pending case or, if no such case exists, open a file without a filing fee and assign an appropriate case number.

16. The clerk of the receiving court must send, by first-class mail, an endorsed, filed copy of this order showing the case number of the receiving court to:

a. ☐ Parent in 2a *(name and address):*

b. ☐ Parent in 2b *(name and address):*

c. ☐ Parent in 2c *(name and address):*

d. ☐ Children in 3 *(names and addresses):*

e. ☐ Children's attorney *(name and address):*

f. ☐ Social worker *(name and address):*

g. ☐ Probation officer *(name and address):*

h. ☐ Other *(name and address):*

and to the originating juvenile court with a completed clerk's certificate of mailing *(see below).*

CLERK'S CERTIFICATE OF MAILING
(To be completed by clerk of receiving court)

I certify that I am not a party to this cause and that an endorsed filed copy of the foregoing order was mailed as follows: Each copy was enclosed in an envelope with postage fully prepaid. The envelopes were addressed to the originating court and to each person whose name and address are given in item 16. Each envelope was sealed and deposited with the United States Postal Service

at *(place):*

on *(date):*

Date: Clerk, by _____, Deputy

THIS IS A COURT ORDER.

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

VISITATION (PARENTING TIME) ORDER—JUVENILE

Attachment to ☐ ***Custody Order—Juvenile—Final Judgment*** **(form JV-200)**
☐ ***Notice of Hearing and Temporary Restraining Order—Juvenile*** **(form JV-250)**
☐ ***Restraining Order—Juvenile*** **(form JV-255)** ☐ ***Change to Restraining Order After Hearing—Juvenile*** **(form JV-257)**

1. This order applies to the following children *(name each):*
2. ☐ **VISITATION (Parenting Time)** *(Name of parent):* will have the children with him or her
   a. ☐ as stated in the visitation agreement on Attachment 2a.
   b. ☐ as follows:
      (1) ☐ **Weekends** starting on *(specify date):*

☐ First weekend of the month *(specify day(s) and times):*	from		at		☐ a.m.	☐ p.m.
	to		at		☐ a.m.	☐ p.m.
☐ *Second weekend of the month (specify day(s) and times):*	from		at		☐ a.m.	☐ p.m.
	to		at		☐ a.m.	☐ p.m.
☐ *Third weekend of the month (specify day(s) and times):*	from		at		☐ a.m.	☐ p.m.
	to		at		☐ a.m.	☐ p.m.
☐ *Fourth weekend of the month (specify day(s) and times):*	from		at		☐ a.m.	☐ p.m.
	to		at		☐ a.m.	☐ p.m.
☐ *Fifth weekend of the month (specify day(s) and times):*	from		at		☐ a.m.	☐ p.m.
	to		at		☐ a.m.	☐ p.m.

      (2) ☐ **Alternating weekends** starting on *(specify date):* from _____
      at _____ ☐ a.m. ☐ p.m. to _____ at _____ ☐ a.m. ☐ p.m.
      (3) ☐ **Midweek** from _____ at _____ ☐ a.m. ☐ p.m.
      to _____ at _____ ☐ a.m. ☐ p.m.
      (4) ☐ **Other** *(specify days and times as well as any additional conditions):*

      ☐ Continued on Attachment 2b(4).
3. ☐ **SUPERVISED VISITATION.** Until ☐ further order of the superior court ☐ other *(specify):*

   (name of parent): may have only supervised visitation with the children according to the schedule in 2 for the reasons stated on ☐ the attached form JV-206 ☐ Attachment 3.
   Visit supervisor *(name):* Phone #: E-mail:
4. ☐ **TRANSPORTATION FOR VISITATION AND PLACE OF EXCHANGE**
   a. ☐ Transportation to the visits must be provided by ☐ Parent *(name):*
      ☐ Other *(specify):*
   b. ☐ Transportation from the visits must be provided by ☐ Parent *(name):*
      ☐ Other *(specify):*
   c. ☐ The children must be delivered to and picked up from *(specify location):*
   d. ☐ Other*(specify):*
5. ☐ **TRAVEL WITH CHILDREN**. Parent *(name):*
   must have written permission from the other parent *(name):* or a court order to take the children out of
   a. ☐ the state of California.
   b. ☐ the following counties *(specify):*
   c. ☐ other places *(specify):*

THIS IS A COURT ORDER.

Form Adopted for Mandatory Use
Judicial Council of California
JV-205 [Rev. January 1, 2016]

VISITATION (PARENTING TIME) ORDER—JUVENILE

Family Code, § 3020 et seq.; Penal Code, § 136.2;
Welfare and Institutions Code, §§ 302(d), 304, 362.4, 726.5;
Cal. Rules of Court, rule 5.700
www.courts.ca.gov

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

6. ☐ **Other findings and orders** *(specify circumstances, at the time of the order, underlying any limits on visitation):*

☐ Continued on Attachment 6.

☐ Continued on the attached form JV-206.

CASE NAME:	CASE NUMBER: JUVENILE: FAMILY:

REASONS FOR NO OR SUPERVISED VISITATION—JUVENILE

Attachment to ☐ *Custody Order—Juvenile—Final Judgment* (form JV-200)
☐ *Visitation (Parenting Time) Order—Juvenile* (form JV-205)

1. This order applies to the following children *(name each):*

2. This parent *(name):* was ordered to have ☐ no visitation ☐ only supervised visitation with the child or children named in 1 because

   a. this parent ☐ has not completed ☐ has not made substantial progress in the following court-ordered programs:

      ☐ Sexual abuse treatment or awareness program ☐ for offenders ☐ for victims

      ☐ Drug abuse treatment program with random testing

      ☐ Alcohol abuse treatment program with random testing

      ☐ Domestic violence treatment program ☐ for offenders ☐ for victims

      ☐ Anger management training

      ☐ Parenting classes

      ☐ Individual counseling

      ☐ Other *(specify):*

   b. The court denied services to this parent on *(date):* based on a finding, by clear and convincing evidence, that:

      ☐ he or she was responsible for severe sexual abuse of the child as described in section 361.5(b)(6) of the Welfare and Institutions Code.

      ☐ he or she was responsible for severe physical abuse of or severe physical harm to the child as described in section 361.5(b)(5)–(6) of the Welfare and Institutions Code.

      ☐ his or her whereabouts were unknown on that date and remain unknown.

      ☐ other *(specify):*

Completion of one of the programs above *might,* but need not, constitute a significant change of circumstances for purposes of modifying this final custody order. (Welf. & Inst. Code, § 302(d).)

THIS IS A COURT ORDER.

Form Approved for Optional Use
Judicial Council of California
JV-206 [New January 1, 2016]

Welfare and Institutions Code, §§ 302(d), 304, 361.5, 362.4, 726.5;
Cal. Rules of Court, rule 5.700
www.courts.ca.gov

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Family Law: New Form and Revisions to Forms for Stepparent and Additional-Parent Adoptions

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
Kyanna Williams, 415-865-7911, kyanna.williams@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved December 10, 2014. Item #1: Provide subject matter expertise to the council by providing recommendations for rules and forms required by recent legislative changes as a result of Assembly Bill 2344 (Ammiano; Stats. 2014, ch. 636) Among other things, creates a statutory form to establish the intent to be a legal parent or not when donating genetic material, and establishes the procedure for stepparent adoptions involving a spouse or partner who gave birth during the marriage or partnership, including exempting such adoptions from home visit and home study requirements.

Approved December 10, 2014. Item #11: Review impact of Senate Bill 274 (Leno; Stats. 2013, ch. 564) on the branch and, as needed, consider any changes to rules, forms, or other policies that the council may need to consider as being required as a result of the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Approve form ADOPT-205; revise forms ADOPT-050, ADOPT-200, ADOPT-210, and ADOPT-215

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title
Family Law: New Form and Revisions to Forms for Stepparent and Additional-Parent Adoptions

Proposed Rules, Forms, Standards, or Statutes
Approve form ADOPT-205; revise forms ADOPT-050, ADOPT-200, ADOPT-210, and ADOPT-215

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Co-Chair
Hon. Mark A. Juhas, Co-Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Kyanna Williams, 415-865-7911
kyanna.williams@jud.ca.gov

Executive Summary and Origin

Recent legislation modified the law regarding stepparent adoptions and certain other adoptions.[1] The changes that would be made by this proposal – creating one new adoption form and revising four existing adoption forms – are required to implement the new California laws.

Background

Assembly Bill 2344, the Modern Family Act, which was enacted in September 2014, expedites adoptions for nonbiological parents. Specifically, the Act added section 9000.5 to the Family Code which exempts stepparent adoptions involving a spouse or partner who gave birth to the child during the marriage or domestic partnership from the following requirements typically applicable to adoptions: that a home visit or home study be performed, that the prospective adoptive parent appear before the court, or that the prospective adoptive parent be liable for all reasonable costs incurred in connection with the stepparent adoption, unless otherwise ordered by the court for good cause.

Senate Bill 274, which was enacted in October 2013, amended the Family Code to provide that a child may have a parent-child relationship with more than two parents. In most instances, the

[1] See Assembly Bill 2344 (Ammiano; Stats. 2014, ch. 636) and Senate Bill 274 (Leno; Stats. 2013, ch. 564).

existing parent or parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibility for, the adopted child, and have no rights over the child. (See Fam. Code, § 8617(a).) SB 274 changed the law so that the existing parent or parents may retain their parental duties and responsibilities if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver of termination of rights at any time before the adoption is finalized. (Fam. Code, § 8617(b).)

The Proposal

The committee is proposing one new adoption form and revisions to four existing adoption forms to implement these new laws. These changes will clarify the process for stepparent and additional-parent adoptions. Minor changes would also be made throughout the forms to improve their overall clarity and usability.

- The changes will benefit families undergoing stepparent and additional-parent adoptions by making Judicial Council adoption forms consistent with the new law and more applicable to their adoption proceedings and will make it easier for those families to provide the information the court requires for these proceedings.
- All families using these adoption forms will benefit from changes that improve the clarity and usability of these forms.

Declaration Confirming Parentage in Stepparent Adoption (form ADOPT-205)

New Family Code section 9000.5 requires litigants in stepparent adoptions where one of the spouses or partners gave birth to the child during the marriage or domestic partnership to provide the following information:

> (1) A copy of the parties' marriage certificate, registered domestic partner certificate, or civil union from another jurisdiction[;] [¶] (2) A copy of the child's birth certificate[; and] [¶] (3) Declarations by the parent who gave birth and the spouse or partner who is adopting explaining the circumstances of the child's conception in detail sufficient to identify whether there may be other persons with a claim to parentage of the child who is *[sic]* required to be provided notice of, or who must consent to, the adoption. (Fam. Code, § 9000.5(c)(1)–(3).)

Proposed new *Declaration Confirming Parentage in Stepparent Adoption* (form ADOPT-205) would make it easier for the stepparent seeking adoption to provide all of this required information, which in turn would make it easier for courts to process these cases. This optional form would be attached to the *Adoption Request* (form ADOPT-200) in stepparent adoption cases involving a spouse or partner who gave birth to the child during the union.

How to Adopt a Child in California (form ADOPT-050)

ADOPT-050 is an existing Judicial Council instructional form that provides an overview of the adoption process and Judicial Council forms needed for this process. Page 1 of this form addresses stepparent/domestic partner adoptions. Under this proposal, form ADOPT-050 would

be amended to include the proposed *Declaration Confirming Parentage in Stepparent Adoption* (ADOPT-205) in the list of forms to be completed in stepparent/domestic partner adoptions. The following language would also be added near the top of page 1:

> The California Legislature developed special procedures for stepparent adoptions used to confirm parentage. If you and the parent who gave birth were married or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) at the time the child was born, you will only complete steps 1–2, unless the court orders otherwise. Before beginning this process, seek legal advice to determine whether adoption would benefit your family.

The first part of this language is necessary to comply with new Family Code section 9000.5, which establishes that stepparent adoptions involving a spouse or partner who gave birth to the child during the union are exempt from certain requirements generally applicable to adoptions, including the requirement that a home visit or home study be performed and that the prospective adoptive parent appear before the court, unless otherwise ordered by the court for good cause. The last sentence encouraging families to seek legal advice before beginning any adoption proceeding is proposed in recognition that adoption may not be appropriate for every family and that it is important that families be knowledgeable about their legal options before beginning an adoption proceeding. This language highlights the importance of families being educated about their legal options and should reduce the likelihood that families may start unnecessary adoption proceedings.

Page 2 of form ADOPT-050 provides an overview of the process and Judicial Council forms needed for independent, agency, or international adoptions. The following language would be added near the top of page 2 to clarify that in accordance Family Code section 8617(b), enacted by SB 274, this process may also be used to add additional parents: "You can also use this process to add any additional parent(s) without terminating the rights of the existing parent(s)." This language should clarify the process for litigants and reduce their need for court assistance.

Adoption Request **(form ADOPT-200)**

ADOPT-200 is the existing Judicial Council form used by the adopting parent to provide information, including identifying details about the child, the adopting parent's relationship to the child, and the type of adoption taking place. Under this proposal, item 3 on form ADOPT-200 would be amended to conform to the prospective adoptive parent provisions of Family Code section 8617(b) by allowing the prospective adoptive parent to indicate that they are seeking an independent adoption involving "Additional Parent(s)."

Item 3 would also be amended to allow the adopting parent to indicate that they were in a union with the parent who gave birth to the child at the time the child was born. A new item 12(d) would be added with language stating, "I am seeking a stepparent adoption to confirm my parentage. At the time the child was born, I was married or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) with the parent who gave

birth. A declaration describing the circumstances of the child's conception is attached." Each of these proposed changes should aid in processing these adoption cases and result in a decreased need for court assistance and case management.

Adoption Agreement (form ADOPT-210)

ADOPT-210 is the existing Judicial Council form used for the adopting and legal parents and the child (if over 12 years old) to indicate their consent to the adoption. Although adoptions typically include a hearing, new Family Code section 9000.5 establishes that in stepparent adoptions involving a spouse or partner who gave birth to the child during the union, no hearing is required unless otherwise ordered by the court for good cause. This proposal adds language to conform form ADOPT-210 to the requirements of section 9000.5.

Although the parties may sign form ADOPT-210 outside of a court hearing, section 9003 of the Family Code requires that the signing be performed in front of a witness or notary. This proposal would add witnessing instructions, space to include identifying information about the witness, and space for the witness to date and sign the form in accordance with Family Code section 9003.

Adoption Order (form ADOPT-215)

ADOPT-215 is the existing mandatory order form that the judge signs if the adoption is approved. This proposal would revise item 4 on ADOPT-215, which references adoption hearings. As discussed above, under new Family Code section 9000.5, stepparent adoptions are exempt from hearings unless otherwise ordered by the court for good cause. This proposal adds language at the beginning of revised item 4 indicating that the adopting parent is waiving the hearing pursuant to Family Code section 9000.5.

Alternatives Considered

The committee considered proposing a new set of forms for stepparent adoptions that specifically conformed to the procedures set forth in new Family Code section 9000.5. This would have included new versions of *How to Adopt a Child in California* (form ADOPT-050); *Adoption Request* (form ADOPT-200); *Adoption Agreement* (form ADOPT-210); and *Adoption Order* (form ADOPT-215). The committee determined, however, that creation of a separate set of stepparent adoption forms would be somewhat duplicative and could cause confusion for stepparent litigants whose adoptions are not addressed by Family Code section 9000.5. The committee also determined that courts may benefit from having fewer types of adoption forms to process. The committee opted for maintaining a more unified set of adoption forms and determined that clarification of the processes could be met through modification of existing forms.

With respect to the proposed new *Declaration Confirming Parentage in Stepparent Adoption* (form ADOPT-205), the committee determined that no existing declaration forms can be reasonably modified to address parentage as required by Family Code section 9000.5. In addition, adding the proposed declaration language to existing adoption forms would make those

forms lengthier and less understandable to litigants. The committee determined that, in order to achieve the goal of clarifying stepparent adoptions under Family Code section 9000.5, it is necessary to develop a new declaration form that specifically addresses cases involving a spouse or partner who gave birth to the child during the union.

The committee also considered alternatives such as education, training, guidelines, or best practices but determined that such alternatives do not address the primary goal of making Judicial Council adoption forms more applicable to stepparent and additional-parent adoption proceedings.

Implementation Requirements, Costs, and Operational Impacts

The committee does not anticipate that this proposal will result in any costs to the branch other than the one-time cost of creating a new form and revising four existing forms. These costs are outweighed by the efficiency benefits of making it easier for litigants to provide the information that the court needs for these cases in a concise and structured manner. This should aid in processing these adoption cases and result in a decreased need for court assistance and case management.

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?
- Do the proposed forms and information sheet make it sufficiently clear that, for some families, adoption may not be legally necessary for recognition of parentage under California law?
- For Family Code section 9000.5 purposes, does the proposed new *Declaration Confirming Parentage in Stepparent Adoption* (form ADOPT-205) adequately cover potential circumstances of conception?
- Would this proposal cause any unintended effect to the overall clarity or usability of the existing ADOPT forms and information sheet?

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. *How to Adopt a Child in California* (form ADOPT-050)
2. *Adoption Request* (form ADOPT-200)
3. *Declaration Confirming Parentage in Stepparent Adoption* (form ADOPT-205)
4. *Adoption Agreement* (form ADOPT-210)
5. *Adoption Order* (form ADOPT-215)
6. Assembly Bill 2344, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2344&search_keywords=
7. Senate Bill 274, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB274&search_keywords=

ADOPT-050 How to Adopt a Child in California

In California, there are several kinds of adoption. Learn about stepparent/domestic partner adoptions on page 1 and independent, agency, and international adoptions; and adoption of an Indian child on page 2.

Every family is different and adoption may not be necessary for some families. Seek legal advice about your family's options before beginning any adoption proceeding. For more information about adoptions in California, please visit: ***www.courts.ca.gov/selfhelp-adoption.htm.***

Stepparent/Domestic Partner Adoptions

If you want to adopt your stepchild or the child of your domestic partner, fill out and file the forms listed below. You can get them from the court clerk or from the California Courts Self-Help Center: ***www.courts.ca.gov/selfhelp.***

The California Legislature developed special procedures for stepparent adoptions used to confirm parentage. If you and the parent who gave birth were married or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) at the time the child was born, you will only complete steps 1–2 listed below, unless the court orders otherwise. Before beginning this process, seek legal advice to determine whether adoption would benefit your family.

1 Fill out court forms.

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.
☐ ADOPT-205	*Declaration Confirming Parentage in Stepparent Adoption*	This tells the court how you conceived your child and whether there are any other parents. Only use this if you are seeking a stepparent adoption and you and the birth parent were married or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) at the time of birth. Both the birth parent and the adopting parent must complete a declaration.

2 Take your forms to court.

Take the completed forms to the court clerk in the county where you live. The court will charge a filing fee. Or, take the forms to your lawyer or adoption agency, if you are using one.

3 The social worker writes a report.

In every adoption, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report with the court and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

4 Go to court on the date of your hearing.

Bring:

☐ The child you are adopting

4 ☐ Form ADOPT-210
☐ Form ADOPT-215
☐ A camera, if you want a photo of you and your child with the judge
☐ Friends/relatives *(optional)*

Independent, Agency, or International Adoptions

If this is an independent, agency, or international adoption, fill out and file the forms below. You can get them from the court clerk or from the California Courts Self-Help Center: ***www.courts.ca.gov/selfhelp.***

You can also use this process to add any additional parent(s) without terminating the rights of the existing parent(s).

1 Fill out court forms.

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.

2 The social worker writes a report.

In every adoption, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report with the court and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

3 Go to court on the date of your hearing.

Bring:

☐ The child you are adopting
☐ Form ADOPT-210
☐ Form ADOPT-215
☐ Form ADOPT-230
☐ A camera, if you want a photo of you and your child with the judge
☐ Friends/relatives *(optional)*

4 Is this an "open" adoption?

If you want your child to have contact with his or her birth family, fill out ADOPT-310, which asks for an open adoption.

5 If you are adopting an Indian child

In addition to the forms listed in **1**, fill out and bring:

☐ Form ADOPT-220 *Adoption of Indian Child*
☐ Form ADOPT-225 *Parent of Indian Child Agrees to End Parental Rights*

If you are adopting through a tribal customary adoption:

☐ Attach a copy of the tribal customary adoption order to *Adoption Request,* ADOPT-200
☐ Attach a copy of the tribal customary adoption order to the *Adoption Order,* ADOPT-215

ADOPT-200 Adoption Request

Clerk stamps date here when form is filed.

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

If you are adopting more than one child, fill out an adoption request for each child.

1 Your name(s) *(adopting parent(s)):*

a. _____

b. _____

Relationship to child: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer *(if any): (Name, address, telephone numbers, e-mail address, and State Bar number):*

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 I/We filed this *Adoption Request* in this court because it is in the county *(check all that apply):*

- ☐ Where the adopting parent(s) reside;
- ☐ Where the child was born or resides at the time of filing;
- ☐ Where an office of the agency that placed the child for adoption is located;
- ☐ Where an office of the department or public adoption agency that is investigating the petition is located;
- ☐ Where a placing birth parent or parents resided when the adoptive placement agreement, consent, or relinquishment was signed;
- ☐ Where a placing birth parent or parents resided when the petition was filed;
- ☐ Where the child was freed for adoption.

(If the child is a dependent of the court, the Adoption Request *must be filed in the county where the child was freed for adoption or the county where the adopting parent(s) reside(s). See Fam. Code, § 8714.)*

3 Type of adoption *(check one):*

- ☐ Agency *(name):* _____
  - ☐ Relative ☐ Nonrelative
- ☐ Joinder will be filed. ☐ Joinder is being filed at same time as this *Adoption Request*.
- ☐ Tribal customary adoption *(attach tribal customary adoption order)*
- ☐ Independent
  - ☐ Relative ☐ Nonrelative ☐ Additional Parent(s)
- ☐ Intercountry *(name of agency):*

  _____
  - ☐ This adoption may be subject to the Hague Adoption Convention *(form ADOPT-216 must be filed with this request).*
- ☐ Stepparent
  - ☐ Confirming parentage of a stepparent who was married or in a registered domestic partnership with the parent who gave birth at the time the child was born.

(To be completed by the clerk of the superior court if a hearing date is available.)

Hearing Date → Hearing is set for:

Date: _____

Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

To the person served with this request: If you do not come to this hearing, the judge can order the adoption without your input.

Your name: _____ **Case Number:**

4 Information about the child:

a. The child's new name will be:
_____

b. ☐ Boy ☐ Girl

c. Date of birth: _____ Age: _____

d. Child's address *(if different from yours):*
Street: _____
City: _____ State: _____ Zip: _____

e. Place of birth *(if known):*
City: _____
State: _____ Country: _____

f. If the child is 12 or older, does the child agree to the adoption? ☐ Yes ☐ No

g. Date child was placed in your physical care:
_____

5 Child's name before adoption *(Fill out ONLY if this is an independent, stepparent, or tribal customary adoption):*
_____

6 Does the child have a legal guardian? ☐ Yes ☐ No

(If yes, attach a copy of the Letters of Guardianship and fill out below):

a. Date guardianship ordered: _____

b. County: _____

c. Case number: _____

7 Is the child a dependent of the court? ☐ Yes ☐ No
(*If yes, fill out below):*

Juvenile case number: _____
County: _____

8 Child may have Indian ancestry: ☐ Yes ☐ No

a. Whether you answered "Yes" or "No," you must fill out and attach *Indian Child Inquiry Attachment* (form ICWA-010(A)) and *Parental Notification of Indian Status* (form ICWA-020) or other proof that ICWA inquiry has been completed in accordance with rule 5.481(a).

b. If you answered "Yes," you must also fill out and attach *Adoption of Indian Child* (form ADOPT-220) if, after notice, it is determined that ICWA does apply to the child.

9 Names of birth parents, if known:

a. Mother: _____

b. Father: _____

10 **If this is an agency adoption:**

a. I/We have received information about the Adoption Assistance Program, the Regional Center, mental health services available through Medi-Cal or other programs, and federal and state tax credits that might be available.
☐ Yes ☐ No

b. All persons with parental rights agree that the child should be placed for adoption by the California Department of Social Services or a county adoption agency or a licensed adoption agency (Fam. Code, § 8700) and have signed a relinquishment form approved by the California Department of Social Services, and the time to revoke the relinquishment has expired or been waived.
☐ Yes ☐ No *(If no, list the name and relationship to child of each person who has not signed the relinquishment form or whose time to revoke the relinquishment has not expired or been waived):*
_____
_____

c. This is a tribal customary adoption under Welfare and Institutions Code section 366.24. Parental rights have been modified under and in accordance with the attached tribal customary adoption order, and the child has been ordered placed for adoption. ☐ Yes ☐ No

d. This is an adoption conducted under the requirements of the Hague Adoption Convention and the child will be moving or has already moved with the adopting parent(s) to another Hague Convention member country at the conclusion of this adoption. ☐ Yes ☐ No If yes, child will be moving or has moved to *(name of country):* _____ and adopting parent(s): ☐ seek(s) a California adoption
☐ will be petitioning for a Hague Adoption Certificate ☐ will be seeking a Hague Custody Declaration.

11 **If this is an independent adoption:**

a. A copy of the Independent Adoptive Placement Agreement from the California Department of Social Services is attached. (This is required in most independent adoptions; see Fam. Code, § 8802.) ☐ Yes ☐ No

b. All persons with parental rights agree to the adoption and have signed the Independent Adoptive Placement Agreement or consent on the appropriate California Department of Social Services form. ☐ Yes ☐ No
(If no, list the name and relationship to child of each person who has not signed the agreement form):
_____

c. I/We will file promptly with the department or delegated county adoption agency the information required by the department in the investigation of the proposed adoption. ☐ Yes ☐ No

12 **If this is a stepparent adoption:**

a. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent

b. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent

c. The adopting parents were married on **or** The domestic partnership was registered on *(date):* _____ *(For court use only. This does not affect social worker's recommendation. There is no waiting period.)*

d. ☐ I am seeking a stepparent adoption to confirm my parentage. At the time the child was born, I was married or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) with the parent who gave birth. A declaration describing the circumstances of the child's conception is attached.

13 ☐ The child was conceived by artificial insemination using semen provided to a medical doctor or a sperm bank. (Fam. Code, § 7613.)

14 **Contact after adoption**

Contact After Adoption Agreement (form ADOPT-310) ☐ is attached ☐ will not be used
☐ will be filed at least 30 days before the adoption hearing ☐ is undecided at this time.
☐ This is a tribal customary adoption. Postadoption contact is governed by the attached tribal customary adoption order.

15 **Consent for adoption is not necessary because *(complete all sections that apply to your adoption):***

a. ☐ The consent of the ☐ birth parent ☐ presumed father is not necessary because *(check the applicable reasons under Fam. Code, § 8606):*

(1) ☐ The parent has been judicially deprived of the custody and control of the child.

(2) ☐ The parent has voluntarily surrendered the right to custody and control of the child in a judicial proceeding in another jurisdiction, under a law of that jurisdiction providing for the surrender.

(3) ☐ The parent has deserted the child without providing information to identify the child.
(4) ☐ The parent has relinquished the child under Family Code section 8700.
(5) ☐ The parent has relinquished the child for adoption to a licensed or authorized child-placing agency in another jurisdiction.

b. ☐ A court ended the parental rights of:

Name: _____ Relationship to child: _____ on *(date):* _____
Name: _____ Relationship to child: _____ on *(date):* _____
(Enter the date of the court order ending parental rights and attach a copy of the order.)

c. ☐ The child is the subject of a tribal customary adoption order under Welfare and Institutions Code section 366.24, which has modified the parental rights of:

Name: _____ Relationship to child: _____ on *(date):* _____
Name: _____ Relationship to child: _____ on *(date):* _____
Name: _____ Relationship to child: _____ on *(date):* _____
(Attach a copy of the order.)

d. ☐ I/We will ask the court to end the parental rights of *(attach copy of* Petition to Terminate Parental Rights *or* Application for Freedom From Parental Custody, *if filed):*

Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

e. ☐ Adopting parent has custody of the child by court order or by agreement with the other parent, and each of the following persons with parental rights has not contacted the child and has not paid for the child's care, support, and education for one year or more when able to do so. (Fam. Code, § 8604(b).)

Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

f. ☐ The child has been abandoned as follows:

(1) ☐ The child has been left by the child's parent or parents with no way to identify the child.

(2) ☐ The child has been left in the custody of another person by both parents or the sole parent for six months without providing for the child's support, or without communication from the parent or parents, with the intent to abandon the child.

(3) ☐ One parent has left the child in the care and custody of the other parent for one year or longer without providing for the child's support or without communication from the parent, with the intent to abandon the child.

(If any of the above boxes were checked, adopting parent must also check item 16(d) and file an Application for Freedom from Parental Custody. *See Fam. Code, § 7822(a).)*

g. ☐ The consent of the presumed father is not required because he did not become a presumed father before the mother's relinquishment or consent became irrevocable or the mother's parental rights were terminated. (Fam. Code, § 8604(a).)

h. ☐ Each of the following persons with parental rights has died:
Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

16 **Suitability for adoption**
Each adopting parent:
a. Is at least 10 years older than the child or meets the criteria in Family Code section 8601(b);
b. Will treat the child as his or her own;
c. Will support and care for the child;
d. Has a suitable home for the child; *and*
e. Agrees to adopt the child.

17 ☐ I/We ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all the rights and duties of this relationship, including the right of inheritance.

☐ I/We ask the court to date its order approving the adoption as of an earlier date *(date):* _____ for the following reason (Fam. Code, § 8601.5):

_____

_____

_____

(Enter a date no earlier than the date parental rights were ended.)

☐ This is a tribal customary adoption. I/We ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all of the rights and duties stated in the attached tribal customary adoption order and in accordance with Welfare and Institutions Code section 366.24.

18 If a lawyer is representing you in this case, he or she must sign here:

Date: _____ _____ ▶ _____
Type or print lawyer's name *Signature of lawyer for adopting parent(s)*

19 I declare under penalty of perjury under the laws of the State of California that the information in this form and all its attachments is true and correct to my knowledge. This means that if I lie on this form, I am guilty of a crime.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

NOTICE—ACCESS TO AFFORDABLE HEALTH INSURANCE: Do you or someone in your household need affordable health insurance? If so, you should apply for Covered California. Covered California can help reduce the cost you pay toward high-quality affordable health care. For more information, visit www.coveredca.com. Or call Covered California at 1-800-300-1506 (English) or 1-800-300-0213 (Spanish).

ADOPT-205 Declaration Confirming Parentage in Stepparent Adoption

(Attach to Adoption Order *(form* ADOPT-200*))*

This optional form may be attached to the form ADOPT-200 if the adopting parent was married to or in a registered domestic partnership (including a domestic partnership or civil union from out-of-state) with the parent who gave birth to the child at the time the child was born. You may instead attach a declaration in another format containing substantially the same information. The birth parent and the adopting parent must complete separate declarations.

Clerk stamps date here when form is filed.

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 I *(write your name)* _____ declare as follows:

2 Relationship between the birth parent and the stepparent seeking to confirm parentage *(check one):*

a. ☐ I am the parent who gave birth to the child to be adopted. I married or entered into a registered domestic partnership with the stepparent who is seeking to confirm parentage *(name of stepparent seeking to confirm parentage)* _____ .

b. ☐ I am the stepparent seeking to confirm parentage. I married or entered into a registered domestic partnership with the parent who gave birth *(name of parent who gave birth to the child to be adopted)* _____ _____ .

3 We were married/registered as domestic partners before our child was born. A copy of our marriage certificate, registered domestic partner certificate, or certificate of out-of-state domestic partnership or civil union on *(date you entered into your earliest union)* _____ is attached *(attach a copy of the certificate of the earliest union).*

4 Our child *(name of child to be adopted)* _____ was born on *(date)* _____ . A copy of our child's birth certificate is attached.

5 Circumstances of conception *(check one):*

a. ☐ Our child was conceived through assisted reproduction and the ☐ sperm ☐ ova were provided to a licensed physician or surgeon or sperm bank before conception. (*Describe how your child was conceived and whether you used a known or unknown donor. If you used a known donor, list donor's name):*

b. ☐ Our child was conceived using a known donor but the sperm was not provided to a licensed physician or surgeon or sperm bank prior to conception. The known donor *(name)*, _____ consents to this adoption and termination of his parental rights.

c. ☐ Our child was not conceived through assisted reproduction *(check one):*

(1) ☐ The biological father *(name)* _____ consents to this adoption and termination of his parental rights.

(2) ☐ The biological mother *(name)* _____ consents to this adoption and termination of her parental rights.

6 ☐ *If there are any other persons who are or may be the child's parents, describe these persons' relationship to the child, including their names, the ways in which these persons act as a parent to the child, and whether these persons consent to the adoption:*

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 your name *Sign name*

ADOPT-210 Adoption Agreement

Clerk stamps date here when form is filed.

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Your name(s) *(adopting parent(s)):*

a. _____

b. _____

Relationship to child: _____

Address *(skip this if you have a lawyer):* _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer *(if any): (Name, address, telephone numbers, e-mail address, and State Bar number):* _____

(2) Child's name before adoption: _____

Child's name after adoption: _____

Date of birth: _____ Age: _____

Signing this form:

Adoptions usually require a hearing where all signatures on this form must be completed in front of a judge.

If this is a stepparent adoption involving a spouse or partner who gave birth to the child during the marriage or registered domestic partnership (including a domestic partnership or civil union from out-of-state), usually no hearing is required and you may sign this form in front of a proper witness. See paragraph 8(b) for instructions on having your signature properly witnessed. If the court orders a hearing in this case, you must sign this form at the hearing in front of the judge.

(3) I am the child listed in (2) and I agree to the adoption. *(Not required in the case of a tribal customary adoption under Welf. & Inst. Code, § 366.24.)*

Date: _____ _____ ▶ _____

Type or print your name — *Signature of child (child must sign if 12 or older; optional if child is under 12)*

(4) *If there is only **one** adopting parent, read and sign below.*

a. I am the adopting parent listed in (1), and I agree that the child will:

(1) Be adopted and treated as my legal child *(Fam. Code, § 8612(b)) and*

(2) Have the same rights as a natural child born to me, including the right to inherit my estate.

Date: _____ _____ ▶ _____

Type or print your name — *Signature of adopting parent*

b. I am married to, or the registered domestic partner of, the adopting parent listed in (1), and I agree to his or her adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of spouse or registered domestic partner*

(5) *If there are **two** adopting parents, read and sign below.* We are the adopting parents listed in (1), and we agree that the child will:

a. Be adopted and treated as our legal child *(Fam. Code, § 8612(b)) and*
b. Have the same rights as a natural child born to us, including the right to inherit our estate.

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

(6) *If this is a tribal customary adoption, read and sign below.* I/we are the adopting parents listed in (1), and I/we agree that the child will:

a. Be adopted and treated as my/our legal child *(Fam. Code, § 8612(b)) and*
b. Have the same rights and duties stated in the tribal customary adoption order dated _____ *(copy attached).*

If two adopting parents, we agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

(7) *For stepparent adoptions only:*
If you are the legal parent of the child listed in (2), read and sign below.
I am the legal parent of the child and am the spouse or registered domestic partner of the adopting parent listed in (1), and I agree to his or her adoption of my child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of legal parent*

(8) **Executed *(check one):***

a. ☐ This form was signed at a hearing in front of a judicial officer. *(The judge will date and sign the form below).*

Date: _____ _____
Judge (or Judicial Officer)

b. ☐ This form was signed outside of a hearing. *(Select this option only for a stepparent adoption involving a spouse or partner who gave birth to the child during the union, where the court did not order a hearing for good cause).*

(1) ☐ This form was signed **in** California

This form was signed in front of the following type of witness *(check one):*

- ☐ notary public *(the notary acknowledgment is attached)*
- ☐ court clerk
- ☐ probation officer
- ☐ qualified court investigator
- ☐ authorized representative of a licensed adoption agency
- ☐ county welfare department staff member

(2) ☐ This form was signed **outside** of California

This form was signed in front of the following type of witness *(check one):*

- ☐ notary public *(the notary acknowledgment is attached)*
- ☐ other person authorized to perform notarial acts *(proof of notarization is attached)*
- ☐ authorized representative of an adoption agency that is licensed in the state or country where this form was signed

(3) Witness information

This form was signed in: *(county)* _____ *(state)* _____ *(country)* _____

Name of witness: _____

Agency witness works for *(if applicable):* _____

Witness signature: _____

Date: _____

ADOPT-215 Adoption Order

Clerk stamps date here when form is filed.

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

1 Your name *(adopting parent(s)):*

a. _____

b. _____

Relationship to child: _____

Street address: _____

City: _____ State: _____ Zip: _____

Daytime telephone number: _____

Lawyer *(if any): (Name, address, telephone number, e-mail address, and State Bar number):* _____

Fill in court name and street address:

Superior Court of California, County of

2 Child's name after adoption: _____

First name: _____

Middle name: _____

Last name: _____

Date of birth: _____ Age: _____

Place of birth *(if known):* _____

City: _____ State: _____ Country: _____

Court fills in case number when form is filed.

Case Number:

3 Name of adoption agency *(if any):* _____

4 Hearing Details

Hearing date: _____ Dept.: _____ Div.: _____ Rm.: _____

Judicial Officer: _____ Clerk's office telephone number: _____

People present at the hearing:

☐ Adopting parent(s) ☐ Lawyer for adopting parent(s)

☐ Child ☐ Child's lawyer

☐ Parent keeping parental rights: _____

☐ Other people present *(list each name and relationship to child):*

a. _____

b. _____

If there are more names, attach a sheet of paper, write "ADOPT-215, Item 4" at the top, and list the additional names and each person's relationship to child.

☐ *The hearing is waived pursuant to Family Code section 9000.5 (Check this box only if this is an adoption confirming parentage of a stepparent who was married or in a registered domestic partnership with the parent who gave birth at the time the child was born.)*

Judge will fill out section below.

5 The judge finds that the child *(check all that apply):*

a. ☐ Is 12 or older and agrees to the adoption

b. ☐ Is under 12

c. ☐ This is a tribal customary adoption and the child's consent is not required.

Your name: _____ **Case Number:**

6 The judge has reviewed the report and other documents and evidence and finds that each adopting parent:

a. Is at least 10 years older than the child or meets the criteria in Fam. Code, § 8601(b)
b. Will treat the child as his or her own
c. Will support and care for the child
d. Has a suitable home for the child *and*
e. Agrees to adopt the child

7 ☐ This case is an adoption by a relative petitioned under Family Code section 8714.5.
☐ The adopting relative ☐ The child, who is 12 or older, has requested that the child's name before adoption be listed on this order. (Fam. Code, § 8714.5(g).)
The child's name before adoption was:
First name: _____ Middle name: _____ Last name: _____

8 ☐ The child is an Indian child. The judge finds that this adoption meets the placement requirements of the Indian Child Welfare Act or that there is good cause to give preference to these adopting parents. The clerk will fill out **13** below.

9 ☐ The judge approves the *Contact After Adoption Agreement* (ADOPT-310)
☐ As submitted ☐ As amended on ADOPT-310

10 This is a tribal customary adoption, The tribal customary adoption order of the _____ tribe dated _____ containing _____ pages and attached hereto is fully incorporated into this order of adoption.

11 ☐ This is an adoption under the Hague Adoption Convention. *Verification of Compliance with Hague Adoption Convention Attachment* (form ADOPT-216) is attached and fully incorporated into this order.

12 The judge believes the adoption is in the child's best interest and orders this adoption.
The child's name after adoption will be:
First name: _____ Middle name: _____ Last name: _____

The adopting parent or parents and the child are now parent and child under the law, with all the rights and duties of the parent-child relationship or, in the case of a tribal customary adoption, all the rights and duties set out in the tribal customary adoption order and Welfare and Institutions Code section 366.24.

☐ The judge believes it will serve public policy and the best interest of the child to grant the request of the adopting parent or parents for the court to make this order effective as of *(date):* _____.

Date: _____ _____
(Date of Signature) *Judge (or Judicial Officer)*

Clerk will fill out section below.

13 **Clerk's Certificate of Mailing**

For the adoption of an Indian child, the Clerk certifies:
I am not a party to this adoption. I placed a filed copy of:

☐ *Adoption Request* (ADOPT-200) ☐ *Adoption of Indian Child* (ADOPT-220)
☐ *Adoption Order* (ADOPT-215) ☐ *Contact After Adoption Agreement* (ADOPT-310)

in a sealed envelope, marked "Confidential" and addressed to:

Chief, Division of Social Services
Bureau of Indian Affairs
1849 C Street, NW
Mail Stop 310-SIB
Washington, DC 20240

The envelope was mailed by U.S. mail, with full postage, from:
Place: _____ on *(date):* _____
Date: _____ Clerk, by: _____, Deputy

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Juvenile Law: Sealing of Records

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
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:
Approved by RUPRO: December 10, 2014
Project description from annual agenda: Provide subject matter expertise to the council by making recommendations for rules and forms required by recent legislative changes as a result of SB 1038 (Leno) Juveniles: dismissal of petition (Ch. 249). Removes the cap of 21 years old by which a court must dismiss a petition against a former ward of the court. Does not require the court to have jurisdiction over the former ward at the time of dismissal of a petition. Further requires a court to automatically seal the records of minors under specified circumstances, and grants limited access to such files without this access constituting "unsealing" of the records.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Adopt Cal. Rules of Court, rule 5.840; amend rule 5.830; adopt forms JV-595, JV-595-INFO, and JV-596; revise forms JV-590 and JV-600

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Juvenile Law: Sealing of Records

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 5.840; amend rule 5.830; adopt forms JV-595, JV-595-INFO, and JV-596; revise forms JV-590 and JV-600

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes new and amended rules and forms to implement the provisions of two recently enacted statutes. Assembly Bill 1006 (Yamada; Stats. 2013, ch. 269) directed the Judicial Council to develop informational materials and a form to enable a former ward or individual for whom a petition was filed under Welfare and Institutions Code section 602, or any individual who had contact with a probation department under section 626, to petition the court for the sealing and destruction of juvenile records under section 781 and rule 5.830.[1] Section 781(g) provides that each county probation department and court must ensure that record-sealing information and a form petition are provided to eligible youth. It also instructs that the sealing information and the form petition "shall be provided . . . when jurisdiction is terminated or when the case is dismissed." After the council circulated a proposal for comment to implement these requirements, new legislation (Sen. Bill 1038 [Leno]; Stats. 2014, ch. 249) was enacted that requires the court to automatically dismiss and seal the records for many juvenile wards.

Prior Circulation

The provisions of this proposal that would implement AB 1006 were circulated for comment in spring 2014. Before the council could act on that proposal, SB 1038 was enacted, significantly

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

changing the law on the sealing of juvenile records. Given this change in the law, committee members opted to defer action on the proposal until they could modify it to incorporate the changes made by SB 1038 and circulate a comprehensive package of rules and forms to implement new law on juvenile record sealing.

The Proposal

This proposal recommends adoption of one mandatory information form, *How to Make Your Juvenile Records Private* (form JV-595-INFO), and one optional petition form, *Request to Seal Juvenile Records* (form JV-595), to implement AB 1006 while incorporating the recent changes made by SB 1038 into the information form. A new optional order form, *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596), is recommended for approval, as well as a new rule of court, rule 5.840, to implement the new mandatory sealing requirements created by SB 1038. In addition, rule 5.830 would be amended to reflect the directives of AB 1006: the petition and information form would be referred to within the rule, and the distribution requirements would also be specified. Additionally, *Order to Seal Juvenile Records—Welfare and Institutions Code Section 781* (form JV-590) would be revised from a mandatory form to an optional form to provide courts with the flexibility to develop an order that reflects local agency and court practices when sealing records based on a petition. Finally, *Juvenile Wardship Petition* (form JV-600) would be revised to include a notice alerting minors about record sealing at an earlier phase of the proceedings.

Section 781 enables eligible individuals to petition the juvenile court to have juvenile records sealed under certain circumstances specified within the code. The records eligible for sealing include contacts with the juvenile justice system, law enforcement, the Department of Motor Vehicles, and other agencies. These contacts include juvenile court records resulting from formal adjudications under section 602 of the code and informal contacts with probation and law enforcement under sections 601 and 626 of the code. To qualify for sealing, among other requirements, the records must not fall within section 707(b) of the code if committed by an individual 14 years of age or older, the offense must not have led to a conviction in adult court under section 707.1, and the petitioner must not have been convicted of a felony or misdemeanor involving moral turpitude as an adult. In addition, the court must find that the petitioner has been satisfactorily rehabilitated.

Newly enacted section 786 provides an alternate procedure for the sealing of records for non-707(b) matters by requiring the juvenile court to dismiss a petition and seal the records pertaining to that petition for any minor who satisfactorily completes an informal probation supervision program under section 654.2, probation under section 725, or a term of probation for any other offense not listed in section 707(b). This newly enacted section went into effect on January 1, 2015, and will thus be applied to matters dismissed after that date, which will result in the sealing of many more records in this manner as opposed to in response to a petition filed under section 781. Only those cases dismissed before January 1, 2015, or those cases in which the court does not find that the minor has satisfactorily completed his or her probation will be required to follow the procedures for section 781.

Proposed new form JV-595-INFO

Previously, no statutory directives mandated that the court and probation "shall ensure" that eligible individuals are informed of available record-sealing options. The newly revised code directs that the informational materials and optional form must be provided by the court or probation to eligible individuals when jurisdiction is terminated or the case is dismissed. Proposed new mandatory *How to Make Your Juvenile Records Private* (form JV-595-INFO) includes information on the benefits and limitations of record sealing. It is intended to use plain language and a user-friendly format to explain the process required for record sealing, with the goal of increasing the likelihood that the optional form JV-595, *Request to Seal Juvenile Records*, is completed accurately so that courts can properly seal all appropriate juvenile records. It also emphasizes that only eligible records included on the form and known to the court will be sealed. This emphasis reinforces that probation will not be taxed with investigation requirements and reduces the burden on the court and probation by clarifying that the responsibility of identifying agencies where records may be found rests with the petitioner.

The form also explains that when a probation case is closed, the probation officer will provide the petitioner with a list of the petitioner's known contacts housed with the juvenile justice system and other agencies. This information will assist the petitioner in filling out form JV-595 as completely as possible. Because many minors with juvenile records will now have their records sealed by the court as a matter of law when their cases are dismissed, the form also provides information on those cases that are eligible for this sealing, as well as information on automatic sealing for cases with a deferred entry of judgment order under section 790. Such cases are sealed if the minor satisfactorily completes the program assigned during the period that the judgment has been deferred.

Proposed new form JV-595

Proposed new optional *Request to Seal Juvenile Records* (form JV-595) is intended to provide the petitioner with a simple but optional method to request sealing. It directs the petitioner to include all known contacts with law enforcement; probation; group homes, camps, and foster care agencies; schools; the Department of Motor Vehicles; and other agencies. It also instructs the petitioner to include contacts in all counties, as provided by amended rule 5.830, which states: "The order must apply in the county of the court hearing the petition and in all other counties in which eligible juvenile records are identified by the petitioner on the petition."[2] Section 781(a) directs the court to "send a copy of the order to each agency and official named therein, directing the agency to seal its records and stating the date thereafter to destroy the sealed records." Some courts have interpreted the requirement to be limited to in-county agencies. By ensuring that the form instructs that *all* identified agencies must be provided with the order, this misinterpretation will be resolved and form JV-590, *Order to Seal Juvenile*

[2] Clarification about proposed changes to the rule is provided in the section of this invitation to comment specific to the rule.

Records—Welfare and Institutions Code Section 781, will be used more consistently and comprehensively.

Proposed new form JV-596

To provide the courts with a means to accomplish its new responsibility to seal records after dismissing a petition, as required by section 786, this proposal recommends approval of a new optional order form for this purpose. This form is very similar to the order form used to seal the records of minors who successfully complete a section 790 deferred entry of judgment program. Although section 786 directs the court to seal "all records pertaining to that dismissed petition in the custody of the juvenile court," the committee has interpreted this language to be consistent with other juvenile record–sealing statutes and to include all records relating to the petition—whether in the custody of the court or another agency. The committee has adopted this view based on the implementation of very similar language in section 793 relating to the sealing of deferred entry of judgment records for which the rule of court and the form provide for sealing of all records, and not simply those held by the juvenile court. [3]

This reading is consistent with the underlying purpose of juvenile record sealing, which is to improve employment and educational opportunities for youth with a juvenile justice record. If the court records were sealed, but criminal history databases continued to include information about the underlying arrest and disposition, this objective would not be comprehensively accomplished. Moreover, it would require two separate sealing processes for many minors, one when the case was dismissed and another under section 781 to seal the remainder of the records. And were the court to act on these subsequent petitions, it would have no access to its own records because they would have been sealed via the earlier process.

The committee concluded that its understanding of section 786 was consistent with the section's intent but that implementation of these new requirements will pose challenges because the juvenile justice system at large, the courts, probation, and other agencies will not have access to information on what services and programs a minor has previously received if a new petition is filed subsequent to the filing of an earlier petition.[4]

Revised form JV-590 by making it an optional form

Order to Seal Juvenile Records—Welfare and Institutions Code Section 781 (form JV-590) is currently a mandatory form. To provide courts with maximum flexibility to issue record-sealing orders that reflect the individual court's needs, practices, and local agencies, the committee

[3] Section 793 provides that when the case is dismissed, "any records in the possession of the juvenile court" must be sealed.

[4] Because the committee is aware that two bills (AB 666(Stone) and AB 989 (Cooper)) have been introduced to revise section 786 to address and clarify these issues, it has used statutory references rather than express language in the proposed form and rule so that modifications to the statute may not require changes to the form and rule. However, the existence of these bills may require subsequent modifications to the proposal after the comment cycle has concluded, or in a future cycle.

proposes that form JV-590 be revised from mandatory to optional. This change would provide flexibility from county to county, with the optional form available if needed. In addition, the committee proposes adding room on the form for the court to specify the date that these records should be destroyed or to indicate that they not be destroyed per the court's order or statutory requirements.

Revised form JV-600

The committee also proposes revising *Juvenile Wardship Petition* (form JV-600) to include a directive informing youth about the option of record sealing and identifying form JV-595-INFO, *How to Make Your Juvenile Records Private*, as a source of information. This proposed revision will serve two purposes: it will (1) alert minors about record sealing at an earlier phase of the juvenile court proceedings, and (2) provide a supplementary way to reach those minors who may be named in a petition but have limited contact with probation.

Amended rule 5.830

Proposed changes to rule 5.830 involve incorporating references to forms JV-595-INFO, JV-595, and JV-590 and defining the roles of the court and probation department in ensuring that the forms are provided as required. The rule would also direct probation to provide the petitioner with a list of the petitioner's known contacts housed with the juvenile justice system at the time that the case is closed, which would assist the petitioner in filling out the petition as completely as possible.

In its current form, rule 5.830 has not been interpreted consistently with regard to its description of the records that must be sealed in other counties when the court's record-sealing order is issued. The rule specifies that the sealing order "must apply in the county of the court hearing the petition and in all other counties in which there are juvenile records concerning the petitioner." The committee recommends that the word *eligible* be inserted before the word *juvenile* to clarify that only those records that can be legally sealed are covered by the order. The committee also proposes adding an advisory comment that provides general context on the purpose of record sealing and addresses the scope and overall specifications of the act of record sealing.

Proposed new rule 5.840

The proposal recommends adoption of a new rule of court to implement the sealing requirements of section 786. The rule would result in the sealing of all records related to eligible petitions dismissed by the court and would direct the clerk of the court to distribute the order to all named agencies and direct those agencies to immediately seal their records. It also includes the access exceptions allowed by section 786, but as with the proposed order form described above, it does not specify the exceptions but rather references the statute so that any future modification to section 786 will not result in the need for changes to the rule. In addition, the rule directs the court to seal all records and not just those in its custody for the reasons discussed above with reference to proposed new form JV-596.

Alternatives Considered

With the passage of Assembly Bill 1006, the Legislature directed the Judicial Council to develop informational materials and a form petition to ensure that eligible individuals are adequately informed about the option of sealing their records and provided with a form to assist them in petitioning the court. Consideration was given to how the informational materials could be most effectively presented and in what format. The committee determined that an information form, available on the court website, would be more likely to reach the target audience and remain more relevant than a less formal handout, which might, over time, be forgotten. In addition, making the information form mandatory would raise its relevance by increasing awareness and encouraging compliance. The committee, to further increase the likelihood for the form to reach its target audience and to provide information at an earlier phase of the proceedings, determined that adding a notice about record sealing to the *Juvenile Wardship Petition* (form JV-600) would be beneficial.

Consideration was also given to whether rule 5.830 needed to be revised. Ensuring consistency and clarifying the new requirements are the clear benefits of revising the rule as proposed.

Request to Seal Juvenile Records, form JV-595, was created as required by the Legislature but is proposed as an optional form to allow petitioners to submit a request to seal in whatever manner they prefer. Although the form provides a convenient method of petitioning the court, mandating its use may delay applications and run contrary to the intent of Assembly Bill 1006. Similarly, revising form JV-590, *Order to Seal Juvenile Records—Welfare and Institutions Code Section 781*, from a mandatory form to an optional form will lead to more flexibility in implementation for the courts.

Although the new legislation's target population is primarily youth described by sections 602 and 626 of the Welfare and Institutions Code, consideration was given to whether efforts should be made to reach youth described by section 781(d)—specifically, those youth who are arrested and dealt with informally by law enforcement. Although reaching these youth would clearly be beneficial, the legislation does not provide an avenue to accomplish this goal, and efforts to reach those individuals not described in section 781(g) would be burdensome to the court and probation.

Implementation of SB 1038 does not expressly require the council to take any action, but the committee deemed it necessary at a minimum to ensure that the information provided to those seeking to seal their records reflected the current state of the law. In addition, because SB 1038 significantly modifies current practices in juvenile court by requiring courts to dismiss and seal many of the petitions that will come before them going forward, the committee deemed it best to create an optional form and a simple and straightforward rule of court to assist courts in implementing these new requirements as efficiently as possible. The committee considered modifying existing rules and forms, but given that this method of sealing will likely become the most common sealing procedure and given its sufficient distinctions from existing sealing

processes, the committee concluded that new forms would ultimately be more useful to the courts.

Implementation Requirements, Costs, and Operational Impacts

Courts will be required to produce paper copies of the information form and petition as required by AB 1006. Some courts may incur programming charges if electronic systems are used for the court order. However, the committee believes that full implementation of this proposal may aid court operations and reduce probation department costs by providing youth with a listing of relevant records at case closing and by streamlining the process in a single county. Although this effort may result in additional time to send notices of record sealing, it should also reduce or eliminate the need for the youth to file requests in multiple counties or to inspect court files to determine which records to request for sealing.

Implementation of SB 1038 will require courts to generate and disseminate many new sealing orders as required by the legislation. The optional order form will assist courts in carrying out this function, and the rule will clarify the basic procedures required to accomplish the new requirements.

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 of ensuring that up-to-date information regarding the eligibility for and the procedures to obtain or request sealing and destruction of records is provided to each person for whom a petition has been filed on or after January 1, 2015, to adjudge the person a ward of the juvenile court, and to specified other minors who are taken into temporary custody and brought before a probation officer under Welfare and Institutions Code section 626?
- Do you agree that the JV-595 petition form should be optional so that juveniles who may choose to submit a petition on a self-created application or local form are able to do so?
- Is the addition of the information about the date of destruction useful, or would it impose an additional workload burden for courts or probation to research and calculate these dates? Would this be overcome if the form was fillable and included a calculation based on the rules that apply to 602 files (in 602 cases, the rule that applies would be five years for noncourt records and age 38 for court records, so a formula could be used in a fillable form, but for 601 and 300 records, the rule is five years for both)?
- Does the information on federal requirements for disclosing sealed records on form JV-585 and JV-595-INFO provide petitioners with accurate and helpful information about when it may be necessary to report juvenile adjudications even when the records have been sealed?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?
- Do you agree that all of the sealing order forms be optional forms so that courts have the flexibility to use the form that best meets their needs?

Attachments and Links

1. Proposed Cal. Rules of Court, rules 5.830 and 5.840, at pages 9–11
2. Proposed new and revised forms JV-590, JV-595, JV-595-INFO, JV-596, and JV-600, at pages 12–19
3. Assembly Bill 1066, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1006
4. Senate Bill 1038 http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1038

Rule 5.830. Sealing records

(a) Sealing records—former wards (§ 781)

(1) A former ward of the court may apply to petition the court to order juvenile records sealed. Determinations under section 781 must be made by the court in the county in which wardship was last terminated.

(2) At the time jurisdiction is terminated or the case is dismissed, the court must provide or instruct the probation department to provide form JV-595-INFO, *How to Make Your Juvenile Records Private*, and form JV-595, *Request to Seal Juvenile Records*, to the ward.

(3) At the time wardship is terminated or the case is dismissed, the probation department must provide the ward with a list of every agency or person that the probation department knows has a record of the ward's case, including the date of each offense, the case number or numbers, and the date when the case was closed. Probation does not need to provide this list if the record is being sealed automatically under section 786.

~~(1)~~(4) *Application—submission*

(A) The application for a petition to seal records must be submitted to the probation department in the county in which wardship was last terminated.

(B) The application for a petition to seal juvenile records may be submitted on form JV-595, *Request to Seal Juvenile Records*, or on another form that includes all required information.

~~(2)~~(5) * * *

~~(3)~~(6) * * *

~~(4)~~(7) If the petition is granted, the court must order the sealing of all records described in section 781 using form JV-590, *Order to Seal Juvenile Records—Welfare and Institutions Code Section 781*, or a similar form. The order must apply in the county of the court hearing the petition and in all other counties in which ~~there are~~ eligible juvenile records ~~concerning the petitioner~~ are identified by the petitioner on the petition.

(b) Sealing—nonwards

(1) * * *

(2) When jurisdiction is terminated or the case is closed, the probation department must provide the following to individuals described under section 781(g)(1)(A) and (B):

(A) Form JV-595-INFO, *How to Make Your Juvenile Records Private;*

(B) Form JV-595, *Request to Seal Juvenile Records;* and

(C) A list of cases of every agency or person that the probation department knows has a record of the ward's case, including the date of each offense, case number(s), and the date when the case was closed. Probation does not need to provide this list if the record is being sealed automatically under section 786.

(c)–(e) * * *

Advisory Committee Comment

This rule is intended to describe the legal process by which a person may apply to petition the juvenile court to order the sealing—that is, the prohibition of public access and inspection—of the records related to specified cases in the custody of the juvenile court, the probation department, and other agencies and public officials. This rule establishes minimum legal standards, but does not prescribe procedures for the management of physical or electronic records or methods for preventing public inspection of the records at issue. These procedures remain subject to local discretion. Procedures may, but are not required to, include the actual sealing of physical records or files. Other permissible methods of sealing physical records pending their destruction under section 781(d) include, but are not limited to, storing sealed records separately from publicly accessible records, placing sealed records in a folder or sleeve of a color different from that in which publicly accessible records are kept, assigning a distinctive file number extension to sealed records, or designating them with a special stamp. Procedures for sealing of electronic records must accomplish the same objectives as the procedures used to seal a physical record.

Rule 5.840. Dismissal of petition and sealing of records (section 786)

(a) Applicability

This rule states the procedures to dismiss and seal the records of minors who are subject to section 786, including all minors who have satisfactorily completed an informal program of supervision under section 654.2, probation under section 725,

or a term of probation for any offense not listed in subdivision (b) of section 707 and whose cases are dismissed on or after January 1, 2015.

(b) Dismissal of petition

If the court finds that a minor subject to this rule has satisfactorily completed his or her informal or formal probation supervision, the court must order the petition dismissed.

(c) Sealing of records

If the court dismisses the petition, it must also order sealed all records pertaining to that dismissed petition using form JV-596, *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786*, or a similar form. The prosecuting attorney, the probation officer, and the court shall have access to these records as specifically provided in section 786.

(d) Destruction of records

All records sealed must be destroyed according to section 781(d).

(e) Distribution of order

The clerk of the issuing court must:

(1) Send a copy of the order to each agency and official listed in the order; and

(2) Send a certified copy of the order to the clerk in each county in which a record is ordered sealed.

(f) Deadline for sealing

Each agency, individual, and official notified must immediately seal all records as ordered.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	**DRAFT** **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:	
CASE NAME:	
ORDER TO SEAL JUVENILE RECORDS — WELFARE AND INSTITUTIONS CODE SECTION 781	CASE NUMBER:

1. Name of petitioner *(specify aliases):* Date of birth:
2. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
3. ☐ The court has read and considered the petition and the report of the probation officer.
4. The petition is
   a. ☐ Granted. b. ☐ Denied.

THE COURT ORDERS

5. a. ☐ The sealing of petitioner's juvenile records in the custody of this court and the courts, agencies, and officials named below *(designate county):*

   ☐ See attachment (5) for additional names.
   b. All records sealed shall be destroyed according to Welfare and Institutions Code sections 389(c) and 781(d).
   c. Date court records must be destroyed:
   d. Court records must be retained
      ☐ for good cause.
      ☐ records pertain to a person adjudged delinquent for an offense listed in section 707(b) when 14 years of age or older.
   e. Date all other records must be destroyed:
6. ☐ Petitioner is relieved from the registration requirements under Penal Code section 290, and the registration information in the custody of the Department of Justice and other agencies and officials listed above shall be destroyed.
7. ☐ The clerk shall send a certified copy of this order to the clerk in each county in which a record is ordered sealed and a copy to each agency and official listed above.

Date:

▶ _____
JUDICIAL OFFICER OF THE SUPERIOR COURT

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

Form Approved for Optional Use
Judicial Council of California
JV-590 [Rev. January 1, 2016]

Penal Code, § 290;
Welfare and Institutions Code, §§ 389(c), 781(d), 781(g)(1);
Cal. Rules of Court, rules 5.504, 5.830
www.courts.ca.gov

JV-595 Request to Seal Juvenile Records

Probation stamps date when form is received.

DRAFT
NOT APPROVED
BY THE JUDICIAL COUNCIL

This form can be used to petition the juvenile court to seal your juvenile records if you meet the requirements of Welfare and Institutions Code section 781. More information about sealing is available on form JV-595-INFO, *How to Make Your Juvenile Records Private*.

On page two of this form, include all the officials and agencies you came in contact with when you were under the age of 18, including law enforcement, probation, the Department of Motor Vehicles, and the district attorney's office. Include agencies in EVERY county. Submit this form to the probation department in the county where you were last on juvenile probation or, if you were not on probation, in any county where you had contact with law enforcement or probation that did not result in a court case. Once the probation department receives the completed form, it will have 90 days to file a record-sealing petition with the court for you, or 180 days if you include agencies outside of this county.

Fill in court name and street address:

Superior Court of California, County of

Fill in your name:

Name:

Fill in case number, if known:

Case Number:

1 My information:

a. Name: _____

b. AKA *(nickname, or other name I've used):*

_____

c. Address: _____

d. City, state, zip code: _____

e. Area code and telephone number: _____

f. Date of birth: _____

g. E-mail address: _____

2 ☐ I had a case(s) that went to court.

Case file number(s): _____ The date my case(s) was closed: _____

☐ I do not remember my case file number or the date my case was closed.

3 I had contact with law enforcement but did not go to court.

☐ Date(s) I had contact with law enforcement: _____

☐ Name(s) of law enforcement or other agency(ies): _____

4 I understand that the probation department is responsible for requesting the juvenile court to seal the records of only those agencies listed on page 2 of this form. I understand that after I file this document and pay any fees that are required, the probation department will have 90 days to conduct an investigation and file a record-sealing petition for me with the juvenile court, or 180 days if I am requesting that information in more than one county be sealed. I also understand that some records may not be eligible for sealing. I am aware that form JV-595-INFO, *How to Make Your Juvenile Records Private*, provides more information on this process. I also understand that the federal government will not recognize sealing of records and that juvenile records must be reported, even though sealed, if I apply for enlistment in the armed services or other federal employment requiring disclosure of juvenile records.

Your name: _____

Case Number:

Note: Your probation officer provided you with a list of contacts with law enforcement when your case closed. That document should make filling out this form easier for you because it includes the contacts that probation is aware of from your juvenile records. The best way to ensure that all your juvenile records are sealed is for you to list all contacts on this form or attach a copy of the list of contacts probation provided to you. Include cases and contacts in both the county where you are filing this petition and any other county where you had contact with law enforcement and other agencies. If contacts in other counties are not included on this form, those juvenile records may not be sealed, and you may need to file again in the county where the record is located.

5 Include all contacts (with addresses) you had with the agencies listed below in every county, before your 18th birthday:

- ☐ Court Clerk: _____
- ☐ Probation Department: _____
- ☐ Sheriff's Department: _____
- ☐ Police Department: _____
- ☐ District Attorney: _____
- ☐ Department of Motor Vehicles: _____
- ☐ Homeland Security: _____

(If you need more space, you may attach a separate page or pages listing the contacts.)

6 I declare that the information on this form is true and correct to the best of my knowledge.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

JV-595-INFO How to Make Your Juvenile Records Private

If you did something wrong when you were under 18, the justice system, your school(s), or the Department of Motor Vehicles (DMV) may have records about what you did. If you make those records **private** (sealed), it could be easier for you to:

- Find a job.
- Get a driver's license.
- Get a loan.
- Rent an apartment.
- Go to college.

In many cases the court will automatically seal your records.

If your case is dismissed by the juvenile court **after January 1, 2015,** because you satisfactorily completed your probation and were NOT found to have committed an offense listed in Welfare and Institutions Code section 707(b) (these are violent offenses such as killing, raping, or kidnapping, and also some offenses involving drugs or weapons), you do not need to ask the court to seal your records because the court will do it automatically. If the court finds that you have *not* satisfactorily completed your probation, it may not dismiss your case and will *not* seal your records automatically. If you want to have your records sealed in this situation, you will need to ask the court to seal your records (see instructions later on this form).

If your probation supervision was under "deferred entry of judgment" under Welfare and Institutions Code sections 790 to 795 and you did what you were supposed to do during the time of that agreement, the court had to order your records sealed when it dismissed your case. If you did not complete the agreement adequately and the court entered judgment against you, you will need to ask the court to seal you records by filing a petition.

If you have more than one juvenile case or contact and are unsure which records were sealed automatically, ask your attorney or probation officer.

Who qualifies to ask the court to seal their juvenile records?

If the court has not automatically sealed your records, you can ask the court to make that order. You qualify if:

- You are at least **18**; or
- It has been at least five years since your case was closed, or your last contact with probation; and
- You have been rehabilitated to the satisfaction of the court.

When do you *not* qualify to seal your records?

- If you were convicted as an adult of an offense involving moral turpitude, such as:
  - A sex or serious drug crime.
  - Murder or other violent crime.
  - Forgery, welfare fraud, or other crime of dishonesty.

  or
- When you were 14 or older and the court found that you committed a serious offense listed in Welfare and Institutions Code section 707(b), such as murder, arson, rape, or other violent crime, as well as some offenses involving drugs or weapons, unless the court has dismissed that petition.

Who can see your sealed records?

- DMV can see your vehicle and traffic records and share them with insurance companies.
- The federal government (and the military) can see your sealed records if you apply for a federal job or enlist.
- The court may see your records if you are a witness or involved in a defamation case.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- If your records were sealed automatically, the prosecutor and others can look at your record to determine if you are eligible to participate in a deferred entry of judgment program (diversion).
- You can request the court to unseal your records if you want to have access to them or allow someone else to inspect them.

How do you ask to have your records sealed?

(1) You must fill out a court form. Form JV-595, *Request to Seal Juvenile Records,* at *www.courts.ca.gov/forms.htm,* can be used, or your court may have a local form.

2. At the end of your case, your probation officer will provide you with a list of every agency or person the probation department knows has a record of your case, as well as a list of any prior contacts with law enforcement, probation, or the courts.

3. Write the names of all agencies from your contacts list on your form and attach it to the form. Also list any other agency that might have records on you, such as:
   - Juvenile court,
   - Probation,
   - Police or sheriff,
   - District attorney's office, and
   - Department of Motor Vehicles.

   If you think you might have contacts that are not on that form, you can get your criminal history record from the Department of Justice. See http://oag.ca.gov/fingerprints/security for more information.

4. Take your completed form to the probation department where you were *last* on probation. (If you were not on probation, take your form to any county probation office where you have a juvenile record.) *Note*: a small number of counties require you to take your form to the court. More information on each county's specific requirements can be found at the website listed at the end of this form.

5. You may have to pay a fee. If you cannot afford the fee, ask the probation department or the court about a fee waiver.

6. Probation will review your form and submit it to the court within **90 days** (or **180 days,** if you have records in two or more counties).

7. The court will review your application. The court may decide right away to seal your juvenile records. Or the court may order a hearing. If there is a hearing, you will receive a notice in the mail with the date and time of the hearing. If the notice says your hearing is "unopposed" (meaning there is no disagreement with your request), you may choose not to go.

8. If you qualify to have your juvenile records sealed, the court will make an order to seal the eligible records listed on your application. ***Important!*** **The court can seal only records it knows about. Make sure you list *all* the records from *all* counties where you have any records.**

9. The court will order each agency on your list to seal your records. The court will also order the records destroyed by a certain date.

10. The court will mail you a copy of its order. Be sure to keep it in a safe place.

What about sex offender registration?

(Penal Code, § 290)
If the court seals a record that required you to register as a sex offender, the order will say you do **not** have to continue to register.

If your records are sealed, do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur. **However**, the military and some federal agencies will not recognize sealing of records and will require you to report all juvenile records, even if sealed, if you are seeking to enlist or apply for a job requiring you to provide information about your juvenile records.

Questions?

If you are not sure if you qualify to seal your records or if you have other questions, talk to a lawyer. The court is not allowed to give you legal advice. More information on sealing your records can be found at *www.courts.ca.gov/28120.htm*.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
CASE NAME:	
DISMISSAL AND SEALING OF RECORDS— WELFARE AND INSTITUTIONS CODE SECTION 786	CASE NUMBER:

1. Name of subject child: Date of birth:
2. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
3. The court has read and considered the report of the probation officer and any other evidence presented or information provided.

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

4. The child has complied satisfactorily with the conditions imposed.
5. The petition filed on *(date):* is dismissed.
6. The child's juvenile records related to the arrest on *(date):* regarding an alleged violation of *(specify offense):* in the custody of this court and of the courts, agencies, and officials listed below are ordered sealed:
   - ☐ District Attorney *(specify county):*
   - ☐ Child's Attorney *(name):*
   - ☐ Probation Dept. *(specify county):*
   - ☐ California Dept. of Justice
   - ☐ Other *(specify):*
   - ☐ Attachment
7. All records pertaining to the dismissed petition are to be destroyed according to Welfare and Institutions Code section 781(d), and the arrest is deemed never to have occurred except that the prosecuting attorney, the probation officer, and the court may access these records for the specific purpose stated in Welfare and Institutions Code section 786.

   Date court records must be destroyed:

   Court records must be retained:
   - ☐ For good cause
   - ☐ Records pertain to a person adjudged delinquent for an offense listed in section 707(b) when 14 years of age or older

   Date all other records must be destroyed:

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-596 [New January 1, 2016]

Welfare and Institutions Code, §§ 781(d), 786
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	**DRAFT**
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	**Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
JUVENILE WARDSHIP PETITION ☐ § 601(a) ☐ § 601(b) ☐ § 602(a)	CASE NUMBER:

1. Petitioner on information and belief alleges the following:

a. ☐ The child named below comes within the jurisdiction of the juvenile court under the following sections of the Welfare and Institutions Code *(check applicable boxes; see attachments for concise statements of facts):*
☐ 601(a) ☐ 601(b) ☐ 602(a) Violation *(specify code section):*

b. ☐ Under a previous order of this court, dated , the child was declared a ward under Welfare and Institutions Code section ☐ 601(a) ☐ 601(b) ☐ 602(a).

c. Child's name and address:	d. Age:	e. Date of birth:	f. Sex:

g. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

h. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

i. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

j. Other *(state name, address, and relationship to child):*
☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.

k. Attorney for child *(if known):*
Address:
Phone number:

l. Child is
☐ not detained ☐ detained.
Date and time of detention *(custody):*
Current place of detention *(address):*

(See important notices on page 2.)

CHILD'S NAME:	CASE NUMBER:

2. Petitioner requests that the court find these allegations to be true.

3. ☐ Petitioner requests a hearing to determine whether the child is a fit and proper subject under juvenile court law under Welfare and Institutions Code section ☐ 707(a)(1) ☐ 707(a)(2) ☐ 707(c).

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 PETITIONER)

☐ *Indian Child Inquiry Attachment* (form ICWA-010(A)) is completed and attached.

☐ Number of pages attached: _____

TO PARENTS OR OTHERS LEGALLY RESPONSIBLE FOR THE SUPPORT OF THE CHILD

You and the estate of your child may be jointly and severally liable for the cost of the care, support, and maintenance of your child in any placement or detention facility, the cost of legal services for your child or you by a public defender or other attorney, the cost of supervision of your child by order of the juvenile court, and the cost of any restitution owed to the victim.

RECORD SEALING

You may have the right to have your record sealed at the conclusion of your case. Please see form JV-595-INFO, *How to Make Your Juvenile Records Private*, and form JV-595, *Request to Seal Juvenile Records*, available through your attorney or *www.courts.ca.gov/forms.htm*, for more information about record sealing.

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Juvenile Law: Extended Foster Care

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
Tracy Kenny, (916) 263-2838, Tracy.Kenny@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved December 10, 2014. Item #1: Provide subject matter expertise to the council by providing recommendations for rules and forms required by recent legislative changes as a result of AB 2454 (Quirk-Silva, stats. 2014, ch. 769). Foster youth: nonminor dependents (Ch. 769) Allows a nonminor dependent who received either Kin-GAP aid or adoption assistance aid after turning 18 years old to petition for resumption of dependency jurisdiction.

If requesting July 1 or out of cycle, explain:

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

Amend Cal. Rules of Court, rules 5.555, 5.707, 5.812, and 5.906; revise forms JV-367, JV-464-INFO, JV-466, JV-470, and JV-472

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Juvenile Law: Extended Foster Care

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.555, 5.707, 5.812, and 5.906; revise forms JV-367, JV-464-INFO, JV-466, JV-470, and JV-472

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Tracy Kenny, 916-263-2838,
tracy.kenny@jud.ca.gov

Executive Summary and Origin

The committee proposes amending four rules of the California Rules of Court and revising five Judicial Council forms to (1) implement the provisions of Assembly Bill 2454 (Quirk-Silva; Stats. 2014, ch. 769) allowing specified youth to petition the court to assume jurisdiction over them as nonminor dependents, and to (2) provide further guidance on the implementation of prior legislation authorizing extended foster care to age 21.[1] The legislation allows youth between the ages of 18 and 21 who were placed in guardianships or adopted out of foster care and whose guardians or adoptive parents have died or are no longer providing support to the youth to petition the court to enter foster care as nonminor dependents if they are willing to meet the eligibility criteria. The rule and forms that currently allow youth to petition for reentry would be modified to accommodate these new petitioners. In addition, this proposal would clarify the requirements for other extended foster care processes to address concerns raised by courts as implementation has proceeded.

The Proposal

In addition to the proposed rule and form changes to implement AB 2454, this proposal would address two areas of procedure pertaining to extended foster care to conform to existing law. As

[1] Assembly Bill 12 (Beall; Stats. 2010, ch. 559), the California Fostering Connections to Success Act, as amended by Assembly Bill 212 (Beall; Stats. 2011, ch. 459); Assembly Bill 1712 (Beall; Stats. 2012, ch. 846); and Assembly Bill 787 (Stone; Stats. 2013, ch. 487). The Judicial Council adopted and approved rules and forms implementing AB 12 in 2011, AB 212 in 2012, and AB 1712 and AB 787 in 2013.

more nonminor dependents approach age 21 and the end of the court's jurisdiction under Welfare and Institutions Code section 303, clarity on the requisite findings to terminate jurisdiction has been sought by the juvenile courts.[2] To accomplish this objective, the proposal would amend California Rules of Court, rule 5.55, and revise *Findings and Orders After Hearing to Consider Termination of Juvenile Court Jurisdiction Over a Nonminor* (form JV-367) to expressly address this situation. To ensure that all youth in foster care as they approach majority are prepared to become nonminor dependents, this proposal would amend rule 5.707 to include a dispositional hearing as the last hearing to be held before the child reaches age 18.

Because AB 2454 expands the pool of youth who are eligible to reenter foster care as nonminor dependents to include youth who exited juvenile court jurisdiction to a guardianship or adoption but whose guardians or adoptive parents are dead or no longer providing support for the youth, the rule and three forms used to reenter care need revisions to include this newly eligible population. This proposal would amend rule 5.906 and revise the information form, petition, and two forms for findings and orders that are currently used for reentry for this purpose.

Amend rule 5.555 to incorporate termination of jurisdiction at age 21

Rule 5.555, which governs any hearing to terminate jurisdiction over a nonminor dependent, is primarily geared toward hearings involving youth who are still eligible for reentry up to age 21. As the first AB 12 cohorts are reaching age 21, courts have noticed that the rule does not specifically address their responsibility at a hearing for a youth who has attained age 21. To address this deficiency, the proposal adds to the rule's findings and orders section language that is specific to this circumstance and would ensure that the nonminor has received the information and support that he or she is statutorily entitled to, while also making clear that his or her attorney is relieved at the end of the appeal period. This rule would also be revised to remove an advisory committee comment regarding the age of eligibility for extended foster care; the comment is now obsolete because the Legislature took action to extend care to age 21.

Amend rules 5.707 and 5.812 to include a dispositional hearing for a child approaching age 18

To ensure that youth in foster care who are approaching age 18 are prepared to participate in extended foster care, the original legislation required that the last review hearing taking place before the child attains age 18 address the child's plans to either access extended foster care services or choose to exit foster care. However, the rules that implement these statutes did not include the circumstance in which the last hearing before the child attains age 18 is a dispositional hearing, rather than a status review hearing. This proposal would address that oversight by adding dispositional hearings to rules 5.707 and 5.812, which state the requirements for these hearings for dependents and delinquents, respectively.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Amend rule 5.906 to include new section 388.1 provisions

Assembly Bill 2454 revised recently-enacted section 388.1 of the Welfare and Institutions Code to authorize specified nonminors whose juvenile court–established guardianships have failed (or whose guardians or adoptive parents have died) to petition the court to assume jurisdiction over them as nonminor dependents so that they may access extended foster care services. These are youth whose former guardians or adoptive parents were receiving support for their care as nonminors but no longer are. The procedures in section 388.1 closely mirror the procedures to be followed when other nonminors petition the court to reenter jurisdiction. To include this newly eligible population of petitioners, this proposal would amend rule 5.906 to include them as eligible and modify the findings and orders requirements to encompass 388.1 petitioners. This rule would also be revised to remove an advisory committee comment regarding the age of eligibility for extended foster care; the comment is now obsolete because the Legislature took action to extend care to age 21.

Revise form JV-367

This proposal, consistent with the changes to rule 5.555 described above, would also revise item 27 of *Findings and Orders After Hearing to Consider Termination of Jurisdiction Over a Nonminor* (form JV-367) to clarify that jurisdiction must be terminated at age 21 and that the attorney for the nonminor is relieved 60 days from the date of the order.

Revise form JV-464-INFO, *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care*

Form JV-464-INFO would be revised to include information in the section with the heading, "Do I qualify to return to juvenile court jurisdiction and foster care?" regarding nonminors who are eligible under section 388.1 to petition the court to assume jurisdiction over them. The proposed provisions would state the requirements for these youth in plain language.

Revise form JV-466, *Request to Return to Juvenile Court Jurisdiction and Foster Care*

Form JV-466 would also be revised to accommodate petitions from nonminors who are asking the court to assume jurisdiction under section 388.1. It would allow these youth to provide the court with the information required to determine whether there is a prima facie case that jurisdiction should be assumed and to make the findings and orders on the request itself. Because this form is intended to be accessible to the youth directly, it would also employ plain language.

Revise form JV-470, *Findings and Orders Regarding Prima Facie Showing on Nonminor's Request to Reenter Foster Care*

Form JV-470 would be revised to allow the court to document its findings and orders under section 388.1 when determining whether the nonminor has made a prima facie showing that he or she is eligible for the court to assume dependency jurisdiction over the nonminor. Withoout creating a new form, these proposed changes would provide the courts with a form to accomplish their statutory obligations under paragraph (1) of subdivision (c) of section 388.1.

Revise form JV-472, *Findings and Orders After Hearing to Consider Nonminor's Request to Reenter Foster Care*

Form JV-472 would be revised to allow the court to document its required findings and orders after a hearing on a petition filed under section 388.1 for a nonminor to reenter foster care. The proposed additions can be made to this existing form to provide the courts with with a form to accomplish their statutory obligations under paragraph (5) of subdivision (c) of section 388.1.

Alternatives Considered

The committee considered preparing new rules and forms specifically to implement AB 2454 but concluded that, because the newly eligible cases were few in numbers and the procedures were very similar, amending the existing rule and forms for reentry into foster care would be preferable. The committee also considered making only the changes necessary to implement AB 2454 but determined that the additional proposed changes would clarify existing law and enhance the ability of the courts to effectively carry out their obligations with regard to extended foster care cases.

Implementation Requirements, Costs, and Operational Impacts

This proposal will have some positive operational impact in implementing the statutory requirements of AB 2454. The proposed amended rules and revised forms are in response to requests for guidance from courts and agencies. The proposed revisions will ensure that courts can easily make the necessary orders in each of the affected cases.

Because AB 2454 expands the eligible population that may petition the court to reenter foster care as nonminors, it will result in additional hearings in the juvenile courts. This proposal will provide the courts with the tools they need to perform their statutorily required obligations as efficiently as possible. The findings and orders forms to implement AB 2454 are optional forms, so courts that prefer to use their own forms could opt not to use the revised forms proposed here.

In implementing the new and revised forms, courts would incur standard reproduction costs and retraining of affected staff.

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?
- Do the revisions to forms JV-464-INFO, JV-466, JV-470, and JV-472 allow for effective implementation of AB 2454?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Rules of Court, rules 5.555, 5.707, 5.812, and 5.906, at pages 6–11
2. Proposed forms JV-367, JV-464-INFO, JV-466, JV-470, and JV-472, at pages 12–26
3. Assembly Bill 2454, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2454*

Rules 5.555, 5.707, 5.812, and 5.906 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.555. Hearing to consider termination of juvenile court jurisdiction over a nonminor—dependents or wards of the juvenile court in a foster care placement and nonminor dependents (§§ 224.1(b), 303, 366.31, 391, 452, 607.3, 16501.1(f)(16))

(a)–(c) * * *

(d) Findings and orders

In addition to complying with all other statutory and rule requirements applicable to the hearing, the following judicial findings and orders must be made and included in the written court documentation of the hearing:

(1) *Findings*

(A)–(M) * * *

(N) For a nonminor who has attained 21 years of age:

(i) Notice was given as required by law.

(ii) The nonminor was provided with the information, documents, and services required under section 391(e), and a completed *Termination of Juvenile Court Jurisdiction – Nonminor* (form JV-365) was filed with the court.

(iii) The 90-day Transition Plan is a concrete, individualized plan that specifically covers the following areas: housing, health insurance, education, local opportunities for mentoring and continuing support services, workforce supports and employment services, and information that explains how and why to designate a power of attorney for health care.

(iv) The nonminor has attained 21 years of age and is no longer subject to the jurisdiction of the court under section 303.

(2) *Orders*

(A)–(E)

(F) For a nonminor who has attained 21 years of age and is no longer subject to the jurisdiction of the juvenile court under section 303, the

court must enter an order that juvenile court jurisdiction is dismissed and that the attorney for the nonminor dependent is relieved 60 days from the date of the order.

Rule 5.707. Review or dispositional hearing requirements for child approaching majority (§§ 224.1, 366(a)(1)(F), 366.3, 366.31, 16501.1(f)(16))

(a) Reports

At the last review hearing before the child attains 18 years of age held under section 366.21, 366.22, 366.25, or 366.3, or at the dispositional hearing held under section 360 if no review hearing will be set before the child attains 18 years of age, in addition to complying with all other statutory and rule requirements applicable to the report prepared by the social worker for the hearing, the report must include a description of:

(1)–(9) * * *

(b) Transitional Independent Living Case Plan

At the last review hearing before the child attains 18 years of age held under section 366.21, 366.22, 366.25, or 366.3, or at the dispositional hearing held under section 360 if no review hearing will be set before the child attains 18 years of age, the child's Transitional Independent Living Case Plan:

(1)–(2) * * *

(c) Findings

(1) At the last review hearing before the child attains 18 years of age held under section 366.21, 366.22, 366.25, or 366.3, or at the dispositional hearing held under section 360 if no review hearing will be set before the child attains 18 years of age, in addition to complying with all other statutory and rule requirements applicable to the hearing, the court must make the following findings in the written court documentation of the hearing:

(A)–(I) * * *

(2) * * *

(d) * * *

Rule 5.812. Additional requirements for any hearing to terminate jurisdiction over child in foster care and for status review or dispositional hearing for child approaching majority (§§ 450, 451, 727.2(i)–(j), 778)

(a) Hearings subject to this rule

The following hearings are subject to this rule:

(1) The last review hearing under section 727.2 or 727.3 before the child turns 18 years of age and a dispositional hearing under section 702 for a child under an order of foster care placement who will attain 18 years of age before a subsequent review hearing will be held. If the hearing is the last review hearing under section 727.2 or 737.3, the ~~This~~ hearing must be set at least 90 days before the child attains his or her 18th birthday and within six months of the previous hearing held under section 727.2 or 727.3.

(2) –(4) * * *

(b)–(f) * * *

Rule 5.906. Request by nonminor for the juvenile court to resume jurisdiction (§§ 224.1(b), 303, 388(e), 388.1)

(a) Purpose

This rule provides the procedures that must be followed when a nonminor wants to have juvenile court jurisdiction assumed or resumed over him or her as a nonminor dependent as defined in section 11400(v).

(b) Contents of the request

(1) The request to have the juvenile court assume or resume jurisdiction must be made on the *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466).

(2)–(3) * * *

(c) Filing the request

(1) * * *

(2) For the convenience of the nonminor, the form JV-466 and, if the nonminor wishes to keep his or her contact information confidential, the *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) may be:

(A) Filed with the juvenile court that maintained general jurisdiction or for cases petitioned under section 388.1, in the court that established the guardianship or had jurisdiction when the adoption was finalized; or

(B) -- (C) ***

(3) -- (5) ***

(d) Determination of prima facie showing

(1) Within three court days of the filing of form JV-466 with the clerk of the juvenile court of general jurisdiction, a juvenile court judicial officer must review the form JV-466 and determine whether a prima facie showing has been made that the nonminor meets all of the criteria set forth below in (d)(1)(A)–(D) and enter an order as set forth in (d)(2) or (d)(3).

(A) The nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement on the date he or she attained 18 years of age, or the nonminor is eligible to seek assumption of dependency jurisdiction pursuant to the provisions of subdivision (c) of section 388.1;

(B) – (D)***

(2) – (3)***

(e) – (g) ***

(h) Reports

(1) The social worker, probation officer, or Indian tribal agency case worker (tribal case worker) must submit a report to the court that includes:

(A) Confirmation that the nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement when he or she attained 18 years of age and that he or she has not attained 21 years of age, or is eligible to petition the court to assume jurisdiction over the nonminor pursuant to section 388.1;

(B) ***

(C) The social worker, probation officer, or tribal case worker's opinion as to whether continuing in a foster care placement is in the nonminor's best interests and recommendation about the assumption or resumption of juvenile court jurisdiction over the nonminor as a nonminor dependent;

(D) – (F) ***

(2) – (3) ***

(i) Findings and orders

The court must read and consider, and state on the record that it has read and considered, the report; the supporting documentation submitted by the social worker, probation officer, or tribal case worker; the evidence submitted by the nonminor; and any other evidence. The following judicial findings and orders must be made and included in the written court documentation of the hearing:

(1) *Findings*

(A) Whether notice was given as required by law;

(B) Whether the nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement when he or she attained 18 years of age, or meets the requirements of subparagraph (5) of subdivision (c) of section 388.1;

(C) -- (E) ***

(F) Whether continuing or reentering and remaining in a foster care placement is in the nonminor's best interests;

(G) – (H) ***

(2) *Orders*

(A) If the court finds that the nonminor has not attained 21 years of age, that the nonminor intends to satisfy at least one condition under section 11403(b), and that the nonminor and placing agency have entered into a reentry agreement, the court must:

(i) Grant the request and enter an order assuming or resuming juvenile court jurisdiction over the nonminor as a nonminor dependent and vesting responsibility for the nonminor's placement and care with the placing agency;

(ii) – (v) ***

(B) – (C) ***

(3) ***

Advisory Committee Comment

Assembly Bill 12 (Beall; Stats. 2010, ch. 559), known as the California Fostering Connections to Success Act, as amended by Assembly Bill 212 (Beall; Stats. 2011, ch. 459), implement the federal Fostering Connections to Success and Increasing Adoptions Act, Pub.L. No. 110-351, which provides funding resources to extend the support of the foster care system to children who are still in a foster care placement on their 18th birthday. Every effort was made in the development of the rules and forms to provide an efficient framework for the implementation of this important and complex legislation.

~~The extension of benefits for nonminors up to 19 years of age during the first year and for nonminors up to 20 years of age during the following year is fully provided for in Assembly Bill 12 and does not require further action by the Legislature; however, extension of those benefits to nonminors between 20 and 21 years of age is contingent upon an appropriation by the Legislature. (Welf. & Inst. Code, § 11403(k).)~~

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(optional):* E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
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: DEPT:	
FINDINGS AND ORDERS AFTER HEARING TO CONSIDER TERMINATION OF JUVENILE COURT JURISDICTION OVER A NONMINOR	CASE NUMBER:

Judicial Officer:	Court Clerk:	Court Reporter:
Bailiff:	Other Court Personnel:	Interpreter: Language:

	Present	Attorney *(name)*	Present
1. Parties *(name)*			
a. Nonminor:	☐		☐
b. Probation officer:	☐		☐
c. County agency social worker:	☐		☐
d. Other *(specify):*	☐		☐
2. Parent			
a. ☐ Father ☐ Mother *(name):*	☐		☐
b. ☐ Father ☐ Mother *(name):*	☐		☐
3. Legal guardian *(name):*	☐		☐
4. Indian custodian *(name):*	☐		☐
5. Tribal representative *(name):*	☐		☐

6. Others present
   a. Other *(name):*
   b. Other *(name):*
   c. Other *(name):*

7. **The court has read and considered and admits into evidence**
   a. ☐ Report of social worker dated:
   b. ☐ Report of probation officer dated:
   c. ☐ Other *(specify):*
   d. ☐ Other *(specify):*
   e. ☐ Other *(specify):*

Form Adopted for Mandatory Use
Judicial Council of California
JV-367 [Rev. Jan. 1, 2016]

Welfare and Institutions Code, §§ 391, 607.3;
Cal. Rules of Court, rule 5.555
www.courts.ca.gov

NONMINOR'S NAME:	CASE NUMBER:

BASED ON THE FOREGOING AND ON ALL OTHER EVIDENCE RECEIVED, THE COURT FINDS AND ORDERS

Findings

8. ☐ Notice of the date, time, and location of the hearing was given as required by law.

9. ☐ Nonminor is not present.
   a. ☐ The nonminor expressed a wish to not appear for hearing and did not appear.
   b. ☐ The nonminor's current location is unknown and reasonable efforts were made to locate the youth.

10. ☐ The nonminor had the opportunity to confer with his or her attorney about the issues currently before the court.

11. Remaining under juvenile court jurisdiction ☐ is ☐ is not in the nonminor's best interests. The facts supporting this determination were stated on the record.

12. a. ☐ The nonminor does not meet the eligibility criteria in Welfare and Institutions Code, § 11403(b), to remain in foster care as a nonminor dependent under juvenile court jurisdiction at this time.
    b. ☐ The nonminor does satisfy the following criteria in Welfare and Institutions Code, § 11403(b), to remain in foster care as a nonminor dependent under juvenile court jurisdiction.
       (1) ☐ The nonminor attends high school or a high school equivalency certificate (GED) program.
       (2) ☐ The nonminor attends a college, a community college, or a vocational education program.
       (3) ☐ The nonminor attends a program or takes part in activities that will promote employment or overcome barriers to employment.
       (4) ☐ The nonminor is employed at least 80 hours per month.
       (5) ☐ The nonminor is incapable of doing any of the activities in (b)(1)–(4) due to a medical condition.

13. ☐ The nonminor has an in-progress application pending for title XVI Supplemental Security Income benefits, and the continuation of juvenile court jurisdiction until a final decision has been issued to ensure continued assistance with the application process ☐ is ☐ is not in the nonminor's best interest.
    a. ☐ is in the child's best interest.
    b. ☐ is not in the child's best interest as it is not necessary.

14. ☐ The nonminor has an in-progress application pending for Special Immigrant Juvenile Status or other application for legal residency for which an active juvenile court case is required.

15. ☐ The nonminor was informed of the options available to assist with the transition from foster care to independence.

16. ☐ The potential benefits of remaining in foster care under juvenile court jurisdiction were explained to the nonminor, and the nonminor has stated that he or she understands those benefits.

17. ☐ The nonminor was informed that, if juvenile court jurisdiction is continued, he or she may have the right to have that jurisdiction terminated and that the court will maintain general jurisdiction for the purpose of resuming jurisdiction over him or her as a nonminor dependent.

18. ☐ The nonminor was informed that if juvenile court jurisdiction is terminated, he or she has the right to file a petition to have the court resume dependency jurisdiction or transition jurisdiction over him or her so long as he or she is within the eligible age range for status as a nonminor dependent.

19. a. ☐ The nonminor was provided with the information, documents, and services required under Welfare and Institutions Code, § 391(e), and a completed *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365) was filed with this court.
    b. ☐ The nonminor cannot be located, reasonable efforts were made to locate him or her, and for that reason the nonminor was not provided with the information, documents, services, and form specified in item 19a.

20. ☐ For a nonminor who is subject to delinquency jurisdiction, the requirements of Welfare and Institutions Code, § 607.5, ☐ were ☐ were not met.

NONMINOR'S NAME:	CASE NUMBER:

21. ☐ For a nonminor who is an Indian child under the Indian Child Welfare Act, he or she ☐ was ☐ was not provided with information regarding the right to continue to be considered an Indian child for the purposes of the ongoing application of the Indian Child Welfare Act as a nonminor dependent.

22. a. ☐ The Transitional Independent Living Case Plan includes a plan for a placement the nonminor believes is consistent with his or her need to gain independence, reflects agreements made to obtain independent living skills, and sets out benchmarks that indicate how the nonminor and social worker or probation officer will know when independence can be achieved.

b. ☐ The Transitional Independent Living Plan (TILP) identified the nonminor's level of functioning, emancipation goals, and specific skills he or she needs to prepare to live independently upon leaving foster care.

c. ☐ The 90-day Transition Plan is a concrete individualized plan that specifically covers the following areas: housing, health insurance, education, local opportunities for mentors and continuing support services, workforce supports and employment services, and information that explains how and why to designate a power of attorney for health care.

Orders

23. ☐ The nonminor meets at least one of the conditions listed in item 12(b)(1)–(5) and juvenile court

a. ☐ dependency jurisdiction ☐ transition jurisdiction over the nonminor as a nonminor dependent is ordered.

b. The nonminor's permanent plan is:

(1) ☐ Independence after a period of placement in supervised settings specified in Welfare and Institutions Code, § 11402.

(2) ☐ Other *(specify):*

c. ☐ The nonminor is an Indian child and ☐ has ☐ has not elected to have the Indian Child Welfare Act apply.

d. The matter is continued for a hearing set under Welfare and Institutions Code, § 366(f), and California Rules of Court, rule 5.903, on the date set in item 29, which is within six months of the nonminor's most recent status review hearing.

24. ☐ The nonminor does not meet and does not intend to meet the eligibility criteria for status as a nonminor dependent but is otherwise eligible to and will remain under the juvenile court's jurisdiction in a foster care placement, and the matter is set for a status review hearing on the date indicated in item 29, which is within six months of the date of the nonminor's most recent status review hearing.

25. ☐ Reasonable efforts were made to locate the nonminor under the court's jurisdiction as a dependent, ward, or nonminor dependent, and his or her current location remains unknown. The juvenile court's jurisdiction over the nonminor is terminated. The nonminor remains under the general jurisdiction of the juvenile court for the purpose of its considering a petition filed under Welfare and Institutions Code, § 388(e), to resume dependency jurisdiction or to assume or resume transition jurisdiction over him or her as a nonminor dependent.

26. ☐ The nonminor

a. ☐ does not meet the eligibility criteria for status as a nonminor dependent and is not otherwise eligible to remain under juvenile court jurisdiction;

b. ☐ does meet the eligibility criteria for status as a nonminor dependent but does not wish to remain under juvenile court jurisdiction as a nonminor dependent; or

c. ☐ does meet the eligibility criteria for status as a nonminor dependent but is not participating in a reasonable and appropriate Transitional Independent Living Case Plan; and

the nonminor was given an endorsed, filed copy of the *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365), and the findings required in items 10, 16, 19a, and 22c were made. The juvenile court's jurisdiction over the nonminor is terminated. The nonminor remains under the general jurisdiction of the juvenile court for the purpose of its considering a petition filed under Welfare and Institutions Code, § 388(e), to resume dependency jurisdiction or to assume or resume transition jurisdiction over him or her as a nonminor dependent.

NONMINOR'S NAME:	CASE NUMBER:

27. ☐ The nonminor is 21 years of age or older and no longer subject to the jurisdiction of the juvenile court under section 303. The findings required by items 19 and 22c were made. Juvenile court jurisdiction over the nonminor is dismissed. The attorney for the nonminor is relieved 60 days from today's date.

28. ☐ **Other findings and orders**

a. See attachment 28a.

b. Other *(specify):*

29. ☐ **Other findings and orders**

Hearing date:	Time:	Dept:	Room:

a. ☐ Nonminor dependent review hearing (Welf. & Inst. Code, § 366(f); Cal. Rules of Court, rule 5.903)

b. ☐ Other *(specify):*

30. Number of pages attached: _____

Date:

JUDICIAL OFFICER

JV-464-INFO How to Ask to Return to Juvenile Court Jurisdiction and Foster Care

Some 18-, 19-, and 20-year-olds can reopen their court case and return to foster care. This form explains:

- The benefits of returning to foster care,
- Who qualifies to return to foster care, and
- How to ask to reopen your court case and return to a foster care placement.

What benefits can I get if I return to foster care?

If you ask the court to reopen your court case and return to foster care as a nonminor dependent, you can get money to live in supervised foster care. You would be able to live in a:

- Relative's home;
- Home of a nonrelated extended family member (a person close to your family but not related to you);
- Foster home;
- Group home if you need to because of a medical condition;
- You can also stay in a group home until your 19th birthday or until you finish high school, whichever one happens first; or
- Supervised independent living setting, such as an apartment or college dormitory.

You can also get:

- A clothing allowance,
- Case management services, and
- Independent Living Program services.

Do I qualify to return to juvenile court jurisdiction and foster care?

You qualify if you meet these requirements:

☐ **Court Jurisdiction Requirements**

- You are now 18, 19, or 20 years old;
- You were in foster care on your 18th birthday;* and
- You were supervised by a social worker or probation officer; **OR**
- You were placed by the juvenile court in a guardianship or adoption; and
- Your guardian(s) or adoptive parent(s) were receiving payments for your support after your 18th birthday; and
- Your guardian(s) or adoptive parent(s) died after your 18th birthday, or they no longer support you and no longer receive payments for your support.

**Even if you were on the run, you can qualify if there was an order for you to be in foster care at the time.*

☐ **Work/School Requirements**

You must plan to do one of the following:

- Finish high school or get a high school equivalency (GED) certificate.
- Attend college or community college.
- Attend a vocational education program.
- Attend a program or do activities that will help you get a job.
- Get a job.

Exception: If you have a medical problem that makes you unable to do any of these things, you do not have to be in school, a program, or working.

☐ **Sign an Agreement to Return to Foster Care**

You and a social worker (SW) or probation officer (PO) must have signed a Voluntary Reentry Agreement that says:

- You want to return to foster care to be placed in a supervised setting.
- The SW or PO will be responsible for your placement and care.
- Together, you and the SW or PO will make a plan that helps you to learn how to live independently.
- If you ask the SW or PO to file your court papers, you will cooperate with the SW or PO.
- If your situation changes and you no longer qualify to stay in foster care, you will tell the SW or PO.

Important! Even if you are not sure you qualify, you should still apply.

When can I get help to find housing?

As soon as you sign the agreement to return to foster care, your social worker or probation officer can help you find housing and other services you may need.

JV-464-INFO How to Ask to Return to Juvenile Court Jurisdiction and Foster Care

How do I ask the juvenile court to reopen my court case and return to foster care?

You must fill out and file the court form JV-466, *Request to Return to Juvenile Court Jurisdiction and Foster Care.* This form tells the court you want to reopen you court case and return to foster care. A SW at the child welfare department or a PO at the probation department that supervised you when you were in foster care can help you fill out the form and file it for you.

If you want to fill out the form yourself, you can find a lot of the information you need on form JV-365, *Termination of Juvenile Court Jurisdiction—Nonminor,* which the court gave you when you left foster care.

Where can I get the form I need to fill out?

The court may have already given you the form when your foster care ended. Or you can get the form at:

- Your county's courthouse or public library, or
- The California Courts website: *www.courts.ca.gov/forms.htm*.

What if I need help with the form?

If you want help to fill out the form, ask:

- A SW at the child welfare department or a PO at the probation department that supervised you when you were in foster care,
- The person who was your lawyer when you were in foster care, or
- An adult you trust.

What do I do with my completed form?

After you and the SW or PO have signed the Voluntary Reentry Agreement, you can:

- File the form yourself, or
- Ask the SW or PO to file the form for you.

Note: If you file it yourself, your court hearing will be about three weeks sooner.

Where do I file my completed form?

You can file it by mail or in person at the juvenile court clerk's office at the courthouse in the county where your court case was closed.

You can submit it by mail or in person at the juvenile court clerk's office in the county where you live. The clerk will send it to the juvenile court clerk's office at the courthouse in the county where your court case was closed.

If you file by mail because you live outside of California, you must sent it to juvenile court clerk's office at the courthouse in the county where your court case was closed.

Important! Keep a copy of all papers you file at court. If you file in person, the clerk can give you free copies.

Do I have to pay to file the form?

No. It's free.

Do I have to fill out other court forms?

No, unless you want to keep your contact information private. If so, do **not** put your address and other contact information on form JV-466. Instead, put it on form JV-468, *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care.*

Who will decide if I can return to juvenile court jurisdiction and foster care?

A judge with the court in the county where your court case was closed will decide if your court case should be reopened.

The judge can decide that:

- **You do not qualify** because of your age. If this happens, you cannot file another request.
- **The information you gave to the court** shows that you do not meet one of the eligibility requirements or the court needs more information to decide your case. If this happens, the court will deny your request and send you a letter explaining why your request was denied. The court will also send you a list of lawyers who can help you with your case. You can file another request that includes the information that was missing.
- **The court has enough information** to decide your case and wants you to come to a court hearing. If this happens, you will get a notice telling you the date, time, and place of your hearing. The court will also assign a lawyer to speak for you at the hearing.

  The court will send a copy of the notice and your papers to:

  – The lawyer assigned to your case, and

  – The office that supervised you when the juvenile court's jurisdiction was dismissed. That office must make a report about your eligibility to return to foster care.

  If you ask for it on the form JV-466, the court can also send a notice to your parents or former legal guardian and the CASA office for your former CASA.

When will the hearing happen?

If you filed your court papers yourself and the court decides there is enough information to decide your case, the hearing will happen about three weeks after you filed your court papers.

If you asked a social worker or probation officer to file your court papers and the court decides there is enough information to decide your case, the hearing will happen about six weeks after you ask the social worker or probation officer to file your court papers.

What happens at the hearing?

At your hearing, the judge will review the evidence and decide your case.

If the court decides you meet the requirements, you will be allowed to return to foster care. You will also have to go back to court within 6 months to tell the court how you are doing. Your lawyer will also go with you to that hearing. If you used to be a dependent, you will be under the juvenile court's dependency jurisdiction.

If you used to be a ward, you will be under the juvenile court's transition jurisdiction.

If the court denies your request, you can file another request later if your situation changes so that you meet the requirements.

JV-466 Request to Return to Juvenile Court Jurisdiction and Foster Care

Clerk stamps date here when form is filed.

This form can be used to ask the court to reopen your case because your situation changed and you decide that you want to return to the court's jurisdiction and a foster care placement.

If you don't want other people (for example, a parent or brother or sister who was part of your case when you were a child) to know your contact information, do not write it in (1). Write that information on form JV-468, *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care*. Read form JV-464-INFO, *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care,* for information about filling out and filing the forms.

If you do not know the information asked for on this form, leave the space blank. Remember to get and keep copies of all court papers and other papers you sign or receive from the child welfare services agency or the probation department.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Name:

Court fills in case number when form is filed.

Case Number:

(1) My information:

a. My address: _____

_____

b. My city, state, zip code: _____

c. My area code and telephone number: _____

d. My date of birth: _____

(2) The location of the juvenile court that had authority over me when I was 18 years old or when my guardianship or adoption was finalized:

a. City: _____

b. County: _____

(3) The name and court file number or case number of my case in juvenile court:

a. Name of my case: _____

b. Court file number or case number: _____

(4) The date the juvenile court closed my case or finalized my guardianship or adoption: _____

(5) I need help to keep or find an appropriate place to live.

☐ I need a placement right now.

(6) Voluntary Reentry Agreement with child welfare services or the probation department to return to foster care:

☐ I agree to sign a Voluntary Reentry Agreement for a supervised placement.

☐ I signed a Voluntary Reentry Agreement for a supervised placement on *(date):* _____ with

☐ Child welfare services.

☐ Probation department.

7 You must plan to meet at least one of the five conditions listed below.
Please check all that apply:

a. ☐ I plan to attend a high school or a high school equivalency certificate (GED) program.

b. ☐ I plan to attend a college, a community college, or a vocational education program.

c. ☐ I plan to attend a program or take part in activities that will help train me to be employed or will help me solve problems that prevented me from finding a job.

d. ☐ I plan to work at least 80 hours per month.

e. ☐ I cannot go to a high school, a high school equivalency certificate (GED) program, a college, a community college, or a vocational education program; take part in a program or activities to help me find a job; or work 80 hours per month because of a medical condition.

8 If you were in a guardianship on your 18th birthday or adopted from foster care, please check all that apply below. If not, skip to 9.

a. ☐ I was placed by the juvenile court in a guardianship.

b. ☐ I was adopted from foster care.

c. ☐ My guardian(s) or adoptive parent(s) were receiving payments for my support on or after my 18th birthday.

d. ☐ My guardian(s) or adoptive parent(s) died on or after my 18th birthday.

e. ☐ My guardian(s) or adoptive parent(s) are no longer supporting me.

f. ☐ My guardian(s) or adoptive parent(s) no longer receive payments for my support.

9 The judge will set a hearing about this request if the judge thinks that he or she has enough information to decide whether you have met all the requirements.

Do you want your parents or former legal guardian to be told about the hearing, if the judge sets one?

☐ NO. I do not want my parents or former legal guardian to be told about the hearing.

☐ YES. I do want my parents or formal legal guardian to be told about the hearing. Their names and addresses are:

Parent's name and address: _____

_____

Parent's name and address: _____

_____

Former legal guardian's name and address: _____

_____

10 The judge will give you a free lawyer to help before and during the hearing. If you want the lawyer who represented you when you were a dependent, ward, or nonminor dependent, please write the lawyer's name and telephone number on the line below, and if that lawyer is available, the court will appoint him or her to help you before and during the hearing.

Name and telephone number of the lawyer who used to represent me and who I want to represent me again:

_____

_____

Your name: _____ **Case Number:**

11 Did you have a Court Appointed Special Advocate (CASA)?

☐ NO. I did not have a CASA.

☐ YES. I did have a CASA.

Would you like the CASA to be told about the hearing if the judge schedules a hearing?

☐ NO. I do not want the CASA to be told about the hearing.

☐ YES. I want the CASA to be told about the hearing. The name of the person who was my CASA is:

_____

12 Did the Indian Child Welfare Act apply to you when you were under juvenile court jurisdiction as a child?

a. ☐ NO. The Indian Child Welfare Act did not apply to me.

b. ☐ YES. The Indian Child Welfare Act did apply to me.

Would you like to have the Indian Child Welfare Act apply to you as a nonminor dependent?

(1) ☐ NO. I do not want the Indian Child Welfare Act to apply to me.

(2) ☐ YES. I do want the Indian Child Welfare Act to apply to me. The name of my tribe and the name, address, and telephone number of my tribal representative is: _____

_____

_____

c. ☐ I DO NOT KNOW if the Indian Child Welfare Act applied to me.

(1) ☐ I am or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
Name of tribe(s) *(name each):*
Name of band *(if applicable):*

(2) ☐ I may have Indian ancestry.
Name of tribe(s) *(name each):*
Name of band *(if applicable):*

(3) ☐ I have no Indian ancestry as far as I know.

13 Your verification:

I declare under penalty of perjury under the laws of the State of California that the information on this form, all attachments, and form JV-468, *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care*, if filed, is true and correct to my knowledge. I understand that this means I am guilty of a crime if I lie on this form, any of the attachments, or any other form I file.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

14 Verification by nonminor's representative:
The nonminor is unable to provide verification due to a medical condition. I declare under penalty of perjury under the laws of the State of California that the information on this form, all attachments, and form JV-468, *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care*, if filed, is true and correct to my knowledge. I understand that this means I am guilty of a crime if I lie on this form, any of the attachments, or any other form I file.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(optional):* E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME:	
FINDINGS AND ORDERS REGARDING PRIMA FACIE SHOWING ON NONMINOR'S REQUEST TO REENTER FOSTER CARE	CASE NUMBER:

Findings and Orders: Prima Facie Showing Made

1. The court has read and considered
   a. ☐ *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466) filed by *(name):* on *(date):*
   b. ☐ Other *(specify):*
   c. ☐ Other *(specify):*
2. ☐ The court finds that a prima facie showing has been made that
   a. ☐ the nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement when he or she attained 18 years of age; or
      ☐ the nonminor was a minor under juvenile court jurisdiction at the time of the establishment of a guardianship under section 360, section 366.26, or section 728(d), or he or she was a minor or nonminor dependent when his or her adoption was finalized, and
         ☐ the nonminor's guardian or guardians, or adoptive parent or parents, as applicable, died after the nonminor attained 18 years of age but before he or she attained 21 years of age.
         ☐ the nonminor's guardian or guardians, or adoptive parent or parents, as applicable, no longer provide ongoing support to, and no longer receive payment on behalf of, the nonminor after the nonminor attained 18 years of age but before he or she attained 21 years of age, and it may be in the nonminor's best interest for the court to assume dependency jurisdiction.
   b. the nonminor is under 21 years of age.
   c. the nonminor wants assistance to maintain or secure an appropriate, supervised placement or is in need of immediate placement and agrees to a supervised placement under a voluntary reentry agreement.
   d. the nonminor intends to satisfy at least one of the conditions described in Welfare and Institutions Code section 11403(b) as follows *(check all that apply):*
      (1) ☐ Attending high school or a high school equivalency certificate (GED) program
      (2) ☐ Attending a college, community college, or vocational education program
      (3) ☐ Attending a program or participating in an activity that will promote or help remove a barrier to employment
      (4) ☐ Employed for at least 80 hours per month
      (5) ☐ Unable to attend high school, a GED program, college, community college, a vocational education program, or an employment program or activity, or to work 80 hours per month due to a medical condition
3. **The court orders the following:**
   a. The nonminor's request to return to foster care is set for hearing on *(specify date within 15 days of the date form JV-466 was filed):*
   b. An attorney is appointed to represent the nonminor solely for the hearing on the request.

NONMINOR'S NAME:	CASE NUMBER:

3. c. ☐ Other orders:

Findings and Orders: Prima Facie Showing Not Made

4. The court has read and considered
   a. ☐ *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466) filed by *(name):* on *(date):*
   b. ☐ Other *(specify):*
   c. ☐ Other *(specify):*

5. ☐ The court finds that a prima facie showing has not been made. The nonminor's request to return to foster care is denied because *(check all that apply)*
   a. ☐ the nonminor was not previously under juvenile court jurisdiction subject to an order for foster care placement when he or she attained 18 years of age; or
   ☐ the nonminor is not eligible under section 388.1 for the juvenile court to assume dependency jurisdiction because *(check all that apply)*
   ☐ the guardian(s) or parent(s) were not receiving Kin-GAP or adoption assistance payments for the nonminor.
   ☐ the guardian(s) or adoptive parent(s) are providing support to the minor and/or are continuing to receive aid payments.
   ☐ the petition is lacking evidence of the death of the guardian(s) or adoptive parent(s).
   b. ☐ the nonminor is over 21 years of age.
   c. ☐ the nonminor does not want assistance to maintain or secure an appropriate, supervised placement or does not agree to a supervised placement under a voluntary reentry agreement.
   d. ☐ the nonminor does not intend to satisfy at least one of the conditions described in Welfare and Institutions Code section 11403(b), and stated below:
      (1) Attending high school or a high school equivalency certificate (GED) program
      (2) Attending a college, community college, or vocational education program
      (3) Attending a program or participating in an activity that will promote or help remove a barrier to employment
      (4) Being employed for at least 80 hours per month
      (5) Unable to attend high school, a GED program, college, community college, a vocational education program, or an employment program or activity or to work 80 hours per month due to a medical condition
   e. ☐ Other *(specify reason for denial):*

6. The nonminor may file a new request when the issues are resolved.

7. The court clerk must serve on the nonminor the following documents:
   a. A copy of the written order
   b. Blank copies of *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466) and *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468)
   c. A copy of *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO)
   d. The names and contact information of attorneys approved by the court to represent children in juvenile court proceedings and who have agreed to provide a consultation to nonminors whose requests are denied due to the failure to make a prima facie showing

Date:

JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(optional):* E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME:	

FINDINGS AND ORDERS AFTER HEARING TO CONSIDER NONMINOR'S REQUEST TO REENTER FOSTER CARE

CASE NUMBER:

Judicial Officer:	Court Clerk:	Court Reporter:
Bailiff:	Other Court Personnel:	Interpreter: Language:

1. Parties *(name)*

	Present	Attorney *(name)*	Present
a. Nonminor dependent:	☐		☐
b. Probation officer:	☐		☐
c. County agency social worker:	☐		☐
d. Other *(specify):*	☐		☐

2. Others present
   a. Other *(specify):*
   b. Other *(specify):*
   c. Other *(specify):*

3. **The court has read and considered and admits into evidence**
   a. ☐ report of social worker dated:
   b. ☐ report of probation officer dated:
   c. ☐ other *(specify):*
   d. ☐ other *(specify):*
   e. ☐ other *(specify):*

Court Grants Request

4. ☐ The court makes the findings stated below:
   a. Notice of the date, time, and location of the hearing was given as required by law.
   b. ☐ The nonminor was previously under juvenile court jurisdiction subject to an order for foster care placement when he or she attained 18 years of age, or
      ☐ The nonminor is eligible for the court to assume jurisdiction as provided in section 388.1.
   c. The nonminor is under 21 years of age.
   d. The nonminor intends to satisfy a condition or conditions under Welfare and Institutions Code section 11403(b).
   e. The condition or conditions under Welfare and Institutions Code section 11403(b) that the nonminor intends to satisfy follow *(specify all that apply):*
      (1) ☐ Attending high school or a high school equivalency certificate (GED) program

Form Approved for Optional Use
Judicial Council of California
JV-472 [Rev. Jan. 1, 2016]

Welfare and Institutions Code, § 388(e), 388.1;
Cal. Rules of Court, rule 5.906
www.courts.ca.gov

NONMINOR'S NAME:	CASE NUMBER:

4. e. (2) ☐ Attending a college, community college, or vocational education program
   (3) ☐ Attending a program or participating in an activity that will promote or help remove a barrier to employment
   (4) ☐ Being employed for at least 80 hours per month
   (5) ☐ Unable to do any of the activities in e(1)–(4) due to a medical condition

   f. Continuing in a foster care placement is in the nonminor's best interest.

   g. The nonminor and the placing agency have entered into a reentry agreement for placement in a supervised setting under the placement and care responsibility of the placing agency.

   h. ☐ The nonminor, who is an Indian child, chooses to have the Indian Child Welfare Act apply to him or her as a nonminor dependent.

5. ☐ The court makes the orders stated below:
   a. The court grants the request to assume or resume jurisdiction, and juvenile court jurisdiction shall resume over the nonminor as a nonminor dependent.
   b. Placement and care are vested with the placing agency.
   c. The placing agency must develop with the nonminor a new Transitional Independent Living Case Plan and file it with the court within 60 days.
   d. ☐ The social worker or probation officer must consult with the tribal representative regarding a new Transitional Independent Living Case Plan.
   e. A nonminor dependent review hearing under Welfare and Institutions Code section 391 and rule 5.903 of the California Rules of Court is set for *(specify a date that is within six months of the date the voluntary reentry agreement was signed):*
   f. The prior order appointing an attorney for the nonminor is continued, and that attorney is appointed until the jurisdiction of the juvenile court is terminated.

Court Denies Request

6. ☐ a. The court finds that the nonminor is under 21 years of age, but the nonminor does not intend to satisfy at least one of the conditions under Welfare and Institutions Code section 11403(b), or the nonminor and the placing agency have not entered into a reentry agreement.
   (1) The nonminor's request to return to foster care is denied. The request is denied because *(specify the reasons for denial):*
   (2) The nonminor may file a new request when the circumstances change.
   (3) The order appointing an attorney to represent the nonminor is terminated, and the attorney is relieved as of *(specify date seven calendar days after the hearing):*

   ☐ b. The court finds that the nonminor is over 21 years of age.
   (1) The request to have juvenile court jurisdiction assumed or resumed is denied; and
   (2) The order appointing an attorney to represent the nonminor is terminated, and the attorney is relieved as of *(specify date seven calendar days after the hearing):*

Findings and Orders: Service

7. The written findings and orders must be served by the juvenile court clerk on all persons who were served with notice of the hearing.
   a. Service must be by personal service or first-class mail within three court days of the issuance of the order.
   b. Proof of service must be filed.

Date:

JUDICIAL OFFICER

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Juvenile Law: Juvenile Delinquency: Documenting Wobbler Determination

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
Audrey Fancy, 415-865-7706, audrey.fancy@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved February 10, 2015. Item #25 Juvenile Delinquency: Documenting Wobbler Determination: Provide subject matter expertise to the council by providing recommendations for change to form JV-665 suggested by the recent unpublished appellate decision In re S.J. (H040997)

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Revise form JV-665

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Juvenile Delinquency: Documenting Wobbler Determination

Action Requested
Review and submit comments by June 17, 2015

Proposed Rules, Forms, Standards, or Statutes
Revise form JV-665

Proposed Effective Date
January 1, 2016

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Contact
Audrey Fancy, 415-865-7706
audrey.fancy@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes revising form JV-665, *Disposition—Juvenile Delinquency*, to clarify documentation of a wobbler (felony or misdemeanor public offense) determination.

The Proposal

Form JV-665 is an optional disposition form that states required findings and orders in delinquency cases. At item 3, the form provides space to designate an offense as a felony or misdemeanor as required by Welfare and Institutions Code section 702.[1] Item 3 currently reads: "The court previously sustained the following counts. Any charges which may be considered a misdemeanor or a felony for which the court has not previously specified the level of offense are now determined to be as follows."

In the case *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 [60 Cal.Rptr.2d 889, 930 P.2d 1255], the California Supreme Court concluded that section 702 is unambiguous and "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." *Manzy* further noted that "the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its

[1] Welf. & Inst. Code, § 702: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

discretion to determine the felony or misdemeanor nature of a wobbler." (*Id*. at p. 1209.) The current language at item 3 was drafted to comply with *Manzy W.* A recent unpublished case, however, noted that the language on the form is unclear with regard to the court's determining whether an offense is a felony or a misdemeanor and in a footnote suggested that the Judicial Council consider modifying the form.[2] See *In re S.J.* (H040997), footnote 6:

> We take judicial notice of the existence and contents of the Judicial Council's form order entitled JURISDICTION HEARING—JUVENILE DELIQUENCY (JV-644 [Rev. Jan. 1, 2012]). (See Evid. Code, §§ 452, subd. (c), 459.) The form provides space for a court to list allegations that have been admitted and found true after the child's admission or no contest plea. By checking the appropriate box, the court may declare each listed statutory violation to be a misdemeanor or a felony or it may indicate the status of the statutory violation will be specified at disposition. It contains additional preprinted language with respect to those allegations: "The court has considered whether the above offense(s) should be felonies or misdemeanors." A juvenile court adopts this language by checking the adjacent box.
>
> The Judicial Council may wish to consider revising Judicial Council form JV-665 to provide for the identification or separately listing of each statutory violation that "would in the case of an adult be punishable alternatively as a felony or a misdemeanor" (§ 702) and to clearly reflect that the court is exercising its discretion pursuant to section 702 and explicitly declaring the status of each such offense. The rebuttable presumption that official duty is regularly performed (see Evid. Code, §§ 660, 664) would answer any concern that a clerk filled out the form and the judge signed it unthinkingly without exercising discretion. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 49 ["In the absence of any indication to the contrary we presume, as we must, that a judicial duty is regularly performed. [Citations.]"].)

The committee considered this suggestion and determined that the language on form JV-665 is unclear and should be revised consistent with form JV-664, *Jurisdiction Hearing—Juvenile Delinquency*. The committee recommends changing the order of the columns in item 3 and more clarification of enhancements in the final column. In addition, the committee also recommends technical changes to form JV-665 to improve the parallelism of subpoints in item 11 and to update cross references to other forms listed as attachments after the judicial officer's signature line at the bottom of page 2. The current cross references list out-of-date form names.

Alternatives Considered

The committee considered whether amending the form as suggested by the court in *In re S.J.* was necessary but concluded that amending the language as suggested would provide helpful clarity.

[2] California Rules of Court, rule 8.1115(a), states that an unpublished opinion "must not be cited or relied on by a court or a party in any other action." This case is cited here to provide background information for this form change.

Implementation Requirements, Costs, and Operational Impacts

Implementation will require some changes in court procedures and training, as well as reproduction costs. Implementation should also result in greater clarity with regard to wobbler determinations, resulting in fewer remands and associated costs.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed form JV-665, at pages 4–5

CHILD'S NAME:	CASE NUMBER:

DISPOSITION—JUVENILE DELINQUENCY

☐ The court has read and considered the social study prepared by the probation officer and any other relevant evidence.
☐ The child has been detained and is at risk of entering foster care. The probation officer believes that child will be able to return home, and the social study includes a case plan as described in Welfare and Institutions Code section 636.
☐ The probation officer has recommended initial or continuing placement in foster care, and the social study includes a case plan as described in Welfare and Institutions Code section 706.6.

THE COURT FINDS AND ORDERS

1. ☐ Notice has been given as required by law.
2. ☐ The court takes judicial notice of all prior findings, orders, and judgments in this proceeding.
3. ☐ The court previously sustained the following counts. The court has considered whether the offenses below should be considered a misdemeanor or a felony and determined as follows:

Count number	Statutory violation	Misdemeanor	Felony		Enhancement *(specify)*
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	

4. ☐ The child resides in *(specify):* County.
5. ☐ *The case is transferred to (specify):* County for disposition. *Juvenile Court Transfer Orders (form JV-550)* will be completed and transmitted.
6. ☐ For the reasons stated on the record, the petition is dismissed ☐ in the interests of justice ☐ because the child does not need treatment or rehabilitation.
7. ☐ The child is placed on probation for up to six months under Welfare and Institutions Code section 725(a) under conditions described in an attachment to this form.
8. ☐ Deferred entry of judgment is ☐ granted ☐ denied.
9. ☐ The child is ☐ declared ☐ continued as a ward of the court.
10. ☐ The recommended findings and orders contained in the probation report dated at pages are adopted ☐ as modified by the court as its own, a copy of which is attached and incorporated herein.
11. ☐ The child is to reside
    a. ☐ in the custody of parent *(name):* ☐ mother ☐ father
    b. ☐ in the custody of parent *(name):* ☐ mother ☐ father
    c. ☐ in the custody of legal guardian *(name):*
    d. ☐ in the custody without probation supervision.
    e. ☐ in the custody under the supervision of the probation officer
       ☐ for out-of-home placement. Form JV-667, *Custodial or Out of Home Placement Disposition Attachment* is completed and attached.
    f. ☐ in the custody under terms and conditions described in the attached form.
12. ☐ The child and legal parent are to pay a restitution fine ☐ of $ ☐ as specified on the attached form.
13. ☐ The child, with his or her parent, is to pay restitution
    ☐ as described on the attached restitution order.
    ☐ to each victim *(name each):*
    a. c.
    b. d.
    ☐ in the amount of $ ☐ in the amount and manner determined by the probation office, with the opportunity for review by the court if disputed by the child or the parents.

Form Approved for Optional Use
Judicial Council of California
JV-665 [Rev. January 1, 2016]

Welfare and Institutions Code,
§§ 702, 706.6, 725, 727, 727.2;
Cal. Rules of Court, rules 5.785, 5.790, 5.795
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

14. ☐ The child, with his or her parents, is to pay a fine in the amount of $, plus a penalty assessment in the amount of $, for a total of $

15. ☐ Terms regarding vehicles. The child must
    a. ☐ participate in and successfully complete *(specify):*
    b. ☐ only drive to and from school, work, and/or counselling programs.
    c. ☐ surrender license to ☐ court ☐ probation officer.

16. ☐ The child's driver's license is
    ☐ suspended.
    ☐ revoked.
    ☐ delayed
        ☐ for a period of months years.
        ☐ until the child attains 18 years of age.

17. ☐ Court will notify the Department of Motor Vehicles of the judgment. The DMV has independent authority to suspend, revoke or delay driving privileges.

18. ☐ The child is ordered to register pursuant to Penal Code section 290.

19. ☐ The child is ordered to submit to DNA collection pursuant to Penal Code section 296.

20. ☐ Other *(specify):*

21. ☐ **The next hearing will be:**

Date:	Time:	Dept:
Date:	Time:	Dept:

22. ☐ The child is ordered to return to court on the above date and time.

23. ☐ The child is advised of his or her right to appeal.

24. ☐ The child is advised that his or her appointed attorney has a continuing obligation to represent the child on this case, until counsel is relieved by the court pursuant to California Rules of Court, rule 5.663.

25. ☐ All prior orders not in conflict, including any terms and conditions of probation, remain in full force and effect.

Date:

JUDICIAL OFFICER

The following attachments are incorporated by reference as findings and orders:

☐ *Custodial and Out Of Home Placement Disposition Attachment* (form JV-667)
☐ *Terms and Conditions* (form JV-624)
☐ *Juvenile Court Transfer Orders* (form JV-550)
☐ *Notice of Hearing and Temporary Restraining Order—Juvenile* (form JV-250)
☐ *Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities* (form JV-732)
☐ *Order for Victim Restitution* (CR-110/JV-790)
☐ *Order Regarding Application for Psychotropic Medication—Juvenile* (JV-223)
☐ *Order Designating Educational Rights Holder* (JV-535)
☐ *Parentage—Findings and Judgment* (JV-501)

Additional attachments:

☐ Indian Child Welfare Act
    ☐ *Order for Repayment of Cost of Legal Services* (form JV-135)
    ☐ Responses from tribes or BIA
☐ Victim Identification Form
☐ Probation officer's case plan approved by the court
    ☐ As submitted
    ☐ As amended and stated on the record
☐ Other (specify):

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Juvenile Law: Proceedings Before a Referee

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
Audrey Fancy, 415-865-7706, audrey.fancy@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved February 10, 2015. Item # 24 Juvenile Law: Proceedings Before a Referee: Propose changes to rule 5.538 required by recent legislative changes as a result of Senate Bill 179 (Stats. 2010, ch. 66).

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Amend Cal. Rules of Court, rule 5.538

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Juvenile Law: Proceedings Before a Referee

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rule 5.538

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Audrey Fancy, 415-865-7706
audrey.fancy@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending California Rules of Court, rule 5.538(b)(3), to make the rule consistent with a statutory change to Welfare and Institutions Code section 248, subdivision (b)(1).[1] The amendment would permit a referee's findings and orders to be personally served in court on a party who is present at the hearing rather than exclusively by mail, as currently provided in the rule.

The Proposal

Rule 5.538(b)(3) is inconsistent with Welfare and Institutions Code section 248, subdivision (b)(1), and must be amended to conform to existing law and to prevent unnecessary appellate delays.

Welfare and Institutions Code section 248(b)(1) was amended by Senate Bill 179, effective January 1, 2011, to provide that if the parent, guardian, or child is present in court at the time the referee's findings and orders are made, then the orders and rehearing rights may be personally served. Otherwise, under subdivision (b)(2), service must be by mail to the last known or designated address.

[1] See Senate Bill 179 (Stats. 2010, ch. 66), *hhttp://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_179&sess=0910&house=B&author=runner*= (as of Dec. 8, 2014).

To reconcile this discrepancy, the committee proposes amending rule 5.538(b)(3) by replacing the final sentence with the following subparagraphs:

(A) Service is deemed complete at the time of personal, in-court service as provided in Welfare and Institutions Code section 248, subdivision (b)(1).

(B) If personal, in-court service as in (A) is not possible, service must be by mail to the last known address and is deemed complete at the time of mailing as provided in subdivision (b)(2) of that section.

Alternatives Considered

No alternatives were considered because the rule is inconsistent with statute.

Implementation Requirements, Costs, and Operational Impacts

Implementation will require some changes in court procedures and training, but costs should be minimal given that many courts already comply with Welfare and Institutions Code section 248. In addition, once court practices are changed, this revision should result in savings because the statutory change allows for service in court, a less costly method of service than service by mail. In addition, implementation should prevent delays in appeals from orders terminating parental rights. The legislative history of Senate Bill 179 indicates that the purpose of the amendment allowing for personal courtroom service of a referee's orders was to prevent such delays.[2]

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

[2] Sen. Rules Com., Off. of Sen. Floor Analyses, unfinished business analysis of Sen. Bill No. 179 (2010–2011 Reg. Sess.) as amended May 20, 2010, at (as of Dec. 8, 2014).

Attachments and Links

1. Proposed Cal. Rules of Court, rule 5.538, at page 4

Rule 5.538 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.538. Conduct of proceedings held before a referee not acting as a temporary judge

(a) * * *

(b) Furnishing and serving findings and order; explanation of right to review (§ 248)

After each hearing before a referee, the referee must make findings and enter an order as provided elsewhere in these rules. In each case, the referee must cause all of the following to be done promptly:

(1) Furnish a copy of the findings and order to the presiding judge of the juvenile court.

(2) Furnish to the child (if the child is 14 or more years of age or, if younger, as requested) a copy of the findings and order, with a written explanation of the right to seek review of the order by a juvenile court judge.

(3) Serve the parent and guardian—and counsel for the child, parent, and guardian—a copy of the findings and order, with a written explanation of the right to seek review of the order by a juvenile court judge. ~~Service must be by mail to the last known address and is deemed complete at the time of mailing.~~

(A) Service is deemed complete at the time of personal, in-court service as provided in Welfare and Institutions Code section 248, subdivision (b)(1).

(B) If personal, in-court service as in (A) is not possible, service must be by mail to the last known address and is deemed complete at the time of mailing as provided in subdivision (b)(2) of that section.

Item number: 11

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Detention. Amend Cal. Rules of Court, rules 5.502, 5.760, and 5.790; revise forms JV-642 and JV-667

Committee or other entity submitting the proposal:
Family & Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Kerry Doyle, (415)865-8791, kerry.doyle@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 10, 2014
Project description from annual agenda: Provide subject matter expertise to the council by providing recommendations for rules and forms requried by recent legislative changes as a result of Assembly Bill 388 (Chesbro; Stats 2014, ch. 760) and Assembly Bill 2607 (Skinner; Stats. 2014, ch. 615).

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-

Title
Juvenile Law: Detention

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.502, 5.760, and 5.790; revise forms JV-642 and JV-667

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Nicole Giacinti, 415-865-7598
Nicole.giacinti@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending California Rules of Court, rules 5.502, 5.760, and 5.790, and revising form JV-642 and form JV-667 to conform to recent statutory changes to the options for children detained in juvenile hall who are dependents of the court under Welfare and Institutions Code section 300 and to the requirements when children remain detained in juvenile hall after a dispositional order committing the child or placing the child in foster care.

Background

Assembly Bill 388 (Chesbro; Stats 2014, ch. 760) amended section 635 of the Welfare and Institutions Code to clarify that the court's decision to detain a child in juvenile hall must not be based on the child's status as a dependent of the court or on the child welfare services department's inability to provide a placement for the child. AB 388 also mandates that if the court releases from custody a child who is a dependent of the court, the court must order the child welfare services department to ensure that the minor's current caregiver takes physical custody of the child or that the department take physical custody of the child and place him or her in an approved placement. Assembly Bill 2607 (Skinner; Stats. 2014, ch. 615) amended section 737 of the Welfare and Institutions Code to add requirements to the reviews that must occur every 15 days in any case in which a child or nonminor dependent is detained pending the execution of an order of commitment or any other disposition.

The Proposal

Rules 5.502, 5.760, and 5.790 would be revised to ensure that they conform to the recently enacted provisions of Welfare and Institutions Code sections 635 and 737 and to clarify that when a child is placed on home supervision he or she is not detained.[1]

The Family and Juvenile Law Advisory Committee proposes the following specific amendments to the California Rules of Court:

- Amend rule 5.502(11) to eliminate the reference to home supervision in the definition of "detained," and amend rule 5.760(c) to clarify that if the court places the child on home supervision the child is not detained.

  Although this amendment is not mandated by either of the bills discussed above, the current definition and phrasing in rule 5.760(c) have led to confusion regarding the status of a child who is on home supervision. Section 628.1 provides that if the child meets one or more of the criteria for detention, but the probation officer believes that 24-hour secure detention is unnecessary, the probation officer must "release such minor to his or her parent, guardian, or responsible relative on home supervision." Because the child is not in a secured detention facility and is released to parental custody, the child is not detained. The committee recommends making the above amendments to remove confusion regarding the status of a child who is placed on home supervision pending disposition of the petition.

- Further amend rule 5.760(c) to conform to the new statutory requirement that the court's decision to detain in juvenile hall a child who is a dependent of the court must not be based on the child's status as a dependent of the court or the inability of the child welfare department to provide a placement for the child.

  Newly enacted section 636(e) states that for a child who is a dependent of the court, "the court's decision to detain the child shall not be based on a finding that continuance in the minor's current placement is contrary to the minor's welfare." The committee is unaware of this finding as a practice in any county, and it is not a finding authorized by statute or rule of court. The committee has clarified throughout the proposal that the "contrary to the minor's welfare" finding must be made regarding the parent's or legal guardian's home. The committee seeks specific comment on whether this clarification is sufficient or whether the rule should be amended to state that a court's decision to detain a child must not be based on a finding that continuance in the child's current placement is contrary to the child's welfare.

- Amend rule 5.760(d) to conform to the new statutory requirement that if the child is a dependent of the court under section 300 and no grounds for detention exist, the court must order the child released and order the child welfare services department either to ensure that

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

the child's current caregiver take physical custody of the child or to take physical custody of the child and place the child in a licensed or approved placement.

- Amend rule 5.760(e) to remove the requirement that the findings and orders document be signed. California law does not require a signature for a valid court order. Currently, this signature requirement exists only in this rule. No other hearing type in either dependency or delinquency proceedings has a requirement that the findings and orders must be signed.

- Amend rule 5.790 to conform to new statutory requirements regarding the fifteen-day reviews the court must conduct when a child is detained pending the implementation of a dispositional order. The committee proposes eliminating the specific requirements and using a cross-reference to the recently amended section 737. By referencing the statute, any future modification to section 737 will not result in the need for changes to the rule.

The committee proposes the following specific revisions to Judicial Council forms:

- On *Initial Appearance Hearing—Juvenile Delinquency* (form JV-642), insert a new item 26, which would allow the court to state that the child is a dependent of the court under section 300 and is ordered released from custody, and to order the child welfare services department to ensure that the child's current caregiver take physical custody of the child or to take physical custody of the child and place the child in a licensed or approved placement.

- On *Custodial and Out-of-Home Placement Disposition Attachment* (form JV-667), clarify that a child on home supervision or electronic monitoring is not "detained" but rather "released" as specified in section 628.1. Add to two items the finding "Continuance in the home is contrary to the child's welfare," which is required at any court hearing where the court is authorizing the removal of the child from the home and is critical to ensure federal foster care funding.[2]

Alternatives Considered

The committee considered making only the changes necessary to implement AB 388 and AB 2607 but determined that amending rules 5.502(11) and 5.760(c) and revising forms JV-642 and JV-667 to clarify the differences between detention and home supervision would remove confusion regarding the status of a child who is placed on home supervision pending disposition of the petition.

Implementation Requirements, Costs, and Operational Impacts

In implementing the revised forms, courts would incur standard reproduction costs and retraining of affected staff.

[2] See 42 U.S.C. § 672(a)(1)–(2); 45 C.F.R. § 1356.21(c).

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?
- Should rule 5.760 be amended to state that a court's decision to detain a child must not be based on a finding that continuance in the child's current placement is contrary to the child's welfare? This finding is not authorized by statute or 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.
- 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Rules of Court, rules 5.502, 5.760, and 5.790, at pages 5–7
2. Proposed forms JV-642 and JV-667, at pages 8–12
3. Assembly Bill 388, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB388&search_keywords*=
4. Assembly Bill 2607, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2607&search_keywords*=

Rules 5.502, 5.760, and 5.790 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.502. Definitions and use of terms

Definitions (§§ 202(e), 303, 319, 361, 361.5(a)(3), 450, 628.1, 636, 726, 727.3(c)(2), 727.4(d), 4512(j), 4701.6(b), 11400(v), 11400(y), 16501(f)(16); 20 U.S.C. § 1415; 25 U.S.C. § 1903(2))

As used in these rules, unless the context or subject matter otherwise requires:

(1)–(10) * * *

(11) "Detained" means any removal of the child from the person or persons legally entitled to the child's physical custody. ~~, or any release of the child on home supervision under section 628.1 or 636.~~

(12)–(45) * * *

Rule 5.760. Detention hearing; report; grounds; determinations; findings; orders; factors to consider for detention; restraining orders

(a)–(b) * * *

(c) Grounds for detention (§§ 625.3, 635, 636)

(1) The child must be released unless the court finds that continuance in the home of the parent or legal guardian is contrary to the child's welfare, and one or more of the following grounds for detention exist:

~~(1)~~(A) The child has violated an order of the court;

~~(2)~~(B) The child has escaped from a commitment of the court;

~~(3)~~(C) The child is likely to flee the jurisdiction of the court;

~~(4)~~(D) It is a matter of immediate and urgent necessity for the protection of the child; or

~~(5)~~(E) It is reasonably necessary for the protection of the person or property of another.

The inability of the child welfare services department to provide a placement for the child can not be the basis for any of the above grounds.

(2) If the child is a dependent of the court under section 300, the court's decision to detain must not be based on the child's status as a dependent of the court or the child welfare services department's inability to provide a placement for the child.

~~The court may order the child detained in juvenile hall or in a suitable place designated by the court., or on home supervision under the conditions stated in sections 628.1 and 636.~~

(3) The court may order the child placed on home supervision under the conditions stated in sections 628.1 and 636, or detained in juvenile hall or in a suitable place designated by the court.

(4) If there are no grounds for detention and the child is a dependent of the court under section 300, the court must order the release of the child and order the child welfare services department either to ensure that the child's current caregiver takes physical custody of the child or to take physical custody of the child and place the child in a licensed or approved placement.

(d) Required determinations before detention

Before detaining the child, the court must determine whether continuance in the home of the parent or legal guardian is contrary to the child's welfare and whether there are available services that would prevent the need for further detention. The court must make these determinations on a case-by-case basis and must state the evidence relied on in reaching its decision.

(1) If the court determines that the child can be returned to the home of the parent or legal guardian through the provision of services, the court must release the child to the parent or guardian and order that the probation department provide the required services.

(2) If the child cannot be returned to the home of the parent or legal guardian, the court must do one of the following:

(A) State the facts on which the detention is based~~.~~; or

(B) If there are no grounds for detention and the child is a dependent of the court under section 300, order release of the child and order the child welfare services department either to ensure that the child's current caregiver takes physical custody of the child or to take physical custody of the child and place the child in a licensed or approved placement.

(e) Required findings to support detention (§ 636)

If the court orders the child detained, the court must make the following findings and order on the record and in the written~~, signed~~ orders. The court must reference the probation officer's report or other evidence relied on to make its determinations:

(1) Continuance in the home of the parent or guardian is contrary to the child's welfare;

(2) Temporary placement and care is the responsibility of the probation officer pending disposition or further order of the court; and

(3) Reasonable efforts have been made to prevent or eliminate the need for removal of the child, or reasonable efforts were not made.

(f)–(k) * * *

(*l*) Restraining orders

As a condition of release ~~or detention~~ on home supervision, the court may issue restraining orders as stated in rule 5.630 or orders restraining the child from any or all of the following:

(1)–(3) * * *

Rule 5.790. Orders of the court

(a)–(i) * * *

(j) Fifteen-day reviews (§ 737)

If the child or nonminor dependent is detained pending the implementation of a dispositional order, the court must review the case at least every 15 days as long as the child is detained. The review must meet all the requirements in section 737. ~~The court must inquire about the action taken by the probation officer to carry out the court's order, the reasons for the delay, and the effects of the delay on the child.~~

CHILD'S NAME:	CASE NUMBER:

INITIAL APPEARANCE HEARING—JUVENILE DELINQUENCY

☐ Out-of-Custody Appearance ☐ In-Custody Appearance and Detention

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

1. ☐ Notice has been given as required by law.
2. ☐ The child's date of birth is *(specify)*:
3. ☐ The child is to remain out of custody pending the next hearing.
4. ☐ The child was taken into custody at ☐ a.m. ☐ p.m. on
5. ☐ The petition or notice of probation violation was filed at ☐ a.m. ☐ p.m. on
6. ☐ Counsel is appointed for the child as follows:
   Counsel is to represent the child until relieved by the court in accordance with California Rules of Court, rule 5.663.
7. ☐ The information on the face of the petition was ☐ confirmed ☐ corrected as follows:
8. a. ☐ The court inquired of ☐ the mother ☐ others *(names and relationships):*

   as to the identities and addresses of all presumed or alleged fathers.

   b. ☐ The court finds *(name):* to be the ☐ legal ☐ biological ☐ presumed ☐ alleged father.
9. The ☐ mother ☐ father ☐ legal guardian ☐ other *(specify):*
   were provided with a *Parental Notification of Indian Status* (form ICWA-020) and ordered to complete the form and submit it to the court before leaving the courthouse today.
10. a. ☐ The child ☐ is ☐ may be an Indian child, and the county agency must provide, as required by law, notice of the proceeding and of the tribe's right to intervene. Proof of such notice must be filed with the court.
    b. ☐ There is reason to believe that the child may be of Indian ancestry, and the county agency must provide notice of the proceedings to the Bureau of Indian Affairs as required by law. Proof of such notice must be filed with this court.
11. ☐ The court advised the child and parent/legal guardian of *(check all that apply):*
    a. ☐ the contents of the petition.
    b. ☐ the nature and possible consequences of juvenile court proceedings.
    c. ☐ the purpose and scope of the initial hearing.
    d. ☐ the hearing rights described in rule:
    e. ☐ the reason the child was taken into custody.
    f. ☐ the parent or legal guardian's financial obligation and right to be represented by counsel.
    g. ☐ other:
12. ☐ Reading of the petition and advice of rights were waived by ☐ the child ☐ the child's counsel.
13. ☐ The prosecutor has requested that a hearing be set to determine whether the child is a fit and proper subject under Welfare and Institutions Code section 707(a) or (c).
14. ☐ The child ☐ through counsel
    a. ☐ denied the allegations of the petition dated:
    b. ☐ asked the court to take no action on the petition at this time.
15. ☐ For the reasons stated on the record, the petition is dismissed ☐ in the interests of justice ☐ because the child does not need treatment or rehabilitation.
16. ☐ The court has questioned the child and finds that the child understands the nature of the allegations and the direct consequences of admitting or pleading no contest to the allegations of the petition, and understands and waives the hearing rights that were explained *(check all that apply):*
    a. ☐ The right to have a hearing.

Form Approved for Optional Use
Judicial Council of California
JV-642 [Rev. January 1, 2016]

Welfare and Institutions Code, §§ 633, 635, 636, 700;
Cal. Rules of Court, rules 5.754, 5.758, 5.760, 5.778
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

16. b. ☐ The right to cross-examine and confront witnesses.
c. ☐ The right to subpoena witnesses and present a defense.
d. ☐ The right to remain silent.

17. ☐ The child ☐ through counsel
a. ☐ admitted the petition ☐ as filed ☐ as amended *(date):*
b. ☐ pleaded no contest to the petition ☐ as filed ☐ as amended *(date):*
c. ☐ The child's counsel consents to the admission or plea of no contest.
d. ☐ The admission or plea of no contest is freely and voluntarily made.
e. ☐ There is a factual basis for the admission or plea of no contest.
f. ☐ The court finds that the child was under 14 years old at the time of the offense but the child knew the wrongfulness of his or her conduct at the time the offense was committed.

18. a. ☐ The following allegations are admitted and found to be true:

Count number	Statutory violation	Misdemeanor	Felony	To be specified at disposition	Enhancement (if applicable)
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	

b. ☐ The court has considered whether the above offense(s) should be misdemeanors or felonies.
c. ☐ The following allegations are dismissed:

Count number	Statutory violation

19. ☐ The child is described by section ☐ 601 ☐ 602 of the Welfare and Institutions Code.
20. ☐ The maximum confinement time is:
21. ☐ The child's residence is in: County.
22. ☐ The matter is transferred to: County for disposition and further proceedings.
Juvenile Court Transfer Orders (form JV-550) will be completed and transmitted immediately.
23. ☐ The child waives his or her right under *People v. Arbuckle* to have the disposition heard by this judicial officer.

CHILD IN CUSTODY

24. ☐ The court has considered the detention report prepared by probation
☐ and the following documents *(specify):*
☐ and the testimony of *(name):*
☐ and the examination by the court of *(name):*
☐ and takes judicial notice of the entire court file.

25. ☐ The child is released from custody ☐ to the home of *(name, address, and relationship to child):*
☐ on home supervision ☐ on electronic monitoring
☐ the terms of which are stated in the attached *Terms and Conditions* (form JV-624).

26. ☐ The child is a dependent of the court under section 300 and is ordered released from custody. The child welfare services department must either ensure that the child's current caregiver takes physical custody of the child or take physical custody of the child and place the child in a licensed or approved placement.

CHILD'S NAME:	CASE NUMBER:

27. ☐ A prima facie showing has been made that the child's disposition is by section 601 or 602.

28. ☐ Based on the facts stated on the record, the child is detained in secure custody on the following grounds *(check all that apply):*

   a. ☐ The child has violated an order of the court.

   b. ☐ The child has escaped from a court commitment.

   c. ☐ The child is likely to flee the jurisdiction of the court.

   d. ☐ It is a matter of immediate and urgent necessity for the protection of the child.

   e. ☐ It is reasonably necessary for the protection of the person or property of another.

29. ☐ Based on the facts stated on the record, continuance in the child's home is contrary to the child's welfare.

30. ☐ Based on the facts stated on the record, there are no available services that would prevent the need for further detention.

31. ☐ Temporary placement and care is the responsibility of the probation department.

32. ☐ Reasonable efforts to prevent or eliminate the need for detention of the child ☐ have ☐ have not been made.

33. ☐ Probation is ordered to provide services that will assist with reunification of the child and the family.

34. ☐ Probation is granted the authority to authorize medical, surgical, or dental care under Welfare and Institutions Code section 739.

35. ☐ The child and the parent/legal guardian have been advised that if the child cannot be returned home within the statutory timelines, a proceeding may be scheduled to determine an alternative permanent home, including an adoptive home after parental rights are terminated.

36. ☐ The ☐ mother ☐ father ☐ legal guardian are ordered to supply the names and contact information of adult relatives to probation so probation can notify them of the removal and of their options to be included in the child's life.

37. ☐ The probation officer must file a case plan within 60 days.

38. ☐ Probation is authorized to release the minor ☐ at its discretion ☐ under the following circumstances:

39. ☐ The court accepts transfer from the County of:

40. ☐ Other orders:

41. ☐ Child ☐ Counsel waives time for *(check all that apply)*
   ☐ jurisdiction hearing ☐ disposition hearing ☐ other:

42. ☐ **The next hearings will be**

Date:	Time:	Dept:	Type of hearing:
Date:	Time:	Dept:	Type of hearing:

43. ☐ The child

   a. ☐ is ordered to return to court on the above date and time.

   b. ☐ remains detained.

44. All prior orders not in conflict, including any terms and conditions of probation, remain in full force and effect.

45. ☐ All appointed counsel are relieved.

Date:

☐ JUDGE ☐ JUDGE PRO TEMPORE ☐ COMMISSIONER ☐ REFEREE

Countersignature for detention orders (*if necessary*):

Date:

JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

CUSTODIAL AND OUT-OF- HOME PLACEMENT DISPOSITION ATTACHMENT

THE COURT FINDS AND ORDERS

1. ☐ The maximum time the child may be confined
   a. ☐ in secure custody for the offenses sustained in the petition before the court is *(specify):*
   b. ☐ in the petition before the court, with the terms of all previously sustained petitions known to the court aggregated, is (specify):

2. ☐ The child is committed to (*specify):* days months in juvenile hall
   a. ☐ and is remanded forthwith. Continuance in the home is contrary to the child's welfare.
   b. ☐ and is to report to *(name):* by ☐ a.m. ☐ p.m. on *(date):*
   c. ☐ with credit for *(specify):* days served.

3. ☐ The welfare of the child requires that physical custody be removed from the parent or guardian. *(Check only if applicable):*
   a. ☐ The child's parent or guardian has failed or neglected to provide, or is incapable of providing, proper maintenance, training, and education for the child.
   b. ☐ The child has been on probation in the custody of the parent or guardian and has failed to reform.
   c. Continuance in the home is contrary to the child's welfare.

4. ☐ Probation is granted the authority to authorize medical, surgical, or dental care under Welfare & Institution Code section 739.

5. ☐ Reasonable efforts to prevent or eliminate the need for removal
   a. ☐ have been made.
   b. ☐ have not been made.

6. a. ☐ The probation officer will ensure provision of reunification services, and the following are ordered to participate in the reunification services specified in the case plan:
   ☐ Mother ☐ Biological father ☐ Legal guardian ☐ Presumed father
   ☐ Alleged father ☐ Indian custodian ☐ Other *(specify):*

   b. ☐ Reunification services do not need to be provided to *(name):* because the court finds by clear and convincing evidence that *(check one)*
      (1) ☐ reunification services were previously terminated for that parent or not offered under section 300 et seq. of the Welfare and Institutions Code.
      (2) ☐ that parent has been convicted of ☐ murder of another child of the parent ☐ voluntary manslaughter of another child of the parent ☐ aiding, abetting, attempting, conspiring, or soliciting to commit murder or manslaughter of another child of the parent ☐ felony assault resulting in serious bodily injury to the child or another child of the parent.
      (3) ☐ the parental rights of that parent regarding a sibling of the child have been terminated involuntarily.

   c. ☐ The child is ☐ ordered to ☐ continued in the care, custody, and control of the probation officer for placement in a suitable relative's home or in a foster or group home.

   d. ☐ The following are ordered to meet with the probation officer on a monthly basis:
   ☐ Mother ☐ Biological father ☐ Legal guardian ☐ Presumed father
   ☐ Alleged father ☐ Indian custodian ☐ Other *(specify):*

   e. ☐ The child is ordered to obey all reasonable directives of placement staff and probation. The child is not to leave placement without the permission of probation or placement staff.

Form Approved for Optional Use
Judicial Council of California
JV-667 [Rev. January 1, 2016]

Welfare & Institution Code,
§§ 702, 706.6, 725, 727, 727.2;
Cal. Rules of Court, rules 5.785, 5.790, 5.795
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

6. f. ☐ The child is to be placed out of state at the following *(name and address):*

(1) ☐ In-state facilities are unavailable or inadequate to meet the needs of the child.

(2) ☐ The state Department of Social Services or its designee has performed initial and continuing inspection of the facility and has certified that it meets all California licensure standards, or has granted a waiver based on a finding that there is no adverse impact to health and safety.

(3) ☐ The requirements of section 7911.1 of the Family Code are met.

g. ☐ Pending placement, the child is detained in juvenile hall. If being housed in another county, please specify county:

h. ☐ The child is released on home supervision to the home of

(a) ☐ parent *(name):* ☐ mother ☐ father

(b) ☐ parent *(name):* ☐ mother ☐ father

(c) ☐ legal guardian *(name):*

(d) ☐ other *(name and address):*

(e) ☐ and is subject to electronic monitoring.

i. ☐ The parent or legal guardian must cooperate in the completion and signing of necessary documents to qualify the child for any medical or financial benefits to which the child may be entitled.

j. ☐ The county is authorized to pay for care, maintenance, clothing, and incidentals at the approved rate.

k. ☐ The likely date by which the child may be returned to and safely maintained in the home or another permanent plan selected is *(specify):*

l. ☐ The right of the parent/guardian to make educational decisions for the child is specifically limited. *Order Designating Educational Rights Holder* (form JV-535) will be completed and transmitted.

7. ☐ The child has been ordered into a placement described by title IV-E of the Social Security Act.

a. ☐ The date the child entered foster care is , which is 60 days after the day the child was removed from his or her home.

b. ☐ An exception applies to the standard calculation of the date the child entered foster care because

(1) ☐ the child has been detained for more than 60 days. Therefore, the date the child entered foster care is today's date of .

(2) ☐ the child has been in a ranch, camp, or other institution for more than 60 days and is now being ordered into an eligible placement. The date the child enters foster care will be the date he or she is moved into the eligible placement facility, which is anticipated to be .

(3) ☐ at the time the wardship petition was filed, the child was a dependent of the juvenile court and in an out-of-home placement. Thus, the date entered foster care is unchanged from the date the child entered foster care in dependency court. That date is .

8. ☐ The child is committed to the care, custody, and control of the probation office for placement in the county juvenile ranch, camp, forestry camp, or _____

a. ☐ for months days.

b. ☐ until the requirements of the program have been satisfactorily completed.

c. ☐ If being housed in another county, please specify:

9. ☐ The child is committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, and *Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities* (form JV-732) will be completed and transmitted.

Date:

_____
JUDICIAL OFFICER

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Juvenile Law: Substance Abuse Treatment

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@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved December 10, 2014. Item #1: Provide subject matter expertise to the council by providing recommendations for rules and forms required by recent legislative changes as a result of Senate Bill 977 (Liu; Stats. 2014, ch. 219) which requires a juvenile dependency court to consider at detention, dispositional, and status review hearings whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Amend Cal. Rules of Court, rules 5.674, 5.676, 5.678, and 5.708

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR15-__

Title
Juvenile Law: Substance Abuse Treatment Facilities and Placement

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.674, 5.676, 5.678, and 5.708

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee recommends amending four rules of the California Rules of Court to conform to recent statutory changes to the factors a juvenile dependency court must consider when determining whether to release or detain a child.

Background

Senate Bill 977 (Liu; Stats. 2014, ch. 219) amended section 319 of the Welfare and Institutions Code to specify that the fact that a parent is enrolled in a substance abuse treatment facility that allows a dependent child to reside with his or her parent is not, for that reason alone, prima facie evidence of detriment or substantial danger. Additionally, SB 977 requires the court to consider at detention, dispositional, and status review hearings whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility.

The Proposal

Rules 5.676, 5.678, and 5.708 would be revised to ensure that they conform to the recently enacted provisions of Welfare and Institutions Code sections 319, 366.21, 366.22, and 366.25.[1] Rule 5.674 would be revised to eliminate the requirement that *all* findings and orders be made on the record at detention hearings.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The Family and Juvenile Law Committee recommends the following specific amendments to the California Rules of Court:

- To ensure the court has the information needed to make the findings required by the recent statutory change to section 319, amend rule 5.676 to require that the social worker's report to the court include information and a recommendation regarding whether a child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent, and to include nonrelative extended family members in the list of possible placement options as is required under current law.

- To conform to the recent statutory change to section 319, amend rule 5.678 to require that when determining whether to release or detain a child, the court must consider whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent.

- To conform to recent statutory changes to sections 366.21, 366.22, and 366.25, amend rule 5.708 to require the court to consider—at all status review hearings, when determining whether return of a child to the parent or legal guardian would create a substantial risk of detriment to the child—whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent.

- Although not required by recent legislation, the committee recommends revising rule 5.674 to eliminate the requirement that *all* detention findings and orders be made on the record, and instead narrow those findings and orders that must be made on the record to only those required under section 319. The committee also considered retaining this requirement for the three title IV-E findings and orders that are reviewed at a federal audit:

    - Continuance in the home is contrary to the child's welfare;
    - Reasonable efforts were made to prevent removal; and
    - Temporary placement and care are vested with the agency.

    Eliminating all nonstatutory requirements to make the findings and orders on the record will significantly reduce those that must be stated on the record, thereby freeing up much-needed court time and making detention hearings shorter or more thorough and meaningful. Given that the three above findings and orders are critical to federal

funding,[2] however; that there are often clerical errors with the documentation of the court's findings and orders; and that at a federal title IV-E audit, a transcript of the court proceedings is the only other documentation that will be accepted to verify that the required determinations have been made,[3] the committee is seeking specific comment on whether the rule should require that the three title IV-E findings and orders reviewed at a federal audit be stated on the record.

Alternatives Considered

The committee considered revising *Findings and Orders After Detention Hearing* (form JV-410) to include a conditional release order that the child is released to the parent only while the parent remains at the substance abuse treatment facility. Practices around conditional releases, however, vary throughout the state, and in jurisdictions that use them, there are multiple conditional release situations, none of which are currently included on the form. The committee decided to leave the form as is, allowing courts that order conditions of release to continue to do so by filling in item 19, "Other findings and orders," on form JV-410.

Implementation Requirements, Costs, and Operational Impacts

This proposal is not likely to impose any costs on the court. The proposal is not recommending changes to any existing Judicial Council forms and is not creating any new court hearings or processes.

[2] If the first two findings above are not timely made, the child is NEVER eligible for title IV-E funding. If the order above is not made, no funding can be claimed until it is made. (See 45 C.F.R. §§ 1356.21(b) & (c), 1356.71(d)(1) (2014).)

[3] See 45 C.F.R. § 1356.21(d)(1) (2014).

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?
- Given that there are often clerical errors with the documentation of the court's findings and orders and that, at a federal title IV-E audit, a transcript of the court proceedings is the only other documentation that will be accepted to verify that the required determinations have been made, should rule 5.674 require that the title IV-E findings and orders reviewed at a federal audit be stated on the record?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Rules of Court, rules 5.674, 5.676, 5.678, and 5.708, at pages 5–6
2. Senate Bill 977, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB977&search_keywords=

Rules 5.674, 5.676, 5.678, and 5.708 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.674. Conduct of hearing; admission, no contest, submission

(a) * * *

(b) Detention hearing; general conduct (§ 319; 42 U.S.C. § 600 et seq.)

The court must read, consider, and reference any reports submitted by the social worker and any relevant evidence submitted by any party or counsel. All detention findings and orders must ~~be made on the record and~~ appear in the written orders of the court. All findings and orders required to be made on the record under section 319 must be made on the record.

(c)–(d) * * *

Rule 5.676. Requirements for detention

(a) * * *

(b) Evidence required at detention hearing

In making the findings required to support an order of detention, the court may rely solely on written police reports, probation or social worker reports, or other documents.

The reports relied on must include:

(1) * * *

(2) * * *

(3) If a parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent, information and a recommendation regarding whether the child can be returned to the custody of that parent.

~~(3)~~ (4) * * *

~~(4)~~ (5)If continued detention is recommended, information about any parent or guardian of the child with whom the child was not residing at the time the child was taken into custody ~~or~~ and about any relative or nonrelative extended family member as defined under section 362.7 with whom the child may be detained.

Rule 5.678. Findings in support of detention; factors to consider; reasonable efforts; detention alternatives

(a) * * *

(b) Factors to consider

In determining whether to release or detain the child under (a), the court must consider the following:

(1) Whether the child can be returned home if the court orders services to be provided, including services under section 306; and

(2) Whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent.

(c)–(e) * * *

Rule 5.708. General review hearing requirements

(a)–(c) * * *

(d) Return of child—detriment finding (§§ 366.21, 366.22, 366.25)

(1) * * *

(2) The court must consider whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent.

~~(2)~~(3) * * *

~~(3)~~(4) * * *

~~(4)~~(5) * * *

~~(5)~~(6) * * *

(e)–(o) * * *

Item number: 13

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Sibling Visitation. Amend Cal. Rules of Court, rules 5.570, 5.708, and 5.810; revise forms JV-183, JV 185, and JV-403

Committee or other entity submitting the proposal:
Family & Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Kerry Doyle, (415)865-8791, kerry.doyle@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 10, 2014
Project description from annual agenda: Provide subject matter expertise to the council by providing recommendations for rules and forms requried by recent legislative changes as a result of Senate Bill 1099 (Steinberg; Stats. 2014, ch. 773).

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-__

Title
Juvenile Law: Sibling Visitation

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.570, 5.708, and 5.810; revise forms JV-183, JV-185, and JV-403

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending three rules and revising three forms to conform them to recent statutory changes giving dependency courts the authority to order visitation between dependent and nondependent siblings in specified circumstances. These changes have created new requirements related to sibling visitation, such as requiring more detailed information in social worker reports and probation officer case plans, and requiring courts to make a renewed finding when renewing any suspension of sibling interaction. The recent statutory changes have also made both current and new sibling placement and visitation requirements apply to children under the jurisdiction of the delinquency court.

Background

In October 2008, Congress passed and President George W. Bush signed the Fostering Connections to Success and Increasing Adoptions Act to promote permanent families for children and youth in foster care by providing greater assistance to relative caregivers and improving incentives for adoption. Among other things, the act requires states to use "reasonable efforts" to place siblings together, unless such placement is contrary to their safety or well-being. If the siblings are not placed together, visitation between them must occur frequently, unless the visitation is contrary to their safety or well-being.[1]

[1] See 42 U.S.C. § 671(a).

Before passage of the act, California was one of the first states to pass legislation promoting sibling visitation for foster children—as early as 1999.[2] Since then, California has enacted several additional statutes to expand legal protections for sibling relationships.

These laws have served to promote sibling relationships when both children are in the dependency system, but at least one recent unpublished case indicates that courts will not grant visitation in a case where one sibling is in the foster system and the other remains in the legal custody of the parent.[3] Senate Bill 1099 (Steinberg; Stats. 2014, ch. 773) sought to address this situation by giving dependency courts the authority to order visitation between dependent and nondependent siblings in specified circumstances. Additionally, SB 1099 created new requirements related to sibling visitation, such as requiring more detailed information in social worker reports and probation officer case plans and requiring courts to make a renewed finding that sibling interaction is contrary to the safety or well-being of either child when renewing any suspension of sibling interaction. SB 1099 also made current and new sibling placement and visitation requirements apply to children under the jurisdiction of the delinquency court.

The Proposal

Rules 5.570, 5.708, and 5.810 would be amended and forms JV-183, JV-185, and JV-403 would be revised to ensure that they conform to the recently enacted provisions of Welfare and Institutions Code sections 358.1, 388, 778, and 16002 and to clarify that after the court has conducted a permanency hearing, it must conduct a postpermanency hearing no less frequently than once every six months.

The committee proposes the following specific amendments to the California Rules of Court:

- Amend rule 5.570 with the new standard for granting or denying a request for sibling visitation with a nondependent sibling.

  As introduced, the standard in section 388 for granting a request for visitation with a nondependent sibling was: "…a request for sibling visitation shall be granted unless it is shown by clear and convincing evidence that sibling visitation is contrary to the safety and well-being of any of the siblings." Staff of the Senate Judiciary Committee had concerns that, "[i]n practice, the clear and convincing standard is a high evidentiary burden that many parties, especially self-represented parties, may have difficulty proving."[4] That committee worked with the sponsor of the bill, the California Youth Connection, to change the standard to: "a request for sibling visitation *may* be granted unless *it is determined by the court* that sibling visitation is contrary to the safety and well-being of any of the siblings." [Emphasis added.]

[2] See Assem. Bill 740 (Stats. 1999, ch. 805).

[3] See *In re A.R.* (2012) 203 Cal.App4th 1160.

[4] Sen. Comm. on Jud., Analysis of Sen. Bill No. 1099 (2013–2014 Reg. Sess.) April 22, 2014, p. 6.

Given this legislative history, the committee proposes adding this new standard to rule 5.570 (h)(2) and (i)(2) but not specifying the burden of proof required.

- Further amend rule 5.570 to clarify that the request for visitation with a nondependent sibling can be granted only if that sibling is in the custody of a mutual parent who is subject to the court's jurisdiction.

  SB 1099 amended section 16002 with the legislative intent to preserve and strengthen a child's sibling relationship so that when a child has been removed from his or her home and he or she has a sibling or siblings who remain in the custody of a mutual parent subject to the court's jurisdiction, the court has the authority to develop a visitation plan for the siblings, unless it has been determined that visitation is contrary to the safety or well-being of any sibling.

- Further amend rule 5.570 to specify the burden of proof and standard when requesting that a child be removed from the home or moved to a more restrictive level of placement.

  In spring 2013, the committee recommended amending rule 5.570 to "[r]emove statutorily incorrect uses of a section 388 petition."[5] Because the subparagraphs addressed requests to remove a child from the child's home and requests to move a child to a more restrictive placement, the committee decided that section 387, which addresses these requests when made by the child welfare department, governed these requests. It has since, however, been pointed out to staff that children's counsel sometimes make these requests, and if so, these requests would be governed by section 388. The committee therefore proposes that the language taken out of the rule effective January 1, 2014, be included in it again.

- Amend rule 5.708 to require that the court make the findings required by section 16002(b).

  Rule 5.708 governs the findings the court must make regarding siblings at dependency status review hearings. SB 1099 created a requirement in section 16002(b) that when sibling interaction has been suspended, in order for the suspension to continue, the court must make a renewed finding that sibling interaction is contrary to the safety or well-being of either child. The committee proposes using a cross-reference to recently amended section 16002(b). By referencing the statute, any future modification to section 16002(b) will not result in the need for changes to the rule.

[5] Judicial Council of Cal., Adv. Comm. Invitation to Comment, *Juvenile Law: Extended Foster Care* (spring 2013), p. 4.

- Amend rule 5.810 to require a finding, if sibling interaction has been suspended and will continue to remain suspended, that sibling interaction is contrary to the safety or well-being of either child.

  Rule 5.810 governs the findings the court must make at delinquency status review hearings. As stated above, SB 1099 created a requirement in section 16002(b) that when sibling interaction has been suspended, in order for the suspension to continue, the court must make a renewed finding that sibling interaction is contrary to the safety or well-being of either child. The committee proposes adding this newly required finding to the subdivisions governing each status review type: prepermanency, permanency, and postpermanency hearings.

- Further amend rules 5.708 and 5.810 to delete references to "youth."

  Frequently, but not consistently, these rules refer to "child or youth" rather than "child." "Youth" is not defined in the California Rules of Court. Rule 5.502 defines "child" as "a person under the age of 18 years." It further defines both "nonminors" and "nonminor dependents." These three definitions include all children and nonminors who are subject to the court's jurisdiction. The committee proposes using the words that are defined in the rule and deleting any references to the undefined "youth."

- Further amend rule 5.810 to clarify that, after the court has conducted a permanency hearing, it must conduct a postpermanency hearing no less frequently than once every 6 months and to eliminate the requirement for a permanency hearing every 12 months.

  Although a permanency hearing is required every 12 months under federal law,[6] California complies with this requirement by holding postpermanency status review hearings every 6 months.[7] The finding and order required by federal law to identify a permanent plan for a child are required by state law to be made at each postpermanency status review hearing, thus satisfying the federal requirement.[8]

- Further amend rule 5.810 to remove subdivision (f) regarding administrative reviews because it is duplicative of statute.

- Amend rules 5.570, 5.708, and 5.810 with new references to code sections and subsections and with further clarifying changes.

The committee also proposes the following specific revisions to Judicial Council forms:

[6] See 45 C.F.R. §§ 1355.20, 1356.21(b)(2)(i); 42 U.S.C. § 675(5)(C),(F).

[7] Welf. & Inst. Code, § 366.3(a), (d).

[8] Welf. & Inst. Code, § 366.3(e)(3).

- Revise *Court Order on Form JV-180,* Request to Change Court Order (form JV-183) to include the new standard for granting a request for sibling visitation with a child who is not a dependent of the court, and to allow the court to deny a request for sibling visitation if the sibling is not living in the custody of a mutual parent subject to the court's jurisdiction.

- Further revise form JV-183 to allow a court to set a hearing for the parties to argue whether a hearing on a section 388 petition should be granted or denied.

  In *In re G.B.* (2014) 227 Cal.App.4th 1147, the First Appellate District held, inter alia, that the failure to hold a hearing on modification requests did not amount to reversible error.[9] In doing so, the appellate court implicitly approved the trial court's practice of setting a hearing for the purpose of giving the parties an opportunity to argue whether the section 388 petition stated a prima facie case and whether a hearing on the petition should be set. The appellate court stated that in checking the box on the form, the juvenile court was not deciding that a prima facie case had been made but was instead scheduling the matter for the parties to argue the issue.[10] It further stated that such a setting was not an option on the form.

  The committee proposes revising the form to allow courts the option of setting a hearing to allow argument by the parties before the court decides whether to grant or deny a hearing on the section 388 petition.

- Revise *Child's Information Sheet—Request to Change Court Order* (form JV-185) to clarify, in plain language, that a child can request visitation with a sibling who lives with a mutual parent subject to the jurisdiction of the court.

- Revise *Sibling Attachment: Contact and Placement* (form JV-403) to include the new findings required by SB 1099 regarding siblings under the court's jurisdiction who are not placed together in the same home.

  SB 1099 amended sections 366 and 366.3 to require findings regarding whether the visits are supervised or unsupervised and, if supervised, why and what needs to be accomplished in order for the visits to be unsupervised; a description of the location and length of the visits; and any plan to increase visitation between the siblings. These findings would be added to the current item 3 and would make the one-page form a two-page form.

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[9] The published opinion can be found at *www.courts.ca.gov/opinions/archive/A140107.PDF*.

[10] Current form JV-183, item 3, which is to be completed by the trial court, reads, "The court orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request. The hearing will take place on (*date*): . . .."

Alternatives Considered

The committee considered not amending rule 5.570 and not revising form JV-183 regarding setting hearings on section 388 petitions but decided that the practice of setting a hearing for parties to argue whether a hearing on a section 388 petition should be granted or denied occurred in enough jurisdictions that the form should be revised. The committee also decided that amending this rule and revising this form would increase the options available to judicial officers.

Implementation Requirements, Costs, and Operational Impacts

This proposal could result in an increase in section 388 petitions filed requesting visitation with siblings who are not dependents of the court. This increase, however, is due to recent statutory changes authorizing such requests. In implementing the revised forms, courts would incur standard reproduction costs and retraining of affected staff.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Rules of Court, rules 5.570, 5.708, and 5.810, at pages 7–17
2. Proposed forms JV-183, JV-185, and JV-403, at pages 18–23
3. Senate Bill 1099, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1099&search_keywords=*

Rule 5.570. Request to change court order (petition for modification)

(a)–(c) * * *

(d) Denial of hearing

The court may deny the petition ex parte if:

(1) The petition filed under section 388(a) or section 778(a) fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction or fails to show that the requested modification would promote the best interest of the child, nonminor, or nonminor dependent.

(2) The petition filed under section 388(b) fails to demonstrate that the requested modification would promote the best interest of the dependent child; ~~or~~

(3) The petition filed under section 388(b) or 778(b) requests visits with a nondependent child and demonstrates that sibling visitation is contrary to the safety and well-being of any of the siblings;

(4) The petition filed under section 388(b) or 778(b) requests visits with a sibling who is not in the custody of a mutual parent subject to the court's jurisdiction; or

~~(3)~~(4) The petition filed under section 388(c) fails to state facts showing that the parent has failed to visit the child or that the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan or fails to show that the requested termination of services would promote the best interest of the child.

(e) Grounds for grant of petition (§§ 388, 778)

(1) If the petition filed under section 388(a) or section 778(a) states a change of circumstance or new evidence and it appears that the best interest of the child, nonminor, or nonminor dependent may be promoted by the proposed change of order or termination of jurisdiction, the court may grant the petition after following the procedures in (f), (g), and (h), or (i).

(2) If the petition is filed under section 388(b) and it appears that the best interest of the child, nonminor, or nonminor dependent may be promoted by the proposed recognition of a sibling relationship ~~and~~ or other requested orders,

the court may grant the petition after following the procedures in (f), (g), and (h).

(3) If the petition is filed under section 388(b), the request is for visitation with a sibling who is not a dependent of the court and who is in the custody of a parent subject to the court's jurisdiction, and it appears that sibling visitation is not contrary to the safety and well-being of any of the siblings, the court may grant the request after following the procedures in (f), (g), and (h).

(4) If the petition is filed under section 778(b) and it appears that the sibling is in the custody of a parent subject to the court's jurisdiction and that visitation is not contrary to the safety and well being of the ward or any of the siblings, the court may grant the request after following the procedures in (f), (g), and (i).

~~(3)~~ (5) * * *

~~(4)~~ (6) * * *

~~(5)~~ (7) If the petition filed under section 388(a) is filed before an order terminating parental rights and is seeking to modify an order that reunification services ~~were not needed~~ need not be provided under section 361.5(b)(4), (5), or (6) or to modify any orders related to custody or visitation of the child for whom reunification services were not ordered under section 361.5(b)(4), (5), or (6), the court may modify the orders only if the court finds by clear and convincing evidence that the proposed change is in the best interests of the child. The court may grant the petition after following the procedures in (f), (g), and (h).

(f) Hearing on petition

If all parties stipulate to the requested modification, the court may order modification without a hearing. If there is no such stipulation and the petition has not been denied ex parte under section (d), the court may order a hearing for the parties to argue whether a hearing on the petition should be granted or denied or may ~~must~~ order that a hearing on the petition ~~for modification~~ be held within 30 calendar days after the petition is filed. If the court orders a hearing for the parties to argue whether a hearing on the petition should be granted or denied and grants a hearing on the petition, that hearing must be held within 30 calendar days after the petition is filed.

(g) * * *

(h) Conduct of hearing (§ 388)

(1) The petitioner requesting the modification under section 388 has the burden of proof.

(A) If the request is for the removal of the child from the child's home, the petitioner must show by clear and convincing evidence that the grounds for removal in section 361(c) exist.

(B) If the request is for removal to a more restrictive level of placement, the petitioner must show by clear and convincing evidence that the change is necessary to protect the physical or emotional well-being of the child.

~~(A)~~(C) If the request is for termination of court-ordered reunification services, the petitioner must show by clear and convincing evidence that one of the conditions in section 388(c)(1)(A) or (B) exists and must show by a preponderance of the evidence that reasonable services have been offered or provided.

~~(B)~~(D) If the request is to modify an order that reunification services were not needed under section 361.5(b)(4), (5), or (6) or to modify any orders related to custody or visitation of the child for whom reunification services were not ordered under section 361.5(b)(4), (5), or (6), the petitioner must show by clear and convincing evidence that the proposed change is in the best interests of the child.

~~(C)~~ (E) All other requests require a preponderance of the evidence to show that the child's welfare requires such a modification.

(2) If the request is for visitation with a sibling who is not a dependent of the court, the court may grant the request unless the court determines that the sibling is not in the custody of a mutual parent subject to the court's jurisdiction or that sibling visitation is contrary to the safety and well-being of any of the siblings.

~~(2)~~ (3) The hearing must be conducted as a dispositional hearing under rules 5.690 and 5.695 if:

(A) The request is for termination of court-ordered reunification services; or

(B) There is a due process right to confront and cross-examine witnesses.

Otherwise, proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.

(i) Conduct of hearing (§ 778)

(1) The petitioner requesting the modification under section 778(a) has the burden of proving by a preponderance of the evidence that the ward's welfare requires the modification. Proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.

(2) If the request is for visitation under section 778(b), the court may grant the request unless the court determines that the sibling is not in the custody of a mutual parent subject to the court's jurisdiction or that sibling visitation is contrary to the safety and well-being of any of the siblings.

(j) Petitions for juvenile court to resume jurisdiction over nonminors (§§ 388(e), 388.1)

A petition filed by or on behalf of a nonminor requesting that the court resume jurisdiction over the nonminor as a nonminor dependent is not subject to this rule. Petitions filed under ~~subdivision (e) of~~ section 388(e) or section 388.1 are subject to rule 5.906.

Rule 5.708. General review hearing requirements

(a)–(b) * * *

(c) Reports (§§ 366.05, 366.1, 366.21, 366.22, 366.25, 16002)

Before the hearing, the social worker must investigate and file a report describing the services offered to the family, progress made, and, if relevant, the prognosis for return of the child to the parent or legal guardian.

(1) The report must include:

(A) Recommendations for court orders and the reasons for those recommendations;

(B) A description of the efforts made to achieve legal permanence for the child if reunification efforts fail; ~~and~~

(C) A factual discussion of each item listed in sections 366.1 and 366.21(c)~~.~~; and

(D) A factual discussion of the information required by section 16002(b).

(2)–(3) * * *

(d)–(e) * * *

(f) Educational and developmental-services needs (§§ 361, 366, 366.1, 366.3)

The court must consider the educational and developmental-services needs of each child and nonminor or nonminor dependent ~~youth~~, including whether it is necessary to limit the rights of the parent or legal guardian to make educational or developmental-services decisions for the child ~~or youth~~. If the court limits those rights or, in the case of a nonminor or nonminor dependent ~~youth~~ who has chosen not to make educational or developmental-services decisions for him- or herself or has been deemed incompetent, finds that appointment would be in the best interests of the ~~youth~~ nonminor or nonminor dependent, the court must appoint a responsible adult as the educational rights holder as defined in rule 5.502. Any limitation on the rights of a parent or guardian to make educational or developmental-services decisions for the child ~~or youth~~ must be specified in the court order. The court must follow the procedures in rules 5.649–5.651.

(g) Case plan (§§ 16001.9, 16501.1)

The court must consider the case plan submitted for the hearing and must determine:

(1) Whether the child ~~or youth~~ was actively involved, as age- and developmentally appropriate, in the development of his or her own case plan and plan for permanent placement. If the court finds that the child ~~or youth~~ was not appropriately involved, the court must order the agency to actively involve the child ~~or youth~~ in the development of his or her own case plan and plan for permanent placement, unless the court finds that the child is unable, unavailable, or unwilling to participate.

(2)–(3) * * *

(4) For a child ~~or youth~~ 12 years of age or older in a permanent placement, whether the child was given the opportunity to review the case plan, sign it, and receive a copy. If the court finds that the child ~~or youth~~ was not given

this opportunity, the court must order the agency to give the child the opportunity to review the case plan, sign it, and receive a copy.

(h)–(i) *** * ***

(j) Sibling findings; additional findings (§§ 366, 16002)

(1) The court must determine whether the child has other siblings under the court's jurisdiction. If so, the court must make the additional determinations required by section 366(a)(1)(D); and

(2) The court must enter any additional findings as required by section 366 and section 16002.

(k)–(m) *** * ***

(n) Requirements on setting a section 366.26 hearing (§§ 366.21, 366.22, 366.25)

The court must make the following orders and determinations when setting a hearing under section 366.26:

(1) The court must terminate reunification services to the parent or legal guardian and:

(A) Order that the social worker provide a copy of the child's birth certificate to the caregiver as consistent with sections 16010.4(e)(5) and 16010.5(b)–(c); and

(B) Order that the social worker provide a child ~~or youth~~ 16 years of age or older with a copy of his or her birth certificate unless the court finds that provision of the birth certificate would be inappropriate.

(2)–(6) * * *

(o) *** * ***

Rule 5.810. Reviews, hearings, and permanency planning

(a) Six-month status review hearings (§§ 727.2, 11404.1)

For any ward removed from the custody of his or her parent or guardian under section 726 and placed in a home under section 727, the court must conduct a status review hearing no less frequently than once every six months from the date the

ward entered foster care. The court may consider the hearing at which the initial order for placement is made as the first status review hearing.

(1)–(2) * * *

(3) *Findings and orders (§ 727.2(e))*

The court must consider the safety of the ward and make findings and orders that determine the following:

(A)–(E) * * *

(F) In the case of a child ~~or youth~~ who is 16 years of age or older, the services needed to assist the child ~~or youth~~ in making the transition from foster care to independent living;

(G) Whether the child ~~or youth~~ was actively involved, as age- and developmentally appropriate, in the development of his or her own case plan and plan for permanent placement. If the court finds that the child ~~or youth~~ was not appropriately involved, the court must order the probation department to actively involve the child ~~or youth~~ in the development of his or her own case plan and plan for permanent placement, unless the court finds that the child ~~or youth~~ is unable, unavailable, or unwilling to participate; ~~and~~

(H) Whether each parent was actively involved in the development of the case plan and plan for permanent placement. If the court finds that any parent was not actively involved, the court must order the probation department to actively involve that parent in the development of the case plan and plan for permanent placement, unless the court finds that the parent is unable, unavailable, or unwilling to participate~~.~~; and

(I) If sibling interaction has been suspended and will continue to be suspended, that sibling interaction is contrary to the safety or well-being of either child.

(4) * * *

(b) Permanency planning hearings (§§ 727.2, 727.3, 11404.1)

A permanency planning hearing for any ward who has been removed from the custody of a parent or guardian and not returned at a previous review hearing must be held within 12 months of the date the ward entered foster care as defined in section 727.4(d)(4). ~~and periodically thereafter, but no less frequently than once every 12 months while the ward remains in placement~~. However, when no reunification services are offered to the parents or guardians under section 727.2(b), the first permanency planning hearing must occur within 30 days of disposition.

(1) * * *

(2) *Findings and orders (§§ 727.2(e), 727.3(a))*

At each permanency planning hearing, the court must consider the safety of the ward and make findings and orders regarding the following:

(A)–(C) * * *

(D) The permanent plan for the child ~~or youth~~, as described in (3);

(E) Whether the child ~~or youth~~ was actively involved, as age- and developmentally appropriate, in the development of his or her own case plan and plan for permanent placement. If the court finds that the child ~~or youth~~ was not appropriately involved, the court must order the probation officer to actively involve the child ~~or youth~~ in the development of his or her own case plan and plan for permanent placement, unless the court finds that the child ~~or youth~~ is unable, unavailable, or unwilling to participate; and

(F) Whether each parent was actively involved in the development of the case plan and plan for permanent placement. If the court finds that any parent was not actively involved, the court must order the probation department to actively involve that parent in the development of the case plan and plan for permanent placement, unless the court finds that the parent is unable, unavailable, or unwilling to participate~~.~~; and

(G) If sibling interaction has been suspended and will continue to be suspended, that sibling interaction is contrary to the safety or well-being of either child.

(3) *Selection of a permanent plan (§ 727.3(b))*

At the first permanency planning hearing, the court must select a permanent plan. At subsequent permanency planning hearings that can be held under

section 727.2(g), the court must either make a finding that the current permanent plan is appropriate or select a different permanent plan, including returning the child home, if appropriate. The court must choose from one of the following permanent plans, which are, in order of priority:

(A) * * *

(B) A permanent plan of return of the child to the physical custody of the parent or guardian, after 6 additional months of reunification services. The court may not order this plan unless the court finds that there is a substantial probability that the child will be able to return home within 18 months of the date of initial removal or that reasonable services have not been provided to the parent or guardian.

(C)–(F) * * *

(4) * * *

(c) Postpermanency status review hearings (§ 727.2)

A postpermanency status review hearing must be conducted for wards in placement no less frequently than once every six months.

(1) *Consideration of reports (§ 727.2(d))*

The court must review and consider the social study report and updated case plan submitted for this hearing by the probation officer and the report submitted by any CASA volunteer, and any other reports filed with the court under section 727.2(d).

(2) *Findings and orders (§ 727.2(g))*

At each postpermanency status review hearing, the court must consider the safety of the ward and make findings and orders regarding the following:

(A) Whether the current permanent plan continues to be appropriate. If not, the court must select a different permanent plan, including returning the child home, if appropriate~~.~~ ; ~~The court must not order the permanent plan of returning home after 6 more months of reunification services, as described in (b)(3)(B), unless it has been 18 months or less since the date the child was removed from home;~~

(B) The continuing necessity for and appropriateness of the placement;

(C) The extent of the probation department's compliance with the case plan in making reasonable efforts to complete whatever steps are necessary to finalize the permanent plan for the child; ~~and~~

(D) Whether the child ~~or youth~~ was actively involved, as age~~-~~ and developmentally appropriate, in the development of his or her own case plan and plan for permanent placement. If the court finds that the child ~~or youth~~ was not appropriately involved, the court must order the probation department to actively involve the child ~~or youth~~ in the development of his or her own case plan and plan for permanent placement, unless the court finds that the child ~~or youth~~ is unable, unavailable, or unwilling to participate~~.~~; and

(E) If sibling interaction has been suspended and will continue to be suspended, sibling interaction is contrary to the safety or well-being of either child.

(d) Notice of hearings; service; contents (§ 727.4)

No earlier than 30 or later than 15 calendar days before each hearing date, the probation officer must serve written notice on all persons entitled to notice under section 727.4, as well as the current caregiver, any CASA volunteer or educational rights holder, and all counsel of record. ~~A~~ *Notice of Hearing—Juvenile Delinquency Proceeding* (form JV-625) must be used.

(e) Report (§§ 706.5, 706.6, 727.2(c), 727.3(a)(1), 727.4(b), 16002)

Before each hearing described above, the probation officer must investigate and prepare a social study report that must include an updated case plan and all of the information required in sections 706.5, 706.6, 727.2, ~~and~~ 727.3, and 16002.

(1) The report must contain recommendations for court findings and orders and must document the evidentiary basis for those recommendations.

(2) At least 10 calendar days before each hearing, the ~~petitioner~~ probation officer must file the report and provide copies of the report to the ward, the parent or guardian, all attorneys of record, and any CASA volunteer.

~~**(f) Hearing by administrative panel (§§ 727.2(h), 727.4(d)(7))**~~

~~The status review hearings described in (a) and (c) may be conducted by an administrative review panel, provided:~~

~~(1) The ward, parent or guardian, and all those entitled to notice under section 727.4 may attend;~~

~~(2) Proper notice is provided;~~

~~(3) The panel has been appointed by the presiding judge of the juvenile court and includes at least one person who is not responsible for the case management of, or delivery of service to, the ward or the parent or guardian; and~~

~~(4) The panel makes findings as required by (a)(3) or (c)(2) above and submits them to the juvenile court for approval and inclusion in the court record.~~

JV-183 Court Order on Form JV-180, *Request to Change Court Order*

Clerk stamps date here when form is filed.

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

The court will complete this form after reviewing the Request to Change Court Order *(form JV-180) and either grant the request, deny the request, or set a hearing on the request.*

After reading and considering the *Request to Change Court Order* (form JV-180) filed by:

Name: _____

on *(date):* _____

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Name of Child or Youth:

Clerk fills in case number when form is filed.

Case Number:

The Court Finds and Orders

1 ☐ All parties and attorneys agree to the request. The request is granted

a. ☐ as requested in item 8 of Form JV-180.

b. ☐ as follows *(state specific modifications):*

_____

_____

_____

_____

2 The request is denied because

a. ☐ the request is not signed.

b. ☐ the request does not state new evidence or a change of circumstances.

c. ☐ the proposed change of order, recognition of sibling relationships, or termination of jurisdiction does not promote the best interest of the child.

d. ☐ the request is for visitation with a dependent of the court and the proposed change of order does not promote the best interest of the child.

e. ☐ the request is for visitation with a nondependent of the court and the proposed change of order is contrary to the safety or well-being of one or more of the siblings.

f. ☐ the request is for visitation with a nondependent of the court and the parent who has custody is not subject to this court's jurisdiction.

g. ☐ Other *(state the specific reason):* _____

_____

_____

3 The court orders a hearing on whether the court should grant or deny a hearing. The hearing will take place on *(date):* _____ at *(time):* _____ *(circle one)* a.m./p.m. in department _____ of the Superior Court of County located at _____

_____

_____

_____

Name of child or youth: _____

Case Number:

4 The court orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request. The hearing will take place on *(date):* _____
at *(time):* _____ *(circle one)* a.m./p.m. in department _____
of the Superior Court of _____ County located at _____

_____

_____

_____

Date: _____

_____
Judicial officer

CHILD'S NAME:	CASE NUMBER:

CHILD'S INFORMATION SHEET— REQUEST TO CHANGE COURT ORDER
(Welf. & Inst. Code, §§ 353.1, 388)

TO THE CHILD: This information sheet tells you about your right to ask the court to change a decision the court has made about your life and the rules that must be followed when you want to ask the court to change a decision. It also explains your right to ask the court to make an order about your relationship with a brother or sister. If you are under 12 years of age, your attorney must talk with you about this information. If you are 12 years of age or older and in court at the dispositional hearing, the court must also talk with you about this information. The court must mail this information to you after a dispositional hearing.

A. I have just made a decision about your life. I will be making other decisions about your life. You have a right to ask me to change a decision I have made. You have an attorney who will help you with this.

For me to change a decision I have made, you must talk with your attorney and have your attorney ask me to change my decision.

Your attorney will have to fill out a form called *Request to Change Court Order* (form JV-180).

The form will explain to me the changes that have happened in your life and why the changes you want me to make in the court order will make things better for you.

You may get a copy of the blank form from your attorney or from the court clerk's office at the courthouse to review so you know what information needs to be on the form.

1. You must tell your attorney the following information:
   a. What has changed since I made the decision? If nothing has changed, what new information do you want to tell me?
   b. What changes to my decision do you want me to make?
   c. If I make the changes you want, will you be better off than if I do not make these changes? Tell me how the changes will make you healthier, safer, and happier.
2. After you speak with your attorney, your attorney will fill out the form.
   a. I will read the form.
   b. I may ask the other people involved with your case if they think you have given me the kind of information I must have in order to change my decision. Then I will decide if you told me anything new and if the change you want me to make is good for you.
   c. If I believe you have not told me anything new or if I believe what you want me to change is not good for you, I will not make any changes. The court clerk will send to you and all the people involved with your case a written notice of my decision not to make any changes.
   d. If I believe you did tell me something new and what you are asking me to change may be better for you, I will schedule a court date for you. The court clerk will send to you and all the people involved with your case a written notice of my decision to schedule a hearing and the date of the hearing.
   e. At that court date, everyone involved in your case will be present and allowed to speak.
   f. After everyone has spoken, I will make the final decision. I will make the changes you want only if I believe you have told me something new and what you are asking for is good for you.

B. If you have a brother or sister who lives with the parent you were removed from, you may ask me to make an order allowing visits with him or her.

If you have a brother or sister who is or might become a dependent of the court, you may ask me to make an order allowing visits, to make an order placing you in the same home, to make other orders that may be in the best interest of your brother or sister, and to consider your relationship with your brother or sister when making decisions about him or her.

For me to make these orders, you must tell your attorney you would like to ask me to make an order about your brother or sister.

CHILD'S NAME:	CASE NUMBER:

B. Your attorney will fill out a form asking me to make the order about your brother or sister.

The court clerk will send to you and all the people involved with your brother's or sister's case a written notice of my decision to schedule a hearing and the date of the hearing.

At that court date, everyone involved in the case will be present and allowed to speak.

After everyone has spoken, I will make the final decision. I will make the order about your brother or sister that you asked me to make only if I believe what you are asking for is good for your brother or sister.

If you have any questions please ask your attorney. Your attorney will be able to answer your questions about court procedures and the laws I will apply in making my decisions.

Date:

JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

1. **The child has siblings under the court's jurisdiction.**
   a. The nature of the relationship between the child and the child's siblings is
      (1) ☐ stated on the record.
      (2) ☐ described in the social worker's report.
      (3) ☐ other *(specify):*
   b. (1) ☐ Developing or maintaining the sibling relationship with the siblings named below is appropriate.
      (a) *(name):*
      (b) *(name):*
      (c) *(name):*
      (d) *(name):*
      (e) *(name):*
      (f) *(name):*
      (2) ☐ Developing or maintaining the sibling relationship with the siblings named below is not appropriate.
      (a) *(name):*
      (b) *(name):*
      (c) *(name):*
      (d) *(name):*
      (e) *(name):*
      (f) *(name):*
      (3) The basis for the finding in item 1b is
      (a) ☐ stated on the record.
      (b) ☐ described in the social worker's report.
      (c) ☐ other *(specify):*
   c. The impact of the sibling relationships on the child's placement and planning for legal permanence is
      (1) ☐ stated on the record.
      (2) ☐ described in the social worker's report.
      (3) ☐ other *(specify):*
2. ☐ **The child and all of the child's siblings under the court's jurisdiction are placed together in the same home.**
3. ☐ **The child and all of the child's siblings under the court's jurisdiction are not placed together in the same home.**
   a. ☐ Efforts are being made to place the child and the following siblings together.
      (1) Child's siblings:
      (a) *(name):*
      (b) *(name):*
      (c) *(name):*
      (d) *(name):*
      (e) *(name):*
      (f) *(name):*
      (2) The reasons the child and these siblings are not placed together and the efforts being made to do so are
      (a) ☐ stated on the record.
      (b) ☐ described in the social worker's report.
      (c) ☐ other *(specify):*
   b. ☐ Efforts to place the child with the following siblings are not appropriate.
      (1) Child's siblings:
      (a) *(name):*
      (b) *(name):*
      (c) *(name):*
      (2) The reasons that efforts to place the child with these siblings are not appropriate are
      (a) ☐ stated on the record.
      (b) ☐ described in the social worker's report.
      (c) ☐ other *(specify):*
   c. ☐ The frequency and nature of the visits between the child and the child's siblings who are not placed together are
      (1) ☐ stated on the record.
      (2) ☐ described in the social worker's report.
      (3) ☐ other *(specify):*

Form Approved for Optional Use
Judicial Council of California
JV-403 [Reised. Jan. 1, 2016]

SIBLING ATTACHMENT: CONTACT AND PLACEMENT

Welfare and Institutions Code, §§ 366, 366.3;
Cal. Rules of Court, rules 5.708 and 5.740
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

3. d. ☐ The reasons why the visits between the child and the child's siblings are supervised are
   (1) ☐ stated on the record.
   (2) ☐ described in the social worker's report.
   (3) ☐ other *(specify):*

   e. ☐ What needs to be accomplished in order for the visits to be unsupervised is
   (1) ☐ stated on the record.
   (2) ☐ described in the social worker's report.
   (3) ☐ other *(specify):*

   f. ☐ The location and length of the visits between the child and the child's siblings who are not placed together are
   (1) ☐ stated on the record.
   (2) ☐ described in the social worker's report.
   (3) ☐ other *(specify):*

   g. ☐ The plan to increase visitation between the child and the child's siblings who are not placed together is
   (1) ☐ stated on the record.
   (2) ☐ described in the social worker's report.
   (3) ☐ other *(specify):*

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 16, 2015

Title of proposal:
Family and Juvenile Law: Transfers to Tribal Court under Indian Child Welfare Act

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee; Tribal Court - State Court Forum

Staff contact (Name, phone and e-mail):
Ann Gilmour, (415) 865-4207, ann.gilmour@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Family and Juvenile Law - Approved December 10, 2014. Item #1: Provide subject matter expertise to the council by providing recommendations for rules and forms required by recent legislative changes as a result of SB 1460 (stats. 2014, ch. 772). Information that must be provided when a case transfers from juvenile court to tribal court.
Tribal Court - State Court Forum - Approved by Executive & Planning Committee at a meeting on April 23, 2014. Item #8 Recommend amendment to Rule 5.483 to ensure that the order for transfer of a juvenile case from state court to tribal court addresses issues such as when and to whom physical transfer of the child shall take place and what necessary information from the court and agency files will be provided to the tribal court and tribal social service agency upon transfer.

If requesting July 1 or out of cycle, explain:

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

Amend Cal. Rules of Court, rules 5.483, 5.590, and 8.406; adopt Cal. Rules of Court rule 8.418; revise forms ICWA-060 and JV-800

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title
Family and Juvenile Law: Transfers to Tribal Court under Indian Child Welfare Act

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.483, 5.590, and 8.406; adopt Cal. Rules of Court, rule 8.418; revise *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) and *Notice of Appeal—Juvenile* (form JV-800)

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Tribal Court–State Court Forum
Hon. Richard C. Blake, Cochair
Hon. Dennis M. Perluss, Cochair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Ann Gilmour, 415-865-4207,
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee (committee) and Tribal Court-State Court Forum (forum) propose amendments to the California Rules of Court and revisions to Judicial Council forms in response to provisions of Senate Bill 1460 (Stats. 2014, ch. 772), which amended section 305.5 of the Welfare and Institutions Code and added sections 381 and 827.15 concerning the transfer of juvenile court proceedings involving an Indian child from the jurisdiction of the juvenile court to a tribal court. The proposed rule amendments and form revisions are also in response to the decision of the Court of Appeal, First Appellate District in *In re M.M.* (2007) 154 Cal.App.4th 897, which implicates an objecting party's right to appeal a decision granting a transfer to a tribal court.

Background

Federal and state law mandate that upon application, certain state "child custody proceedings" involving an "Indian child" be transferred from state court to tribal court unless there is a finding of "good cause" not to transfer.[1] According to federal law and section 177 of the Family Code, section 1459.5 of the Probate Code, and rules 5.480 and 7.1015 of the California Rules of Court, the Indian Child Welfare Act (ICWA) rules 5.480 through 5.487 apply to "child custody proceedings" involving an Indian child which arise in family and probate proceedings. As a result, no specific amendments are proposed to probate or family rules or forms to address the *In re. M.M.* decision in those case types because the amendments being made to the ICWA rules will apply. In 2008, as part of a comprehensive rules and forms proposal dealing with ICWA matters following the passage of SB 678 (Stats. 2006, ch. 838), state legislation implementing ICWA in California, the Judicial Council enacted California Rules of Court, rule 5.483 governing transfers of child custody proceedings involving an Indian child to tribal court and approved *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) as an optional form.[2]

In 2007, the Court of Appeal, First Appellate District held that once a transfer from state court to tribal court is finalized, the decision to transfer is not appealable because the California Court of Appeal has no power over the tribal court to which the case has been transferred.[3]

The Legislature recently enacted Senate Bill 1460 (Stats. 2014, ch. 772), which amended section 305.5 of the Welfare and Institutions Code and added sections 381 and 827.15 concerning the transfer of juvenile court proceedings involving an Indian child from the jurisdiction of the juvenile court to a tribal court. In particular, SB 1460 sets out certain requirements concerning the contents of orders and the information which must be provided when a child's case is transferred from a California juvenile court to a tribal court. This change brings California law into alignment with federal requirements under Title IV-E of the Social Security Act designed to ensure continuity of Title IV-E eligibility when a case transfers from state juvenile court to tribal court.

The Proposal

The Tribal Court–State Court Forum (forum) and the Family and Juvenile Law Advisory Committee (committee) propose the following amendments to the California Rules of Court and revisions to the following Judicial Council forms:

- Amend rule 5.483 by:
    - Adding the following as subsection (3) under what is currently (g):

[1] See the federal Indian Child Welfare Act (25 U.S.C. §§ 1901–1963 at § 1911(b)) and the California Welf. & Inst. Code, § 305.5.
[2] See Item A27 for Judicial Council meeting held October 26, 2007, available at: http://www.courts.ca.gov/documents/age102607.pdf
[3] *In re. M.M.* (2007) 154 Cal.App.4th 897.

The dismissal and order transferring physical custody will not be issued under subsection (i) until 12 court days after service of a copy of the order granting the transfer petition.

This subsection is being added in response to the decision of the court in *In re M.M.* (2007) 154 Cal.App.4th 897, which held that once a transfer of a child custody proceeding to a tribal court has been finalized, it deprives California courts of jurisdiction over the case and, thus, precludes any appeal from the transfer order.

The intent of this provision, together with other provisions in the proposal, is to ensure that an objecting party does not inadvertently lose the right to appeal as a result of the transfer being finalized before the expiration of the normal appellate period as was the case in *In re M.M.*. At the same time, we do not want to unduly delay the finalization of proceedings concerning child welfare matters. This provision would set a specific time period before which the transfer process would not be finalized, creating a short window within which the state courts would retain jurisdiction to consider an appeal. The proposal would also require that any appeal to the order granting transfer be filed within seven days (see proposed rule 8.418). The court would be required to advise the parties of this time frame (see proposed amendment to rule 5.590).

Although the *In re M.M.* case involved a juvenile dependency proceeding being transferred from state to tribal court, the forum and committee believe that this provision should apply to all Indian Child Welfare Act matters including those in juvenile, probate, and family court.

- Adding a provision to what is currently subsection (g) stipulating that an order transferring a proceeding from a juvenile court to a tribal court must include (1) all of the findings and orders or modifications of orders that have been made in the case, (2) the name and address of the tribe to which jurisdiction is being transferred, (3) directions to the agency to release the child case file to the tribe having jurisdiction pursuant to section 827.15 of the Welfare and Institutions Code, and (4) directions that all papers contained in the court file be transferred to the tribal court and copies retained by the transferring court.

  These provisions are required by subsection (b) of Welfare and Institutions Code section 381, added by section 12 of SB 1460, and would apply only to proceedings being transferred from a juvenile court; they would not apply to proceedings being transferred from a probate or family court.

- Adding a new subdivision (f) specifying that rule 8.418 governs appellate review of an order granting transfer of a child custody matter involving an Indian child from a superior court to a tribal court.

- Amend rule 5.590 which governs the advisement of rights to appellate review in juvenile cases to include subsection (c), which would provide an advisement concerning the timing for filing a notice of appeal when the court grants a petition to transfer an ICWA case to tribal court. This subsection is added in response to the *In re M.M.* decision.

- Amend rule 8.406 which governs time to appeal in juvenile cases to include a reference to the timing requirements of filing a notice of appeal when the court grants a petition to transfer an ICWA case to tribal court. This subsection is added in response to the *In re M.M.* decision.

- Adopt rule 8.418 to address the time to appeal in juvenile cases to include references to the timing requirements of filing a notice of appeal when the court grants a petition to transfer an ICWA case to tribal court. This proposed rule would also require the appellant to file a request for a stay and a petition for supersedeas with the reviewing court at the same time as they file the notice of appeal. This rule is added in response to the *In re M.M.* decision.

- Revise Judicial Council *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) by:

    - Making it a mandatory rather than optional form to ensure that the necessary advisements and information concerning appeals—and the information which must be provided to the tribal court—are part of the order.
    - Adding subparts to item 5 on the form to indicate that:

        - If the case is being transferred from a juvenile court, all of the findings and orders or modifications of order that have been made in the case are attached;
        - When the case is being transferred from a juvenile court, the county agency is directed to release its case file to the tribe under section 827.15 of the Welfare and Institutions Code; and
        - When the case is being transferred from a juvenile court, the court file must be transferred to the tribal court with copies maintained by the transferring court.

    These are added to comply with the requirements of Welfare and Institutions Code section 381(b) added by section 12 of SB 1460.

    - Adding an advisement in item 6 that any party wishing to appeal a decision to transfer must file a notice of appeal within seven days after service of a copy of the order.

- Revise Judicial Council *Notice of Appeal—Juvenile* (form JV-800) to add:

    - Discussion of the time to appeal;
    - Reference to the timing requirements for filing a notice of appeal under the Notice section; and

- A new section under item 7 to reference section 305.5 of the Welfare and Institutions Code and transfers to tribal court.

These changes are in response to the *In re M.M.* decision.

The proposal will assist the state judicial branch by ensuring that the rules of court and forms give appropriate guidance to the courts and litigants in conformity with the law.

Alternatives Considered

The committee and forum considered taking no action with respect to the issues discussed in the *In re M.M.* decision. The committee and forum determined that objecting parties might inadvertently lose their appellate rights if no action was taken in response to the *In re M.M.* decision since transfers to tribal court are relatively rare, and attorneys may not be aware of the potential loss of appellate rights if a transfer finalizes prior to the expiration of the normal 60-day appeal period. As an alternative to the proposal as drafted, the committee and forum considered whether the issues discussed in the *In re M.M.* decision would be better addressed by requiring advisements to the parties about the possibility of losing appellate rights if a transfer finalizes before an appeal is taken or heard rather than establishing an alternative time frame for appealing such transfer orders.

The committee and forum considered whether amendments to rule 7.1015 of the California Rules of Court might also be appropriate but, after conferring with the Probate and Mental Health Advisory Committee staff, determined that because rule 7.1015 already incorporates the provisions of rules 5.480 through 5.487 a specific amendment was not necessary.

Finally the committee and forum are aware that the Bureau of Indian Affairs (BIA) published new *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (new guidelines) on February 25, 2015, which replace and supersede the guidelines issued in 1979.[4] The committee and forum are aware that the new guidelines contain provisions that appear to conflict with both California case law and the Welfare and Institutions Code, which may result in the need to amend California Rules of Court and forms concerning the Indian Child Welfare Act including potential additional changes to rules and forms governing transfers to tribal court (Cal. Rules of Court, rule 5.483; and form ICWA-060) as well as changes regarding nature and timing of inquiry, content of notice, timing and nature of active efforts, consideration in applying placement preferences, and a number of other areas. The committee and forum considered whether to defer action on this current proposal in light of the new guidelines. They decided to move forward with the current proposal notwithstanding the new guidelines because more comprehensive action to address the relationship between California statutes and rules of court concerning ICWA and the new guidelines may take several years to implement. The committee is cognizant of the impact on courts and justice partners when rules and forms are changed more than once in a short time frame; however, the forum and committee believe that the need to

[4] The new guidelines may be found at: *http://www.bia.gov/cs/groups/public/documents/text/idc1-029447.pdf*.

implement SB 1460, on balance, justifies this possibility. The forum and committee are also mindful that, following the comment period, it may be prudent to delay bringing the proposal to the Judicial Council for implementation if legislation is in process and likely to be implemented in a timeframe that would perhaps delay implementation of SB 1460. (Such a delay would be for a reasonable time to allow for comprehensive changes.)

Implementation Requirements, Costs, and Operational Impacts

The committee and forum believe that there will be minimal one-time costs associated with the revision of forms ICWA-060 and JV-800.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Is it necessary to address the appellate issues discussed in the *In re M.M.* decision through an amendment to the rules and forms?
- Would a better alternative be to address the issues discussed in the *In re M.M.* decision by way of advisements rather than establishing an alternate appeal time frame?
- Does the procedure established by the proposal properly address the issues raised in the *In re M.M.* decision concerning appeals of orders to transfer an ICWA case to tribal court?
- Is the time for filing an appeal of an order for transfer to tribal court appropriate?
- Does the proposal adequately address the issues raised in the *In re M.M.* decision in all case types, including juvenile, family and probate? In particular—given that there is no notice of appeal form equivalent to the JV-800 that governs appeals in probate and family—does the advisement of appellate rights contained in rule 5.483 and form ICWA-060 give the parties in family and probate proceedings sufficient notice?
- Should this proposal proceed at this time or should it be deferred in light of the new Bureau of Indian Affairs *Indian Child Welfare Act Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* and the possibility that further changes may be required?

The committee and forum also seek 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 three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, rules 5.483, 5.590, and 8.406; and proposed new rule 8.418, from pages 8–11.
2. Proposed revised form ICWA-060, from pages 12–15.
3. Proposed revised form JV-800.
4. SB 1460 (Stats. 2014; ch. 772) is available at: *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1460*. *In re M.M.* (2007) 154 Cal.App.4th 897 is available at: *http://www.lexisnexis.com/clients/CACourts*.

Rules 5.483, 5.590, and 8.406 of the California Rules of Court would be amended, and rule 8.418 would be adopted, effective January 1, 2016, to read:

Title 5. Family and Juvenile Rules

Division 2. Rules Applicable in Family and Juvenile Proceedings

Chapter 2. Indian Child Welfare Act

Rule 5.483. Transfer of case

(a)–(f) *** * ***

(g) Order on request to transfer

(1) The court must issue its final order on the *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060).

(2) When a matter is being transferred from the jurisdiction of a juvenile court, the order must include:

(A) All of the findings, orders, or modifications of orders that have been made in the case;

(B) The name and address of the tribe to which jurisdiction is being transferred;

(C) Directions for the agency to release the child case file to the tribe having jurisdiction under section 827.15 of the Welfare and Institutions Code;

(D) Directions that all papers contained in the child case file must be transferred to the tribal court; and

(E) Directions that a copy of the transfer order and the findings of fact must be maintained by the transferring court.

(3) The dismissal and order transferring physical custody will not be issued under subsection (i) until 12 court days after service of a copy of the order granting the transfer petition.

(h) Appeal of transfer order

Rule 8.418 governs appellate review of an order granting transfer of a child custody matter involving an Indian child from a superior court to a tribal court.

~~(h)~~ (i) Proceeding after transfer

* * *

Advisory Committee Comment

Subsections (g)(3) and (h) are intended to preserve an objecting party's right to appeal the order transferring a case to tribal court. Once a transfer to tribal court is finalized, the state court lacks jurisdiction to order the case returned to state court (*In re M.M.* (2007) 154 Cal.App.4th 897). Rule 8.418 establishes that a party wishing to appeal an order transferring a child custody proceeding from a superior court to a tribal court must file the notice of appeal and request for stay and petition for writ of supersedeas within 7 court days after service of a copy of the order being appealed.

Division 3. Juvenile Rules

Chapter 5. Appellate Review

Rule 5.590. Advisement of right to review in Welfare and Institutions Code section 300, 601, or 602 cases

(a)–(b) * * *

(c) Advisement requirements for appeal of order to transfer to tribal court

When the court grants a petition under Welfare and Institutions Code section 305.5, Family Code section 177(a), or Probate Code section 1459.5(b) and rule 5.483 transferring a case to a tribal court and one of the parties has objected to that transfer, the court must advise the objecting party that an appeal of the order for transfer and request for stay and a petition for a writ of supersedeas must be filed within 7 court days after service of a copy of the order granting transfer under rule 8.418.

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.406. Time to appeal

(a) Normal time

(1) Except as provided in (2) and (3) and in rule 8.418, 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)–(3) * * *

**(b)–(d) * * *

Rule 8.418. Appeals of orders transferring an Indian Child Welfare Act case to a tribal court

(a) Application

(1) This rule applies to appeals of orders under Welfare and Institutions Code section 305.5, Family Code section 177(a), Probate Code section 1459.5(b), and rule 5.483 transferring a case to a tribal court.

(2) In all respects not provided for in this rule, rules 8.403–8.412 apply.

(b) Time to appeal

(1) Normal time

(A) Except as provided in (B) and (C), a notice of appeal in a proceeding subject to this rule must be filed within 7 court days after service of a copy of the order being appealed.

(B) In matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 7 court 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 7 court days after that order is

served under rule 5.538(b)(3) or 5 court days after entry of the order denying rehearing, whichever is later.

(2) Cross-appeal

If an appellant timely appeals from the order, the time for any other party to appeal from the same order is either the time specified in (1) or 5 court days after the superior court clerk mails notification of the first appeal, whichever is later.

(c) Petition for writ of supersedeas and request for stay

Within the time for filing a notice of appeal under (b), the appellant must also file a request for a stay and a petition for writ of supersedeas in the reviewing court.

(d) Form of the record

The cover of the record must prominently display the title "Appeal From Order Transferring Case to Tribal Court Under [Welfare and Institutions Code section 305.5, Family Code section 177(a), or Probate Code section 1459.5(b)]," whichever is appropriate.

(e) Expedited procedures

The procedures established by rule 8.416(c)–(h) apply in proceedings under this rule.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
CHILD'S NAME:	CASE NUMBER:
ORDER ON PETITION TO TRANSFER CASE INVOLVING AN INDIAN CHILD TO TRIBAL JURISDICTION	RELATED CASES *(if any):*

1. Child's name: Date of birth:

2. a. Date of hearing: Time: Dept.: Room:

   b. Persons present:

   - ☐ Child
   - ☐ Child's attorney
   - ☐ Probation officer/social worker
   - ☐ Deputy county counsel
   - ☐ Tribal representative: _____ Name
   - ☐ Parent *(name):*
   - ☐ Parent *(name):*
   - ☐ Guardian
   - ☐ Deputy district attorney
   - ☐ Parent's attorney
   - ☐ Parent's attorney
   - ☐ CASA
   - ☐ Other:

3. The court has read and considered the
   - ☐ ICWA-50, *Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction*
   - ☐ Other *relevant evidence (specify):*

4. ☐ The child's tribe has informed this court that it has a tribal court or other administrative body vested with authority over child custody proceedings.

5. **THE COURT FINDS AND ORDERS** under ☐ Family Code, § 177(a); ☐ Probate Code, § 1459.5(b); ☐ Welfare and Institutions Code, § 305.5; ☐ 25 U.S.C. § 1911(a) (Exclusive Jurisdiction)

   a. ☐ The child's case is ordered transferred to the jurisdiction of the tribe listed below:
   Name of tribe:
   Address:
   City, state, zip code:
   Telephone number:

   b. ☐ Physical custody of the child is transferred to a designated representative of the tribal court listed below:
   Name:
   Title:
   Address:
   City, state, zip code:
   Telephone number:

   c. ☐ The case is being transferred from a juvenile court and all of the findings and orders or modifications of orders that have been made in the case are attached.

   d. ☐ The case is being transferred from a juvenile court and the county agency is hereby directed to release its case file to the tribe under section 827.15 of the Welfare and Institutions Code.

   e. ☐ The case is being transferred from a juvenile court and all originals contained in the court file must be transferred to the tribal court with copies maintained by this court.

Form Adopted for Optional Use
Judicial Council of California
ICWA-060 [Rev. January 1, 2016]

Family Code, § 177(a);
Probate Code, § 1459.5(b);
Welfare and Institutions Code, § 305.5;
Cal. Rules of Court, rule 5.483
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

f. ☐ The petition to transfer is denied because one of the following circumstances exist:

(1) ☐ One or both of the child's parents opposes the transfer.
Name of opposing parent:

(2) ☐ The child's tribe has informed this court that it does not have a tribal court or other administrative body as defined in 25 U.S.C. § 1903.

(3) ☐ The tribal court or other administrative body of the child's tribe declines the transfer.

g. ☐ The petition to transfer is denied because good cause exists not to transfer the case.

(1) ☐ Name of opposing party: has submitted information or evidence in writing to the court and all parties.

(2) ☐ Petitioner has had the opportunity to provide information or evidence in rebuttal.

(3) ☐ The party opposing the transfer has established that good cause not to transfer the proceeding exists as follows:

(a) ☐ The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.

(b) ☐ The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding. The notice complied with:

☐ Family Code section 180 or
☐ Probate Code section 1460.2 or
☐ Welfare and Institutions Code section 224.2.

(Note: The fact that a party waited until after reunification efforts failed and reunification services were terminated is not good cause to deny transfer.)

(c) ☐ The Indian child is over 12 years of age and objects to the transfer.

(d) ☐ The parents of the child, over five years of age, are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(e) ☐ *Other (specify):* _____

(4) ☐ The court provided a tentative decision in writing with reasons to deny the transfer in advance of the hearing at which the order to deny was made.

6. ☐ The court grants the petition to transfer and an objecting party that intends to seek appellate review of the transfer order is advised that they must file a written notice of appeal within 7 court days after the date of this order or risk losing their right to appeal. Any notice of appeal must be filed before the transfer to tribal court is finalized and in any event no later than 60 days after the date of the court's transfer order.

7. ☐ Proof that tribe has accepted transfer is attached and jurisdiction is terminated.

8. ☐ Hearing is set for *(Date):* *(Time):* *(Dept.):*
to confirm that tribe has accepted transfer and to terminate jurisdiction.

Date:

_____
JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
CHILD'S NAME:	
NOTICE OF APPEAL—JUVENILE	CASE NUMBER:

— NOTICE —

- 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 4–6 on the reverse of this form.
- Rule 8.406 says that to appeal from an order or judgment, 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.
- If you want to appeal an order transferring a case to tribal court, you must file a written notice of appeal within 7 court days, or before the transfer to tribal court is finalized. In any case no appeal of such an order may be filed after **60** days from the date of the order.

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 and address and phone number of person to be contacted *(if different from appellant):*

3. ☐ I request that the court appoint an attorney on appeal. I ☐ was ☐ was not represented by an appointed attorney in the superior court.

Date:

TYPE OR PRINT NAME

▶ SIGNATURE OF ☐ APPELLANT ☐ ATTORNEY

4. Items 5 through 7 on the reverse are ☐ completed ☐ not completed.

Form Approved for Optional Use
Judicial Council of California
JV-800 [Rev. Jan1, 2016]

Cal. Rules of Court, rule 8.400, 8.401, 8.405, 8.406
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

5. Appellant is the
   a. ☐ child
   b. ☐ mother
   c. ☐ father
   d. ☐ 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 5.

7. The order appealed from was made under Welfare and Institutions Code section *(check all that apply):*
   a. ☐ **Section 305.5** (transfer to tribal court)
      ☐ Granting transfer to tribal court
   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 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)
      ☐ 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. ☐ Other appealable orders relating to dependency *(specify):*
      Dates of hearing *(specify):*
   f. ☐ **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):*
   g. ☐ Other appealable orders relating to wardship *(specify):*
      Dates of hearing *(specify):*
   h. ☐ Other *(specify):*

Item number: 15

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Domestic Violence—Request to Modify or Terminate Domestic Violence Restraining Orders; Family Law—Changes to Request for Order Rules and Forms

(Amend Cal. Rules of Court, rules 5.12, 5.62, 5.63, 5.92, 5.94, 5.151; adopt forms DV-400, DV-400-INFO, FL-303, and FL-320-INFO; revise forms DV-130, DV-200, DV-250, FL-300, FL-300-INFO, FL-305, FL-306, FL-311, FL-312, FL-320, FL-336, FL-337, FL-341, FL-341(B), FL-341(C), FL-341(D), and FL-341(E))

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle D. Selden, 415-865-8085, gabrielle.selden@jud.ca.gov and Bonnie R. Hough, 415-865-7668, bonnie.hough@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved December 10, 2014. Item 12: Family Law: Revise FL-300 and companion forms

Project description from annual agenda: Propose revisions to forms to respond to statutory changes and requests from litigants and court professionals about new FL-300 and comply with new statutory requirements in Family Code section 6345(d) regarding providing a mechanism to allow parties to modify domestic violence restraining orders.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-15

Title
Domestic Violence—Request to Modify or Terminate Domestic Violence Restraining Orders; Family Law—Changes to Request for Order Rules and Forms

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.12, 5.62, 5.63, 5.92, 5.94, 5.151; adopt forms DV-400, DV-400-INFO, FL-303, and FL-320-INFO; revise forms DV-130, DV-200, DV-250, FL-300, FL-300-INFO, FL-305, FL-306, FL-311, FL-312, FL-320, FL-336, FL-337, FL-341, FL-341(B), FL-341(C), FL-341(D), and FL-341(E)

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and Submit Comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
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Executive Summary and Origin

In recent years, the Family and Juvenile Law Advisory Committee has been developing two separate proposals in the areas of Domestic Violence (concerning the modification or termination of restraining orders) and Family Law (relating to *Request for Order* rules and forms). Although the impetus for each proposal originates from different sources, there is significant overlap in the forms that would be affected by the proposals. For example, each proposes several changes to *Request for Order* (form FL-300) and *Responsive Declaration to Request for Order* (form FL-320). The proposals are being circulated together as they concern a number of important overlapping issues for family law and domestic violence legal communities to consider.

Domestic violence proposal

The proposal would help the Judicial Council implement the mandate of Family Code section 6380(f), which states that "[i]f a court issues a modification … or termination of a protective order, it shall be on forms adopted by the Judicial Council of California and that have been approved by the Department of Justice…" The statute has been in effect for some time and the committee has attempted to address this requirement over the years with proposed forms. But, due to significant public comment and the need for legislative action to resolve controversial issues, the committee deferred recommendation on the proposals.

The domestic violence proposal also originated from the legal community (court staff members, domestic violence victim advocates, and law enforcement officers) who requested that the Judicial Council develop consistent court forms, valid for entry into the California Law Enforcement Telecommunications System (CLETS), to assist litigants who want to terminate or modify their Domestic Violence Prevention Act (DVPA) orders under Family Code section 6345.

When Family Code Section 6345(d) became operative, effective January 1, 2012,[1] the Legislature authorized "termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party." The amended statute provided protections to the victim of domestic violence such as requiring strict requirements for service of requests filed by the restrained person to modify or terminate a restraining order. However, neither the Family Code nor the California Rules of Court provide guidance on the procedural requirements for dissolving or modifying DVPA orders. For this reason, courts use a variety of methods to effect modifications and terminate orders, resulting in an inconsistent application of procedures.

The committee proposes a new approach to implement sections 6345and 6380 by revising existing family law and domestic violence forms and creating a new termination order and litigant information sheet. The proposal is based on feedback from self-help center staff and legal services providers who work on domestic violence issues.

Family law proposal

The family law proposal originated from court operations managers, supervisors, and clerks from several counties who suggested practical and clarifying changes to form FL-300 after the Judicial Council adopted significant revisions to the form, effective July 1, 2012. The family law proposal previously circulated for comment in two separate cycles. The comments received informed the recommendations of the Family and Juvenile Law Committee. Indeed, the current invitation to comment incorporates many of the substantive changes proposed by commentators.

[1] Assembly Bill 454 (Stats. 2010, ch. 101) may be found at: *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB454&search_keywords*=.

The proposal includes a revised *Request for Order* (form FL-300), which encourages the participation of the responding party at the hearing but acknowledges that the court may be authorized to make orders without his or her participation. The proposal also includes a new version of the *Information Sheet for Request for Order* (form FL-300-INFO) that incorporates comments proposing ways to simplify the information about when a *Request for Order* (form FL-300) may be served by mail or when personal service is required on the other party. In addition, the proposal includes a new optional form titled *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) to help parties comply with rule 5.151 of the California Rules of Court and provide a declaration in support of their request for temporary emergency orders. It also includes a proposed new *Information Sheet: Responsive Declaration to Request for Order* (form FL-320-INFO), which would provide information about responding to a *Request for Order*.

Prior Circulation

Domestic violence proposal

The Family and Juvenile Law Advisory Committee proposed forms to modify or terminate the Domestic Violence Prevention Act (DVPA) in three previous public comment periods: 2003, 2005, and 2012.

- The initial invitation to comment circulated from April 17, 2003, through July 1, 2003, was titled "SPR03-40, New Forms and Information Sheets to Vacate and Modify Domestic Violence Prevention Act Orders."[2]

- The committee recirculated the proposal from December 8, 2004, to February 4, 2005, seeking comment on specific issues that were raised by commentators during the first circulation.[3] However, the committee withdrew section of the proposal dealing with modification and terminations of domestic violence restraining orders.[4]

- Another proposal circulated for comment from April 21, 2011, to June 30, 2011.[5] Once again, the committee recommended that it undergo further development.[6]

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[2] Judicial Council of Cal., Family and Juvenile Law Advisory Com. Rep., *Domestic Violence (revise forms DV-100, DV-110, DV-120, DV-130, DV-500, DV-505, DV-520, DV-540, JV-245, and JV-250)* (March 2005 Judicial Coun), p. 5. The report is found at: *http://www.courts.ca.gov/documents/0405itema6.pdf*.

[3] *Ibid.*

[4] All comments made during the winter 2005 circulation of proposed forms DV-300, DV-310, DV-320, DV-370, DV-380, and DV-390 were published in the March 2005 Judicial Council report.

[5] Invitation to Comment (SPR11-55), "Family Law—Domestic Violence: Adopt Rule of Court Regarding Modification of Child Custody and Visitation Orders and Revise, Approve, Adopt, or Revoke Forms Used in Domestic Violence Prevention Act Cases."

[6] Judicial Council of Cal., Family and Juvenile Law Advisory Com. Rep., *Domestic Violence: Forms and rule for use in Domestic Violence Prevention cases* (October 20, 2011), p. 16. The report can be found at: *http://www.courts.ca.gov/documents/ItemA16.pdf*.

Family law proposal

The Family and Juvenile Law Advisory Committee and Elkins Family Law Implementation Task Force previously sought comment on proposals to address issues raised by courts about the *Request for Order* (form FL-300) that was significantly revised, effective July 1, 2012.

- "Family Law: Improvements to Request for Order Rules and Forms" circulated from April 19, 2013, to June 19, 2013, proposing changes to rules 5.92, 5.94, and forms FL-300, FL-300-INFO, FL-305, FL-306, FL-312, FL-320, FL-336, FL-337, FL-341(C), FL-341(D), and FL-341(E).[7]

- A revised proposal titled "Family Law: Changes to Request for Order" circulated for public comment from December 13, 2013, to January 24, 2014,[8] and was expanded to propose amendments to rules 5.12, 5.62, 5.63, 5.151, and 5.170. Following its circulation, the Family and Juvenile Law Advisory Committee tabled the proposal to allow additional time to consider how to respond to the additional substantive changes proposed by commentators.

The Proposals

Domestic violence—modification or termination of restraining orders

The Family and Juvenile Law Advisory committee proposes the following changes to implement the Family Code sections 6345 and 6380 relating to a request to modify or terminate a DVPA order issued on *Restraining Order After Hearing* (form DV-130).

Restraining Order After Hearing (form DV-130)
Form DV-130 would be revised to add new check boxes to indicate whether the order is new ("Original") or changed ("Amended"). A blank line in front of the check box for "Amended" would allow courts to identify if the order is a 1st, 2nd, 3rd, or other amended order. This would make it clear to law enforcement and the parties which order is more current. Item 24 on page 4 would also be revised to include that a proof of service of the *Request for Order* (form FL-300) was presented to the court and would specify whether proof of service of the amended order is required on either party.

Proof of Personal Service (form DV-200) and *Proof of Service by Mail* (form DV-250)
These two forms would be revised in item 4 to add *Request for Order* (form FL-300) to the checklist of forms served on the other party.

Findings and Notice of Termination of Restraining Order (form DV-400)
The proposal is for a standalone form to memorialize the *termination* of a DVPA order. The form would (1) identify the name of the parties; (2) provide a section for the court to make

[7] "Family Law: Improvements to Request for Order Rules and Forms" (SPR13-22) may be found at: *http://www.courts.ca.gov/documents/SPR13-22.pdf*.

[8] The invitation to comment may be found at: *http://www.courts.ca.gov/documents/W14-12.pdf*.

findings about the nature of the proceeding and how service of the request was effected under Family Code section 6345; (3) include a court orders section to specify the date the *Restraining Order After Hearing* (DV-130) was issued and the date that order terminated; (4) identify if orders for child custody, child visitation, or child, spousal, or domestic partner support were changed or also terminated; (5) include a notice that the court or its designee will transmit the form for entry into CLETS within one business day; and (6) include a section for the court to provide specific instructions about serving the order.

How to Change or End a Domestic Violence Restraining Order? (form DV-400-INFO)
This new, four-page information sheet would mirror *Information Sheet for Request for Order* (form FL-300-INFO) but be tailored to provide answers to frequently asked questions and guidance to parties about the forms and procedures for requesting a modification or termination of the restraining order issued on form DV-130.

Request for Order (form FL-300)
Because parties would use form FL-300 to request an order to modify or terminate a restraining order, this form would require several changes. The form would be changed to refer specifically to form DV-400-INFO, which will provide information to persons who want to modify or terminate a restraining order. In addition, page 4 of form FL-300 would be revised to provide a specific check box noting a request to either modify or terminate the restraining order. The item would also include fillable space for a party to provide details about the requested orders. As to this item, the committee seeks comment on whether the form should instruct a party to attach a copy of the restraining order to form FL-300 being filed with the clerk and served on the other party.

Responsive Declaration to Request for Order (form FL-320)
This form would be revised to include a specific item on page 2 for a party to check and indicate consent or opposition to the orders requested on form FL-300 to either modify (change) or terminate (end) the restraining orders granted in form DV-130.

Legislative and other solutions to previous issues
The committee previously sought comment on several issues that raised concern with commentators. As noted below, Family Code section 6345 specifically addressed a number of issues relating to the modification or termination of restraining orders such as personal conduct, stay-away, and residence exclusions orders:

- *Either party is able to request a modification or termination of restraining orders.* Family Code section 6345 authorizes either party to make the request. The statute does not restrict the filing of such a request to either a protected party or a restrained party. Instead, the statute generally permits "…termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party."

- *Personal service required if request made by restrained person.* Section 6345(d) specifies strict service requirements if a restrained party requests modification or termination of the restraining order. The statute requires that "…the party who is protected by the order shall be given notice…of the proceeding…by personal service." Service may also be made on the Secretary of State if the protected party has been provided a confidential address for victims of domestic violence under Government Code section 6205 et seq.[9]

  The statute, however, does not require that the party who is protected by the order give notice of the proceeding by personal service on the restrained party. This seems to permit the protected party to give notice of the request to modify or terminate the restraining orders using service by mail.

- *Shortened time for service of notice of hearing permitted.* Section 6345(d) requires that a party other than the protected party give notice to the protected party of the request to terminate or modify domestic violence restraining as required by Code of Civil Procedure section 1005(b). Section 1005(b) states "[u]nless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing."

  However, the author (Silva) of Assembly Bill 454's bill analysis, provided at the Senate Judiciary Committee hearing of June 7, 2011, supports that Family Code section 6345 permits either party to seek an order shortening time for service of the notice of the hearing in rare occasions:

  > While it is plausible that a party may face circumstances that require a modification or termination of an order in a shorter time frame than the 16 days' notice required by this bill pursuant to Section 1005(b) of the Code of Civil Procedure (for example, start of a new job in an area enjoined from entering), public policy here would dictate that the interest of protecting victims of violence or threats of violence from new or further physical and/or psychological harm would take precedence above any other interests of parties who are enjoined by the protective party. The court may still find that the order should be modified or terminated in advance of the expiration date upon a hearing, but in the interest of public policy, the person protected by the order should be given sufficient advance notice to appear in court and oppose any modification or termination and provide their evidence for why the other party's motion should not be granted in light of the danger posed to the victim. Moreover,

[9] Government Code section 6206(a)(5)(A) provides that service on the Secretary of State of any summons, writ, demand, or process shall be made by delivering to the address of confidentiality program personnel of the office of the Secretary of State two copies of the summons, writ, demand, or process.

Section 1005(b) would permit the court to shorten the timing of notice if it deems appropriate under specific circumstances.[10]

- *No temporary emergency orders to change or end the restraining order before a hearing.* The court is not authorized to rule on the restrained party's request and make temporary orders that change or end the restraining order before the noticed hearing. Family Code section 6345(d) provides that if the party who is protected by the order cannot be notified prior to the hearing, the court shall deny the motion to modify or terminate the protective order without prejudice or continue the hearing until the party is properly noticed, and may, upon a showing of good cause, specify another service method.

- *Evidentiary standard.* Family Code section 6345 does not articulate an evidentiary standard that the court should use on a request to modify or terminate a domestic violence restraining order. Therefore, under Family Code section 210, the standards under the Code of Civil Procedure must be applied. Case law does provide some guidance on this issue. In *Loeffler v. Medina*,[11] the appellate court noted that the evidentiary standard is not governed by the "reasonable apprehension of future abuse" standard applicable when a party is seeking to renew an expiring domestic violence restraining order. Instead, the court adopted the standard in Code of Civil Procedure, section 533.[12]

- *Use of form FL-300 reflects current court practice.* Many requests to modify form DV-130 orders relate to child custody, visitation, and support. Because custody and visitation orders remain in effect even after a protective order ends under Family Code section 6340, litigants with ongoing custody and visitation matters will often use family law forms to request a change to such orders filed on form DV-130. Thus, the proposal to use existing family law form FL-300 to request a change in the current restraining orders would reflect current practice in most courts.

- *No accompanying rule of court is needed.* Because the proposed forms indicate the procedures for their use (for example, forms DV-130, DV-400, DV-400-INFO, FL-300, FL-300-INFO, and FL-320), no specific rule of court is required concerning modification

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[10] The Senate Judiciary Committee bill analysis dated June 6, 2011, may be found on page 7 at: *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml*.

[11] *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 95 Cal.Rptr.3d 343. The case can be found at: *http://scholar.google.com/scholar_case?case=17223333606025192688&q=Loeffler+v.+Medina&hl=en&as_sdt=2006&as_vis=1*.

[12] Code of Civil Procedure section 533 provides:

In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.

or termination of restraining orders. Under California Rules of Court, rule 5.7, "All forms adopted or approved by the Judicial Council for use in any proceeding under the Family Code, including any form in the …DV… series, are adopted as rules of court under the authority of Family Code section 211; article VI, section 6 of the California Constitution; and other applicable law."

Family law—request for order rules and forms

This proposal is intended to revise the request for order rules, forms, and update associated forms used as attachments to form FL-300 relating to child custody and visitation (parenting time) (including forms FL-341 and FL-341(B)–(E)) to make them more effective and user friendly. The proposal would benefit the judicial branch—along with attorneys and self-represented litigants who use the forms—by clarifying, reorganizing, and rewording specific items that have caused some confusion to persons who complete the forms and to the court clerks who process them.

In addition, the proposal recommends adoption of a new, optional form titled *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) to help parties comply with rule 5.151 (Request for emergency orders; application; required documents) which requires, among other things, that a party's request for temporary emergency orders include a written declaration regarding notice of application for emergency orders based on personal knowledge. The proposed new form would also assist courts that do not provide a local form for this purpose.

Further, the proposal recommends adoption of a new form titled *Information Sheet: Responsive Declaration to Request for Order* (form FL-320-INFO) to provide information to a party about responding to *Request for Order* (form FL-300).

Family law—specific changes proposed to rules of court relating to form FL-300

Rule 5.12. Discovery motions

This rule would be updated to replace references to a "notice of motion" with "request for order." This change would avoid confusion for persons who may look to complete a form titled *Notice of Motion* (form FL-301), which was revoked, effective July 1, 2012. However, the rule would be also clarify that a request for order regarding discovery is subject to the same requirements for discovery *motions* under the Code of Civil Procedure. The rule would be further revised to specify that that the Family Code sections regarding the disclosure of assets and liabilities are found at sections 2100 through 2113.

Rule 5.62. Appearance by respondent or defendant

The proposal includes only a few revisions to this rule. The term "defendant" would be deleted to reflect the same change being made to the family law forms. The term "motion" would be replaced with "request for order." The first paragraph of the rule would also be amended to include Family Code sections 2012 and 3409, which commentators have pointed out are other exceptions to the rule on general appearances.

Rule 5.63. Motion to quash proceeding or responsive relief
This rule would be amended to delete the reference to "motions." Instead, "motions" would be replaced with "request for order." This change is needed to avoid confusion to parties and attorneys since the Judicial Council previously revoked *Notice of Motion* (form FL-301), effective July 1, 2012.

Rule 5.92. Request for court order; response.
The committee proposes the following technical and substantive amendments to rule 5.92 to provide better guidance to court users and increase court efficiencies:

- Reformat the rule under new subheadings titled (a) Application, (b) Required forms and documents, (c) Request for temporary emergency orders, (d) Request for order shortening time, (e) Issuance by court clerk, (f) Service requirements, and (g) Responding papers.
- Clarify that additional forms, rules, and local rules apply to requests for temporary emergency orders;
- Authorize the court clerk to issue a *Request for Order* (form FL-300) as a ministerial act in specific circumstances, such as ordering parties to attend orientation and child custody mediation or child custody recommending counseling as well as in circumstances that do not require the use of judicial discretion; and
- Provide a more comprehensive description of when personal service of the FL-300 is required.

Finally, an advisory committee comment would be added following the rule to provide background information about the rule and form FL-300. It would specifically note that the rule and form were developed in response to the Elkins Family Law Task Force recommendations for one comprehensive form and related procedure to replace the former *Order to Show Cause* and *Notice of Motion*.

To facilitate review of rule 5.92 during the comment period, the proposal eliminates standard editing marks. Following public comment, the rule in the Judicial Council report will include conventional editing marks. The text of the current rule may be found at: *http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_92*.

Rule 5.94. Order shortening time; other filing requirements
The proposal would amend the rule relating to reissuances of the *Request for Order* (form FL-300) and *Temporary Emergency Orders* (form FL-305). The substantive changes proposed to the rule would address the concerns of attorneys and court personnel that the current version of the rule provides insufficient guidance about the consequences of a party's failure to timely serve the moving papers. The proposal would amend rule 5.94(c) as follows:

- Reference the proposed title change to form FL-306 as *Application and Order for Reissuance*;
- Specify that the completed form FL-306 must be attached as the cover page when serving the reissued documents;
- Clarify that failing to timely serve form FL-300 and any temporary orders granted by the court will result in the orders expiring on the actual hearing date; and
- Indicate that the party may request up to three reissuances without charge.

Rule 5.151. Request for temporary emergency court orders; application; required documents
Rule 5.151 would be amended at subdivision (c)(4) to reference a proposed, new optional form that is titled *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303). That proposed form is included with this proposal.

Proposed changes to form FL-300
Since the Judicial Council adopted *Request for Order* (form FL-300), effective July 1, 2012, court operations managers, supervisors, and clerks from several counties have provided suggestions for practical and clarifying changes to the form. Their suggestions have informed the Family and Juvenile Law Advisory Committee's proposal for technical and substantive changes to the form. Thus, the proposed changes in this invitation to comment are substantially different from the versions of the form that circulated in two prior public comment cycles. The current proposal includes the following changes to form FL-300:

Changes to page 1

- The following changes are proposed to a caption box: (1) The height of the box would be increased to allow more space for additional entries; (2) to create more space, the term "Modification" would be reduced to "Modify;" (3) "Temporary Emergency Orders" would appear in all capital letters; (4) the "Spousal Support" checkbox would read "Spousal or Partner Support" to more accurately reflect that domestic partners may use the form to request support orders; (5) the term "parenting time" would be added to the "Visitation" check box;[13] (6) new check boxes would be included titled "Property Issues" and "Change or End Domestic Violence Restraining Order After Hearing;" (7) the check boxes would be reformatted to better fit the space; and (8) additional fillable space would be provided following the check box for "Other *(specify)*:".

- The part of the form above "Court Orders" would be given its own title heading, "Notice of Hearing" to clearly state the purpose of the information on page 1 and differentiate it from the "Court Orders" section on the same page.

[13] Footnote 8 on page 41 of the *Elkins Family Law Task Force Final Report and Recommendations* provides: "The task force recommends the use of the term "parenting time" to refer to visitation, where appropriate. See recommendation II.A, page 48." The final report may be found at *http://www.courts.ca.gov/documents/elkins-finalreport.pdf*.

- Item 2 would be simplified to read "A COURT HEARING WILL BE HELD AS FOLLOWS:" The bolded notice regarding mediation would be deleted to avoid redundancy on the form. Also, item 2b would be moved to include it in the same box as item 2a to group information about the hearing.

- The current item 3, which refers to attachments to be served with form FL-300 would be deleted. Since the subsequent items on pages 2 to 4 already list forms that are required to be completed, filed, and served or provide check boxes for the moving party to indicate which forms are attached, the committee believes that item 3 is redundant. Further, item 3 does not provide sufficient space to include all forms that could possibly be served with form FL-300. Such a list is, however, included on *Information Sheet for Request for Order* (form FL-300-INFO).

- A new item 3 would provide a warning to the respondent about failing to serve a *Responsive Declaration* and appear at the hearing. This item would replace the current notice box at the bottom of page 1 and would include a reference to proposed new form *Information Sheet: Responsive Declaration to Request for Order* (form FL-320-INFO). However, the proposal would delete the specific language about paying a filing fee to address concerns of self-help centers. The statement, "You do not have to pay a fee to file the *Responsive Declaration to Request for Order* (form FL-320) or any other declaration….." assumes the responding party has already filed a *Response* in the case. However, frequently, a party's responsive declaration to a request for order is the party's first filing with the court—instead of a *Response*. In this situation, a fee to file form FL-320 would be required and would serve as that party's first appearance fee. Because the statement can be misleading, the committee recommends deleting it from the form.

- The date and signature line in the middle of the page would be deleted. This information was formerly included on a *Notice of Motion* (FL-301). However, because the declarant's signature is required on the last page of the form, the additional signature line on page 1 is redundant.

- A notice immediately before the Court Order section would refer parties to either forms FL-300-INFO or DV-400-INFO for information about completing form FL-300.

Changes to page 1 (Court Order section)
Item 4, order to show cause (OSC) language
The committee proposes deleting the "OSC language" currently at item 4, which states "YOU ARE ORDERED TO APPEAR IN COURT AT THE DATE AND TIME LISTED IN ITEM 2 TO GIVE ANY LEGAL REASON WHY THE ORDERS REQUESTED SHOULD NOT BE GRANTED." Maintaining this language on form FL-300 has caused confusion, which the committee has been trying to address for some time.

The confusion relates to when one should check the OSC language on form FL-300. For example, when should a party be ordered to appear at the hearing? And, who is responsible for checking that box (the party or the court)? Courts have addressed these questions in different ways. Some court clerks have indicated that they leave it up to the party to determine if the other party is ordered to appear. Other court clerks check the box if the respondent has not yet appeared in the case, which requires additional workload for court clerks reviewing the case history. Still, in other counties, court clerks check the box if the issue is determined to be in the nature of a "motion."

To eliminate confusion and additional work load on court staff, the committee proposes deleting the OSC language from form FL-300. Although some commentators have expressed concern that removing the OSC language will result in litigants failing to appear at the hearing of the request for order, the committee believes that the proposed revision to item 3 will encourage the responding party to appear at the hearing.

Deleting the OSC language from the form would:

- Reflect that, upon proper service of the FL-300, the court does not have to *also* issue an order requiring the party to attend the hearing before the court can make orders on the relief requested.

- Not interfere with a judge's ability to order a party to appear at the hearing or issue a bench warrant. Committee members agreed that the court could issue an order for a litigant to appear if necessary to determine the case. The court could grant the order using the "Other Orders" box on page 1 (item 8) of form FL-300. Committee members also reported that they infrequently issue bench warrants if a litigant fails to appear at a hearing.

Finally, to provide direction to a moving party about how to compel the presence of a responding party or a witness at the hearing, the committee proposes revising form FL-300-INFO to include a link to new web content about notices in lieu of subpoena and civil subpoenas. The web page is currently under construction.

Changes to page 1 (items 5–8; notice box)

Most of the concerns about form FL-300 relate to the bottom half of the first page, the Court Order section. Court personnel expressed confusion about when the check box for "Court Order" on the current form is to be checked. Clerks noted differences in their local practices: some clerks check this box only if mediation is ordered, others check the box when any of the items in this section are checked by the parties. To avoid confusion, the committee proposes eliminating the check box in front of "Court Orders" and placing below it "(For Court Use Only)."

With respect to current item 5 (item 4 in the attached form FL-300), the committee members discussed comments about deleting the order shortening time for service or time for the hearing from form FL-300 and placing it on the proposed standalone form, *Temporary Emergency*

Orders (form FL-305). After receiving input from small and large courts, the committee proposed that these orders remain on page 1 of the *Request for Order* (form FL-300). The input demonstrated that the requests for order shortening times are among the most frequently requested orders and are often the only orders requested on form FL-300. Removing the order to shorten time to a separate document could decrease court efficiency in those cases by requiring the party to generate a second form for filing and service. Therefore, the committee proposes maintaining this item in the court orders section and renumbering it as item 4.

Regarding current item 7 (item 6 in the attached FL-300), instead of using the term "mandatory custody services," the item would be rewritten to state: "The parties must attend an appointment for child custody mediation or child custody recommending counseling as follows *(specify date, time, and location)*:". This change would more accurately reflect the language in the Family Code relating to mandatory child custody mediation.

Current checkbox at item 8 (item 7 in the attached form) would be revised to state that temporary emergency orders must be personally served with all documents filed with this *Request for Order*.

In item 9 (item 8 in the attached form), the blank space area would be increased to allow the court to write more than one line of other orders made in connection with the request.

Finally, as previously noted, the notice box below the judicial officer's signature line would be deleted and incorporated into the "warning" at item 3.

Form FL-300, changes to pages 2–4

- "This Is Not a Court Order" would be added to pages 2–4 of FL-300.
- The check boxes at items 1, 2, 6, and 7 would be changed. Instead of stating "To be ordered pending hearing," these check boxes would be revised to state "Applicant requests temporary emergency orders." These revisions are needed to clarify that any request for relief on pages 2–4 pending a hearing is distinct from the actual temporary emergency orders granted by the court.

- Item 3 (Child Support) would be revised to add a check box to indicate if the orders are contained in DV-130. It would also include a new item e to specify that a completed *Income and Expense Declaration* (form FL-150) or a *Financial Statement (Simplified)* (form FL-155) must be filed with the *Request for Order*.

- Item 4 (Spousal or Partner Support) would be reformatted and simplified. Items b and c would be combined and a new check box would be added to alert the court that the support orders are included in DV-130.

- Item 5 (Attorney's Fees and Costs) would be reformatted to make it easier to read. The content would be divided into subitems a through c.

- The language in item 6a on page 3 (Property Restraint) would be expanded to include the full language of the statute and provide: "However, the parties may use community property, quasi-community property, or separate property to pay for the help of an attorney or to pay court costs." Items 6a—along with 7a and 7b (Property Control)—would also include a new check box for "other parent/party" so that a court can make this order, if appropriate.

- As previously indicated, a new item 8 would be added to cover requests to change or end domestic violence restraining orders.

- Item 10 (Order Shortening Time) would be expanded to distinguish between a request for an order shortening time and an order shortening time for the hearing of the request for order.

Family law—proposed changes to FL-300-INFO

This form serves as the instruction sheet to help parties complete form FL-300. The committee has proposed the following extensive revisions of this form in response to comments from the legal community:

- The whole form would be reformatted similar to the plain-language format of *How Do I Ask for a Temporary Restraining Order?* (form DV-505-INFO). It would use a two-column format, except for the first page. The first page includes a long list of forms. To facilitate listing the full name of each form on a single line, the committee proposes a different format for the first page.

- New sections to the form (on pages 1–3) would be added that provide (1) information about when a party should or should not use form FL-300, (2) a checklist of additional forms that might be needed depending upon the relief requested, (3) more detailed information about the additional requirements for seeking a temporary emergency (ex parte) order, and (4) more specific information and graphics that help explain the differences between personal service and service by mail of the request for order.

- New sections to the form on page 4 would be added to help (1) parties understand when the *Request for Order* (form FL-300) should be served using personal service or service by mail and (2) connect a party to legal services and other information.

- In addition, at 4 and 7, the form would make parties aware that different local practices may apply that affect how to complete or file form FL-300. For example, local practices differ as to whether the court clerk or the party complete page 1, item 7 of form FL-300 with the appointment date for the child custody mediation or child custody

recommending counseling. Local procedures may also differ about how the court clerk processes requests for temporary emergency orders.

- A new section at item 21 would provide information about preparing for the hearing, including a link to new web content about notices in lieu of civil subpoenas.

Family law—proposed new form FL-303

Effective January 1, 2013, the Judicial Council adopted specific rules relating to requests for temporary emergency (ex parte) orders: rules 5.151 through 5.169. Rule 5.151 (Request for emergency orders; application; required documents) requires, among other items, that a party's request for temporary emergency orders include a written declaration regarding notice of application for emergency orders based on personal knowledge.

There is no current Judicial Council form to help a party comply with the requirement for such a written declaration. Historically, the reason has been because courts throughout the state had adopted a variety of rules and forms regarding notice of ex parte hearings in family law matters. Local rules and forms often differed from county to county about the time frame for providing notice, which presented particular challenges to proposing a statewide form that could serve the needs of self-represented litigants or attorneys who practice in more than one jurisdiction.

With the adoption of rule 5.165 (Requirements for notice), effective January 1, 2013, the Judicial Council implemented a uniform rule in family court addressing the time frame for providing notice to the other party about the request for temporary emergency orders. The rule requires, absent the court's approval for shortened notice or a waiver of notice, that, "[a] party seeking emergency orders under this chapter must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court."

While some local courts offer a form for parties to complete and demonstrate their compliance with the notice requirements of rule 5.165, the committee recognizes that other courts do not. The *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) would help fill a need for a standard form that can be accepted for filing in family courts across the state. Understanding that local courts may still require a party seeking temporary emergency orders to follow local rules and encourage parties to use local forms, the proposed FL-303 would include a notice box under the caption to advise parties that local procedures for this type of hearing may vary in each county and that parties should consult their county court's local rules. In addition, the notice box would include a link to *http://www.courts.ca.gov/3027.htm*, which lists the local court rules from the California Court's Online Self-Help Center.

Family law—proposed changes to FL-305

Current *Temporary Emergency Orders* (form FL-305) serves as a court order that is attached to the *Request for Order* (form FL-300) when it is served on the other party. Judicial officers have

expressed concern that when form FL-305 is attached as the second page of form FL-300, the actual court orders may not be easily distinguished from orders being requested by a party. To avoid confusion, courts have suggested revising the form to be a separate, standalone order that is served along with form FL-300. To respond to these concerns, and other suggestions from commentators to improve this form, the committee proposes the following changes to form FL-305:

- Insert standard captions and headings to create a separate, standalone form;
- Insert a new item 1 to reference the hearing date, time, and location that appears in item 2 of the filed *Request for Order* (form FL-300) that would be served with form FL-305;
- Add a new item to list the names and ages of the children subject to the temporary emergency orders;
- Add check boxes to cover cases in which temporary care, custody, and control of children are divided among the parties; and
- Insert a statement that the party or parties with temporary physical custody, care, and control of minor children must not remove the child from California unless the court allows it after the noticed hearing.

Family law—proposed changes to FL-306

Application and Order for Reissuance of Request for Order (form FL-306) is used by a party to request that the court reissue temporary emergency orders in family court if the other party could not be served before the hearing date. In response to comments received about this form, the committee proposes that:

- The form's title be simplified to *Application and Order for Reissuance*;
- The application portion of the form be reorganized and reflect some of the plain-language content in form DV-115, *Request to Continue Court Hearing and Reissue Temporary Restraining Order*;
- The terms "court mediator or family court services" be updated to "child custody mediator or child custody recommending counselor"; and
- The form be revised to include a request and order to reissue an order shortening time for service or time for the hearing.

Family law and domestic violence—proposed changes to FL-320

Responsive Declaration to Request for Order (form FL-320) is completed by a party to respond to a filed *Request for Order* (form FL-300). Given the proposed changes to the domestic violence forms and form FL-300 in this cycle, the committee proposes revising form FL-320 by:

- Revising "Other Party" to read "Other Parent/Party" in the caption;
- Specifying under check box 3 that, a current *Income and Expense Declaration* (form FL-150) or, if eligible, a current *Financial Statement (Simplified)* (form FL-155) is attached;
- Revising check boxes 4 and 5, item a, to indicate that a current *Income and Expense Declaration* (form FL-150) is attached;

- In item 5, adding a requirement to complete and file with the form a *Supporting Declaration for Attorney's Fees and Costs Attachment* (form FL-158) or a declaration that addresses the factors covered in the form;
- Providing at item 8 a specific check box titled "Modify or Terminate Domestic Violence Restraining Orders";
- Correcting the titles of forms DV-100 and DV-120 in the box at the bottom of page 2; and
- Creating additional space on the form by consolidating all check boxes that indicate a party does not consent with the order requested with a check box for a party to specify an order to which he or she would consent.

Family law—proposed new form FL-320-INFO

The committee proposes a new form to help parties who are served with a *Request for Order* (form FL-300). The new form, *Information Sheet: Responsive Declaration to Request for Order* (form FL-320-INFO), would provide information about completing, filing, and serving a *Responsive Declaration to Request for Order* (form FL-320). It would serve as the counterpart to the current information sheet (form FL-300-INFO) that was designed for a party who files and serves a *Request for Order*. The proposed new form would also include the same information about legal resources that is currently included in the information sheet developed for moving parties: *Information Sheet for Request for Order* (form FL-300-INFO).

The committee believes that the proposed new form supports the Judicial Council's strategic goals of access, fairness, and diversity because it would help remove barriers to the courts for parties responding to a request for order. It would also address a clear need to provide balanced information to all parties in a family law case, not only to those who use form FL-300 to request orders.

Family Law—proposed changes to forms FL-311, FL-312, FL-336, FL-337, and FL-341

Forms FL-311, FL-312, FL-336, and FL-337 were circulated for comment in spring 2013 with the proposal that they only be revised to delete references to "Order to Show Cause" and *Notice of Motion* (form FL-301) and replaced with *Request for Order* (form FL-300). In addition, the proposal included other technical changes such as inserting "Other Parent/Party" in the caption and throughout the forms.

Based on comments received, the committee now recommends additional substantive revisions to these forms. One global revision would be to replace references to "parents" with "parties" and also identify whether the term "parties" applies to the petitioner, respondent, or other parent/party in the case. This change would improve these forms by allowing for cases in which the petitioner may not be a parent, such as in actions involving a local child support agency (who may be listed as the petitioner in the case), or cases in which the court grants custody or visitation rights to a child's grandparent or another relative. Descriptions of other proposed revisions are listed following the title of each form in this report.

Child Custody and Visitation Application Attachment (form FL-311)
Other revisions to this form would include the following:

- A statement under the title that form FL-311 is not a court order;
- Changing "child custody and visitation" to "child custody and visitation (parenting time)" throughout the form;
- Separating the attachments below the title to read "Petition," "Response," "Request for Order," and "Other (specify)";
- Updating the form to use the terms "child custody mediation" or "child custody recommending counseling";
- Following item 2, inserting a note to inform parties that a court ordered child's holiday schedule has priority over the regular parenting timeshare;
- In item 2e, adding an instruction for this section and including check boxes for a party to indicate if the visitation (parenting time) will begin "at the start of school" or "after school;"
- Changing item 2e(4) to indicate that form MC-025 may be used if space is needed to provide additional information about other visitation (parenting time) days and times;
- Reformatting item 3 to clearly indentify the requests made for supervised visitation; and
- Revising item 4f to replace the term "home" with "home (or exchange location)."

Request for Child Abduction Prevention Orders (form FL-312)
The form would be revised under the title to clarify that it is not a court order. In addition:

- References to "parent" would be replaced by "party" or "other parent/party;"
- Items 2 and 3 would be revised to read as a party's declaration instead of a questionnaire. For example, item 2 would be revised to read "I request orders to prevent child abduction by (specify): __ Petitioner __ Respondent __Other Parent/Party." Item 3 would be simplified to "I think that he or she might take the children without my permission to *(check all that apply):*".
- On page 2, the opening statement would be revised to read "I request the following orders against *(specify)*: __ Petitioner ___ Respondent __ Other Parent/Party."
- Item 5 would be revised to include a statement for a party to acknowledge an understanding that the supervised visitation provider must meet the qualifications listed in form FL-324.
- Item 10 would be revised to include a request for an order that the party turn in all the children's passports in his or her possession. This change would make the choices consistent with the item's title.

Order to Pay Waived Court Fees and Costs (Superior Court) (form FL-336)
Proposed revisions to this form would include:

- Changing the check box at item 1 to "Contested or Trial" to help parties understand that "Contested" can also mean "Trial";

- Adding a check box to item 1 for "On the *Request for Order* filed *(date):* …by *(party):*" to clarify that the order to pay waived court fees costs can originate from a specific request filed by a party in the case;
- Adding check boxes (for "Other Parent/Party") throughout the form to cover court findings and orders relating to another parent or party in the case; and
- Simplifying the notice on page 2 so that it is easier for the court to complete and easier for the recipient to understand, while still reflecting the intent of Government Code section 63687(d).

Application to Set Aside Order to Pay Waived Court Fees—Attachment (Family Law) (form FL-337)
No commentators proposed additional substantive changes to this form. Therefore, the committee proposes only technical changes to the form as previously described.

Child Custody and Visitation (Parenting Time) Order Attachment (form FL-341)
The committee proposes:

- Adding "Other Parent/Party" to the form wherever "Petitioner" and "Respondent" appear;
- Updating item 7c with the terms "child custody mediation" or "child custody recommending counseling;"
- Throughout item 7e(1), including check boxes for a party to indicate if the visitation (parenting time) will begin "at the start of school" or "after school"; and
- Revising item 10f to replace the term "home" with "home (or exchange location)."

Family Law and Juvenile Law—proposed changes to forms FL-341(B)−(E)
Child Abduction Prevention Order Attachment (form FL-341(B))
The committee proposes:

- Adding "Other Parent/Party" to the form's caption;
- Changing the term "parent" to "party" throughout the form, as appropriate to the context;
- Revising item 1(f) by replacing "another country" with "another county";
- Revising items 7 and 8 to create a separate category for orders to turn in children's passports and other vital documents; and
- Renumbering the remaining items accordingly.

Children's Holiday Schedule Attachment (form FL-341(C))
The committee proposes a number of changes to this form, including the following:

- Adding "Other Parent/Party" throughout the form;
- Inserting a note before the holiday table to inform parties that a court ordered child's holiday schedule has priority over the regular parenting time;
- Starting the preprinted list of holidays with December 31 (New Year's Eve);
- Including the specific date for Lincoln's birthday (February 12) and Veterans Day (November 11) as these always occur on a specific date;

- Adding categories to cover other holidays commonly used in stipulations and orders, such as "President's Week Recess," "December/January School Break," and "Breaks for year-round schools;"
- Increasing the entries for "Child's birthday (date):"
- Providing fillable space to specify the date for the parents' birthdays;
- Expanding the form to two pages, providing a blank table of holidays for parties to customize;
- Revising item 2 to better organize and provide more space to complete the section on vacations; and
- Adding, under item 2, new items b(1) and (2)(A)—(D) to reflect language commonly used by parties to designate in advance how to resolve disagreements over a proposed vacation schedule without requesting a court hearing. For example, item (2)(B) would provide that "In even-numbered years, the parties will follow the suggestions of either Petitioner, Respondent, or Other Parent/Party for resolving the disagreement." Item (2)(C) would then have the same language but for odd-numbered years. Item (2)(D) would provide a space for a party to request another means of resolving any disagreement about a vacation schedule.

Additional Provisions—Physical Custody Attachment (FL-341(D))
This form would also be revised to delete references to "parents," replace them with "party" or "parties," and restructure the paragraphs, as appropriate. The form would also include a new introductory paragraph to help identify whether the references to "parties" used throughout the form apply to the petitioner, respondent, or other parent/party. In addition, the committee proposes the following:

- Revising item 1 to include a party's e-mail address and cell phone number;
- Revising items 5b and 5c to provide an option for a party to request more specific orders about canceled visitation (parenting time);
- Adding a new item 8 titled "Discussion of court proceedings with children";
- At item 11, including that the children will not be exposed to either cigarette smoke or medical marijuana smoke; and
- Technical changes such as rearranging the items in the form, providing more space between the provisions to make them easier to read, and renumbering the items.

Joint Legal Custody Attachment (form FL-341(E))
Substantive changes to this form would include:

- Adding "Other Parent/Party" throughout the form, wherever appropriate;
- Including a notice box to explain the meaning of "joint legal custody" and that the form is to be used if a party wants to ask for court orders specifying when the consent of both parties is required to exercise joint legal custody of the parties' children;
- Changing the term "confer" in item 2 to a more plain language term, "discuss"; and
- Rearranging the entries under item 2.

Adapting family law forms for use as juvenile court child custody orders
In addition to the above-mentioned changes, forms FL-341(B)−(E) would be revised to include a check box in the caption to make clear that each form may serve as attachments to either *Custody—Juvenile Court—Final Judgment* (form JV-200) or *Visitation Order—Juvenile* (form JV-205). By doing so, the Family and Juvenile Law Advisory Committee proposes to address issues relating to juvenile court child custody orders, also sometimes known as "exit orders." Using existing family law forms, the juvenile child custody orders would provide sufficient detail and use language familiar to the family law bench and bar to permit their enforcement in family court in the event that a dispute does arise.

A companion proposal for changes to juvenile court child custody orders is circulating concurrently with this invitation to comment. For information about the specific juvenile court forms proposed for revision, please refer to the invitation to comment titled "Juvenile Law: Final Custody and Visitation Orders."

Alternatives Considered

Domestic violence proposal

The committee considered a number of other options to address procedures for requesting a modification or termination of Domestic Violence Prevention Act orders and sought informal feedback and suggestions from court self-help staff, legal services providers, and domestic violence advocates who commonly use DV forms. All the attorneys indicated approval of some type of form for entry of modified or terminated orders into CLETS. The following proposals were considered:

- ***Create a standalone DVPA packet to modify or terminate any of the orders. This option would require new or revised forms for the application, response, and notice of hearing.***
  The benefit to this approach is that all issues could be addressed with "plain-language" forms that indicate that the case is a DV case. The existing DVPA request for child custody and visitation orders could be used with minimal revision (form DV-140). A new information sheet would need to be developed to instruct litigants how to use the forms to modify or terminate orders.

  The drawback to this approach is that courts would be required to distribute an entirely new forms set. The existing *Response to Request for Domestic Violence Restraining Order* (form DV-120) and the existing *Notice of Court Hearing* (form DV-109) are not currently well suited to requests to modify or terminate orders. These forms would need to be significantly revised or new forms would need to be developed to respond to and give notice of hearing on a request to modify or terminate a restraining order.

  Commentators strongly disfavored this option due to the necessity for numerous new forms or complicated multipurpose DVPA forms. The committee agreed with this position.

- ***Create a forms set only to terminate or modify the restraining/protective order (not other-included orders like custody).***
  This approach would create DVPA forms to request only a modification or termination of the restraining orders. There is general agreement that the "restraining orders" constitute only the no-contact, stay-away, and residence exclusion orders, and Family Code section 6380(f) requires Department of Justice-approved forms only for orders to modify or terminate restraining orders. Thus, creating a separate set only to terminate or modify the restraining/protective order would bring the Judicial Council in compliance with section 6380(f).

  The benefit to this option is its simplicity: the forms could have check boxes to add or remove protected persons and to modify or terminate the no-contact, stay-away, and residence exclusion orders. Litigants wishing to modify anything else would use the family law forms. Another benefit of this approach is that Family Code section 6345(d) requires personal service if anyone other than the protected person petitions to modify or terminate the protective order.

  The drawback to this option is that many litigants may want to end a stay-away order from a child and also modify custody, visitation, or support orders. This option would require the litigant to navigate two entirely different form sets to take care of these requests. The committee considered but declined this option in the past due to this significant drawback.

  The commentators strongly disfavored this option for the same reason. The committee agreed with this position.

- ***Modify Renewal Packet.***
  The Family and Juvenile Law Advisory Committee considered expanding existing restraining order renewal forms to use for requests to modify or terminate restraining orders. The forms would consist of *Request to Renew Restraining Order* (form DV-700), *Notice of Hearing to Renew Restraining Order* (form DV-710), and *Response to Request to Renew Restraining Order* (form DV-720). This approach would require development of an information sheet.

  The benefit to this approach is that it would avoid having to develop a new forms set. The main drawback is that it would make the renewal forms complicated for people who only want to renew their order.

  The commentators strongly disfavored this proposal because they thought it would be confusing for litigants. The committee agreed with this position.

- ***Use Existing Family Law Forms, including FL-300.***
  This option would utilize existing family law forms, continuing what is reportedly current court practice.

  There are several benefits to this option. First, many requests to modify orders relate to child custody, visitation, and support. These requests are easily handled with existing family law forms (see form FL-300). In addition, because custody and visitation orders remain in effect even after a protective order ends, litigants with ongoing custody and visitation matters will use family law forms anyway (see Family Code, §§ 6340 and 6345), unless the committee chooses to develop a specific DVPA forms set as noted below. If the family law forms option were selected, an information sheet would be developed to instruct litigants how to use the FL forms to modify the custody, visitation, and support orders.

  Since the family law forms are not in the same format as are the DVPA forms, litigants would need to learn a new format. However, the format difference may not be too significant because litigants seeking support in a DVPA action already use the family law *Income and Expense Declaration*.

  Commentators strongly preferred this option and the committee agreed with this position. For this reason, the committee decided to circulate the forms again for comment.

Family law

Rule 5.62. Appearance by respondent or defendant

As previously stated, the invitation to comment titled "Changes to Request for Order Rules and Forms" circulated for public comment from December 13, 2013, to January 24, 2014. Among the rules and forms, the committee sought comment on the proposal to change rule 5.62 and expand the definition of an "appearance" by adding item (a)(5). The proposal stated that the new language would be consistent with the definition of "appearance" in appellate case law. Following is the pertinent part of the proposed amendments to rule 5.62, which circulated for comment:

(a) Appearance

Except as provided in Code of Civil Procedure sections 418.10 and 1014 or Family Code section 2012, a respondent or defendant is deemed to have ~~appeared~~ made a general appearance in a proceeding when he or she ~~files~~:

(1) Files a response, ~~or~~ answer, or stipulation;

(2) Files a ~~notice of motion~~ request for order to strike, under section 435 of the Code of Civil Procedure;

(3) Files a ~~notice of motion~~ request for order to transfer the proceeding under section 395 of the Code of Civil Procedure; ~~or~~

(4) Files a written notice of his or her appearance; or

(5) Intentionally submits to the jurisdiction of the court in the case by seeking to obtain a ruling or court order that goes to the merits of the case, other than a ruling or court order on jurisdiction.

Four commentators submitted comments about rule 5.62(a)(5). Three out of four comments opposed amending rule 5.62 to include subdivision (a)(5).

- The Superior Court of Los Angeles County submitted a voluminous response in opposition to the new language and stated that the new language made the rule overbroad and would have very specific, significant negative impacts on litigants.

  "[w]e think this rule overreaches and could harm both parties at the expense of trying to protect respondents. Moreover, we believe that respondents should have the right to decide whether they want to make a general appearance and when they want to participate in only a portion of the action." "Additionally, we believe that this rule will lead to inefficiencies in the court system, require additional hearings and trials, and that it implicates changes to the Family Code, Code of Civil Procedure and numerous court forms and instructional materials. The proposed rule does not anticipate nor offer suggestions for these necessary related changes."

- The Superior Court of Sonoma County stated that it would agree with the proposed changes if they included clarification as to what specific filings would constitute an appearance, because the rule as stated is vague and likely to cause confusion as to when a party has actually made an appearance.

- The Superior Court of San Diego staff attorney commented that the rule at 5.62(a)(5) needs to be further clarified: "Rule 5.62 (a)(5), should be made clear if it includes filing an opposition to a request for order, whether agreeing or disagreeing with the requested relief."

Because the majority of commentators stated that the proposed change was confusing, too vague, overbroad, and overreaching, the committee considered the possibility of drafting a version that would clarify the language in 5.62(a)(5) to avoid (1) impacting default procedures in family court, (2) requiring additional hearings and trials, and (3) implicating changes to the Family Code, Code of Civil Procedure, and numerous court forms and instructional materials. After discussion, the committee decided to limit the proposed changes to the rule to those that are technical in nature.

Form FL-300

The committee considered several options in an attempt to address the main issue on the ***Request for Order*** (form FL-300) relating to the "order to show cause" check box on page 1. The committee considered:

- ***Maintaining the OSC check box as a court order on form FL-300.***
  The committee reflected that when former forms FL-300, FL-301, and FL-310 were combined to make the current form FL-300, effective July 1, 2012, this caused confusion for court clerks, judicial officers, as well as parties and their attorneys about how to complete and process this part of the new form. Generally, the committee reported that their courts have since then found ways to overcome the initial concerns. For this reason, the committee considered the option of maintaining the OSC language on form FL-300. However, the committee did not favor this option.

  The committee noted that maintaining the OSC check box on the form would continue to impact court operations in varying degrees, including the workload of court professionals. It might also impact litigants since checking the OSC box in some counties might trigger additional processing fees. The committee also took into account that the actual appearance of the other party at the hearing may not necessarily be required in all cases for the court to make orders on the moving party's request.

- ***Replacing the OSC language with a new Notice to Appear.***
  To address the concerns that removing the OSC language could result in litigants failing to appear at the hearing of the request for order, the committee considered revising the form to include language similar to a notice in lieu of subpoena for *a party* to compel another party to appear and testify at the hearing under Code of Civil Procedure section 1987(b).[14] The notice would not have appeared in the court orders section, but as a proposed item 3, on page 1, of form FL-300 and read:

  > NOTICE TO ATTEND HEARING: To the party or parties (specify):_____ and their attorneys of record: You must appear at the hearing to testify. Under Code of Civil Procedure section 1987(b), the court may sanction you if you do not appear.
  >
  > Date issued: _____ _____
  > (SIGNATURE OF PARTY OR PARTY'S ATTORNEY ISSUING NOTICE TO ATTEND HEARING)

  The committee examined incorporating the notice into form FL-300 to determine if that could serve to simplify the process for compelling a party to appear at the hearing because it would not require the review or signature of a judicial officer. Service of the notice as specified under Code of Civil Procedure section 1987 has the same effect as service of a subpoena on a witness; however, it also has the same limitations. For example, the notice may be used only to compel the attendance of and production of documents by persons who are California residents at the time of service of the notice.[15] To help make this clear to

[14] The full text of the statute may be found at: *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=1987*.

[15] See Code Civ. Proc., § 1989 at: *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=1989*.

litigants, the *Information Sheet for Request for Order* (form FL-300-INFO) would have also been proposed for revision to note the residence requirement.

The committee decided not to recommend this proposed revision because it raised some concerns. Including the notice to appear on the form could give the impression that the moving party is required to issue the notice for the other party to appear. The committee also recognized that issuing a notice to attend could require a party to pay witness fees if the other party is entitled to such fees. Thus, issuing the notice as part of form FL-300 would likely create an unnecessary financial burden on a party when, in fact, the other party's appearance may not actually be required for the court to make an order on the *Request for Order*.

- ***Remove the OSC language without proposing a new Notice to Appear.***
  Given the concerns raised in the above-mentioned options, the committee preferred to circulate a proposal and seek comments about the impact of deleting the OSC language from page 1 of form FL-300. This provides a streamlined form and allows respondents to focus on the notice that if they do not appear or submit a responsive declaration to the court, the court can make orders without their input. As an alternative to including the OSC language or the notice on form FL-300, the committee proposed informing parties about the options available to them to compel a party to attend the hearing (for example, by serving notice in lieu of subpoena or civil subpoena). To this end, the committee proposed including such information in the *Information Sheet for Request for Order* (form FL-300-INFO). The committee also proposed revising form FL-300 to better alert the responding party of the consequences for failing to respond to the request to appear at the hearing.

Implementation Requirements, Costs, and Operational Impacts

The committee anticipates that this proposal will result in some costs incurred by the courts to revise forms, train court staff about the changes to the rules and forms included in this proposal, and possibly to revise local court rules and forms so they are consistent with the changes adopted by the Judicial Council. However, the committee expects that the changes will save resources for the courts by clarifying and simplifying procedures.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee and task force are interested in comments on the following:

- Are there changes that would improve the rules and forms in this proposal? (If so, please specify the rule, form, and the particular recommended changes.)
- Re: form FL-300
  (1) Should the language at item 4 on page 1 be deleted as proposed (see write-up on page 11)?
  (2) Would removing the OSC language from form FL-300 have any adverse impact on courts or the parties in a family law case (please specify)?
  (3) Should item 8 include an instruction requiring a moving party to attach a copy of the current court ordered *Restraining Order After Hearing* (DV-130) if seeking to modify or terminate that order?
  (4) Should a separate check box be added to items 1 through 4 (as shown on pages 2 and 3 of form FL-300) for a party to indicate that he or she seeks modification of orders for child custody, visitation (parenting time), and support that are found in the *Restraining Order After Hearing* (form DV-130)?
- Re: form DV-400-INFO Should the form instruct a party to attach a copy of the current court ordered *Restraining Order After Hearing* (DV-130) if seeking to modify, terminate, or respond to a request about that order?

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

- Would the proposal provide cost savings? If so, please quantify.
- What are the implementation requirements 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Rule 5.12, 5.62, 5.63, 5.92, 5.94, 5.151, at pages 28–35
2. Forms DV-130, DV-200, DV-250, DV-400, DV-400-INFO, at pages 36−49
3. Forms FL-300, FL-300-INFO, FL-303, FL-305, FL-306, at pages 50–62
4. Forms FL-311, FL-312, FL-320, FL-320-INFO, FL-336, FL-337, at pages 63–74
5. Forms FL-341, FL-341(B), FL-341(C), FL-341(D), FL-341(E), at pages 75–84

Rules 5.12, 5.62, 5.63, 5.92, 5.94, and 5.151 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 5.12. ~~Discovery motions~~ Request for order regarding discovery

(a) Applicable law

Requests for orders regarding discovery in family court ~~Family law discovery motions~~ are subject to the provisions ~~of~~ for discovery motions under Code of Civil Procedure sections 2016.010 through 2036.050 and Family Code sections 2100 ~~et seq.~~ through 2113 regarding disclosure of assets and liabilities.

(b) Applicable rules

Discovery proceedings brought in a case under the Family Code must comply with applicable civil rules for motions, including:

(1)–(5) * * *

Rule 5.62. Appearance by respondent ~~or defendant~~

(a) Appearance

Except as provided in Code of Civil Procedure sections 418.10 and Family Code sections 2012 and 3409, a respondent ~~or defendant~~ is deemed to have ~~appeared~~ made a general appearance in a proceeding when he or she ~~files~~:

(1) Files a response, or answer;

(2) Files a ~~notice of motion~~ request for order to strike, under section 435 of the Code of Civil Procedure;

(3) Files a ~~notice of motion~~ request for order to transfer the proceeding under section 395 of the Code of Civil Procedure; or

(4) Files a written notice of his or her appearance.

(b) Notice required after appearance

After appearance, the respondent ~~or defendant~~ or his or her attorney is entitled to notice of all subsequent proceedings of which notice is required to be given by these rules or in civil actions generally.

(c) No notice required

Where a respondent ~~or defendant~~ has not appeared, notice of subsequent proceedings need not be given to the respondent ~~or defendant~~ except as provided in these rules.

Rule 5.63. ~~Motion~~ Request for order to quash proceeding or responsive relief

(a) * * *

(b) Service of respondent's ~~motion~~ request for order to quash

The ~~motion~~ request for order to quash must be served in compliance with Code of Civil Procedure section 1005(b). If the respondent files a ~~notice of motion~~ request for order to quash, no default may be entered, and the time to file a response will be extended until 15 days after service of the court's order denying the ~~motion~~ request for order to quash.

(c) * * *

(d) Waiver

The parties are deemed to have waived the grounds set forth in (a) if they do not file a ~~motion~~ request for order to quash within the time frame set forth.

(e) Relief

When a ~~motion~~ request for order to quash is granted, the court may grant leave to amend the petition or response and set a date for filing the amended pleadings. The court may also dismiss the action without leave to amend. The action may also be dismissed if the ~~motion~~ request for order has been sustained with leave to amend and the amendment is not made within the time permitted by the court.

Rule 5.92. Request for court order~~; response~~

(a) Application

(1) In a family law proceeding other than an action under the Domestic Violence Prevention Act or a local child support agency action under the Family Code, a *Request for Order* (form FL-300) must be used to seek court orders, unless another Judicial Council form has been adopted or approved for the specific request.

(2) In an action under the Domestic Violence Prevention Act, a *Request for Order* (form FL-300) must be used to request a modification or termination of existing orders entered after a hearing on *Restraining Order After Hearing* (form DV-130).

(3) In a local child support action under the Family Code, any party other than the local child support agency must use *Request for Order* (form FL-300) to seek court orders.

(b) Required forms and documents

(1) The *Request for Order* (form FL-300) must set forth facts sufficient to notify the other party of the declarant's contentions in support of the relief requested.

(2) A completed, current *Income and Expense Declaration* (form FL-150) must be filed with the *Request for Order* (form FL-300) when a party seeks orders for spousal or partner support, attorney's fees and costs, or when relevant to other relief requested.

(3) A completed, current *Income and Expense Declaration* (form FL-150) or, if eligibile, a *Financial Statement (Simplified)* (form FL-155) must be filed with the *Request for Order* (form FL-300) when a party seeks child support orders.

(4) The moving party may be required to complete, file, and have additional forms or attachments served along with a *Request for Order* (form FL-300) when seeking court orders for child custody and visitation (parenting time), attorney fees and costs, support, and other financial matters.

(5) No memorandum of points and authorities need be filed with a *Request for Order* (form FL-300) unless required by the court on a case-by-case basis.

(c) Request for temporary emergency orders

If the moving party seeks temporary emergency orders pending the hearing, the moving party must:

(1) Comply with rules 5.151 through 5.169 of the California Rules of Court;

(2) Complete and include a proposed *Temporary Emergency Orders* (form FL-305) with the Request for Order (form FL-300); and

(3) Comply with local court procedures or local court rules about reserving the day for the emergency hearing, and submitting the paperwork to the court.

(d) Request for order shortening time

If the moving party seeks an order shortening time for the hearing or service of the request:

(1) The moving party must submit the request as a temporary emergency order on form FL-300 and comply with rules 5.151 through 5.169 of the California Rules of Court; and

(2) The moving party's request must be supported by a declaration showing good cause for the court to prescribe shorter times for the filing and service of the *Request for Order* (form FL-300) than the times specified in Code of Civil Procedure section 1005.

(3) The court may issue the order shortening time in the "Court Orders" section of *Request for Order* (form FL-300).

(e) Issuance by court clerk

The court clerk's authority to issue a *Request for Order* (form FL-300) as a ministerial act is limited to those orders or notices:

(1) For the parties to attend orientation and confidential mediation or child custody recommending counseling; and

(2) That may be delegated by a judicial officer and do not require the use of judicial discretion.

(f) Service requirements

(1) The *Request for Order* (form FL-300) and appropriate documents or orders must be served in the manner specified for the service of a summons in Code of Civil Procedure sections 415.10 through 415.95, including personal service, if:

(A) The court granted temporary emergency orders pending the hearing;

(B) The responding party has not yet appeared in the case as described in rule 5.62; or

(C) The court ordered personal service on the other party.

(2) The *Request for Order* (form FL-300) and other appropriate documents or orders must be served as specified in Family Code section 215 if filed after entry of a judgment in an action for dissolution of marriage, nullity of marriage, legal separation of the parties, paternity, custody and support, or after a permanent order in any other proceeding in which the visitation (parenting time), custody, or support of a child is at issue.

(3) All other requests for orders and appropriate documents may be served as specified in Code of Civil Procedure section 1010 et seq., including service by mail.

(4) The following blank forms must be served with a *Request for Order* (form FL-300):

(A) *Responsive Declaration to Request for Order* (form FL-320); and

(B) *Income and Expense Declaration* (form FL-150), when the requesting party is serving a competed FL-150 or FL-155.

(g) Responding papers

To respond to the issues raised in the *Request for Order* (form FL-300) and accompanying papers, the responding party must complete, file, and have a *Responsive Declaration to Request for Order* (form FL-320) served on all parties.

(1) The *Responsive Declaration to Request for Order* (form FL-320) must set forth facts sufficient to notify the other party of the declarant's contentions in response to the request for order and in support of any relief requested.

(2) The responding papers may request relief related to the orders requested in the moving papers. However, unrelated relief must be sought by filing a separate *Request for Order* (form FL-300) as specified in (a).

(3) A completed *Income and Expense Declaration* (form FL-150) or *Financial Statement (Simplified)* (form FL-155) must be filed with the *Responsive Declaration to Request for Order* (form FL-320) when relevant to the relief requested.

(4) The responding party may be required to complete, file, and serve additional forms or attachments along with a *Responsive Declaration to Request for Order* (form FL-320) when responding to a *Request for Order* (form FL-300) about child custody and visitation (parenting time), attorney fees and costs, support, and other financial matters.

(5) No memorandum of points and authorities need be filed with a *Responsive Declaration to Request for Order* (form FL-320) unless required by the court on a case-by-case basis.

(6) A *Responsive Declaration to Request for Order* (form FL-320) may be served on the parties by mail, unless otherwise required by court order.

Advisory Committee Comment

The Family and Juvenile Law Advisory Committee and the Elkins Implementation Task Force developed rule 5.92 and *Request for Order* (form FL-300) in response to *Elkins Family Law Task Force: Final Report and Recommendations (April 2010)* for one comprehensive form and related procedures to replace the *Order to Show Cause* (form FL-300) and *Notice of Motion* (form FL-301). (See page 35 of the final report online at *www.courts.ca.gov/elkins-finalreport.pdf*.)

Rule 5.94. Order shortening time; other filing requirements; reissuance of request for order

(a) Order shortening time

The court, on its own motion or on application for an order shortening time supported by a declaration showing good cause, may prescribe shorter times for the filing and service of papers than the times specified in Code of Civil Procedure section 1005.

(b) Time for filing proof of service

Proof of service of the *Request for Order* (form FL-300) and supporting papers should be filed five court days before the hearing date.

(c) ~~(d)~~ Filing of late papers

No moving or responding papers relating to a request for order maybe rejected for filing on the ground that ~~it was~~ they were untimely submitted for filing. If the court, in its discretion, refuses to consider the late filed paper, the minutes or order must so indicate.

(d) ~~(e)~~ ~~Computation of~~ Timely submission to court clerk

Moving or responding papers are deemed timely filed if they are submitted: ~~before the close of the clerk's office to the public on the day that the paper is due is deemed timely filed.~~

(1) Before the close of the court clerk's office to the public; and

(2) On the day the papers are due.

(e) ~~(c)~~ Failure to timely serve ~~moving papers~~ Request for Order; reissuance

~~If a *Request for Order* (FL-300) is not timely served on the opposing party, the moving party must notify the court as soon as possible before the date assigned for the court hearing and request a new hearing date to allow additional time to serve the *Request for Order* (FL-300) and supporting documents.~~

~~The moving party must also request that the court reissue the *Request for Order* (FL-300) and any temporary orders. To do so, the moving party must complete and submit to the court an *Application and Order for Reissuance of Request for Order* (form FL-306).~~

(1) If a *Request for Order* (form FL-300) is not timely served on the other party and the moving party wishes to proceed with the request, the moving party must use the following procedures:

(A) Notify the court as soon as possible before the date assigned for the court hearing and request a new hearing date to allow additional time to have all parties served with the *Request for Order* (FL-300), any temporary orders, and supporting documents; and

(B) Request that the court schedule a new hearing date and reissue the *Request for Order* (FL-300) and any temporary orders. To do so, the moving party must complete and submit to the court an *Application and Order for Reissuance* (form FL-306).

(i) The *Application and Order for Reissuance* (form FL-306) should be filed no later than five court days before the scheduled hearing date or presented at the hearing.

(ii) A filed copy of form FL-306 must be attached as the cover page of the filed *Request for Order* (form FL-300) packet and must be served on all parties to whom the orders are directed in the manner required under rule 5.92 or as ordered by the court.

(iii) If the moving party fails to timely serve the filed *Application and Order for Reissuance* (form FL-306), form FL-300, and supporting orders, and the moving party wishes to proceed with the request for orders, he or she must repeat the reissuance procedure in this rule.

(2) Failure to timely serve the *Request for Order* (FL-300), any temporary emergency orders and supporting documents or to obtain a reissuance will result in all orders included in that *Request for Order* and *Temporary Emergency Orders* (form FL-305) expiring on the actual hearing date.

(3) No fee will be charged for reissuance of the order unless the order has been dissolved three times previously.

Rule 5.151. Request for emergency orders; application; required documents

(a)–(b) * * *

(c) Required documents

A request for emergency orders must be in writing and must include all of the following completed documents ~~when relevant to the relief requested~~:

(1) *Request for Order* (form FL-300) that identifies the relief requested.

(2) When relevant to the relief requested, a current *Income and Expense Declaration* (form FL-150) or *Financial Statement (Simplified)* (form FL-155) and *Property Declaration* (form FL-160).

(3) *Temporary Emergency Orders* (form FL-305) to serve as the proposed temporary order.

(4) A written declaration regarding notice of application for emergency orders based on personal knowledge. *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) may be used for this purpose.

(5) * * *

(d)–(e) * * *

DV-130 Restraining Order After Hearing (Order of Protection)

Clerk stamps date here when form is filed.

DRAFT -

NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Clerk fills in case number when form is filed.

Case Number:

1 Name of Protected Person:

Your lawyer in this case *(if you have one):*
Name: _____ State Bar No.: _____
Firm Name: _____
Address *(If you have a lawyer for this case, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, give a different mailing address instead. You do not have to give your telephone, fax, or e-mail.):*
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

2 Name of Restrained Person:

Description of restrained person:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Hair Color: _____ Eye Color: _____
Race: _____ Age: _____ Date of Birth: _____
Mailing Address *(if known):* _____
City: _____ State: _____ Zip: _____
Relationship to protected person: _____

3 ☐ Additional Protected Persons

In addition to the person named in 1, the following persons are protected by orders as indicated in items 6 and 7 *(family or household members):*

Full name	Relationship to person in 1	Sex	Age

☐ *Check here if there are additional protected persons. List them on an attached sheet of paper and write,* "DV-130, Additional Protected Persons," *as a title.*

4 Expiration Date ☐ Original Order ☐ ____ Amended Order

The orders, except as noted below, end on

(date): _____ at *(time):* _____ ☐ a.m. ☐ p.m. or ☐ midnight

- *If no date is written, the restraining order ends three years after the date of the hearing in item 5(a).*
- *If no time is written, the restraining order ends at midnight on the expiration date.*
- *Note: Custody, visitation, child support, and spousal support orders remain in effect after the restraining order ends. Custody, visitation, and child support orders usually end when the child is 18.*
- ***The court orders are on pages 2, 3, 4, and 5 and attachment pages (if any).***

This order complies with VAWA and shall be enforced throughout the United States. See page 5.

This is a Court Order.

5 Hearings

a. The hearing was on *(date):* _____ with *(name of judicial officer):* _____

b. These people were at the hearing *(check all that apply):*

☐ The person in 1 ☐ The lawyer for the person in 1 *(name):* _____

☐ The person in 2 ☐ The lawyer for the person in 2 *(name):* _____

c. The people in 1 and 2 must **return to Dept.** _____ **of the court** on *(date):* _____

at *(time):* _____ ☐ a.m. ☐ p.m. to review *(specify issues):* _____

To the person in 2 :

The court has granted the orders checked below. Item 9 is also an order. If you do not obey these orders, you can be arrested and charged with a crime. You may be sent to jail for up to one year, pay a fine of up to $1,000, or both.

6 ☐ Personal Conduct Orders

a. The person in 2 must **not** do the following things to the protected people in 1 and 3 :

☐ Harass, attack, strike, threaten, assault *(sexually or otherwise),* hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, impersonate *(on the Internet, electronically or otherwise),* or block movements.

☐ Contact, either directly or indirectly, by any means, including, but not limited to, by telephone, mail, e-mail, or other electronic means.

☐ Take any action, directly or through others, to obtain the addresses or locations of any protected persons. *(If this item is not checked, the court has found good cause not to make this order.)*

b. Peaceful written contact through a lawyer or process server or another person for service of legal papers related to a court case is allowed and does not violate this order.

c. ☐ Exceptions: Brief and peaceful contact with the person in 1, and peaceful contact with children in 3, as required for court-ordered visitation of children, is allowed unless a criminal protective order says otherwise.

7 ☐ Stay-Away Order

a. The person in 2 **must** stay at least *(specify):* _____ yards away from *(check all that apply):*

☐ The person in 1
☐ The persons in 3
☐ Home of person in 1
☐ The job or workplace of person in 1
☐ Vehicle of person in 1
☐ School of person in 1
☐ The child(ren)'s school or child care
☐ Other *(specify):* _____

b. ☐ Exceptions: Brief and peaceful contact with the person in 1, and peaceful contact with children in 3, as required for court-ordered visitation of children, is allowed unless a criminal protective order says otherwise.

8 ☐ Move-Out Order

The person in 2 must move out immediately from *(address):* _____

9 No Guns or Other Firearms or Ammunition

a. The person in 2 cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition.

This is a Court Order.

9 b. The person in (2) must:
- Sell to, or store with, a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms within his or her immediate possession or control. Do so within 24 hours of being served with this order.
- Within 48 hours of receiving this order, file with the court a receipt that proves guns have been turned in, sold, or stored. *(*Form DV-800, *Proof of Firearms Turned In, Sold, or Stored*, may be used for the receipt.*)* Bring a court filed copy to the hearing.

c. ☐ The court has received information that the person in (2) owns or possesses a firearm.

d. ☐ The court has made the necessary findings and applies the firearm relinquishment exemption under Family Code section 6389(h). Under California law, the person in (2) is not required to relinquish this firearm *(specify make, model, and serial number of firearm):* _____
The firearm must be in his or her physical possession only during scheduled work hours and during travel to and from his or her place of employment. Even if exempt under California law, the person in (2) may be subject to federal prosecution for possessing or controlling a firearm.

10 ☐ **Record Unlawful Communications**
The person in (1) has the right to record communications made by the person in (2) that violate the judge's orders.

11 ☐ **Care of Animals**
The person in (1) is given the sole possession, care, and control of the animals listed below. The person in (2) must stay at least _____ yards away from and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of the following animals: _____

12 ☐ **Child Custody and Visitation**
Child custody and visitation are ordered on the attached form DV-140, *Child Custody and Visitation Order* or *(specify other form):* _____

13 ☐ **Child Support**
Child support is ordered on the attached form FL-342, *Child Support Information and Order Attachment* or *(specify other form):* _____

14 ☐ **Property Control**
Only the person in (1) can use, control, and possess the following property: _____

15 ☐ **Debt Payment**
The person in (2) must make these payments until this order ends:
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
☐ *Check here if more payments are ordered. List them on an attached sheet of paper and write* "DV-130, Debt Payments" *as a title.*

16 ☐ **Property Restraint**
The ☐ person in (1) ☐ person in (2) must not transfer, borrow against, sell, hide, or get rid of or destroy any property, including animals, except in the usual course of business or for necessities of life. In addition, the person must notify the other of any new or big expenses and explain them to the court. *(The person in (2) cannot contact the person in (1) if the court has made a "No-Contact" order.)*
Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this order.

This is a Court Order.

17 ☐ **Spousal Support**
Spousal support is ordered on the attached form FL-343, *Spousal, Partner, or Family Support Order Attachment* or *(specify other form):* _____

18 ☐ **Insurance**
☐ The person in (1) ☐ the person in (2) is ordered NOT to cash, borrow against, cancel, transfer, dispose of, or change the beneficiaries of any insurance or coverage held for the benefit of the parties, or their child(ren), if any, for whom support may be ordered, or both.

19 ☐ **Lawyer's Fees and Costs**
The person in (2) must pay the following lawyer's fees and costs:
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
Pay to: _____ For: _____ Amount: $ _____ Due date: _____

20 ☐ **Payments for Costs and Services**
The person in (2) must pay the following:
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
Pay to: _____ For: _____ Amount: $ _____ Due date: _____
☐ *Check here if more payments are ordered. List them on an attached sheet of paper and write* "DV-130, Payments for Costs and Services" *as a title.*

21 ☐ **Batterer Intervention Program**
The person in (2) must go to and pay for a 52-week batterer intervention program and show written proof of completion to the court. This program must be approved by the probation department.

22 ☐ **Other Orders**
Other orders *(specify):* _____

23 **No Fee to Serve (Notify) Restrained Person**
If the sheriff or marshal serves this order, he or she will do it for free.

24 **Service**
a. ☐ The people in (1) and (2) were at the hearing or agreed in writing to this order. No other proof of service is needed.
b. ☐ The person in (1) was at the hearing on the request for original orders. The person in (2) was not present.
(1) ☐ Proof of service of form DV-109 and form DV-110 (if issued) was presented to the court. The judge's orders in this form are the same as in form DV-110 except for the end date. The person in (2) must be served. This order can be served by mail.
(2) ☐ Proof of service of form DV-109 and form DV-110 (if issued) was presented to the court. The judge's orders in this form are different from the orders in form DV-110, or form DV-110 was not issued. The person in (2) must be personally "served" (delivered) a copy of this order.
c. ☐ Proof of service of form FL-300 to modify the orders in form DV-130 was presented to the court.
(1) ☐ The people in (1) and (2) were at the hearing or agreed in writing to this order. No other proof of service is needed.
(2) ☐ The person in ☐ (1) ☐ (2) was not at the hearing and must be personally "served" (delivered) a copy of this amended order.

25 ☐ **Criminal Protective Order**
a. ☐ Form CR-160, *Criminal Protective Order—Domestic Violence*, is in effect.
Case Number: _____ County: _____ Expiration Date: _____
(List all other orders on an attached sheet of paper. Write "DV-130, Other Criminal Protective Orders" *as a title.)*

This is a Court Order.

b. ☐ No information has been provided to the judge about a criminal protective order.

26 ☐ **Attached pages are orders.**

- Number of pages attached to this six-page form: _____
- All of the attached pages are part of this order.
- Attachments include *(check all that apply):*

☐ DV-140 ☐ DV-145 ☐ DV-150 ☐ FL-342 ☐ FL-343

☐ Other *(specify):* _____

Date: _____

_____

Judge (or Judicial Officer)

Certificate of Compliance With VAWA

This restraining (protective) order meets all "full faith and credit" requirements of the Violence Against Women Act, 18 U.S.C. § 2265 (1994) (VAWA) upon notice of the restrained person. This court has jurisdiction over the parties and the subject matter; the restrained person has been or will be afforded notice and a timely opportunity to be heard as provided by the laws of this jurisdiction. **This order is valid and entitled to enforcement in each jurisdiction throughout the 50 states of the United States, the District of Columbia, all tribal lands, and all U.S. territories, commonwealths, and possessions and shall be enforced as if it were an order of that jurisdiction.**

Warnings and Notices to the Restrained Person in 2

If you do not obey this order, you can be arrested and charged with a crime.

- If you do not obey this order, you can go to jail or prison and/or pay a fine.
- It is a felony to take or hide a child in violation of this order.
- If you travel to another state or to tribal lands or make the protected person do so, with the intention of disobeying this order, you can be charged with a federal crime.

You cannot have guns, firearms, and/or ammunition.

You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, other firearms, and/or ammunition while the order is in effect. If you do, you can go to jail and pay a $1,000 fine. Unless the court grants an exemption, you must sell to, or store with, a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms that you have or control. The judge will ask you for proof that you did so. If you do not obey this order, you can be charged with a crime. Federal law says you cannot have guns or ammunition while the order is in effect. Even if exempt under California law, you may be subject to federal prosecution for possessing or controlling a firearm.

Instructions for Law Enforcement

Start Date and End Date of Orders

The orders *start* on the earlier of the following dates:

- The hearing date in item 5 (a) on page 2, or
- The date next to the judge's signature on this page.

The orders *end* on the expiration date in item 4 on page 1. If no date is listed, they end three years from the hearing date.

This is a Court Order.

Arrest Required if Order Is Violated

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6.

Notice/Proof of Service

Law enforcement must first determine if the restrained person had notice of the orders. If notice cannot be verified, the restrained person must be advised of the terms of the orders. If the restrained person then fails to obey the orders, the officer must enforce them. (Fam. Code, § 6383.)

Consider the restrained person "served" (notified) if:

- The officer sees a copy of the *Proof of Service* or confirms that the *Proof of Service* is on file; *or*
- The restrained person was at the restraining order hearing or was informed of the order by an officer. (Fam. Code, § 6383; Pen. Code, § 836(c)(2).) An officer can obtain information about the contents of the order in the Domestic Violence Restraining Order System (DVROS). (Fam. Code, § 6381(b)-(c).)

If the Protected Person Contacts the Restrained Person

Even if the protected person invites or consents to contact with the restrained person, the orders remain in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The orders can be changed only by another court order. (Pen. Code, § 13710(b).)

Child Custody and Visitation

The custody and visitation orders are on form DV-140, items ③ and ④. They are sometimes also written on additional pages or referenced in DV-140 or other orders that are not part of the restraining order.

Enforcing the Restraining Order in California

Any law enforcement officer in California who receives, sees, or verifies the orders on a paper copy, in the California Law Enforcement Telecommunications System (CLETS), or in an NCIC Protection Order File must enforce the orders.

Conflicting Orders—Priorities for Enforcement

If more than one restraining order has been issued protecting the protected person from the restrained person, the orders must be enforced in the following priority (see Pen. Code, § 136.2 and Fam. Code, §§ 6383(h)(2), 6405(b)):

1. *EPO:* If one of the orders is an *Emergency Protective Order* (form EPO-001) and it is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders.
2. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.
3. *Criminal Order:* If none of the orders includes a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
4. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Restraining Order After Hearing (Order of Protection)* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

DV-200 Proof of Personal Service

Clerk stamps date here when form is filed.

DRAFT -

NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Name of Person Asking for Protection:

2 Name of Person to Be Restrained:

3 Notice to Server

The server must:

- Be 18 years of age or older.
- Not be listed in items 1 or 3 of form DV-100, *Request for Domestic Violence Restraining Order*.
- Give a copy of all documents checked in 4 to the restrained person in 2. (You cannot send them by mail.) Then complete and sign this form, and give or mail it to the person in 1.

4 I gave the person in 2 a copy of all the documents checked:

a. ☐ DV-109 with DV-100 and a blank DV-120 *(Notice of Court Hearing; Request for Domestic Violence Restraining Order;* blank *Response to Request for Domestic Violence Restraining Order)*
b. ☐ DV-110 *(Temporary Restraining Order)*
c. ☐ DV-105 and DV-140 *(Request for Child Custody and Visitation Orders, Child Custody and Visitation Order)*
d. ☐ FL-150 with a blank FL-150 *(Income and Expense Declaration)*
e. ☐ FL-155 with a blank FL-155 *(Financial Statement (Simplified))*
f. ☐ DV-115 *(Request to Continue Hearing and Reissue Temporary Restraining Order)*
g. ☐ DV-116 *(Notice of New Hearing and Order on Reissuance)*
h. ☐ DV-130 *(Restraining Order After Hearing)*
i. ☐ FL-300 *(Request for Order)*
j. ☐ Other *(specify):*

5 I personally gave copies of the documents checked above to the person in 2 on:

a. Date: _____ b. Time: _____ ☐ a.m. ☐ p.m.

c. At this address: _____

City: _____ State: _____ Zip: _____

6 Server's Information

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

(If you are a registered process server):

County of registration: _____ Registration number: _____

7 I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print server's name *Server to sign here*

DV-250 Proof of Service by Mail

Clerk stamps date here when form is filed.

DRAFT -

NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

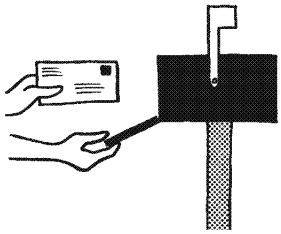
Court fills in case number when form is filed.

Case Number:

1 Name of Person Asking for Protection:

2 Name of Person to Be Restrained:

3 Notice to Server



The server must:

- Be 18 years of age or older.
- Not be listed in items 1 or 2 or 3 of form DV-100, *Request for Domestic Violence Restraining Order*.
- Mail a copy of all documents checked in 4 to the person in 5.

4 I (the server) am 18 years of age or over and live in or am employed in the county where the mailing took place. I mailed a copy of all documents checked below to the person in 5:

a. ☐ DV-112, *Waiver of Hearing on Denied Request for Temporary Restraining Order*
b. ☐ DV-120, *Response to Request for Domestic Violence Restraining Order*
c. ☐ FL-150, *Income and Expense Declaration*
d. ☐ FL-155, *Financial Statement (Simplified)*
e. ☐ DV-130, *Restraining Order After Hearing (Order of Protection)*
f. ☐ FL-300, *Request for Order*
g. ☐ Other *(specify):* _____

Note: You cannot serve DV-100, DV-105, DV-109, or DV-110 by mail.

5 I placed copies of the documents checked above in a sealed envelope and mailed them as described below:

a. Name of person served: _____
b. To this address: _____
City: _____ State: _____ Zip: _____
c. Mailed on *(date)*: _____
d. Mailed from: City: _____ State: _____

6 Server's Information

Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____
(If you are a registered process server):
County of registration: _____ Registration number: _____

7 I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print server's name *Server to sign here*

DV-400 Findings and Notice of Termination of Restraining Order

This form is for court use only.

Clerk stamps date here when form is filed.

DRAFT NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 **Name of Protected Person:** _____

2 **Name of Restrained Person:** _____

3 **Court Findings** (Fam. Code, § 6345 (a) & (d))

a. ☐ The **Protected Party** filed the request to terminate the restraining orders in *Restraining Order After Hearing* (form DV-130). A proof of service (by mail or personal service) of the request on the Restrained Party is filed with the court.

b ☐ The **Restrained Party** filed the request to terminate restraining orders. The filed proof of service shows that the Protected Party received notice of the Request by:

1. ☐ Personal service.
2. ☐ Service on the Secretary of State (the Protected Person is registered in the Safe at Home Program).
3. ☐ An alternative, court-ordered method of service designed to afford actual notice.

c. ☐ The **Restrained Party** filed the request to terminate restraining orders. The party protected by the restraining orders was physically present in court, waived his or her right to notice, and does not challenge the sufficiency of the notice.

d. ☐ The **Protected Party and the Restrained Party** filed a signed, written stipulation to terminate the restraining orders in the *Restraining Order After Hearing*.

e. ☐ This case was dismissed. The dismissal was entered on *(date):* _____ (Code Civ. Proc., § 581)

4 **Court Orders**

The protective orders in *Restraining Order After Hearing* (form DV-130) issued on *(date):* _____ are terminated.

a. This order is effective when made.

b. Any existing orders for child custody, child visitation, child support, and spousal or partner support made in a Domestic Violence Prevention Act case after a noticed hearing survive the termination of the protective order, and remain in effect unless changed by court order. Family Code sections 6340(a), 6345(b).

c. This order does not modify or terminate any criminal, juvenile, civil, or probate orders.

d. ☐ Orders for child custody, child visitation, and child support in the *Restraining Order After Hearing:*
   1. ☐ Have been modified.
   2. ☐ Are also terminated.

e. ☐ Orders for spousal or domestic partner support in the *Restraining Order After Hearing*:
   1. ☐ Have been modified.
   2. ☐ Are also terminated.

This is a Court Order.

5 CLETS Entry

The court or its designee will transmit this form within one business day to law enforcement personnel for entry into CLETS.

6 Service of this Order

a. ☐ The people in (1) and (2) were at the hearing or agreed in writing to this order. No other proof of service is needed.

b. ☐ The person in (1) was at the hearing. The person in (2) was not.
Someone 18 or over—not anyone else protected or restrained by the restraining order—must personally "serve" the restraining order a copy of this form DV-400 on the person in (2).

c. ☐ The person in (2) was at the hearing. The person in (1) was not.
Someone 18 or over—not anyone else protected or restrained by the restraining order—must personally "serve" the restraining order a copy of this form DV-400 on the person in (1).

Date: _____ _____
Signature of Judicial Officer

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Findings and Notice of Termination of Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

DV-400-INFO How to Change or End a Domestic Violence Restraining Order

1 Who can ask the court to change or end the *Restraining Order After Hearing*?

Either of the parties in the case (the protected person or the restrained person) can ask to modify (change) or terminate (end) the restraining orders issued on *Restraining Order After Hearing* (form DV-130) before the orders expire.

2 What orders can be changed or ended?

A party may request an order to change or end any of the orders made on form DV-130, including:

- ☑ Restraining orders that protect persons from violence or threat of violence by others, including personal conduct, no contact, stay-away, move out, firearms, recording of unlawful communication;
- ☑ Names of protected people;
- ☑ The end date of the restraining orders;
- ☑ Child custody, child visitation, or child support orders; and
- ☑ Spousal or domestic partner support orders.

3 If I ask to end the restraining order, can I keep child custody, visitation, or support orders?

Yes. Even if the restraining order ends, any child custody, visitation, support, or spousal/domestic partnership orders will remain in effect.

4 What if the Restrained Person wants to change or end the restraining orders?

The law requires strict notice to the protected party. This means that the court cannot change or end the restraining orders unless the protected person receives notice of the request.

5 What forms do I fill out to ask to change or end the Restraining Order?

a. To ask for an order to change or end your *Restraining Order After Hearing* (form DV-130);
   - ☐ Fill out FL-300, *Request for Order.*
   - ☐ Attach a copy of the *Restraining Order After Hearing* (form DV-130) that you want to change or end.
   - ☐ Make sure the copy of the restraining order includes all attachments, if any.

b. To also ask for child custody or visitation (parenting time) orders, you may need to complete some of these forms:
   - ☐ FL-105, *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act*
   - ☐ FL-311, *Child Custody and Visitation (Parenting Time) Application Attachment*
   - ☐ FL-312, *Request for Child Abduction Prevention Orders*
   - ☐ FL-341(C), *Children's Holiday Schedule Attachment*
   - ☐ FL-341(D), *Additional Provisions—Physical Custody Attachment*
   - ☐ FL-341(E), *Joint Legal Custody Attachment*

c. If you also want child support orders, you also need:
   - ☐ A current form FL-150, *Income and Expense Declaration* or form FL-155, *Financial Statement (Simplified)* (To know which form is right for you, read form DV-570, *Which Financial Form—FL-155 or FL-150?*)

d. If you also want spousal or partner support orders or orders about your finances, you also need:
   - ☐ A current Form FL-150, *Income and Expense Declaration*
   - ☐ FL-157, *Spousal or Partner Support Declaration Attachment* (if asking to change a support judgment)

e. If you also want to ask the court orders for attorney's fees and costs, you also need:
   - ☐ A current FL-150, *Income and Expense Declaration*
   - ☐ FL-319, *Request for Attorney's Fees and Costs Attachment* (or provide the information in a declaration)
   - ☐ FL-158, *Supporting Declaration for Attorney's Fees and Costs* (or provide the information in a declaration)

f. If you plan on having witnesses testify at the hearing, you will need:
   - ☐ FL-321, *Witness List*

g. Additional forms you may need are described on pages 3 and 4 of this information sheet.

6 What if I want to respond to a request to change or end the Restraining Order?

Complete, file, and serve form FL-320, *Responsive Declaration to Request for Order*. See form FL-320-INFO, *Information Sheet: Responsive Declaration to Request for Order* for more information.

DV-400-INFO How to Change or End a Domestic Violence Restraining Order

7 Complete form FL-300 (Page 1)

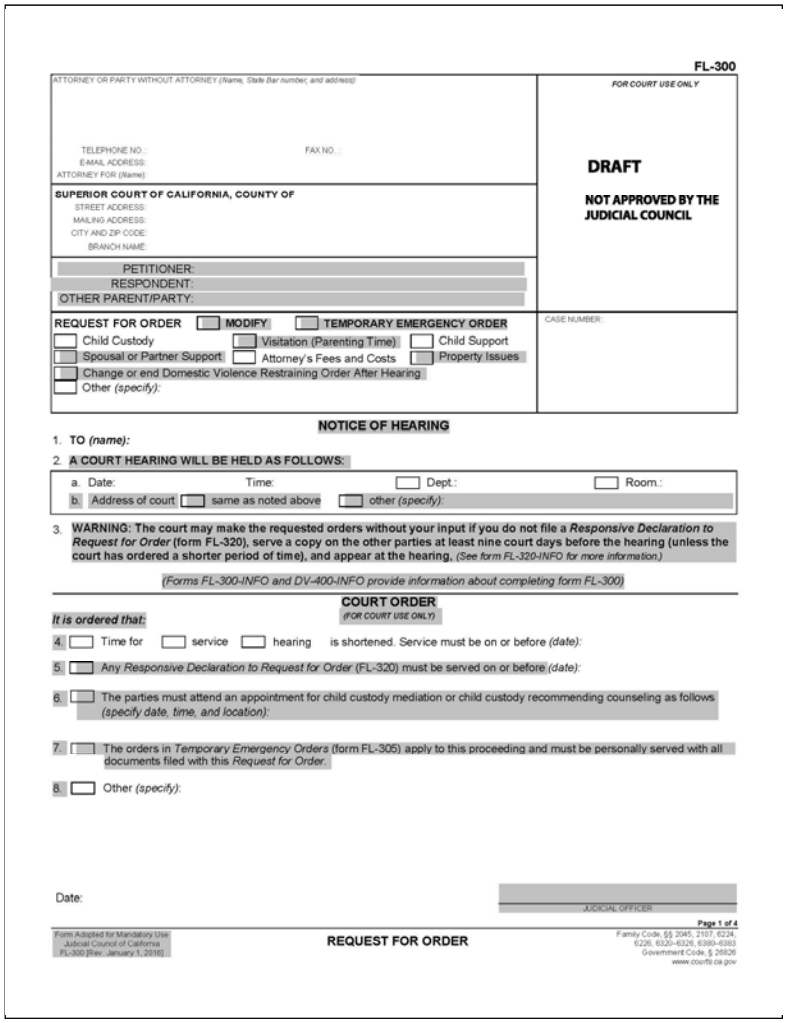
Caption: Complete the top part of the form, including your name, address, and telephone number, and the court address.

- **Write the names of the parties in the caption.**
  If you already have a family law case, use the party names as they are in that case. If you are the Petitioner in that case, you will be the Petitioner on form FL-300. If you are the Respondent in the family law case, you will be the Respondent on form FL-300.

  If you do not already have a family law case, list yourself as the Petitioner on form FL-300 if you are the Protected Person on the restraining order. List yourself as the Respondent on form FL-300 if you are the Restrained Person on the restraining order.

- **Check all the boxes that apply to the orders you want.**
  For example, check the "MODIFY" box if you want to change an existing order. Below that, choose the orders that you want to change (for example, child custody, visitation, spousal or partner support).

  If you want to ask the court to change or end the restraining orders granted in form DV-130 (for example, the personal conduct, no contact, stay-away, move-out orders), check the box titled "Change or end Domestic Violence Restraining Order After Hearing."



FL-300

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): | FOR COURT USE ONLY

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:

PETITIONER:
RESPONDENT:
OTHER PARENT/PARTY:

REQUEST FOR ORDER ☐ MODIFY ☐ TEMPORARY EMERGENCY ORDER
☐ Child Custody ☐ Visitation (Parenting Time) ☐ Child Support
☐ Spousal or Partner Support ☐ Attorney's Fees and Costs ☐ Property Issues
☐ Change or end Domestic Violence Restraining Order After Hearing
☐ Other (specify):

CASE NUMBER:

NOTICE OF HEARING

1. TO (name):
2. A COURT HEARING WILL BE HELD AS FOLLOWS:
   a. Date: Time: ☐ Dept.: ☐ Room.:
   b. Address of court ☐ same as noted above ☐ other (specify):
3. WARNING: The court may make the requested orders without your input if you do not file a *Responsive Declaration to Request for Order* (form FL-320), serve a copy on the other parties at least nine court days before the hearing (unless the court has ordered a shorter period of time), and appear at the hearing. *(See form FL-320-INFO for more information.)*

(Forms FL-300-INFO and DV-400-INFO provide information about completing form FL-300)

COURT ORDER
(FOR COURT USE ONLY)

It is ordered that:

4. ☐ Time for ☐ service ☐ hearing is shortened. Service must be on or before *(date):*
5. ☐ Any *Responsive Declaration to Request for Order* (FL-320) must be served on or before *(date):*
6. ☐ The parties must attend an appointment for child custody mediation or child custody recommending counseling as follows *(specify date, time, and location):*
7. ☐ The orders in *Temporary Emergency Orders* (form FL-305) apply to this proceeding and must be personally served with all documents filed with this *Request for Order.*
8. ☐ Other *(specify):*

Date: JUDICIAL OFFICER

Page 1 of 4

Form Adopted for Mandatory Use Judicial Council of California FL-300 [Rev. January 1, 2016]

REQUEST FOR ORDER

Family Code, §§ 2045, 2107, 6224, 6226, 6320–6326, 6389–6393 Government Code, § 26826
www.courts.ca.gov

Item 1: Write the name of the other parties in your case.

Item 2: Leave this blank. The court clerk will fill in the date, time, and location of the hearing.

Item 3: This is a notice to the other parties.

Items 4-5: Leave these blank. If you asked for an order shortening time (form FL-300 on page 4, item 9), the court will complete items 4-5 if the order is granted.

Item 6: In some counties, the court clerk will check item 6 and provide the details for your required child custody mediation or recommending counseling appointment. Other courts require the party or the party's attorney to make the appointment and then complete item 6 before filing form FL-300. Ask your court's family law facilitator or self-help center to find out what your court requires.

Items 7-8: Leave these blank. The court will complete them if needed.

8 Complete form FL-300 (Pages 2–4)

Complete the items 1 through 10 on pages 2, 3, and 4 that apply to the orders you request.

Example: If you are asking the court to make or change child custody and visitation orders AND terminate the personal conduct, stay-away, and move-out orders in form DV-130, check and complete items 1 and 2 on page 2. Next, check and complete item 8 on page 4.

Write your declaration in item 11 to explain why you want the new orders. If you want to change or end existing orders, explain in your declaration the change in circumstances that support your request. If needed, you may also attach additional pages to complete your declaration. Finally, sign and date page 4.

DV-400-INFO How to Change or End a Domestic Violence Restraining Order

9 Complete additional forms and make copies

Complete any additional forms that you will need to give to the court clerk to process with the *Request for Order*. Make at least three copies of your full packet.

10 File your completed forms to the court clerk

Give your paperwork and the copies you made to the court clerk to process. You may take them to the clerk's office in person, mail them, or, in some counties, you can e-file them. The clerk will keep the original and give you back the copies you made with a court date and time stamped on the first page of the *Request for Order*. The procedure may be different in some courts if you are requesting temporary emergency orders.

11 Pay filing fees

A fee may be due at the time of filing. For example, courts may charge a fee to file a request to end a restraining order. A fee may also be charged to file a request to change a child custody, visitation, or support order if a protective order is no longer in effect. If you cannot afford to pay the filing fee, and you do not have a valid fee waiver order in this case, you can ask the court to waive the fee by completing and filing form FW-001, *Request to Waive Court Fees* and form FW-003, *Order on Court Fee Waiver*.

12 Temporary Emergency (Ex Parte) Orders

To address emergencies, courts can sometimes grant a party's request for temporary emergency orders with or without notice to the other party before the court hearing. The temporary orders last until the day of the hearing.

- *A request for temporary emergency orders must involve an immediate danger or irreparable harm to a party or children in the case, or an immediate loss or damage to property.*
- Ask your court's family law facilitator or self-help center to explain procedures for requesting temporary emergency orders at your court, and follow those procedures.
- By law, the court **CANNOT** grant a Restrained Person's request for temporary emergency orders to change or end the restraining orders before the noticed court hearing. However, the Restrained Person may seek a court order for a shorter time for the hearing or for service of the request on the Protected Person.

13 Serve the Request for Order documents

- You must make sure that the other party is "served" with a copy of the *Request for Order* and all the other filed forms, attachments, and temporary orders. A blank Form FL-320, *Responsive Declaration to Request for Order* must also be served.
- If you completed and filed a form FL-150, *Income and Expense Declaration* or a form FL-155, *Financial Statement (Simplified),* you must include a blank copy of form FL-150, *Income and Expense Declaration* for the other party to complete.

14 General information about "service"

"Service" is the act of giving your legal papers to all persons named as parties in the case so that they know: what orders you are asking for; whether temporary emergency orders were made before the hearing; the date, time, and location of the hearing; and how to respond to your request. There are two types of service: "personal service" and "service by mail."

15 Time for service

The other party must be served with the request to change or end restraining orders at least 16 court days before the hearing. If service is permitted by mail, you must add 5 days if served within California. In some cases, the court can order a shorter time for service.

16 Who can serve the other party?

Ask someone you know, a registered process server, or law enforcement agency (for example, a sheriff) to serve a copy of the request to change or end restraining orders to the other party. The server must:

- Be 18 years of age or over; and
- Not be you or anyone protected by the orders.

17 When personal service is required

☑ A Restrained Person's request to change or end restraining orders must be personally served, unless the court allows another method. When required, service on the Secretary of State is made by delivering 2 copies of each document being served to the personnel at the office of the "Safe at Home" address confidentiality program.

☑ A request for any temporary emergency orders (for example for child custody or property orders) requires personal service.

18 When service by mail is permitted

☑ A Protected Person's *Request for Order* that includes a request to change or end the restraining orders in form DV-130 may be served on the Restrained Person by mail.

☑ Requests made by either party to change *temporary orders* in form DV-130 for child custody or visitation (parenting time), support, financial, or other orders (NOT protective orders), may be served by mail.

☑ Requests made by either party only to change *"permanent"* or *"final"*orders for child custody and visitation (parenting time), or child support in form DV-130 may be served by mail if an *Address Verification* is included (see form FL-334 at courts.ca.gov/documents/fl334.pdf).

19 Server must complete a *Proof of Service*

After the server has personally served the forms on the other party, he or she must complete a proof of service. Form DV-200, *Proof of Personal Service* may be used for this purpose. See DV-200-INFO, *What is "Proof of Personal Service"* for instructions. If service was by mail, the server may use DV-250, *Proof of Service by Mail.* (Note: if the registered process server uses a different proof of service form, make sure it lists the forms served.)

20 File the *Proof of Service* before your hearing

The *Proof of Service* shows the judge that the person received a copy of the *Request for Order* and all other documents or attachments. Make three copies of the completed *Proof of Service*.

Give the original and copies to the court clerk as soon as possible (or e-file them) **before your hearing.** The clerk will keep the original and give you back the copies stamped "Filed." Bring a copy stamped "Filed" to your hearing.

21 Get ready for your hearing

Find more information about preparing for your hearing at http://www.courts.ca.gov/1094.htm.

22 Go to the court hearing

Take at least three copies of your filed forms to the hearing, including the proof of service. At the hearing, the judge will decide whether to amend (change) or terminate (end) the DV-130.

23 What if the judge changes or ends the restraining order at the hearing?

☑ If the judge *changes* the orders, fill out a new form DV-130, *Restraining Order After Hearing* to show the new orders. At item 4, check the "Amended" box. Make three copies.

☑ If the judge *ends* the restraining order, give the court a blank form DV-400, *Findings and Notice of Termination of Restraining Order* to complete, along with three copies.

☑ After the judge signs the new order, the clerk will file the original and and give you three stamped copies.

☑ Have the other party personally served with a copy of the filed, amended form DV-130 or form DV-400, unless the court order says otherwise.

24 File the Proof of Service

- If the amended form DV-130 or form DV-400 must be personally served after the hearing, the server must complete a proof of personal service, such as form DV-200, *Proof of Personal Service*. Make three copies. The original proof of personal service must be filed with the court clerk. The clerk will file the original and give you back the copies you sent to the clerk stamped "Filed."
- Keep one copy with you and another in a safe place in case you need to show it to the police.

25 Get the new order entered into California's statewide Registry of Restraining Orders

The court will send the filed, amended form DV-130 or form DV-400 and proof of service to law enforcement for you. That way, police across the state and the nation will know the order has changed or ended.

26 *If you need protection in the future, you can always go back to court and ask for a restraining order.*

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
REQUEST FOR ORDER ☐ **MODIFY** ☐ **TEMPORARY EMERGENCY ORDER** ☐ Child Custody ☐ Visitation (Parenting Time) ☐ Child Support ☐ Spousal or Partner Support ☐ Attorney's Fees and Costs ☐ Property Issues ☐ Change or end Domestic Violence Restraining Order After Hearing ☐ Other *(specify):*	CASE NUMBER:

NOTICE OF HEARING

1. **TO *(name):***

2. **A COURT HEARING WILL BE HELD AS FOLLOWS:**

   a. Date: Time: ☐ Dept.: ☐ Room.:

   b. Address of court ☐ same as noted above ☐ other *(specify):*

3. **WARNING: The court may make the requested orders without your input if you do not file a *Responsive Declaration to Request for Order* (form FL-320), serve a copy on the other parties at least nine court days before the hearing (unless the court has ordered a shorter period of time), and appear at the hearing,** *(See form FL-320-INFO for more information.)*

(Forms FL-300-INFO and DV-400-INFO provide information about completing form FL-300)

COURT ORDER

(FOR COURT USE ONLY)

It is ordered that:

4. ☐ Time for ☐ service ☐ hearing is shortened. Service must be on or before *(date):*

5. ☐ Any *Responsive Declaration to Request for Order* (FL-320) must be served on or before *(date):*

6. ☐ The parties must attend an appointment for child custody mediation or child custody recommending counseling as follows *(specify date, time, and location):*

7. ☐ The orders in *Temporary Emergency Orders* (form FL-305) apply to this proceeding and must be personally served with all documents filed with this *Request for Order*.

8. ☐ Other *(specify)*:

Date:

JUDICIAL OFFICER

Form Adopted for Mandatory Use
Judicial Council of California
FL-300 [Rev. January 1, 2016]

REQUEST FOR ORDER

Family Code, §§ 2045, 2107, 6224, 6226, 6320–6326, 6380–6383
Government Code, § 26826
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

REQUEST FOR ORDER AND SUPPORTING DECLARATION

—THIS IS NOT A COURT ORDER—

☐ Petitioner ☐ Respondent ☐ Other Parent/Party requests the following orders

1. ☐ CHILD CUSTODY ☐ Applicant requests temporary emergency orders

a. Child's name and age | b. Legal Custody to *(person who decides about health, education, etc.)* | c. Physical Custody to *(person with whom the child lives)*

d. ☐ As requested in attached form:
- (1) ☐ *Child Custody and Visitation Application Attachment* (form FL-311)
- (2) ☐ *Request for Child Abduction Prevention Orders* (form FL-312)
- (3) ☐ *Children's Holiday Schedule Attachment* (form FL-341(C))
- (4) ☐ *Additional Provisions—Physical Custody Attachment* (form FL-341(D))
- (5) ☐ *Joint Legal Custody Attachment* (form FL-341(E))
- (6) ☐ Other *(specify):*
- (7) ☐ Attachment 1d

e. Modify existing order filed on *(date):* ☐ in *Restraining Order After Hearing* (form DV-130)
ordering *(specify):*

2. ☐ CHILD VISITATION (PARENTING TIME) ☐ Applicant requests temporary emergency orders

a. As requested in: (1) ☐ *Child Custody and Visitation Application Attachment* (form FL-311) (2) ☐ Attachment 2a
(3) ☐ Other *(specify):*

b. ☐ Modify existing order filed on *(date):* ☐ in *Restraining Order After Hearing* (form DV-130)
ordering *(specify):*

c. ☐ One or more domestic violence restraining/protective orders are now in effect between *(specify):*
☐ Petitioner ☐ Respondent ☐ Other Parent/Party *(Attach a copy of the orders if you have one.)*
The orders are from the following court or courts *(specify county and state):*
- (1) ☐ Criminal: County/state *(specify):* Case No. *(if known)*:
- (2) ☐ Family: County/state *(specify):* Case No. *(if known)*:
- (3) ☐ Juvenile: County/state *(specify):* Case No. *(if known)*:
- (4) ☐ Other: County/state *(specify):* Case No. *(if known)*:

3. ☐ CHILD SUPPORT *(An earnings assignment order may be issued.)*

a. Child's name and age | b. ☐ I request support based on the child support guidelines | c. Monthly amount ($) requested (if not by guideline)

Notice: The court will order child support based on the income of both parents. It normally continues until the child is 18 and has graduated from high school. You must supply the court with information about your finances by filing a current *Income and Expense Declaration* (FL-150) or *Financial Statement (Simplified)* (FL-155). If you do not, the child support order will be based on information about your income that the court receives from other sources, including the other parent.

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

—THIS IS NOT A COURT ORDER—

3. ☐ CHILD SUPPORT (continued)

d. ☐ Modify existing order filed on *(date):* ☐ in *Restraining Order After Hearing* (form DV-130)
ordering *(specify):*

e. I have completed and filed with this *Request for Order* a current *Income and Expense Declaration* (form FL-150) or, if eligible, *a Financial Statement (Simplified)* (form FL-155).

4. a. ☐ SPOUSAL OR PARTNER SUPPORT *(An earnings assignment order may be issued.)*

(1) ☐ Amount requested *(monthly):* $

(2) a. ☐ Modify b. ☐ Terminate existing order filed on *(date):*

☐ in *Restraining Order After Hearing* (form DV-130) ordering *(specify):*

b. ☐ I request a modification of spousal or partner support after entry of a judgment. I have completed and attached a *Spousal or Partner Support Declaration Attachment* (form FL-157) or a declaration that addresses the same factors covered in that form.

c. I have completed and filed with this *Request for Order* a current *Income and Expense Declaration* (form FL-150).

5. ☐ ATTORNEY'S FEES AND COSTS

I request attorney's fees and costs and have completed and filed with this *Request for Order* all of the following documents:

a. A current *Income and Expense Declaration* (form FL-150).

b. A *Request for Attorney's Fees and Costs Attachment* (form FL-319) or a declaration that addresses the factors covered in that form.

c. A *Supporting Declaration for Attorney's Fees and Costs Attachment* (form FL-158) or a declaration that addresses the factors covered in that form.

6. ☐ PROPERTY RESTRAINT ☐ Applicant requests temporary emergency orders

a. The ☐ petitioner ☐ respondent ☐ other parent/party ☐ claimant be restrained from transferring, encumbering, hypothecating, concealing, or in any way disposing of property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.

☐ The applicant be notified at least five business days before any proposed extraordinary expenditures, and an accounting of such will be made to the court. However, the parties may use community property, quasi-community property, or separate property to pay for the help of an attorney or to pay court costs.

b. ☐ All parties and claimants be restrained and enjoined from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties or their minor children.

c. ☐ No party or claimant to incur any debts or liabilities for which the other may be held responsible, other than in the ordinary course of business or for the necessities of life.

7. ☐ PROPERTY CONTROL ☐ Applicant requests temporary emergency orders

a. The ☐ petitioner ☐ respondent ☐ other parent/party be given exclusive temporary use, possession, and control of the following property that we own or are buying *(specify):*

NOTE: To ask for domestic violence restraining orders, you must use the forms *Request for Domestic Violence Restraining Order* (form DV-100), *Temporary Restraining Order (Domestic Violence Prevention)* (form DV-110), and *Notice of Court Hearing (Domestic Violence)* (form DV-109).

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

—THIS IS NOT A COURT ORDER—

7. ☐ PROPERTY CONTROL (continued) ☐ Applicant requests temporary emergency orders

b. The ☐ petitioner ☐ respondent ☐ other parent/party be ordered to make the following payments on liens and encumbrances coming due while the order is in effect:

Debt	Amount of payment	Pay to

8. ☐ DOMESTIC VIOLENCE RESTRAINING ORDERS (personal conduct, stay-away, move-out orders, or other protective order made in *Restraining Order After Hearing* (form DV-130))

a. ☐ Change b. ☐ End existing order filed on *(date):* as follows *(specify):*

c ☐ Attachment 8c

9. ☐ OTHER RELIEF *(specify):*

10. ☐ ORDER SHORTENING TIME

I request that time for *(specify):*

a. ☐ Service of the *Request for Order* and accompanying papers be shortened so that these documents may be served no less than *(specify number):* court days before the time set for the hearing. I need to have this order shortening time because of the facts specified below in item 11 or in the attached declaration.

b. ☐ The hearing on the *Request for Order* and accompanying papers be shortened. I need to have this order shortening time because of the facts specified below in item 11 or the attached declaration.

11. ☐ FACTS IN SUPPORT of orders requested and change of circumstances for any modification are *(specify):*

☐ Contained in the attached declaration. (*You may use* Attached Declaration (form MC-031) *for this purpose). The attached declaration must not exceed 10 pages in length unless permission to file a longer declaration has been obtained from the court.)*

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 APPLICANT)

Requests for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civil Code, § 54.8.)

FL-300-INFO Information Sheet for Request for Order

1 USE *Request for Order* (form FL-300):

- To schedule a court hearing and ask the court to make new orders or to change orders in your case. The request can be about child custody, visitation (parenting time), child support, spousal or partner support, property, finances, attorney's fees and costs, or other matters.
- To modify (change) or terminate (end) the domestic violence restraining orders granted by the court in *Restraining Order After Hearing* (form DV-130). Read form DV-400-INFO for information about filing, responding to, serving, and other procedures relating to a request to change or end domestic violence restraining orders.

2 DO NOT USE *Request for Order* (form FL-300):

- If you have not yet filed the *Petition* in your family law case.
- To ask the court for domestic violence restraining orders under the Domestic Violence Protection Act.
- If you and the other party have an agreement and you don't need a judge to resolve any issues. For information about how to write up your agreement and get it approved by the court, see *http://www.courts.ca.gov/selfhelp-agreements.htm.*

3 Forms checklist

a. Form FL-300, *Request for Order* is the basic form you need to file with the court. Depending on your request, you may need these additional forms:

b. To request child custody or visitation (parenting time) orders, you may need to complete some of these forms:
- ☐ FL-105, *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act*
- ☐ FL-311, *Child Custody and Visitation (Parenting Time) Application Attachment*
- ☐ FL-312, *Request for Child Abduction Prevention Orders*
- ☐ FL-341(C), *Children's Holiday Schedule Attachment*
- ☐ FL-341(D), *Additional Provisions—Physical Custody Attachment*
- ☐ FL-341(E), *Joint Legal Custody Attachment*

c. If you want child support, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration* or form FL-155, *Financial Statement (Simplified)*. (To know which form is right for you, read form DV-570, *Which Financial Form—FL-155 or FL-150?*)

d. If you want spousal or partner support or orders about your finances, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration*
- ☐ FL-157, *Spousal or Partner Support Declaration Attachment*

e. To request court orders for attorney's fees and costs, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration*
- ☐ FL-319, *Request for Attorney's Fees and Costs Attachment* (or provide the information in a declaration)
- ☐ FL-158, *Supporting Declaration for Attorney's Fees and Costs* (or provide the information in a declaration)

f. To request temporary emergency (ex parte) orders, you also need:
- ☐ FL-305, *Temporary Emergency Orders* to serve as the proposed temporary emergency orders
- ☐ Your declaration describing how and when you gave notice about the request for temporary emergency orders. You may use form FL-303, *Declaration Regarding Notice and Delivery of Request for Temporary Emergency (Ex Parte) Orders*.
- ☐ Other forms required by local courts. See item 9 on page 3 of this form for more information.

g. If you plan on having witnesses testify at the hearing, you also need:
- ☐ FL-321, *Witness List*

h. If you want to request a separate trial (bifurcation) on an issue, you also need:
- ☐ FL-315, *Request or Response to Request for Separate Trial*

FL-300-INFO Information Sheet for Request for Order

4 Complete form FL-300 (Page 1)

Caption: Complete the top portion with your name, address, and telephone number, and the court address. Next, enter the name of the Petitioner, Respondent, or Other Parent/Party (You must use the party names as they appear in the petition that was originally filed with the court). Then, enter the case number.

Check all the boxes that apply to the orders you are requesting. Check the "MODIFY" box if you are requesting a change to an existing order. Check the "TEMPORARY EMERGENCY ORDER" box if you are requesting that the court issue emergency orders that will be effective before the hearing date.

Item 1: Write the name of the other party or parties in the case.

Item 2: Leave this blank. The court clerk will fill in the date, time, and location of the hearing.

Item 3: This is a notice to all the parties.

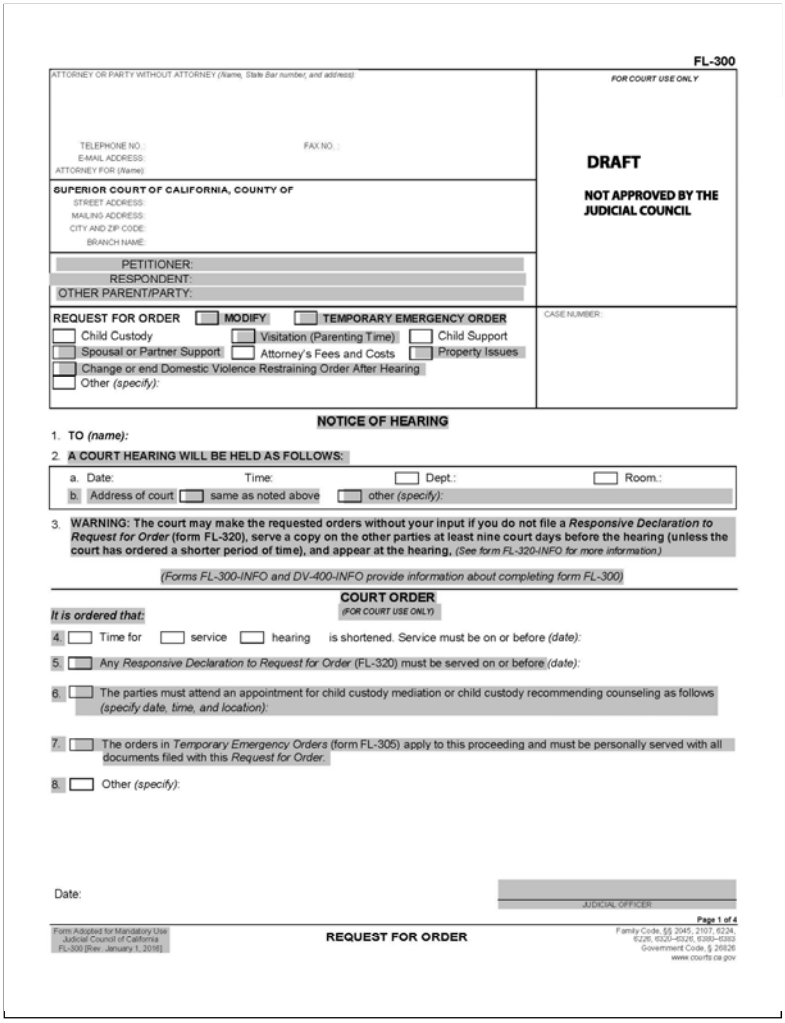
Item 4-5: Leave these blank. If you asked for an order shortening time (on form FL-300, page 4, item 9), the court will complete items 4-5 if the court grants the order.

Item 6: In some counties, the court clerk will check item 6 and provide the details for your required child custody mediation or recommending counseling appointment. Other courts require the party or the party's attorney to make the appointment and then complete item 6 before filing form FL-300. Ask your court's family law facilitator or self-help center to find out what your court requires.

Item 7-8: Leave these blank. The court will complete them if needed.

5 Complete form FL-300 (pages 2–4)

Complete the items on pages 2, 3, and 4 that apply to the orders you request. For example, if you are asking the court to make child custody orders, on page 2 check the box at item 1 and complete this section. Then on page 4, write your declaration in item 11. If needed, you may also attach additional pages to complete your declaration. Then, sign and date page 4.



FL-300

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

FOR COURT USE ONLY

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:

PETITIONER:
RESPONDENT:
OTHER PARENT/PARTY:

CASE NUMBER:

REQUEST FOR ORDER ☐ MODIFY ☐ TEMPORARY EMERGENCY ORDER
☐ Child Custody ☐ Visitation (Parenting Time) ☐ Child Support
☐ Spousal or Partner Support ☐ Attorney's Fees and Costs ☐ Property Issues
☐ Change or end Domestic Violence Restraining Order After Hearing
☐ Other (specify):

NOTICE OF HEARING

1. TO (name):
2. A COURT HEARING WILL BE HELD AS FOLLOWS:
a. Date: Time: ☐ Dept.: ☐ Room.:
b. Address of court ☐ same as noted above ☐ other (specify):
3. WARNING: The court may make the requested orders without your input if you do not file a *Responsive Declaration to Request for Order* (form FL-320), serve a copy on the other parties at least nine court days before the hearing (unless the court has ordered a shorter period of time), and appear at the hearing. (See form FL-320-INFO for more information.)

(Forms FL-300-INFO and DV-400-INFO provide information about completing form FL-300)

COURT ORDER
(FOR COURT USE ONLY)

It is ordered that:

4. ☐ Time for ☐ service ☐ hearing is shortened. Service must be on or before (date):
5. ☐ Any *Responsive Declaration to Request for Order* (FL-320) must be served on or before (date):
6. ☐ The parties must attend an appointment for child custody mediation or child custody recommending counseling as follows (specify date, time, and location):
7. ☐ The orders in *Temporary Emergency Orders* (form FL-305) apply to this proceeding and must be personally served with all documents filed with this *Request for Order*.
8. ☐ Other (specify):

Date:

JUDICIAL OFFICER

Page 1 of 4

Form Adopted for Mandatory Use
Judicial Council of California
FL-300 [Rev. January 1, 2016]

REQUEST FOR ORDER

Family Code, §§ 2045, 2107, 6224, 6226, 6325–6326, 6380–6383
Government Code, § 26826
www.courts.ca.gov

6 Complete additional forms and make copies

Complete any additional forms that you will need to give to the court clerk to process with the *Request for Order*. Make at least two copies of your full packet.

7 File your documents with the court clerk

Give your paperwork and the copies you made to the court clerk to process. You may take them to the clerk's office in person, mail them, or, in some counties, you can e-file them. The clerk will keep the original and give you back the copies you made with a court date and time stamped on the first page of the *Request for Order*. The procedure may be different in some courts if you are requesting temporary emergency orders.

8 Pay filing fees

A fee is due at the time of filing. If you cannot afford to pay the filing fee, and you do not already have a valid fee waiver order in this case, you can ask the court to waive the fee by completing and filing form FW-001, *Request to Waive Court Fees* and form FW-003, *Order on Court Fee Waiver.*

FL-300-INFO Information Sheet for Request for Order

9 Temporary Emergency (Ex Parte) Orders

Courts can make temporary orders to respond to emergencies that cannot wait to be heard on the court's regular hearing calendar. *The emergency must involve an immediate danger or irreparable harm to a party or children in the case, or an immediate loss or damage to property.*

To request temporary emergency orders, you must:

- Complete form FL-300. Describe the emergency and explain why you need the temporary emergency orders.
- Complete form FL-305 to serve as your proposed temporary orders.
- Include a declaration describing how and when you notified the other parties (or why you could not give notice) about your request and the hearing (see form FL-303).
- If needed, complete other forms required by your local court.
- Follow your court's local procedures for reserving the day for the hearing, submitting your paperwork, and paying filing fees.

10 General information about "service"

"Service" is the act of giving your legal papers to all persons named as parties in the case so that they know what orders you are asking for, whether temporary emergency orders were made before the hearing, the date, time, and location of the hearing, and how to respond to your request.

If the other parties are NOT properly served, the judge cannot make the orders you requested on the date of the hearing and law enforcement cannot help enforce your orders.

11 Serving the Request for Order

You must make sure that the other parties are "served" with a copy of the *Request for Order* and all the other filed forms, attachments, and temporary orders. A blank FL-320, *Responsive Declaration to Request for Order* must also be served. In addition, if you completed and filed a form FL-150, *Income and Expense Declaration* or a form FL-155, *Financial Statement (Simplified),* you must include a blank copy of form FL-150, *Income and Expense Declaration* for the other party to complete.

You may also need to complete and have served a form FL-334, *Address Verification.* (Read the notice following item 14e, on page 4 for more information.)

12 Time for Service

Generally, the other parties must be served with the *Request for Order* and other forms at least 16 court days before the hearing.

If service is by mail, parties must be served at least 16 court days plus 5 calendar days before the hearing if they are served within the state of California. Other timelines apply if the other parties need to be served by mail outside of California.

13 Types of "Service" and "Servers"

Sometimes, the other parties must be served your *Request for Order* by "personal service." Sometimes service can be completed by mailing the papers. You cannot serve the papers. Have someone else (who is at least 18 years old) do it. The "server" can be a friend, a relative who is not involved in your case, a sheriff, or a professional process server.

14 "Personal Service"

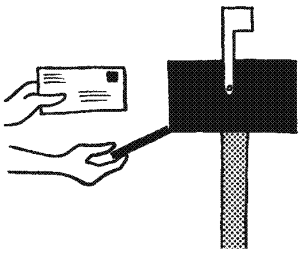
means that your "server" walks up to each person to be served, makes sure he or she is the right person, and then hand-delivers a copy of all the papers (and the blank forms) to him or her.

15 When to use personal service

Personal service is the preferred method to ensure a party receives notice of the hearing. Personal service of the *Request for Order* may always be used, but is *required* if:

- The court orders personal service;
- The court granted temporary emergency orders; or
- The respondent has NOT yet been served with a *Summons* and *Petition*. (Note: In this situation, the respondent must be served with a *Summons*, *Petition*, and *Request for Order* before the court can make orders at the hearing.)

16 "Service by mail"



means that your "server" places copies of all the documents (and blank forms) in a sealed envelope and mails them to the address of each person being served. The server must be 18 years ofage or over and must live or be employed in the county where the mailing took place.

17 When can the other party be served by mail?

☑ **No judgment or final orders entered?**

If there is no judgment or final order in your case on the issues raised in the *Request for Order*, you may have it served by mail if:

- The documents being served do not include temporary emergency orders;
- The court did not order personal service;
- Respondent was previously served with a *Summons* and *Petition* Or Respondent previously filed any of these documents:

  ---*Response* to a *Petition*;
  ---*Appearance, Stipulations, and Waivers;*
  ---Written notice of appearance;
  ---Request to strike or transfer the case.

☑ **Judgment or final orders entered?**

Child custody, visitation (parenting time), child support? If you want to change a judgment or final order on the issue of child custody, visitation (parenting time), or child support, you may have the *Request for Order* served by mail if:

- The documents being served do not include temporary restraining orders;
- The court did not order personal service; and
- You have verified the other party's current residence or office address. (You may use *Address Verification* (form FL-334).)

Property or financial issues? If you want to change a judgment or final order on any other issue, including spousal or domestic partner support, the *Request for Order* may need to be personally served.

For questions contact your family facilitator or self-help center *http://www.courts.ca.gov/1083.htm/* .

18 Server must complete a *Proof of Service*

Personal Service. After the server gives the forms to the other party in person, he or she should complete a form FL-330, *Proof of Personal Service*. Form FL-330-INFO, *Information Sheet for Proof of Personal Service* has instructions to help the server complete the form.

Service by mail. After the server mails the forms, he or she should complete form FL-335, *Proof of Service by Mail*. Form FL-335-INFO, *Information Sheet for Proof of Service by Mail* has instructions to help the server complete the form.

19 File the *Proof of Service* before your hearing date

The *Proof of Service* shows the judge that the person received a copy of the *Request for Order* and any temporary emergency orders. Make three copies of the completed *Proof of Service*. Take the original and copies to the court clerk (or e-file them) as soon as possible **before your hearing.** If you file in person, the clerk will keep the original and give you back the copies stamped "Filed." Bring a copy stamped "Filed" to your hearing.

20 Still have questions or need help?

- Contact the family law facilitator or self-help center for information, local rules and court forms, and referrals to local legal services providers. Go to *http://www.courts.ca.gov/selfhelp-courtresources.htm*.
- Find an attorney through your local bar association, the State Bar of California at *http://calbar.ca.gov*, or the Lawyer Referral Service at 1-866-442-2529.
- For free and low-cost legal help (if you qualify), go to http://*www.lawhelpca.org*.

21 Get ready for your hearing

- Take at least two copies of your documents and filed forms to the hearing.
- Find more information about preparing for your hearing at *http://www.courts.ca.gov/1094.htm.*
- To require the other party to testify at the hearing, you may need to serve a notice to appear or subpoena. Go to *http://www.courts.ca.gov/____*. (*Note: URL under construction*)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
DECLARATION REGARDING NOTICE AND DELIVERY OF REQUEST FOR TEMPORARY EMERGENCY (EX PARTE) ORDERS	CASE NUMBER:

NOTICE: A party requesting temporary emergency (ex parte) orders must file with the court a declaration showing compliance with rules about notice to the other party. Local court procedures for this type of hearing may vary. Check your court's local rules about temporary emergency (ex parte) hearings at *courts.ca.gov/3027.htm*.

1. I, *(name):* am the ☐ attorney for ☐ petitioner ☐ respondent ☐ other parent/party
   ☐ other *(specify):* in this case.

2. **NOTICE** (*Complete either a, b, or c)*
   a. ☐ **I gave notice of the request for temporary emergency orders** *(complete items (1), (2), and (3) below):*
      (1) I told the following person the date, time, and place of the emergency hearing and the specific court orders I seek:
         (a) ☐ Petitioner ☐ Petitioner's Attorney
         (b) ☐ Respondent ☐ Respondent's Attorney
         (c) ☐ Other Parent/Party ☐ Other Parent's/Party's Attorney
         (d) ☐ Other *(specify):*
      (2) I gave notice by this method:
         (a) ☐ personally on *(date):* at *(location):* , California; at ☐ a.m. ☐ p.m.
         (b) ☐ telephone on *(date):* telephone no.: at ☐ a.m. ☐ p.m.
         (c) ☐ voicemail on *(date):* voicemail no.: at ☐ a.m. ☐ p.m.
         (d) ☐ fax on *(date):* fax no.: at ☐ a.m. ☐ p.m.
      (3) The time I gave notice:
         (a) ☐ By 10 a.m. the court day before this emergency hearing.
         (b) ☐ After 10 a.m. the court day before this emergency hearing because of the following exceptional circumstances *(specify):*

   b. ☐ **I did not give notice to the opposing party** about this request for temporary emergency orders. I request that the court waive notice to the other party due to the following exceptional circumstances *(check all that apply):*
      (1) ☐ To help prevent an immediate danger or irreparable harm to myself (or my client) or to the children in the case.
      (2) ☐ There is an immediate risk that the children in the case will be removed from the state of California.
      (3) ☐ To help prevent immediate loss or damage to property subject to disposition in the case.
      (4) ☐ Other exceptional circumstances *(specify):*

      (5) Facts in support of the request to waive notice *(specify):*

Form Approved for Optional Use
Judicial Council of California
FL-303 [New January 1, 2016]

Family Code, §§ 2045, 3062–3064, 4620, 6200, 6300, 7710
Cal. Rules of Court, rules 5.151–5.169
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

c. ☐ **I did not give notice to the opposing party** about this request for temporary emergency orders. I used my best efforts to tell the opposing party when and where this hearing would take place but was unable to do so. The efforts I made to inform the other person were *(specify):*

3. ☐ **DELIVERY**

a. The *Request for Order* (form FL-300) for temporary emergency orders, *Temporary Emergency Orders* (form FL-305) and related documents were delivered to:

(a) ☐ Petitioner ☐ Petitioner's Attorney
(b) ☐ Respondent ☐ Respondent's Attorney
(c) ☐ Other Parent/Party ☐ Other Parent's/Party's Attorney
(d) ☐ Other *(specify):*

b. Method of delivery:

(a) ☐ personal delivery on *(date):* at *(location):* , California; at ☐ a.m. ☐ p.m.
(b) ☐ fax on *(date):* fax no.: at ☐ a.m. ☐ p.m.
(c) ☐ Overnight mail or other overnight carrier

c. ☐ **Documents were not delivered to the opposing party** due to the following exceptional circumstances *(specify facts in support of the request to waive delivery of the documents)*.

4. I ☐ do ☐ do not believe the opposing party will oppose this request for temporary emergency orders.

5. ☐ **OTHER COURT CASES**
The parties in this case are involved in another family, probate, juvenile, or criminal court case *(specify the type of case and the case number for each):*

6. **PREVIOUS REQUEST FOR SAME ORDERS**

a. ☐ I have not requested the same order from the court in the past.

b. ☐ I have previously requested the same orders from the court, and the court denied my request in whole or in part as follows *(specify):*

7. ☐ Additional space to explain your answers to any of the above items *(specify):*

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)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
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:	
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
TEMPORARY EMERGENCY ORDERS ☐ Child Custody/Parenting Time ☐ Property Restraint ☐ Property Control ☐ Other *(specify):*	CASE NUMBER:

1 **TO *(name):***

A court hearing will be held on the *Request for Order* (form FL-300) served with these *Temporary Emergency Orders*, as follows:

a. Date: Time: ☐ Dept.: ☐ Room:

b. Address of court ☐ same as noted above ☐ other *(specify):*

2. The court makes the following temporary emergency orders. These orders automatically expire on the hearing date in item 1.

a. ☐ **CHILD CUSTODY**

(1) Child's name and age

	Temporary physical custody, care, and control to: Petitioner	Respondent	Other Party/Parent
	☐	☐	☐
	☐	☐	☐
	☐	☐	☐
	☐	☐	☐
	☐	☐	☐

(2) The party or parties with temporary physical custody, care and control of minor children **must not remove the minor children from the state of California unless the court allows it after a noticed hearing.**

(3) ☐ **Visitation (Parenting time)** The temporary orders for physical custody, care, and control of the minor children are subject to the other party's or parties' rights of visitation (parenting time) as follows *(specify):*

☐ See Attachment or form *(specify):*

(4) ☐ **Travel restrictions**

☐ Petitioner ☐ Respondent ☐ Other Parent/Party must not remove the minor children of the parties

(a) ☐ from the state of California.

(b) ☐ from the following counties *(specify):*

(c) ☐ other *(specify):*

(5) ☐ **Child abduction prevention orders** are attached (see form FL-341(B)).

THIS IS A COURT ORDER.

Form Adopted for Mandatory Use
Judicial Council of California
FL-305 [Rev. January 1, 2016]

TEMPORARY EMERGENCY ORDERS

Family Code, §§ 2045, 3062–3064, 6226, 6320–6383
Government Code, § 26826
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

(6) (a) **Jurisdiction:** This court has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act (part 3 of the California Family code, commencing with section 3400).

(b) **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.

(c) **Country of habitual residence:** The country of habitual residence of the child or children is
☐ The United States of America ☐ Other *(specify):*

(d) **If you violate this order, you may be subject to civil or criminal penalties, or both.**

b. ☐ **PROPERTY RESTRAINT**

(1) ☐ Petitioner ☐ Respondent ☐ Other Parent/Party ☐ Claimant is restrained from transferring, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.

☐ The other party is to be notified at least five business days before any proposed extraordinary expenditures, and an accounting of such is to be made to the court. However, the parties may use community property, quasi-community property, or separate property to pay for the help of an attorney or to pay court costs.

(2) ☐ The parties are restrained and enjoined from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties or their minor child or children.

(3) ☐ None of the parties may incur any debts or liabilities for which the other may be held responsible, other than in the ordinary course of business or for the necessities of life.

c. ☐ **PROPERTY CONTROL**

(1) ☐ Petitioner ☐ Respondent ☐ Other Parent/Party is given exclusive temporary use, possession, and control of the following property that the parties own or are buying *(specify):*

(2) ☐ Petitioner ☐ Respondent ☐ Other Parent/Party is ordered to make the following payments on the liens and encumbrances coming due while the order is in effect:

Debt	Amount of payment	Pay to

d. ☐ All other existing orders, not in conflict with these temporary emergency orders, remain in full force and effect.

e. ☐ **OTHER ORDERS** *(specify):*

☐ Additional orders are listed in Attachment 2e.

Date:

JUDGE OF THE SUPERIOR COURT

THIS IS A COURT ORDER.

FL-306

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS: ATTORNEY FOR (*Name*): **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	**DRAFT** **NOT APPROVED BY THE JUDICIAL COUNCIL**
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
APPLICATION AND ORDER FOR REISSUANCE ☐ REQUEST FOR ORDER ☐ TEMPORARY EMERGENCY ORDERS ☐ Other *(specify):*	CASE NUMBER:

1. Name of Applicant:
2. I request that the court reset the hearing date and *(check all that apply):*
   a. ☐ Reissue the *Request for Order* (form FL-300).
   b. ☐ Reissue the order shortening time for service or for the hearing.
   c. ☐ Reissue any temporary emergency orders granted on *Temporary Emergency Orders* (form FL-305).
3. a. The orders were originally issued on *(date):*
   b. The last scheduled hearing date was *(date):*
   c. Number of times the *Request for Order* (form FL-300) and any temporary orders have been reissued *(specify)*:
4. I request a reissuance because:
   a. ☐ The papers could not be served as required before the hearing date.
   b. ☐ The hearing was continued for the parties to meet with a child custody mediator or child custody recommending counselor.
   c. ☐ Other *(specify):*

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

COURT ORDER

5. IT IS ORDERED that the ☐ Request for Order ☐ Temporary Emergency Orders ☐ Order shortening time for service ☐ Other *(specify):*
   and any orders listed are reissued unless this order changes them. The hearing is reset as follows:

Date:	Time:	Dept.:	Room:
at the street address of the court shown above.			

6. a. ☐ Time for ☐ service ☐ hearing is shortened. Service must be on or before *(date):*
   b. Any responsive declaration must be served on or before *(date):*
7. ☐ Other *(specify):*
8. A filed copy of this order must be attached as the cover page of the *Request for Order* (form FL-300) and orders and served.
9. All orders will end on the date and time shown for the hearing in item 5, unless the court extends the time.

Date:

JUDICIAL OFFICER

Form Adopted for Mandatory Use
Judicial Council of California
FL-306 [Rev. January 1, 2016]

APPLICATION AND ORDER FOR REISSUANCE
(Family Law—Governmental—Uniform Parentage—Custody and Support)

www.courts.ca.gov

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

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. ☐ **Custody.** Custody of the minor children of the parties is requested as follows:

Child's Name	Date of Birth	Legal Custody to *(person who decides about health, education, etc.)*	Physical Custody to *(person with whom the child lives)*

2. ☐ **Visitation (parenting time).**

Note: Unless specifically ordered, a child's holiday schedule order has priority over the regular parenting timeshare.

a. ☐ Reasonable right of visitation (parenting time) 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 location below):*

d. ☐ No visitation (parenting time)

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** visitation (parenting time) 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./ ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ 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./ ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

(3) ☐ **Weekdays starting** *(date):*

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

(4) ☐ Other *(Specify days and times as well as any additional restrictions.):*

☐ See Attachment 2e(4) (You may use *Attachment* (form MC-025) for this purpose).

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

3. ☐ **Supervised visitation (parenting time).**
   a. **If item 3 is checked, you must attach a declaration that shows why unsupervised visitation (parenting time) would be bad for your children. The judge is required to consider supervised visitation if one parent or party is alleging domestic violence and is protected by a restraining order.**
   b. The person you request to supervise the visits must meet the qualifications listed in *Declaration of Supervised Visitation Provider* (form FL-324).
   c. I request that *(name):* have supervised visits with the minor children according to the schedule set out on page 1.
   d. I request that the visits be supervised by *(name):*
      who is a ☐ professional ☐ nonprofessional supervisor.
      The supervisor's phone number is *(specify):*
   e. I request that any costs of supervision be paid as follows: petitioner: percent; respondent: percent; other parent/party: percent.

4. ☐ **Transportation for visitation (parenting time) and place of exchange.**
   a. The children will be driven only by a licensed and insured driver. The car or truck must have legal child restraint devices.
   b. ☐ Transportation **to** the visits will be provided by *(name):*
   c. ☐ Transportation **from** the visits will be provided by *(name):*
   d. ☐ Drop-off of the children will be at *(address):*
   e. ☐ Pick-up of the children 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 his or her home (or exchange location) while the children go between the car and the home (or exchange location).
   g. ☐ Other *(specify):*

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 on the attached ☐ form FL-341(C)
   ☐ Other *(specify):*

8. ☐ **Additional custody provisions.** I request the additional orders regarding custody set out on the attached
   ☐ form FL-341(D) ☐ Other *(specify):*

9. ☐ **Joint legal custody provisions.** I request joint legal custody and want the additional orders set out on the attached
   ☐ form FL-341(E) ☐ Other *(specify):*

10. ☐ **Other.** I request the following additional orders *(specify):*

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

REQUEST FOR CHILD ABDUCTION PREVENTION ORDERS

—This is not a court order—

TO ☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**
☐ Other *(specify):*

1. Your name:
2. **I request orders to prevent child abduction by (*specify):*** ☐ **Petitioner** ☐ **Respondent** ☐ **Other Parent/Party**
3. **I think that he or she might take the children without my permission to *(check all that apply):***
   a. ☐ another county in California *(specify the county):*
   b. ☐ another state *(specify the state):*
   c. ☐ a foreign country *(specify the foreign country):*
      (1) ☐ He or she is a citizen of that country.
      (2) ☐ He or she has family or emotional ties to that country *(explain)*:
4. **I think that he or she might take the children without my permission because he or she *(check all that apply):***
   a. ☐ has violated—or threatened to violate—a custody or visitation (parenting time) order in the past.
   Explain:
   b. ☐ does not have strong ties to California.
   Explain any work, financial, social, or family situation that makes it easy for the party to leave California.
   c. ☐ has recently done things that make it easy for him or her to take the children away without permission. He or she has *(check all that apply):*
      ☐ quit his or her job. ☐ sold his or her home.
      ☐ closed a bank account. ☐ ended a lease.
      ☐ sold or gotten rid of assets. ☐ hidden or destroyed documents.
      ☐ applied for a passport, birth certificate, or school or medical records.
      ☐ Other *(specify):*
   d. ☐ has a history of *(check all that apply)*
      ☐ domestic violence.
      ☐ child abuse.
      ☐ not cooperating with me in parenting.
      ☐ taking the children without my permission. *Explain:*
   e. ☐ has a criminal record. *Explain:*

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

I REQUEST THE FOLLOWING ORDERS AGAINST *(specify)*: ☐ **Petitioner** ☐ **Respondent** ☐ **Other Parent/Party**

5. ☐ **Supervised Visitation (Parenting Time)**
I ask the court to order supervised visitation (parenting time). I understand that the person I request to supervise the visits must meet the qualifications listed in *Declaration of Supervised Visitation Provider* (form FL-324).
The specific terms are attached *(check one):* ☐ form FL-311 ☐ form FL-341(A) ☐ as follows:

6. ☐ **Post a Bond**
I ask the court to order the posting of a bond for $ _____. If the party takes the children without my permission, I can use this money to bring the children back.

7. ☐ **Do Not Move Without My Permission or Court Order**
I ask for a court order preventing the party from moving with the children, without my written permission or a court order.

8. ☐ **No Travel Without My Permission or Court Order**
I ask for a court order preventing the party from traveling with the children outside *(check all that apply):*
☐ this county ☐ the United States
☐ California ☐ Other *(specify):*
without my written permission or a court order.

9. ☐ **Notify Other State of Travel Restrictions**
I ask the court to order the party to register this order in the state of _____ before the children can travel to that state for visitation (parenting time).

10. ☐ **Turn In and Do Not Apply for Passports or Other Vital Documents**
I ask for a court order *(check all that apply):*
☐ requiring the party to turn in all the children's passports and other documents (such as visas, birth certificates, and other documents used for travel) that are in his or her possession and control.
☐ preventing the party from applying for passports or other documents (such as visas or birth certificates) that can be used to travel with the children.

11. ☐ **Provide Itinerary and Other Travel Documents**
If the party is allowed to travel with the children, I ask the court to order the party to give me before leaving *(specify):*
☐ the children's travel itinerary.
☐ copies of round-trip airline tickets.
☐ addresses and telephone numbers where the children can be reached.
☐ an open airline ticket for me in case the children are not returned.
☐ other *(specify):*

12. ☐ **Notify Foreign Embassy or Consulate of Passport Restrictions**
I ask the court to order the party to notify the embassy or consulate of _____ of this order and to provide the court with proof of that notification within _____ calendar days.

13. ☐ **Foreign Custody and Visitation Order**
I ask the court to order the party to get a custody and visitation (parenting time) order in a foreign country equal to the most recent United States order before the children can travel to that country for visits. I understand that foreign orders may be changed or enforced depending on the laws of that country.

14. ☐ **Other** *(specify):*

I declare under penalty of perjury under the laws of the State of California that the information on this form is true and correct.

Date:

▶ _____
(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(optional):* 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:	
PETITIONER: **RESPONDENT:** **OTHER PARENT/PARTY:**	
RESPONSIVE DECLARATION TO REQUEST FOR ORDER	CASE NUMBER:
HEARING DATE: TIME: DEPARTMENT OR ROOM:	

(Form FL-320-INFO provides information about completing this form.)

1. ☐ CHILD CUSTODY
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

2. ☐ CHILD VISITATION (PARENTING TIME)
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

3. ☐ CHILD SUPPORT
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) or, if eligible, a current *Financial Statement (Simplified)* (form FL-155) in support of this declaration.
   b. ☐ I consent to the order requested.
   c. ☐ I consent to guideline support.
   d. ☐ I do not consent to the order requested ☐ but I consent to the following order:
      (1) ☐ Guideline
      (2) ☐ Other *(specify):*

4. ☐ SPOUSAL OR PARTNER SUPPORT
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) in support of this declaration.
   b. ☐ I consent to the order requested.
   c. ☐ I do not consent to the order requested ☐ but I consent to the following order:

5. ☐ ATTORNEY'S FEES AND COSTS
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) in support of this declaration.
   b. I have completed and filed with this *Responsive Declaration* (form FL-320) a *Supporting Declaration for Attorney's Fees and Costs Attachment* (form FL-158) or a declaration that addresses the factors covered in that form.

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

5. ☐ ATTORNEY'S FEES AND COSTS (continued)
   c. ☐ I consent to the order requested.
   d. ☐ I do not consent to the order requested ☐ but I consent to the following order:

6. ☐ PROPERTY RESTRAINT
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

7. ☐ PROPERTY CONTROL
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

8. ☐ CHANGE OR END DOMESTIC VIOLENCE RESTRAINING ORDERS
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

9. ☐ OTHER RELIEF
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

10. ☐ SUPPORTING INFORMATION
   ☐ Contained in the attached declaration. (You may use *Attached Declaration* (form MC-031) for this purpose).

NOTE: To respond to domestic violence restraining orders requested in *Request for Domestic Violence Restraining Order* (form DV-100), you must use the *Response to Request for Domestic Violence Restraining Order* (form DV-120).

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 DECLARANT)

FL-320-INFO Information Sheet: Responsive Declaration to Request for Order

1 **If you received a *Request for Order* (form FL-300),** carefully read the papers you received to make sure you understand what orders are being requested. Note the date, time, and location of the court hearing.

2 **Responding to the *Request for Order* (form FL-300)** You must respond if you want the court to know what your position is on the orders requested at the court hearing. If you do not respond, the court will make orders without your input.

3 **USE *Responsive Declaration to Request for Order* (form FL-320)** to let the court and the other party know what your position is on each of the requests made on the *Request for Order* (form FL-300) and to ask for court orders related to each request.

4 **DO NOT USE *Responsive Declaration to Request for Order* (form FL-320)** to:

a. Ask for court orders that are not related to the requests made on the *Request for Order* (form FL-300). File and serve your own form FL-300 to ask for orders on other issues.

b. Respond to domestic violence restraining orders requested in *Request for Domestic Violence Restraining Order* (form DV-100). You must use the *Response to Request for Domestic Restraining Order* (form DV-120).

5 **Forms checklist**

a. Form FL-320, *Responsive Declaration to Request for Order* is the basic form you need to file with the court. Depending on the requests made in the *Request for Order* (form FL-300), you may need these additional forms.

b. For child custody or visitation (parenting time) orders, you may need to complete some of these forms:
- ☐ FL-105, *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act*
- ☐ FL-311, *Child Custody and Visitation (Parenting Time) Application Attachment*
- ☐ FL-312, *Request for Child Abduction Prevention Orders*
- ☐ FL-341(C), *Children's Holiday Schedule Attachment*
- ☐ FL-341(D), *Additional Provisions—Physical Custody Attachment*
- ☐ FL-341(E), *Joint Legal Custody Attachment*

c. For child support, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration* or form FL-155, *Financial Statement (Simplified)* (To know which form is right for you, read form DV-570, *Which Financial Form—FL-155 or FL-150?*)

d. For spousal or partner support or orders about your finances, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration*
- ☐ FL-157, *Spousal or Partner Support Declaration Attachment* (if the request is to change a support judgment)

e. For attorney's fees and costs, you also need:
- ☐ A current form FL-150, *Income and Expense Declaration*
- ☐ FL-319, *Request for Attorney's Fees and Costs Attachment* (or provide the information in a declaration)
- ☐ FL-158, *Supporting Declaration for Attorney's Fees and Costs* (or provide the information in a declaration)

f. If you plan on having witnesses testify at the hearing, you also need:
- ☐ FL-321, *Witness List*

g. If you want to request a separate trial (bifurcation) on an issue, you also need:
- ☐ FL-315, *Request or Response to Request for Separate Trial*

FL-320-INFO Information Sheet: Responsive Declaration to Request for Order

To respond to a *Request for Order*, you must:

6 Complete caption of the form

Complete the top portion including your name, address, and telephone number, the court address, the name of all the parties in the case, and the case number. Also, write the same hearing date, time, and department that appears on the *Request for Order* (form FL-300).

7 Specify a response to orders requested

Item 1: Check this box if it is checked on form FL-300 and indicate your response.

Item 2: Check this box if it is checked on form FL-300 and indicate your response.

Item 3: Check this box if it is checked on FL-300 and indicate your response. You must also complete an *Income and Expense Declaration* (form FL-150).

Item 4: Check this box if it is checked on form FL-300 and indicate your response. You must also complete and file form FL-150.

Item 5: Check this box if it is checked on form FL_300 and indicate your response. You must also complete and file forms FL-150 and FL-158.

Item 6–9: Check these boxes if they are checked on form FL-300 and indicate your response.

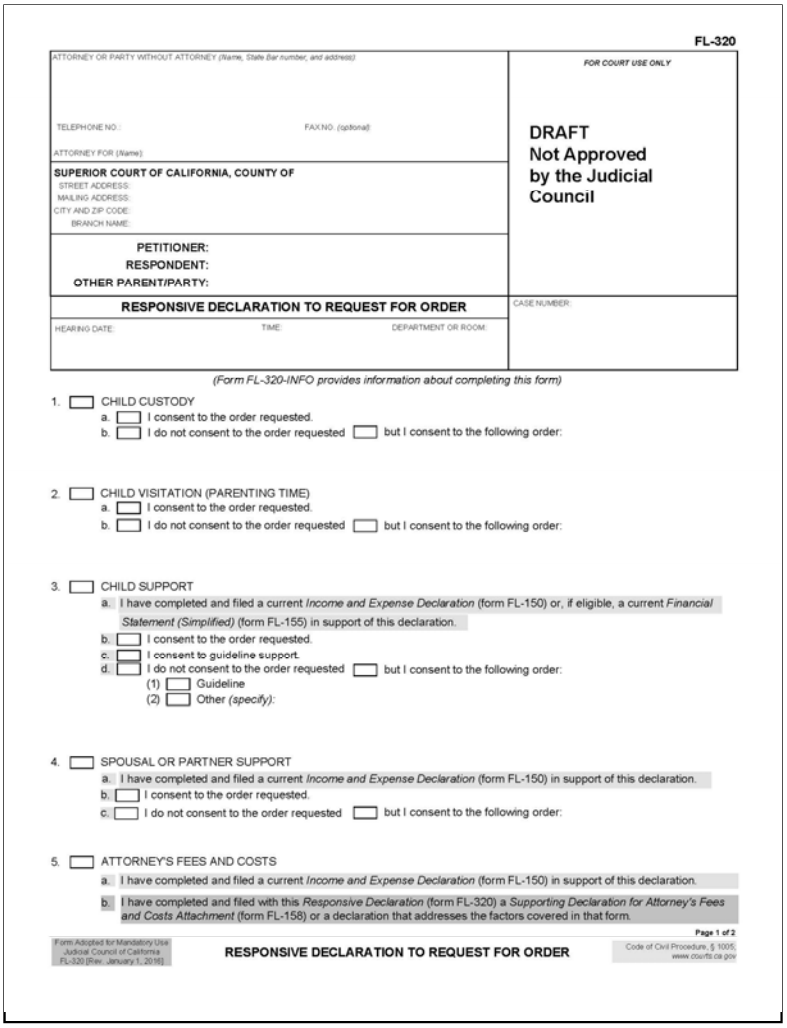
Item 10: Check this box to provide information that supports your responses. If you need more space, check the box to indicate that your supporting declaration is included in another document attached to form FL-320.

Bottom of page 2: Print your name, sign the form, and write the date you signed this form.

7 Next steps: file or serve your paperwork

File your original paperwork with the court clerk. The clerk will keep the original and give you back the copies with a court stamp on them.

Alternatively, you may first serve an unstamped copy of form FL-320 (and other forms you needed to complete) before you take the originals to the court clerk to file. Just make sure you do not serve the originals. See items 9 to 12 for information about "service."



FL-320

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): | FOR COURT USE ONLY

TELEPHONE NO.: FAX NO. (optional):

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:
RESPONDENT:
OTHER PARENT/PARTY:

RESPONSIVE DECLARATION TO REQUEST FOR ORDER | CASE NUMBER:

HEARING DATE: TIME: DEPARTMENT OR ROOM:

(Form FL-320-INFO provides information about completing this form)

1. ☐ CHILD CUSTODY
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

2. ☐ CHILD VISITATION (PARENTING TIME)
   a. ☐ I consent to the order requested.
   b. ☐ I do not consent to the order requested ☐ but I consent to the following order:

3. ☐ CHILD SUPPORT
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) or, if eligible, a current *Financial Statement (Simplified)* (form FL-155) in support of this declaration.
   b. ☐ I consent to the order requested.
   c. ☐ I consent to guideline support.
   d. ☐ I do not consent to the order requested ☐ but I consent to the following order:
      (1) ☐ Guideline
      (2) ☐ Other *(specify)*:

4. ☐ SPOUSAL OR PARTNER SUPPORT
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) in support of this declaration.
   b. ☐ I consent to the order requested.
   c. ☐ I do not consent to the order requested ☐ but I consent to the following order:

5. ☐ ATTORNEY'S FEES AND COSTS
   a. I have completed and filed a current *Income and Expense Declaration* (form FL-150) in support of this declaration.
   b. I have completed and filed with this *Responsive Declaration* (form FL-320) a *Supporting Declaration for Attorney's Fees and Costs Attachment* (form FL-158) or a declaration that addresses the factors covered in that form.

Page 1 of 2

Form Adopted for Mandatory Use
Judicial Council of California
FL-320 [Rev. January 1, 2016]

RESPONSIVE DECLARATION TO REQUEST FOR ORDER

Code of Civil Procedure, § 1005;
www.courts.ca.gov

8 Pay filing fees

Generally, you do not have to pay a fee to file the *Responsive Declaration*. However, if you have never filed any papers in the case, you may have to pay a "first appearance fee," which, in general, everyone has to pay when filing court papers in a case for the first time.

If you do have to pay a fee and you cannot afford it, you can ask the court to waive the fees by completing and filing form FW-001, *Request to Waive Court Fees* and form FW-003, *Order on Court Fee Waiver*.

9 Serve your papers on the other party

"Service" is the act of giving your legal papers to all persons named as parties in the case so that they know what orders you want the court to make. You cannot serve the papers. Have someone else (who is at least 18 years old) do it. The "server" can be a friend, a relative

FL-320-INFO Information Sheet: Responsive Declaration to Request for Order

9 Serve your papers (continued)

who is not involved in your case, a county sheriff, or a professional process server.

Your papers may be served by "personal service" or by mail. "Personal service" means that your "server" walks up to each person to be served, makes sure he or she is the right person, and then hand-delivers a copy of all the papers to him or her.

"Service by mail" means that your "server" places copies of all the documents in a sealed envelope and mails them to the address of each person being served. The server must be 18 years of age or over and must live in or be employed in the county where the mailing took place.

10 Time requirements for service

Personal service on the other party must be completed at least *9 days* before the court hearing. Service done by mail must be completed at least *14 days* before the hearing.

11 Server must complete a *Proof of Service*

After personal service, the server should complete a form FL-330, *Proof of Personal Service*. Form FL-330-INFO, *Information Sheet for Proof of Personal Service* has instructions to help the person complete the form.

After service by mail, the server should complete form FL-335, *Proof of Service by Mail*. Form FL-335-INFO, *Information Sheet for Proof of Service by Mail* has instructions to help the person complete the form.

12 File the *Proof of Service* before your hearing date

The *Proof of Service* shows the judge that the person received a copy of your *Responsive Declaration to Request for Order*. Make three copies of the completed *Proof of Service*. Take the original and copies to the court clerk as soon as possible **before your hearing.** The clerk will keep the original and give you back the copies stamped "Filed." Bring a copy stamped "Filed" to your hearing. (If unstamped copies of your paperwork were served, you can file the completed *Proof of Service* when you file the original *Responsive Declaration*.)

13 Get ready for your hearing

Find more information about preparing for the hearing at *www.courts.ca.gov/1094.*

14 Still have questions or need help?

- Contact the family law facilitator or self-help center for information, local rules and court forms, and referrals to local legal services providers. Go to http://www.courts.ca.gov/1083.htm/.
- Find an attorney through your local bar association, the State Bar of California at *calbar.ca.gov*, or the Lawyer Referral Service at 1-866-442-2529.
- For free and low-cost legal help (if you qualify), go to *lawhelpcalifornia.org*.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(optional):* 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: **RESPONDENT:** **OTHER PARENT/PARTY:**	
ORDER TO PAY WAIVED COURT FEES AND COSTS (Superior Court)	CASE NUMBER:

1. This proceeding was heard as follows: ☐ Default or uncontested ☐ By declaration under Family Code section 2336
   ☐ Contested or Trial ☐ On the *Request for Order* filed *(date):* by *(party):*
   ☐ Other *(specify):*
   on *(date):* at *(time):* in Dept.: Room:
   a. by Judge *(name):* ☐ Temporary Judge
   b. ☐ Petitioner/Plaintiff present ☐ Attorney present *(name):*
   c. ☐ Respondent/Defendant present ☐ Attorney present *(name):*
   d. ☐ Other present ☐ Attorney present *(name):*

2. **THE COURT FINDS**
   a. The court made an order waiving court fees and costs for ☐ Petitioner ☐ Respondent ☐ Other Parent/Party in this matter on *(date):*
   b. ☐ The court made an order for support payable by ☐ Petitioner ☐ Respondent ☐ Other Parent/Party to ☐ Petitioner ☐ Respondent ☐ Other Parent/Party on *(date):*
   c. After considering information in the court file and other evidence, ☐ Petitioner ☐ Respondent ☐ Other Parent/Party has the ability to pay all or part of the waived court fees and costs.

3. **THE COURT ORDERS**
   a. ☐ Petitioner ☐ Respondent ☐ Other Parent/Party must pay ☐ his or her own ☐ Petitioner's ☐ Respondent's ☐ Other Parent's/Party's previously waived court fees and costs totalling *(specify):*
   b. Payment be made:
      (1) $ per month until paid in full, beginning *(date):*
      (2) ☐ Within 10 days from the date of service of this *Order to Pay Waived Court Fees and Costs (see attached Proof of Service).*
      (3) After all current support and accrued support arrears have been paid (if ordered to pay the other party's waived court fees). (Gov. Code, § 68637(d).)
      (4) ☐ Other *(specify):*
   c. Payment be sent to *(specify):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-336 [Rev. January 1, 2016]

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

☐ **NOTICE TO THE PERSON ORDERED TO PAY WAIVED COURT FEES AND COSTS**

☐ Petitioner ☐ Respondent ☐ Other Parent/Party *(name):*

1. You are receiving this notice because:
   a. The court ordered you to pay the initial fee waiver recipient's previously waived court fees and costs described on page 1; and
   b. You were NOT present in court at the time the order was made or the judgment was entered.

2. You have the right to request a hearing to ask that the court set aside the order:

YOU HAVE AN OPPORTUNITY FOR A HEARING TO REQUEST THAT THE COURT SET ASIDE THE ORDER TO PAY WAIVED COURT FEES AND COSTS

a. To request a hearing, complete and file with the court clerk:
   (1) *Request for Order* (form FL-300); and
   (2) *Application to Set Aside Order to Pay Waived Court Fees—Attachment* (form FL-337).

b. The forms specified in item a must be completed and filed with the court clerk **within 30 days** from the date of service of this *Order to Pay Waived Court Fees and Costs* (see attached Proof of Service).

c. In addition, the party requesting the hearing must serve the other party with:
   (1) Copies of the documents in item a filed with the court; and
   (2) A **blank** *Responsive Declaration to Request for Order* (form FL-320).

   You can obtain these forms from the clerk of the court, your county law library, or online at *www.courts.ca.gov/forms*.

3. If your request for hearing to set aside the order is filed with the court clerk within 30 days from the date you were served with this *Order to Pay Waived Court Fees and Costs*, the order will not be enforced until after the hearing.

WARNING: The court has ordered that you pay court fees and costs. If you do not pay the court fees and costs, the court can institute collection proceedings and charge you interest and a collection fee.

Date:

JUDICIAL OFFICER

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

APPLICATION TO SET ASIDE ORDER TO PAY WAIVED COURT FEES—ATTACHMENT
Attachment to *Request for Order* (form FL-300)

1. I am the ☐ petitioner ☐ respondent ☐ other parent/party. I request that the court set aside the *Order to Pay Waived Court Fees and Costs* (form FL-336).

2. In making this request, I ask the court to consider the information in the court's case file, the information attached to this application, the information specified in the supporting declaration, and the evidence presented at the hearing.

NOTICE

To request a hearing, the party must complete and file with the court clerk the following: (1) *Request for Order* (form FL-300) and (2) *Application to Set Aside Order to Pay Waived Court Fees—Attachment (Family Law)* (form FL-337). These forms must be completed and filed with the court clerk within 30 days from the date of personal service of the *Order to Pay Waived Court Fees and Costs* (form FL-336) *OR* within 35 days from the date the O*rder to Pay Waived Court Fees and Costs* (form FL-336) was served by mail.

In addition, the party requesting the hearing must serve the other party with (1) copies of the above-listed documents filed with the court and (2) a **blank** *Responsive Declaration to Request for Order* (form FL-320). You may obtain Judicial Council forms from the clerk of the court, your county law library, or *www.courts.ca.gov/forms.*

If the request for hearing is filed with the court clerk within this time, the *Order to Pay Waived Court Fees and Costs* (form FL-336) will not be enforced until after the hearing.

3. The reasons in support of this request are *(specify below):*
   ☐ Complete supporting declaration attached. You may use *Attached Declaration* (form MC-031).

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)

Form Adopted for Mandatory Use
Judicial Council of California
FL-337 [Rev. January 1, 2016]

Government Code, § 68637
www.courts.ca.gov

FL-341

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

CHILD CUSTODY AND VISITATION (PARENTING TIME) ORDER ATTACHMENT

TO ☐ **Findings and Order After Hearing (form FL-340)** ☐ **Judgment (form FL-180)**
☐ **Stipulation and Order fo 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 (Family Code sections 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. ☐ **Custody**. Custody of the minor children of the parties is awarded as follows:

Child's Name	Birth Date	Legal custody to: *(person who makes decisions about health, education, etc.)*	Physical custody to: *(person with whom child lives)*

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. (*Child Abduction Prevention Orders Attachment* (form FL-341(B)) must be attached and must be obeyed.)

7. ☐ **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 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./ ☐ start of school ☐ after school
      to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ 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.

THIS IS A COURT ORDER.

Form Approved for Optional Use
Judicial Council of California
FL-341 [Rev. January 1, 2016]

CHILD CUSTODY AND VISITATION (PARENTING TIME) ORDER ATTACHMENT

Family Code, §§ 3020, 3022, 3025, 3040–3043, 3048, 3100, 6340, 7604
www.courts.ca.gov

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

7. e. (2) ☐ **Alternate weekends starting** *(date):*

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

(3) ☐ **Weekdays starting** *(date):*

from _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

to _____ *(day of week)* at _____ *(time)* ☐ a.m. ☐ p.m./ ☐ start of school ☐ after school

(4) ☐ **Other** *(specify days and times as well as any additional restrictions):*

☐ See Attachment 7e(4) (You may use *Attached Declaration* (form MC-031) for this purpose.)

8. ☐ **The court acknowledges** that criminal protective orders in case number *(specify):* in *(specify court):* relating to the parties in this case are in effect under Penal Code section 136.2, are current, and have priority of enforcement.

9. ☐ **Supervised visitation**. Until ☐ further order of the court ☐ other *(specify):* the ☐ petitioner ☐ respondent ☐ other *(name):* will have supervised visitation (parenting time) with the minor children according to the schedule.

set forth on page 1. **(You must attach *Supervised Visitation Order* (form FL-341(A).)**

10. ☐ **Transportation for visitation**

a. The children must be driven only by a licensed and insured driver. The car or truck must have legal child restraint devices.

b. ☐ Transportation **to** 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 his or her 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:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

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. ☐ **Other** *(specify):*

FL-341(B)

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

CHILD ABDUCTION PREVENTION ORDER ATTACHMENT

TO ☐ **Child Custody and Visitation Order Attachment** (form FL-341(A))
☐ **Custody Order—Juvenile—Final Judgment (form JV-200)**
☐ Other *(specify):*

1. **The court finds there is a risk that** *(specify name of party):* **will take the child without permission because that party** *(check all that apply):*
   a. ☐ has violated—or threatened to violate—a custody or visitation order in the past.
   b. ☐ does not have strong ties to California.
   c. ☐ has done things that make it easy for him or her to take the children away without any permission, such as *(check all that apply):*
      ☐ quit a job. ☐ sold his or her home.
      ☐ closed a bank account. ☐ ended a lease.
      ☐ sold or gotten rid of assets. ☐ hidden or destroyed documents.
      ☐ applied for a passport, birth certificate, or school or medical records.
      ☐ Other *(specify):*
   d. ☐ has a history of *(check all that apply):*
      ☐ domestic violence.
      ☐ child abuse.
      ☐ not cooperating with the other parent or party in parenting.
   e. ☐ has a criminal record.
   f. ☐ has family or emotional ties to another county, state, or foreign country.
   (NOTE: If item "f" is checked, at least one other factor must be checked, too.)

THE COURT ORDERS, to prevent the party in item 1 from taking the children without permission:

2. ☐ **Supervised visitation**. Terms of visitation are *(check one):*
   ☐ as specified on attached form FL-341(A) ☐ as follows:

3. ☐ T**he part**y in item 1 must post a bond for $. The terms of the bond are *(specify):*

4. ☐ **The party in item 1 must not move from the following locations with the children** without permission in writing from the other parent or party or a court order:
   ☐ Current residence ☐ Current school district *(specify):*
   ☐ This county ☐ Other *(specify):*

5. ☐ **The party in item 1 must not travel with the children** out of *(check all that apply):*
   ☐ this county. ☐ the United States.
   ☐ California. ☐ Other *(specify):*

6. ☐ **The party in item 1 must register this order** in the state of *(specify):* before the children can travel to that state for visits.

7. ☐ **The party in item 1 must not apply for a passport or any other vital document**, such as a visa or birth certificate, that can be used for travel.

8. ☐ **The party in item 1 must turn in all the children's passports and other vital documents**, such as a visa or birth certificates, in his or her possession or control, including the following documents *(specify):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-341(B) [Rev. January 1, 2016]

Family Code, § 3048; 42 U.S.C § 11601
www.courts.ca.gov

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

9. ☐ **The party in item 1 must give the other parent or party the following *before* traveling with the children:**
   - ☐ The children's travel itinerary
   - ☐ Copies of round-trip airline tickets
   - ☐ Addresses and telephone numbers where the children can be reached at all times
   - ☐ An open airline ticket for the other parent in case the children are not returned
   - ☐ Other *(specify):*

10. ☐ **The party in item 1 must notify the embassy or consulate** of *(specify country):* about this order and provide the court with proof of that notification within *specify number):* days

11. ☐ **The party in item 1 must get a custody and visitation order** equivalent to the most recent U.S. order before the children may travel to that country for visits. The court recognizes that foreign orders may be changed or enforced according to the laws of that country.

12. ☐ **Enforcing the order.** The court authorizes any law enforcement officer to enforce this order. In this county, contact the Child Abduction Unit of the Office of the District Attorney at *(phone number and address):*

13. ☐ Other *(specify):*

14. This order is valid in other states and in any country that has signed the Hague Convention on Child Abduction.

NOTICE TO AUTHORITIES IN OTHER STATES AND COUNTRIES

This court has jurisdiction to make child custody orders under California's Uniform Child Custody Jurisdiction and Enforcement Act (California Fam. Code, § 3400 et seq.) and the Hague Convention on Civil Aspects of International Child Abduction (42 U.S.C. § 11601 et seq.). If jurisdiction is based on other factors, they are listed in item 12 above.

Date:

JUDICIAL OFFICER

FL-341(C)

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

CHILDREN'S HOLIDAY SCHEDULE ATTACHMENT

TO ☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**
☐ **Stipulation and Order for Custody and/or Visitation of Children** ☐ **Findings and Order After Hearing or Judgment**
☐ **Visitation Order—Juvenile** ☐ **Other *(specify):***

1. **Holiday parenting.** The following table shows the holiday parenting schedules. Write "Petitioner," "Respondent," "Other Parent," or "Other Party" to specify each parent's (or party's) years—odd or even numbered years or both ("every year")—and under "Times," specify the starting and ending days and times.
Note: Unless specifically ordered, a child's holiday schedule order has priority over the regular parenting timeshare.

Holidays	**Times (from when to when)** *(Unless noted below, all single-day holidays start at ____ a.m. and end at ____ p.m.)*	**Every Year** *Petitioner/ Respondent/ Other Parent/Party*	**Even Numbered Years** *Petitioner/ Respondent/ Other Parent/Party*	**Odd Numbered Years** *Petitioner/ Respondent/ Other Parent/Party*
December 31 (New Year's Eve)				
January 1 (New Year's Day)				
Martin Luther King's Birthday (weekend)				
February 12 (Lincoln's Birthday)				
President's Day (Weekend)				
President's Week Recess, first half				
President's Week Recess, second half				
Spring Break, first half				
Spring Break, second half				
Mother's Day				
Memorial Day (weekend)				
Father's Day				
July 4th				
Summer Break				
Labor Day (weekend)				
Columbus Day (weekend)				
Halloween				
November 11 (Veterans Day)				
Thanksgiving Day				
Thanksgiving weekend				
December/January School Break				
Child's birthday (*date):*				
Child's birthday *(date):*				
Child's birthday *(date):*				
Mother's birthday *(date):*				
Father's birthday *(date):*				
Other Parent/Party's birthday *(date):*				
Breaks for year-round schools				

Form Approved for Optional Use
Judicial Council of California
FL-341(C) [Rev. January 1, 2016]

Family Code, §§ 3003, 3083
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

1. **Holiday parenting *(continued)***

Other Holidays	**Times (from when to when)** *(Unless noted below, all single-day holidays start at ___ a.m. and end at ___ p.m.)*	**Every Year** *Petitioner/ Respondent/ Other Parent/Party*	**Even Numbered Years** *Petitioner/ Respondent/ Other Parent/Party*	**Odd Numbered Years** *Petitioner/ Respondent/ Other Parent/Party*

☐ Any three-day weekend not specified in item 1 will be spent with the parent or party who would normally have that weekend.
☐ Other *(specify):*

2. **Vacations.**

The ☐ Petitioner ☐ Respondent ☐ Other Parent/Party:

a. May take vacation with the children of up to (*specify number)*: ☐ days ☐ weeks the following number of times per year *(specify):*

b. Must notify the other parent or party in writing of vacation plans a minimum of *(specify number):* days in advance and provide the other parent or party with a basic itinerary that includes dates of leaving and returning, destinations, flight information, and telephone numbers for emergency purposes.

(1) ☐ The other parent or party has *(number):* days to respond if there is a problem with the vacation schedule.

(2) ☐ If the parties cannot agree on the vacation plans (*check all that apply):*

(A) ☐ They must confer to try to resolve any disagreement before filing for a court hearing.

(B) ☐ In even-numbered years, the parties will follow the suggestions of ☐ Petitioner ☐ Respondent ☐ Other Parent/Party for resolving the disagreement.

(C) ☐ In odd-numbered years, the parties will follow the suggestions of ☐ Petitioner ☐ Respondent ☐ Other Parent/Party for resolving the disagreement.

(D) ☐ Other *(specify):*

c. ☐ This vacation may be outside the state of California.

d. ☐ Any vacation outside ☐ California ☐ the United States requires prior written consent of the other parent or a court order.

e. ☐

FL-341(D)

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

ADDITIONAL PROVISIONS—PHYSICAL CUSTODY ATTACHMENT

TO ☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**
☐ **Stipulation and Order for Custody and/or Visitation of Children** ☐ **Findings and Order After Hearing or Judgment**
☐ **Custody Order—Juvenile —Final Judgment** ☐ **Other *(specify):***

The additional provisions to physical custody apply to *(specify parties):* ☐ Petitioner ☐ Respondent ☐ Other Parent/Party

1. ☐ **Notification of parties' current address.** ☐ Petitioner ☐ Respondent ☐ Other Parent/Party
must notify all parties within *(specify number)*: days of any change in his or her
a. address for ☐ residence ☐ mailing ☐ work ☐ email
b. telephone/message number at ☐ home ☐ cell phone ☐ work ☐ the children's schools
The parties may not use such information for the purpose of harassing, annoying, or disturbing the peace of the other or invading the other's privacy. If a party has an address with the State of California's Safe at Home confidential address program, no residence or work address is needed.

2. ☐ **Notification of proposed move of child.** Each party must notify the other *(specify number):* days before any planned change in residence of the children.The notification must state, to the extent known, the planned address of the children, including the county and state of the new residence.The notification must be sent by certified mail, return receipt requested.

3. ☐ **Child care.**
a. ☐ The children must not be left alone without age-appropriate supervision.
b. ☐ The parties must let each other know the name, address, and phone number of the children's regular child-care providers.

4. ☐ **Right of first option of child care.** In the event any party requires child care for *(specify number):* hours or more while the children are in his or her custody, the other party or parties must be given first opportunity, with as much prior notice as possible, to care for the children before other arrangements are made. Unless specifically agreed or ordered by the court, this order does not include regular child care needed when a party is working.

5. ☐ **Canceled visitation (parenting time).**
a. ☐ If the noncustodial party fails to arrive at the appointed time and fails to notify the custodial party that he or she will be late, then the custodial party need wait for only *(specify number):* minutes before considering the visitation (parenting time) canceled.
b. ☐ If the noncustodial party is unable to exercise visitation (parenting time) on a given occasion, he or she must notify the custodial party *(specify):*
☐ at the earliest possible opportunity.
☐ Other *(specify):*
c. ☐ If the children are ill and unable to participate in the scheduled visitation (parenting time), the custodial party must give the noncustodial party *(specify):* ☐ A doctor's excuse is required.
☐ as much notice as possible
☐ Other *(specify):*

6. ☐ **Phone contact between parties and children.**
a. ☐ The children may have telephone access to the parties ☐ and the parties may have telephone access to the children at reasonable times, for reasonable durations.
b. ☐ The scheduled phone contact between the parties and children is *(specify):*

c. ☐ No party or any other third party may listen to or monitor the calls.

Form Approved for Optional Use
Judicial Council of California
FL-341(D) [Rev. January 1, 2016]

Family Code, §§ 3003, 3024, 3083
www.courts.ca.gov

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

7. ☐ **No negative comments.** The parties will not make or allow others to make negative comments about each other or about their past or present relationships, family, or friends within hearing distance of the children.

8. ☐ **Discussion of court proceedings with children.** Other than age appropriate discussion of the parenting plan and the children's role in mediation or other court proceedings, the parties will not discuss with the children any court proceedings relating to custody or visitation (parenting time).

9. ☐ **No use of children as messengers.** The parties will communicate directly with each other on matters concerning the children and may not use the children as messengers between them.

10. ☐ **Alcohol or substance abuse.** The ☐ petitioner ☐ respondent ☐ other parent/party may not consume alcoholic beverages, narcotics, or restricted dangerous drugs (except by prescription) within *(specify number):* hours prior to or during periods of time with the children ☐ and may not permit any third party to do so in the presence of the children.

11. ☐ **No exposure to cigarette or medical marijuana smoke.** The parties will not expose the children to secondhand cigarette or medical marijuana smoke.

12. ☐ **No interference with schedule of any party without that party's consent.** The parties will not schedule activities for the children during the other party's scheduled visitation (parenting time) without the other party's prior agreement.

13. ☐ **Third-party contact.**
    a. ☐ The children will have no contact with *(specify name):*
    b. ☐ The children must not be left alone in the presence of *(specify name):*

14. ☐ **Children's clothing and belongings.**
    a. ☐ Each party will maintain clothing for the children so that the children do not have to make the exchanges with additional clothing.
    b. ☐ The children will be returned to the other party with the clothing and other belongings they had when they arrived.

15. ☐ **Log book.** The parties will maintain a "log book" and make sure that the book is sent with the children between their homes. Using businesslike notes (no personal comments), parties will record information related to the health, education, and welfare issues that arise during the time the children are with them.

16. ☐ **Terms and conditions of order may be changed.** The terms and conditions of this order may be added to or changed as the needs of the children and parties change. Such changes will be in writing, dated and signed by the parties; each party will retain a copy. If the parties want a change to be a court order, it must be filed with the court in the form of a court document.

17. ☐ **Other *(specify):***

FL-341(E)

PETITIONER:	CASE NUMBER:
RESPONDENT:	
OTHER PARENT/PARTY:	

JOINT LEGAL CUSTODY ATTACHMENT

TO ☐ **Petition** ☐ **Response** ☐ **Request for Order** ☐ **Responsive Declaration to Request for Order**
☐ **Stipulation and Order for Custody and/or Visitation of Children** ☐ **Findings and Order After Hearing or Judgment**
☐ **Custody Order—Juvenile—Final Judgment** ☐ **Other *(specify):***

NOTICE: In exercising joint legal custody, the parties may act alone, as long as the action does not conflict with any orders about the physical custody of the children. Use this form only if you want to ask the court to make orders specifying when the consent of both parties is required to exercise legal control of the children and the consequences for failing to obtain mutual consent.

1. The parties *(specify):* ☐ Petitioner ☐ Respondent ☐ Other Parent/Party will have joint legal custody of the children.
2. In exercising joint legal custody, the parties will share in the responsibility and discuss in good faith matters concerning the health, education, and welfare of the children. The parties must discuss and consent in making decisions on the following matters:
   a. ☐ Enrollment in or leaving a particular private or public school or daycare center
   b. ☐ Beginning or ending of psychiatric, psychological, or other mental health counseling or therapy
   c. ☐ Participation in extracurricular activities
   d. ☐ Selection of a doctor, dentist, or other health professional (except in emergency situations)
   e. ☐ Participation in particular religious activities or institutions.
   f. ☐ Out-of-country or out-of-state travel
   g. ☐ Other *(specify):*
3. **If a party does not obtain the consent of the other party to those items in 2, which are granted as court orders:**
   a. He or she may be subject to civil or criminal penalties.
   b. The court may change the legal and physical custody of the minor children.
   c. ☐ Other consequences *(specify):*
4. ☐ **Special decision making designation and Access to children's records**
   a. The ☐ petitioner ☐ respondent ☐ other parent/party will be responsible for making decisions regarding the following issues *(specify):*
   b. ☐ Each party will have access to the children's school, medical, and dental records, and the right to consult with professionals who are providing services to the children.
5. ☐ **Health-care notification.**
   a. ☐ Each party must notify the other of the name and address of each health practitioner who examines or treats the children; such notification must be made within *(specify number):* days of the commencement of the first such treatment or examination.
   b. ☐ Each party is authorized to take any and all actions necessary to protect the health and welfare of the children, including but not limited to consent to emergency surgical procedures or treatment.The party authorizing such emergency treatment must notify the other party as soon as possible of the emergency situation and of all procedures or treatment administered to the children.
   c. ☐ The parties are required to administer any prescribed medications for the children.
6. ☐ **School notification.** Each party will be designated as a person the children's school will contact in the event of an emergency.
7. ☐ **Name.** The parties will not change the last name of the children or have a different name used on the children's medical, school, or other records without the written consent of the other party.
8. ☐ Other *(specify):*

Form Approved for Optional Use
Judicial Council of California
FL-341(E) [Rev. January 1, 2016]

Family Code, §§ 3003, 3083
www.courts.ca.gov

RUPRO ACTION REQUEST FORM

Item #26

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: April 15, 2015

Title of proposal:
Domestic Violence: Preparing for Restraining Order Court Hearing

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (Name, phone and e-mail):
Julia Weber, 415-865-7693, julia.weber@jud.ca.gov

Approved by RUPRO on the committee's annual agenda (date and description of item):
Approved February 10, 2015. Item #26 Domestic Violence: Preparing for Restraining Order Court Hearing. Addition of Project to Annual Agenda. Propose amendments to correct information on the form and improve the availability of information for litigants, including self-represented litigants, on preparing for court hearings so as to reduce confusion and delay at court hearings.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

SPR15-__

Title
Domestic Violence: Preparing for Restraining Order Court Hearing

Action Requested
Review and submit comments by June 17, 2015

Proposed Rules, Forms, Standards, or Statutes
Revise form DV-520-INFO

Proposed Effective Date
January 1, 2016

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Contact
Julia F. Weber, 415-865-7693
julia.weber@jud.ca.gov

Executive Summary and Origin

Form DV-520-INFO, *Get Ready for the Court Hearing*, is available for optional use by courts to provide information to litigants about preparing for a domestic violence restraining order hearing, hundreds of which are held each day in courts throughout the state. Courts report finding the form helpful; however, the current version includes information that can be confusing and, as a result, may cause unnecessary difficulties and delays at hearings. Rather than continuing to provide legally inaccurate information, some courts have chosen not to use the form and do not have a substitute readily available. Additionally, this form remains on the public website, so litigants may be relying on it to their detriment. The Family and Juvenile Law Advisory Committee seeks to revise the form in this cycle so that it is clearer, is legally accurate, and as a result, accomplishes the original goal in adopting the form: to inform litigants and assist in making these complex and important hearings run more smoothly.

The Proposal

The Family and Juvenile Law Advisory Committee recommends making the following changes to form DV-520-INFO, effective January 1, 2016:

- Changing the name of the form to clarify that it provides information about restraining order hearings;
- Providing examples of documents that can assist the court in making decisions about support and at the same time explaining that the judge will make decisions about what

documents may be considered so that litigants are less likely to assume that everything brought to court will be admissible;

- Clarifying that witnesses may come to court and write statements but may be required to testify if objections to the written declarations arise;
- Informing parties that a local form may be available with which to request an interpreter;
- Clarifying that the judge will decide whether enough evidence exists to issue a restraining order;
- Clarifying that a restrained party might be served in the courtroom after a hearing; and
- Making some technical changes to remove commas and correct a typo.

Text of the proposed revised form is attached at pages 4–6.

Alternatives Considered

The committee considered not making the changes proposed. However, because some of the information on the form may be read to suggest that evidence offered by the litigants will always be accepted by the judge—and may be confusing in other respects—some courts have chosen not to provide the form out of concern that it may be unclear or misleading. The committee agrees that given the value of the form and the need to provide litigants with helpful information to assist in more smoothly running hearings, it is important to propose revisions correcting these inaccuracies, thereby improving the form and enabling courts to more routinely make it available.

Implementation Requirements, Costs, and Operational Impacts

Courts may be required to produce paper copies of the information form to replace the existing form.

Request for Specific Comments

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

- Do the proposed changes more clearly provide litigants with information that will assist them at restraining order hearings?
- Are there any aspects of the proposed changes that may be unclear or confusing to self-represented litigants?

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed form DV-520-INFO, attached at pages 4–6
2. Current form DV-520-INFO, at *www.courts.ca.gov/documents/dv520info.pdf*

DV-520-INFO Get Ready for the Restraining Order Court Hearing

Be prepared.

- Bring two copies of all documents and filed forms, including the *Proof of Service.*
- Bring documents that support your case (police or medical reports, rental agreements or receipts, photos, bills, pay stubs or other proof of income if support is requested, etc.). Provide the other party with a copy of all documents. Sometimes the judge cannot look at or consider certain documents. The judge will decide which of the documents that you and the other party bring can be included in your case.
- Either person can bring a support person to the court hearing to feel safer. The support person must not talk for either person in court.
- At the hearing, both of you can have witnesses to testify in support of your case. Your witnesses can also write their statements about what they saw or heard in a declaration signed under penalty of perjury. However, if the party objects to the written declarations, the witnesses will need to be present in court and testify. Witnesses can use form MC-030, *Declaration*, or a sheet of paper entitled "Declaration," to provide statements in writing.
- If you are the person to be restrained, complete, file, and serve Form DV-120, *Response to Request for Domestic Violence Restraining Order,* if you haven't already. Bring three copies of Form DV-120 to the hearing. Also bring pay stubs or other proof of income, if support is being requested.
- Most courtrooms do not allow children. Before the date of the hearing, ask if there is a children's waiting room in the courthouse, if you do not have childcare available.
- Practice what you want to say to the judge. Make a list of the orders you want or the orders you disagree with. If you get nervous at the hearing, just read from your list. You may also write out a statement and read it to the judge.

Don't miss the hearing.

- If you are the person asking for protection and you miss the hearing, the restraining orders will end and you will have to complete the paperwork all over again.
- If you are the person to be restrained and you miss the hearing, the judge can still make the orders.

Get there 30 minutes early.

- Find the courtroom.
- When the courtroom opens, go in and tell the court clerk or officer that you are present.
- Do not sit near or talk to the other person.
- If you are afraid of the other person, tell the officer.
- Watch the other cases so you will know what to do.
- When your name is called, go to the front of the courtroom.
- Your hearing may last just a few minutes or up to an hour or more. However, you may be at court several hours, depending on the number of other cases.

What if you don't speak English?

When you file your papers, tell the clerk you will need an interpreter. Your court may have a local form you can use to request an interpreter. If a court interpreter is not available, bring someone to interpret for you. Do not ask a child, a protected person, or a witness to interpret for you.

The judge may ask questions.

- Tell the truth. Speak slowly. You can read from your list.
- Give complete answers.
- If you don't understand, say "I don't understand the question."

- Speak only to the judge, unless it is your turn to ask questions.
- When people are talking, wait for them to finish. Then you can ask them questions about what they said.
- Do not interrupt other than for legal objections.
- If the other person tells a lie, wait until he or she finishes talking, then tell the judge.
- The person to be protected and the person to be restrained or their lawyers may ask questions.

The judge will decide.

- At the hearing, the judge will decide if the evidence shows you are entitled to a restraining order. The judge will consider whether denial of any orders will risk the safety of the person asking for protection or the safety of children for whom custody, visitation, or support orders are requested. Safety concerns about the financial needs of the person asking for protection will also be considered.
- At the end of the hearing, the judge will say what the orders are. The orders will be put on Form DV-130, *Restraining Order After Hearing*.

What if the judge makes orders at the hearing—Form DV-130?

For person to be protected:

- Sometimes the courtroom clerk will fill out Form DV-130. If not, ask who should fill it out.
- If the courtroom clerk fills out Form DV-130, the clerk will bring the form to the judge.
- If you fill out Form DV-130, ask where you should bring the form when you finish so that it can be filed. After the form is filed, the court clerk will give you up to three copies.
- Read the signed Form DV-130 carefully. If anything is different from what the judge ordered, ask for help at the courthouse right away or talk to your lawyer, if you have one for the case.

For person to be restrained:

- If the judge makes orders at the hearing, you must obey them. If you do not, you could be arrested.
- Any orders will be written on Form DV-130. When you receive the signed and filed Form DV-130, read it carefully. If anything is different from what the judge ordered, ask for help at the courthouse right away or talk to your lawyer, if you have one for the case.

The judge may "continue" your case.

This means that you have to come back another day. The judge can do this if:

- The person to be restrained needs time to get a lawyer or prepare an answer.
- The judge wants more information.
- Your hearing is taking longer than planned.

The person to be protected may ask the judge to extend the temporary orders until the new hearing date.

The court may use *Notice of New Hearing Date and Order on Reissuance* (Form DV-116) for the new hearing.

What about child custody or visitation?

- If you ask for child custody or visitation orders, the court may send you to Family Court Services (also known as *court-connected mediation or child custody recommending counseling*). See Forms FL-313-INFO, *Child Custody Information Sheet—Recommending Counseling,* and FL-314-INFO, *Child Custody Information Sheet—Child Custody Mediation,* for more information.
- If you are sent to Family Court Services, the judge may extend the temporary restraining order, and make or extend temporary custody and visitation orders, which last until the next hearing or until another court order.

DV-520-INFO Get Ready for the Restraining Order Court Hearing

What happens after the hearing?

For person to be protected:

- The court clerk will send Form DV-130 to law enforcement or CLETS for you. CLETS is a statewide computer system that lets police know about the order.
- If the restrained person was at the hearing, you may have him or her served with a copy of Form DV-130 by mail, or some courts may have the restrained person served in the courtroom after the hearing.
- If the restrained person was not at the hearing but the judge's orders are the ***same*** as the temporary order, you may have him or her served with a copy of Form DV-130 by mail.
- If the restrained person was not at the hearing and the judge's orders are ***different*** from the temporary order, you must have someone serve Form DV-130 in person, not by mail. Ask the server to complete Form DV-200, *Proof of Personal Service,* and give it back to you.
- Keep a copy of the orders with you at all times.

For person to be restrained:

- You will be served with the *Restraining Order After Hearing* (Form DV-130) either at the hearing or within a few days, by mail or in person.
- If you do not receive a copy of the orders within a few days after the hearing, ask the clerk for a copy.
- Keep a copy of the orders with you at all times.

Which forms will I receive after the hearing?

Use this checklist to see if you have the right forms for the case:

- Form DV-130, *Restraining Order After Hearing,* if the judge made orders at the hearing.
- Form DV-140, *Child Custody and Visitation Order,* if the judge ordered child custody or visitation.
- Form FL-342, *Child Support Information and Order Attachment,* or Form FL-343, *Spousal, Partner, or Family Support Order Attachment,* if the judge orders child support and/or spousal support.
- Sometimes there may be other forms in addition to these.

Need more help?

Ask the court clerk about free or low-cost legal help. For a referral to a local domestic violence or legal assistance program, call the National Domestic Violence Hotline:

1-800-799-7233
TDD: 1-800-787-3224

It's free and private.
They can help you in more than 100 languages.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (Form MC-410). (Civil Code, § 54.8.)

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal*:*
Appellate Procedure: Record on Appeal in Civil Cases (revise forms APP-003, APP-010, APP-103, and form APP-110)

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 5 - Designation of the record: Consider whether to recommend revisions to the forms for designating the record in civil appeals (Forms APP-003, APP-010, APP-103, and APP-110) to change the requirement that a fee waiver application or order be "attached" to a requirement that it be submitted with the designation; and Item 12 - Respondent's notice designating the record: Consider whether to recommend revising the forms for respondents in civil cases (APP-010 and APP-110) to designate additional items to be included in the record on appeal to clarify when the respondent must deposit a fee.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In December 2013, RUPRO approved including consideration of item 5 (the suggestion relating to attachment of fee waiver applications) on the committee's annual agenda as a priority 1 project with a January 1, 2015 completion date. RUPRO also approved including item 12 (consideration of the suggestion regarding clarifying when a respondent must deposit a fee) on the committee's annual agenda as a priority 2 project with a January 1, 2015 completion date.

In early 2014, the committee developed a proposal that combined form revisions designed to implement both of these suggestions and sought approval to circulate this proposal for public comment. In April 2014, RUPRO declined to approve the circulation of this proposal. RUPRO's action appears to have been based on some members' view that having the fee waiver application attached to the designation forms did not represent a significant enough problem to warrant revising the forms.

Committee member Sheran Morton, Court Executive Officer of the Superior Court of Fresno County, has subsequently informed the committee that that court has also experienced difficulties with scanning record designation forms when fee waiver applications are attached and indicated that it would provide some savings to the court in terms of both staff time and avoidance of repetitive motion injuries if the forms were modified. She also reported that the Superior Court of Orange County similarly indicated that modifying these forms would result in saving court staff time. Based on this information, the committee is again seeking to circulate this proposal for public comment.

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR15-___

Title
Appellate Procedure: Record on Appeal in Civil Cases

Proposed Rules, Forms, Standards, or Statutes
Revise forms APP-003, APP-010, APP-103, and form APP-110

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

Based on suggestions received from a superior court and an attorney, the Appellate Advisory Committee is proposing to revise the forms for designating the record on appeal in unlimited and limited civil cases to (1) change references to a fee waiver application's being "attached to" the record designation form to "submitted with"; and (2) revise one of the forms to clarify that respondent must pay for additional proceedings that he or she designates to be included in the record.

The Proposal

In a civil appeal, the appellant is generally responsible for choosing the form of the record on appeal and identifying (designating) items to be included in that record. Depending on the type of record chosen, the respondent then has an opportunity to designate additional items to include in the record. Courts charge fees to prepare or make copies of some forms of the record on appeal, such as a clerk's transcript. If a party who is indigent files an application for an initial fee waiver and the court grants that application, these fees will be waived.

Four Judicial Council optional forms are available for parties to use to designate the record on appeal in unlimited and limited civil cases: *Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003); *Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-010); *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103); and *Respondent's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-110). On each of these forms, there are currently one or more

places where the designating party may indicate that, in lieu of submitting the required court fee for a particular form of the record, the party is attaching a fee waiver application.

Attaching a fee waiver application to these designation forms may cause problems and create additional work for those courts that are scanning and storing records electronically. While designation forms are public court records, fee waiver applications are confidential (see Cal. Rules of Court, rule 3.54) and must not be revealed to the public. To prevent inadvertent inclusion of a fee waiver application in scanned records that will be publically available, clerks must check each designation form to ensure that such an application is not attached. Several courts have indicated that it takes additional time and scarce staff resources to identify and detach fee waiver applications from record designation forms before the forms can be scanned. To eliminate these potential problems and reduce court costs, this proposal would modify the designation forms to instead provide that a fee waiver application may be *submitted with*, rather than *attached to*, the designation form.

The committee is also proposing an additional change to *Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-010). Under rule 8.130, when a respondent designates additional proceedings to be included in a reporter's transcript on appeal, the respondent is responsible for the cost of transcribing those additional proceedings. Currently, however, on form APP-010 the section regarding these costs does not immediately follow the section regarding designation of these proceedings; there is an intervening section regarding whether and in what form the respondent would like a copy of the reporter's transcript. This placement may create confusion. The committee is therefore proposing moving the section of the form regarding these costs to immediately follow the section regarding designation of additional proceedings to be included in a reporter's transcript.

Alternatives Considered

The committee considered not proposing these form revisions. However, the committee concluded that revising these forms is likely to result in cost savings to the courts and therefore that it would be beneficial to pursue this proposal.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs should be associated with these form revisions; instead, these revisions should result in cost *savings* for the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on whether the proposal appropriately addresses the stated purpose.

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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Forms APP-003, APP-010, APP-103, and APP-110

ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. *(if available):* E-MAIL ADDRESS *(if available):* ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	Superior Court Case Number:
RE: Appeal filed on *(date):*	Court of Appeal Case Number *(if known)*:

Notice: Please read form APP-001 before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

I elect to use the following method of providing the Court of Appeal with a record of the documents filed in the superior (*check a, b, c, d, or e and fill in any required information):*

a. ☐ A clerk's transcript under rule 8.122. (*You must check (1) or (2) and fill out the clerk's transcript section on page 2 of this form.)*

(1) ☐ I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.

(2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b)):*

(a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or

(b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (*Use* Request to Waive Court Fees *(form FW-001) to prepare and file this application.*)

b. ☐ An appendix under rule 8.124.

c. ☐ The original superior court file under rule 8.128. (NOTE: *Local rules in the Court of Appeal, First, Third, Fourth, and Fifth Appellate Districts, permit parties to stipulate to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.*)

d. ☐ An agreed statement under rule 8.134. *(You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)*

e. ☐ A settled statement under rule 8.137. *(You must complete item 2b(3) below and attach to your proposed statement on appeal copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.137(b)(3).)*

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I elect to proceed:

a. ☐ WITHOUT a record of the oral proceedings in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings.

Form Approved for Optional Use
Judicial Council of California
APP-003 [Rev. Jan. 1, 2016]

Cal. Rules of Court, rules 3.50, 8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courts.ca.gov

Case Name:	Superior Court Case Number:

2. b. ☐ WITH the following record of the oral proceedings in the superior court:

(1) ☐ A reporter's transcript under rule 8.130. *(You must fill out the reporter's transcript section on page 3 of this form.)* I have *(check all that apply):*

(a) ☐ Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).

(b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).

(c) ☐ Attached the reporter's written waiver of a deposit for *(check either (i) or (ii)):*

(i) ☐ all of the designated proceedings.

(ii) ☐ part of the designated proceedings.

(d) ☐ Attached a certified transcript under rule 8.130(b)(3).

(2) ☐ An agreed statement. *(Check and complete either (a) or (b) below.)*

(a) ☐ I have attached an agreed statement to this notice.

(b) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement. *(You must attach a copy of this stipulation to this notice.)* I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

(3) ☐ A settled statement under rule 8.137. *(You must attach the motion required under rule 8.137(a) to this form.)*

3. **RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE REVIEWING COURT**

☐ I request that the clerk transmit to the reviewing court under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court *(give the title and date or dates of the administrative proceeding):*

Title of Administrative Proceeding	Date or Dates

4. **NOTICE DESIGNATING CLERK'S TRANSCRIPT**

(You must complete this section if you checked item 1a. above indicating that you elect to use a clerk's transcript as the record of the documents filed in the superior court.)

a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.

Document Title and Description	Date of Filing
(1) Notice of appeal	
(2) Notice designating record on appeal *(this document)*	
(3) Judgment or order appealed from	
(4) Notice of entry of judgment *(if any)*	
(5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order *(if any)*	
(6) Ruling on one or more of the items listed in (5)	
(7) Register of actions or docket *(if any)*	

Case Name:	Superior Court Case Number:

4. **NOTICE DESIGNATING CLERK'S TRANSCRIPT**

b. **Additional documents.** *(If you want any documents from the superior court proceeding in addition to the items listed in a. above to be included in the clerk's transcript, you must identify those documents here.)*

☐ I request that the clerk include the following documents from the superior court proceeding in the transcript. *(You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

Document Title and Description	Date of Filing
(8)	
(9)	
(10)	
(11)	
(12)	

☐ See additional pages.

c. **Exhibits to be included in clerk's transcript.**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court *(for each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence):*

Exhibit Number	Description	Admitted (Yes/No)
(1)		
(2)		
(3)		
(4)		
(5)		

☐ See additional pages.

5. **NOTICE DESIGNATING REPORTER'S TRANSCRIPT**

(You must complete this section if you checked item 2b(1) above indicating that you elect to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.)

a. I request that the reporters provide *(check one):*

(1) ☐ My copy of the reporter's transcript in paper format.

(2) ☐ My copy of the reporter's transcript in computer-readable format.

(3) ☐ My copy of the reporter's transcript in paper format and a second copy in computer-readable format.

(Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).)

Case Name:	Superior Court Case Number:

5. b. **Proceedings.**

I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)*

	Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)						☐ Yes ☐ No
(2)						☐ Yes ☐ No
(3)						☐ Yes ☐ No
(4)						☐ Yes ☐ No
(5)						☐ Yes ☐ No
(6)						☐ Yes ☐ No
(7)						☐ Yes ☐ No

c. The proceedings designated in 5b ☐ include ☐ do not include all of the testimony in the superior court.

If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal *(rule 8.130(a)(2) provides that your appeal will be limited to these points unless, on motion, the reviewing court permits otherwise)*.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. *(if available)*: E-MAIL ADDRESS *(if available)*: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
RESPONDENT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	SUPERIOR COURT CASE NUMBER:
Re: Appeal filed on *(date):*	COURT OF APPEAL CASE NUMBER *(if known)*:

Notice: Please read Judicial Council form APP-001 before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. **RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT**

The appellant has elected to use a clerk's transcript under rule 8.122.

a. ☐ **Additional documents.** *(If you want any documents from the superior court proceedings in addition to the documents designated by the appellant to be included in the clerk's transcript, you must identify those documents here.)*

In addition to the documents designated by the appellant, I request that the clerk include in the transcript the following documents from the superior court proceedings. *(You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

	Document Title and Description	Date of Filing
(1)		
(2)		
(3)		

☐ See additional pages.

b. ☐ **Additional exhibits.** *(If you want any exhibits from the superior court proceedings in addition to those designated by the appellant to be included in the clerk's transcript, you must identify these exhibits here.)*

In addition to the exhibits designated by the appellant, I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. *(For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence.)*

	Exhibit Number	Description	Admitted (Yes/No)
(1)			
(2)			
(3)			

☐ See additional pages.

Form Approved for Optional Use
Judicial Council of California
APP-010 [Rev. January 1, 2016]

RESPONDENT'S NOTICE DESIGNATING RECORD ON APPEAL (Unlimited Civil Case)

Cal. Rules of Court, rules 3.50, 8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courts.ca.gov

CASE NAME:	SUPERIOR COURT CASE NUMBER:

1. c. ☐ Copy of clerk's transcript. I request a copy of the clerk's transcript. *(check (1) or (2).)*

   (1) ☐ I will pay the superior court clerk for this transcript when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, I will not receive a copy.

   (2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b)):*

   (a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or

   (b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (*Use* Request to Waive Court Fees *(form FW-001) to prepare and file this application.*)

2. **RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT**

   The appellant has elected to use a reporter's transcript under rule 8.130.

   a. ☐ **Designation of additional proceedings.** *(If you want any oral proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*

   (1) In addition to the proceedings designated by the appellant, I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)*

	Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(a)						☐ Yes ☐ No
(b)						☐ Yes ☐ No
(c)						☐ Yes ☐ No
(d)						☐ Yes ☐ No
(e)						☐ Yes ☐ No
(f)						☐ Yes ☐ No
(g)						☐ Yes ☐ No

☐ See additional pages.

CASE NAME:	SUPERIOR COURT CASE NUMBER:

2. a. (2) **Deposit for additional proceedings**

I have *(check a, b, c, or d):*

(a) ☐ Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).

(b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(b)(3)(B).

(c) ☐ Attached the reporter's written waiver of a deposit for *(check either (i) or (ii)):*

(i) ☐ All of the designated proceedings.

(ii) ☐ Part of the designated proceedings.

(d) ☐ Attached a certified transcript under rule 8.130(b)(3)(C).

b. **Copy of reporter's transcript.**

(1) ☐ I request a copy of the reporter's transcript.

(2) ☐ I request that the reporters provide *(check (a), (b), or (c))* :

(a) ☐ My copy of the reporter's transcript in paper format.

(b) ☐ My copy of the reporter's transcript in computer-readable format.

(c) ☐ My copy of the reporter's transcript in paper format and a second copy of the reporter's transcript in computer-readable format.

(*Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).*)

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF APPELLANT OR ATTORNEY)

APP-103 Appellant's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- This form can be attached to your notice of appeal. If it is not attached to your notice of appeal, you must serve and file this form within 10 days after you file your notice of appeal. **If you do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service on the California Courts Online Self-Help Center site at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Appellant (the party who is filing this appeal):

Name: _____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available):* _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available):* _____

Fax *(if available):* _____

Information About Your Appeal

2 On *(fill in the date):* _____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Record of the Documents Filed in the Trial Court

3 I elect (choose)/My client elects to use the following record of the documents filed in the trial court *(check a or b and fill in any required information):*

a. ☐ **Clerk's Transcript.** *(Fill out (1)–(4).) Note that, if the appellate division has adopted a local rule permitting this, the clerk may prepare and send the original court file to the appellate division instead of a clerk's transcript.*

(1) **Required documents.** *The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.*

Document Title and Description	Date of Filing
(a) Notice of appeal	
(b) Notice designating record on appeal (this document)	
(c) Judgment or order appealed from	
(d) Notice of entry of judgment (if any)	
(e) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)	
(f) Ruling on any item included under (e)	
(g) Register of actions or docket	

(2) **Additional documents.** *If you want any documents in addition to the required documents listed in (1) above to be included in the clerk's transcript, you must identify those documents here.*

☐ I request that the clerk include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

Document Title and Description	Date of Filing
(a)	
(b)	
(c)	
(d)	
(e)	

☐ *Check here if you need more space to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-103, item 3a(2)."*

3 a. (continued)

(3) **Exhibits.**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number (such as Plaintiff's #1 or Defendant's A) and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need more space to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-103, item 3a(3)."*

(4) **Payment for clerk's transcript.** *(Check a or b.)*

(a) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(b) ☐ I am asking that the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (i) or (ii) and submit the checked document):*

(i) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(ii) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

b. ☐ **Agreed statement.** *(You must complete item 5 d, below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in 3a(1) above and in rule 8.832 of the California Rules of Court.)*

Record of Oral Proceedings in the Trial Court

You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings"). But, if you do not, the appellate division will not be able to consider what was said during the trial court proceedings in deciding whether a legal error was made in those proceedings.

4 I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court (*skip item 5; sign and date this form*). I understand that if I proceed without a record of the oral proceedings, the appellate division will not be able to consider what was said in the trial court during those proceedings in deciding whether a legal error was made.

(Write initials here): _____

4 (continued)

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item 5 below)*. I understand that if I elect (choose) to proceed WITH a record of the oral proceedings in the trial court, I have to choose the record I want to use and take the actions described below to make sure this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal.

(Write initials here): _____

5 I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, d, or e):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Complete (1) and (2).):*

(1) **Designation of proceedings to be included in reporter's transcript.** I request that the following proceedings in the trial court be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings [for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions], the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.*)

	Date	Department	Description	Reporter's Name	Prev. prepared?
(a)					☐ Yes ☐ No
(b)					☐ Yes ☐ No
(c)					☐ Yes ☐ No
(d)					☐ Yes ☐ No
(e)					☐ Yes ☐ No
(f)					☐ Yes ☐ No
(g)					☐ Yes ☐ No

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-103, item 5a."*

(2) The proceedings designated in (1) ☐ include ☐ do not include all of the testimony in the trial court. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. *(Rule 8.834(a)(2) provides that your appeal will be limited to these points unless, on motion, the appellate division permits otherwise.)*

_____

_____

_____

_____

☐ *Check here if you need more space to list other points and attach a separate page or pages listing those points. At the top of each page, write "APP-103, item 5a(2)."*

5 a. (continued)

(3) **Payment for reporter's transcript.** I will pay for this transcript myself or request payment from the Transcript Reimbursement Fund when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay the trial court clerk's office for this transcript, file with the court a written waiver of this deposit signed by the reporter, or receive approval of my Transcript Reimbursement Fund application, the transcript will not be prepared and provided to the appellate division.
(Write initials here): _____

☐ I request that the reporters provide *(check one):*
- (i) ☐ My copy of the reporter's transcript in paper format.
- (ii) ☐ My copy of the reporter's transcript in computer-readable format.
- (iii) ☐ My copy of the reporter's transcript in paper format and a second copy of the reporter's transcript in computer-readable format.

OR

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division permitting the use of the official electronic recording itself as the record of the proceedings, and all of the parties have agreed (stipulated) that they want to use the recording itself as the record of what was said in the case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of your agreement (stipulation) with the other parties to this notice. (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the costs of this copy. I understand that if I do not pay for this copy of the recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that a copy of the recording be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

5 (continued)

OR

d. ☐ **Agreed Statement.** *An agreed statement is a summary of the trial court proceedings agreed to by the parties. See form APP-101-INFO for information about preparing an agreed statement. (Check (1) or (2).):*

(1) ☐ I have attached an agreed statement to this notice.

(2) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement *(you must attach a copy of this agreement (stipulation) to this notice).* I understand that, within 30 days after I file this notice, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

OR

e. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form APP-101-INFO for information about preparing a proposed statement (Check (1) or (2).):*

(1) ☐ I have attached my proposed statement on appeal to this notice. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Limited Civil Case) *(form APP-104) to prepare and file this proposed statement. You can get a copy of form APP-104 at any courthouse or county law library or online at* www.courts.ca.gov/forms.htm.)

(2) ☐ I have NOT attached my proposed statement on appeal to this notice. I understand that I must serve and file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

APP-110

Respondent's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) or on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order that is being appealed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of respondent (the party who is responding to an appeal filed by another party):

Name: _____

b. Respondent's contact information *(skip this if the respondent has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available):* _____

c. Respondent's lawyer *(skip this if the respondent does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available):* _____

Fax *(if available):* _____

Information About the Appeal

2 On *(fill in the date):* _____ another party filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

3 On *(fill in the date):* _____ the appellant filed an appellant's notice designating the record on appeal.

Record of the Documents Filed in the Trial Court

4 The appellant elected (chose) to use a clerk's transcript under rule 8.832 as the record of the documents filed in the trial court.

a. ☐ **Additional documents or exhibits.** *If you want any documents or exhibits in addition to those designated by the appellant to be included in the clerk's transcript, you must identify those documents here.*

(1) **Documents**

☐ In addition to the documents designated by the appellant, I request that the clerk include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed).*

Document Title and Description	Date of Filing
(a)	
(b)	
(c)	
(d)	

☐ *Check here if you need more space to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-110, item 4a(1)."*

(2) **Exhibits**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number [such as Plaintiff's #1 or Defendant's A] and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need more space to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-110, item 4a(2)."*

4 (continued)

b. ☐ **Copy of clerk's transcript.** I request a copy of the clerk's transcript. *(Check (1) or (2).)*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript.

(2) ☐ I am asking that a copy of the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the checked document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58.

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58. (*Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

Record of Oral Proceedings in the Trial Court

5 The appellant elected to use the following record of what was said in the trial court proceedings *(check and complete **only one** of the following below—a, b, or c):*

a. ☐ **Reporter's Transcript.** The appellant elected to use a reporter's transcript under rule 8.834 as the record of the oral proceedings in the trial court.

(1) ☐ **Designation of additional proceedings to be included in the reporter's transcript.** *(If you want any proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*
In addition to the proceedings designated by the appellant, I request that the following proceedings in the trial court be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings [for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions], the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Description	Reporter's Name	Prev. prepared?
(a)				☐ Yes ☐ No
(b)				☐ Yes ☐ No
(c)				☐ Yes ☐ No
(d)				☐ Yes ☐ No
(e)				☐ Yes ☐ No
(f)				☐ Yes ☐ No
(g)				☐ Yes ☐ No

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-110, item 5a(1)."*

5 a. (continued)

(2) **Copy of reporter's transcript.**

(a) ☐ I request a copy of the reporter's transcript. I will pay for this transcript myself or request payment from the Transcript Reimbursement Fund when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay the trial court clerk's office for this transcript or file with the court a waiver of this deposit signed by the court reporter or receive approval of my Transcript Reimbursement Fund application, I will not receive a copy.

(b) ☐ I request that the court reporter provide *(check one):*

(i) ☐ My copy of the reporter's transcript in paper format.
(ii) ☐ My copy of the reporter's transcript in computer-readable format.
(iii) ☐ My copy of the reporter's transcript in paper format and a second copy of the reporter's transcript in computer-readable format.

OR

b. ☐ **Transcript From Official Electronic Recording.** The appellant elected to use the transcript from an official electronic recording as the record of the oral proceedings in the trial court under rule 8.835(b). I request a copy of this transcript. *(Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the cost of the transcript.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

c. ☐ **Copy of Official Electronic Recording.** The appellant and I have agreed to use the official electronic recording itself as the record of the oral proceedings in the trial court under rule 8.835(a). I request a copy of this recording. *(Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the costs of this copy.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

Date: _____

_____ ▶ _____
Type or print your name *Signature of respondent or attorney*

Item number: 18

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Electronic Filing and Service: Authorization of Electronic Service on Trial and Appellate Courts (amend Cal. Rules of Court, rules 2.251 and 8.71)

Committee or other entity submitting the proposal:
Appellate Advisory Committee and Court Technology Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691; Tara Lundstrom, tara.lundstrom@jud.ca.gov, 415-865-7650

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 9 - Electronic service: Consider whether to recommend rule amendments to clarify that a court may be served electronically if the court consents to receive this form of service. This project also appears on the CTAC annual agenda.

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-__

Title
Electronic Filing and Service: Authorization of Electronic Service on Trial and Appellate Courts

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 2.251 and 8.71

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair
Court Technology Advisory Committee
Hon. Terence L. Bruiniers, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov
Tara Lundstrom, 415-865-7650
tara.lundstrom@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee and the Court Technology Advisory Committee propose to amend rules 2.251 and 8.71 of the California Rules of Court to authorize electronic service on consenting courts. There is some ambiguity in the rules regarding whether electronic service is authorized not only by, but also on, a court. The proposal would add language to clarify that electronic service on a court is permissible under the rules. It originated from the court executive officer of a superior court.

Background

Several California Rules of Court require that certain documents be served on the superior court. For example, rule 8.212(c)(1) requires that one copy of each brief in a civil appeal be served on the superior court clerk for delivery to the trial judge. Similar language also appears in rule 8.360 (briefs in felony appeals), rule 8.412 (briefs in juvenile appeals), and rule 8.630 (briefs in capital appeals). Rules 8.500 and 8.508, governing petitions for review filed in the Supreme Court, similarly require that copies of the petition be served on both the superior court and the Court of Appeal.

There is some ambiguity as to whether the current rules authorize electronic service on a court. Rule 8.25(a), which generally addresses service of documents in appellate proceedings, requires that the parties serve documents "by any method permitted by the Code of Civil Procedure."

Code of Civil Procedure section 1010.6 (electronic service and filing in the trial courts), rule 2.250 (electronic service in the trial courts), and rule 8.70 (electronic filing and service in the appellate courts) all define "electronic service" as service of a document "*on a party or other person*" (italics added); they do not expressly provide for service on a court.

Arguably, the term "other person" in these provisions could be interpreted to encompass courts. Rule 1.6(14) offers some support for this interpretation because it defines the term "person" as including "a corporation *or other legal entity* as well as a natural person." (Italics added.)

Nevertheless, Code of Civil Procedure section 1010.6 and rules 2.251 and 8.71 specifically address electronic service *by* a court without mentioning service *on* a court. This absence could be interpreted as indicating that the rules now only contemplate service by a court and do not contemplate service on a court.

The Proposal

This proposal would eliminate the ambiguity in the rules by expressly authorizing electronic service on a trial and appellate court with that court's consent. Electronic service may benefit the courts by improving efficiency because the clerk could forward the electronic copies to the trial judge by e-mail. It would also be more efficient for the parties in many cases.

Electronic service authorized on consenting courts

The amendment would add a new paragraph (2) to rules 2.251(j) and 8.71(g), which currently address electronic service by a court. The initial paragraph of these new subdivisions is modeled on the language of current rules 2.251(e)(2) and 8.71(c)(2), which provide that a document may not be served on a nonparty unless that nonparty consents or electronic service is otherwise provided for by law or court order. The draft of new 2.251(j)(2) and 8.71(g)(2) would similarly prohibit electronic service on a court without the court's consent unless such service is provided for by law or court order.

Subparagraphs (A) and (B) of rules 2.251(j)(2) and 8.71(g)(2) would specify how a court indicates its agreement to accept electronic service. Subparagraph (A) is modeled on 2.251(b)(1)(A) and 8.71(a)(2)(A), which provide that a party may indicate that it agrees to accept electronic service by serving a notice on all parties. New 2.251(j)(2)(A) and 8.71(g)(2)(A) would similarly provide that a court may indicate that it agrees to accept electronic service by serving a notice on all the parties. Subparagraph (B) would provide that the court may also indicate its agreement to accept electronic service by adopting a local rule stating so.

Nonsubstantive amendments to rule 8.71

Additional amendments to rule 8.71(a) and (c) have been proposed. These nonsubstantive amendments make this rule more consistent with the language of trial court rule 2.251 and consolidate provisions relating to the authorization for electronic service in the appellate courts. The amendments would clarify that a document may be electronically served on a party or other person if electronic service is provided for by law or court order or if the party or person

consents to this service. The amendments would also move the provision regarding service on a nonparty from subdivision (c) to subdivision (a).

Alternatives Considered

The committees considered not recommending any amendments to the rules. The rules may be interpreted to allow for electronic service on a court. The committees did not elect this alternative, however, because the rules are ambiguous and it may not be clear to all parties that courts can accept electronic service. The amendments to the rule would also clarify how a party may consent to electronic service.

Implementation Requirements, Costs, and Operational Impacts

Under this proposed rule, implementation of electronic service on a court would generally be voluntary; each court would determine whether to consent to electronic service. For those courts that chose to implement such service, the rule would require the court either to adopt a local rule or to provide notice in individual cases. These courts would also have to establish and monitor an e-mail account to receive documents served by the parties on the court. Because implementation would be voluntary, however, each court could determine whether potential efficiencies would outweigh these implementation costs. Potential efficiencies for the courts include being able to forward copies of briefs by e-mail to judges. The proposed amendment might also provide cost-savings for the parties because they would not have to pay the costs incurred by physical filing, including any copying, transportation, and mailing expenses.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The advisory committees also seek comments from *courts* on the following cost and implementation matter:

- Would the proposal provide cost savings? If so please quantify.

Attachments

1. Cal. Rules of Court, rules 2.251 and 8.71, at pages 4–6

Rule 2.251 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 2.251. Electronic service

(a)–(i) * * *

(j) Electronic service by or on court

(1) The court may electronically serve any notice, order, judgment, or other document issued by the court in the same manner that parties may serve documents by electronic service.

(2) A document may be electronically served on a court if the court consents to electronic service or electronic service is otherwise provided for by law or court order. A court indicates that it agrees to accept electronic service by:

(A) Serving a notice on all parties that the court accepts electronic service. The notice must include the electronic service address at which the court agrees to accept service; or

(B) Adopting a local rule stating that the court accepts electronic service. The rule must indicate where to obtain the electronic service address at which the court agrees to accept service.

Rule 8.71 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 8.71. Electronic service

(a) ~~Consent to~~ Authorization for electronic service

(1) A document may be electronically served under these rules:

(A) If electronic service is provided for by law or court order; or

(B) If the recipient agrees to accept electronic services as provided by these rules and the ~~When a~~ document ~~may be~~ is otherwise authorized to be served by mail, express mail, overnight delivery, or fax transmission~~,~~ ~~electronic service of the document is permitted when authorized by these rules~~.

(2)–(3) * * *

(4) A document may be electronically served on a nonparty if the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.

(b) Maintenance of electronic service lists

When the court orders or permits electronic filing in a case, it must maintain and make available electronically to the parties an electronic service list that contains the parties' current electronic service addresses, as provided by the parties that have filed electronically in the case.

(c) Service by the parties

~~(1)~~ Notwithstanding (b), parties are responsible for electronic service on all other parties in the case. A party may serve documents electronically directly, by an agent, or through a designated electronic filing service provider.

~~(2) A document may not be electronically served on a nonparty unless the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.~~

(d)–(f) * * *

(g) Electronic service by or on court

(1) The court may electronically serve any notice, order, opinion, or other document issued by the court in the same manner that parties may serve documents by electronic service.

(2) A document may be electronically served on a court if the court consents to electronic service or electronic service is otherwise provided for by law or court order. A court indicates that it agrees to accept electronic service by:

(A) Serving a notice on all parties that the court accepts electronic service. The notice must include the electronic service address at which the court agrees to accept service; or

(B) Adopting a local rule stating that the court accepts electronic service. The rule must indicate where to obtain the electronic service address at which the court agrees to accept service.

Item number: 19

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal*:*
Appellate Procedure: Access to Electronic Appellate Court Records (adopt Cal. Rules of Court, rules 8.80–8.85)

Committee or other entity submitting the proposal:
Appellate Advisory Committee and Court Technology Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 8 on AAC annual agenda - Court records: Consider whether to recommend adoption of new rules to address public access to electronic court records.

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-___

Title
Appellate Procedure: Access to Electronic Appellate Court Records

Action Requested
Review and submit comments by June 17, 2015

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 8.80–8.85

Proposed Effective Date
January 1, 2016

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Court Technology Advisory Committee
Hon. Terence L. Bruiniers, Chair

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

Based on a suggestion received from a justice of a Court of Appeal, the Appellate Advisory Committee and the Court Technology Advisory Committee are proposing new rules addressing public access to electronic appellate court records. The proposed appellate rules are based on the existing rules regarding public access to electronic trial court records.

The Proposal

California Rules of Court, rules 2.500–2.507 address public access to electronic trial court records. These rules are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests. The rules address, among other things, what electronic trial court records may be made available remotely, what records may be made available only at the courthouse, what records can be made available in bulk, and what records may only be accessed on a case-by-case basis.

As more documents are electronically filed in the Courts of Appeal and Supreme Court and stored in electronic form, it is anticipated that questions will arise about public access to these electronic records. This proposal would establish a set of rules to addresses public access to electronic records of the Courts of Appeal and Supreme Court. The proposed appellate rules are based on the trial court rules, but have some substantive differences based primarily on differences in the nature of the records maintained by trial and appellate courts and in existing public access to these records. The proposed rules:

- Define "court records" to reflect the types of records maintained by the Courts of Appeal and Supreme Court and the fact that the Government Code section cited in the definition of trial court records does not apply to appellate courts (proposed rule 8.82);

- Reflect the fact that certain types of Court of Appeal and Supreme Court records, such as opinions, are already made available to the public on the California courts website. The proposed rules would provide for continued remote public access to those electronic appellate court records now made available to the public on this website (proposed rule 8.83(b));

- Would permit an appellate court to provide remote access to additional records not only in extraordinary criminal cases, but in other extraordinary cases as well (proposed rule 8.83(d));

- Reflect the fact that the public can search for Court of Appeal cases based on some criteria that are not available for searches of trial court records (proposed rule 8.83(e));

- Reflect the fact that electronic appellate court records will generally be made available through a centralized mechanism, such as the California courts website, rather than by each individual appellate court; and

- Do not set out requirements for the items that must be included in appellate court calendars and registers of actions or for items that must be excluded from these records. The committees considered such requirements unnecessary because the appellate court electronic calendars and registers of actions currently made available on the California courts website already generally comply with those aspects of the trial court rule that would be applicable to appellate court records.

There are additional, minor substantive differences between the proposed appellate rules and the existing trial court rules, such as replacing references to presiding judges with references to presiding justices and replacing references to statutes regarding trial court fees with statutes regarding appellate court fees. In addition, there are some differences in the structure of the proposed rules—such as in the placement of definitions and other provisions—and in wording that are not intended to be substantive.

Alternatives Considered

In developing these rules, the committees considered a variety of alternatives with respect to the scope and proposed language of individual rules. For example, the committees considered whether the rules should provide for remote access only to those types of electronic records that are remotely accessible under the trial court rules, but ultimately decided that the proposed rules should reflect and maintain the current remote access to additional appellate court records.

The committees also considered not proposing these rule amendments at all. However, the committee concluded that it would be helpful to both the public and the courts to clarify the scope of public access to electronic appellate court records.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not impose significant implementation requirements on the courts because it mandates access to those electronic appellate court records that are already currently being made available electronically and, like the trial court rules, provides for further access only to the extent feasible. The proposed rules should provide guidance with respect to electronic access to appellate court records, which may reduce questions about such access for litigants and thus costs associated with inquiries about this access for both litigants and the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on whether the proposal appropriately addresses the stated purpose.

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.80–8.85, at pages 4–10

Rules 8.80–8.85 of the California Rules of Court would be adopted, effective January 1, 2016, to read:

Article 6. Public Access to Electronic Appellate Court Records

Rule 8.80. Statement of purpose

(a) Intent

The rules in this article are intended to provide the public with reasonable access to appellate court records that are maintained in electronic form, while protecting privacy interests.

(b) Benefits of electronic access

Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of court records maintained in electronic form. Providing public access to appellate court records that are maintained in electronic form may save the courts and the public time, money, and effort and encourage courts to be more efficient in their operations. Improved access to appellate court records may also foster in the public a more comprehensive understanding of the appellate court system.

(c) No creation of rights

The rules in this article are not intended to give the public a right of access to any record that they are not otherwise entitled to access. The rules do not create any right of access to sealed or confidential records.

Advisory Committee Comment

The rules in this article acknowledge the benefits that electronic court records provide but attempt to limit the potential for unjustified intrusions into the privacy of individuals involved in litigation that can occur as a result of remote access to electronic court records. The proposed rules take into account the limited resources currently available in the appellate courts. It is contemplated that the rules may be modified to provide greater electronic access as the courts' technical capabilities improve and with the knowledge gained from the experience of the courts in providing electronic access under these rules.

Subdivision (c). Rules 8.45–8.47 govern sealed and confidential records in the appellate courts.

Rule 8.81. Application and scope

(a) Application

The rules in this article apply only to records of the Supreme Court and Courts of Appeal.

(b) Access by parties and attorneys

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

Rule 8.82. Definitions

As used in this article, the following definitions apply:

(1) "Court record" is any document, paper, exhibit, transcript, or other thing filed in an action or proceeding; any order, judgment, or opinion of the court; and any court minutes, index, register of actions, or docket. The term does not include the personal notes or preliminary memoranda of justices, judges, or other judicial branch personnel.

(2) "Electronic record" is a court record that requires the use of an electronic device to access. The term includes both a record that has been filed electronically and an electronic copy or version of a record that was filed in paper form.

(3) "The public" means an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity.

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

(5) Providing electronic access to electronic records "to the extent it is feasible to do so" means that electronic access must be provided to the extent the court determines it has the resources and technical capacity to do so.

(6) "Bulk distribution" means distribution of multiple electronic records that is not done on a case-by-case basis.

Rule 8.83. Public access

(a) General right of access

All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except sealed or confidential records.

(b) Electronic access required to extent feasible

(1) Electronic access, both remote and at the courthouse, will be provided to the following court records, except sealed or confidential records, to the extent it is feasible to do so:

(A) Dockets or registers of actions;

(B) Calendars;

(C) Opinions; and

(D) The following Supreme Court records:

i. Results from the most recent Supreme Court weekly conference;

ii. Party briefs in cases argued in the Supreme Court for at least the preceding 3 years;

iii. Supreme Court minutes from at least the preceding 3 years.

(2) If a court maintains records in civil cases in addition to those listed in (1) in electronic form, electronic access to these records, except those listed in (c), must be provided both remotely and at the courthouse, to the extent it is feasible to do so.

(c) Courthouse electronic access only

If a court maintains the following records in electronic form, electronic access to these records must be provided at the courthouse, to the extent it is feasible to do so, but remote electronic access may not be provided to these records:

(1) Any reporter's transcript for which the reporter is entitled to receive a fee; and

(2) Records other than those listed in (b)(1) in the following proceedings:

(A) Proceedings under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;

(B) Juvenile court proceedings;

(C) Guardianship or conservatorship proceedings;

(D) Mental health proceedings;

(E) Criminal proceedings;

(F) Civil harassment proceedings under Code of Civil Procedure section 527.6;

(G) Workplace violence prevention proceedings under Code of Civil Procedure section 527.8;

(H) Private postsecondary school violence prevention proceedings under Code of Civil Procedure section 527.85;

(I) Elder or dependent adult abuse prevention proceedings under Welfare and Institutions Code section 15657.03; and

(J) Proceedings to compromise the claims of a minor or a person with a disability.

(d) Remote electronic access allowed in extraordinary cases

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

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

(A) The privacy interests of parties, victims, witnesses, and court personnel, and the ability of the court to redact sensitive personal information;

(B) The benefits to and burdens on the parties in allowing remote electronic access; and

(C) The burdens on the court in responding to an extraordinarily high number of requests for access to documents.

(2) The following information must be redacted from records to which the court allows remote access under (d): driver's license numbers; dates of birth; social security

numbers; Criminal Identification and Information and National Crime Information numbers; addresses and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access. Subdivision (d)(2) does not apply to any document in the original court file; it applies only to documents that are made available by remote electronic access.

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

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

(e) Access only on a case-by-case basis

With the exception of the records covered by (b)(1), electronic access to an electronic record may be granted only when the record is identified by the number of the case, the caption of the case, the name of a party, the name of the attorney, or the date of oral argument, and only on a case-by-case basis.

(f) Bulk distribution

Bulk distribution may be provided only of the records covered by (b)(1).

(g) Records that become inaccessible

If an electronic record to which electronic access has been provided is made inaccessible to the public by court order or by operation of law, the court is not required to take action with respect to any copy of the record that was made by a member of the public before the record became inaccessible.

Advisory Committee Comment

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

Subdivision (b). Courts should encourage availability of electronic access to court records at public off-site locations.

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

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

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

Rule 8.84. Limitations and conditions

(a) Means of access

Electronic access to records required under this article must be provided by means of a network or software that is based on industry standards or is in the public domain.

(b) Official record

Unless electronically certified by the court, a court record available by electronic access is not the official record of the court.

(c) Conditions of use by persons accessing records

Electronic access to court records may be conditioned on:

(1) The user's consent to access the records only as instructed; and

(2) The user's consent to monitoring of access to its records.

The court must give notice of these conditions, in any manner it deems appropriate. Access may be denied to a member of the public for failure to comply with either of these conditions of use.

(d) Notices to persons accessing records

The court must give notice of the following information to members of the public accessing its records electronically, in any manner it deems appropriate:

(1) The identity of the court staff member to be contacted about the requirements for accessing the court's records electronically.

(2) That copyright and other proprietary rights may apply to information in a case file, absent an express grant of additional rights by the holder of the copyright or other proprietary right. This notice must advise the public that:

(A) Use of such information in a case file is permissible only to the extent permitted by law or court order; and

(B) Any use inconsistent with proprietary rights is prohibited.

(3) Whether electronic records are the official records of the court. The notice must describe the procedure and any fee required for obtaining a certified copy of an official record of the court.

(4) That any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201.

(e) Access policy

A privacy policy must be posted on the California Courts public-access website to inform members of the public accessing its electronic records of the information collected regarding access transactions and the uses that may be made of the collected information.

Rule 8.85. Fees for electronic access

(a) Court may impose fees for copies

The court may impose fees for the costs of providing copies of its electronic records, under Government Code section 68928.

(b) Fees of vendor must be reasonable

To the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure that any fees the vendor imposes for the costs of providing access are reasonable.

Item number: 20

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal:
Appellate Procedure: Prehearing Conferences (amend Cal. Rules of Court, rule 8.248)

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 7 - Case management conferences: Consider whether to recommend amendments to rule 8.248 that would permit a justice who participated in a case management conference in an appeal to participate in the determination of that appeal.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In 2014, RUPRO approved including consideration of this item on the committee's annual agenda as a priority 1 project with a January 1, 2015 completion date. In April 2014, the committee sought approval to circulate this proposal for public comment. RUPRO did not approve circulation, but instead referred the proposal back to the committee to consider whether it should include a procedure whereby litigants could waive the disqualification of a justice who had participated in settlement discussions concerning the case.

Committee staff sought input from the proponent of the proposal on the issue of the potential waiver of a justice's disqualification where the justice had been involved in settlement discussions. The proponent indicated that he did not consider it problematic that the rule prohibits justices who participated in settlement discussions from subsequently being involved in determination of the appeal and that he had not been seeking a change in this aspect of the rule. His interest was only in eliminating the disqualification where the pre-hearing conference was in the nature of a case management conference. He also noted that several districts have specifically structured their settlement programs so that justices involved in settlement discussions will not be on the panel deciding the case. Based on this input, and the fact that, unlike in the trial court, there is not an existing procedure for parties to waive grounds for disqualification of a justice, the committee is seeking to circulate this proposal without adding a provision relating to waiver of disqualification.

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INVITATION TO COMMENT

SPR15-___

Title
Appellate Procedure: Prehearing Conferences

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.248

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Heather Anderson,
heather.anderson@jud.ca.gov, 415-865-7691

Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rule governing prehearing conferences in the Court of Appeal to limit the circumstances in which a prohibition on a justice's participation in determining the appeal would apply. The rule would be amended to provide that a justice may not participate in or influence the determination of the appeal only when the settlement of the case was addressed at the prehearing conference. This proposal is based on a suggestion received from the presiding justice of a Court of Appeal.

The Proposal

California Rules of Court, rule 8.248 currently allows the presiding justice of a Court of Appeal to order the parties/counsel on appeal to attend a conference to consider narrowing the issues on appeal, settlement, and other relevant matters. Subdivision (c) of this rule also currently provides that "[n]either the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal." This effectively means that any justice who participates in such a conference may not be on the panel that decides the matter.

Holding a prehearing conference for case management purposes can be helpful, particularly in large, complex appeals. A prehearing conference can provide an opportunity to discuss such procedural matters as consolidating or severing cases/issues, coordinating briefing schedules, and augmenting the record. This can save the parties and the appellate courts time and resources. However, the current prohibition on subsequent participation in the determination of the appeal appears to discourage the use of these conferences for these case management purposes.

This proposal would make two changes to rule 8.248. First, to clarify the potential use of these conferences for case management purposes, it would replace the reference to using prehearing conferences to consider narrowing the issues with a broader reference to using such conferences to consider case management issues. Second, it would limit the prohibition on subsequent participation in the determination of the appeal to situations in which settlement was addressed at the prehearing conference. The committee notes that the California Code of Judicial Ethics Canon 3B(12) cautions judges to keep in mind the effect that the judge's participation in dispute resolution efforts, such as settlement conferences, may have on the judge's impartiality or the appearance of impartiality. At least two appellate districts have also adopted local settlement conference procedures that are designed to ensure that a justice who facilitates settlement discussions is not involved in any subsequent adjudication of a case.[1] In light of the caution in the Code of Judicial Ethics and these existing local procedures, the committee is not proposing a change in the current prohibition on a justice participating in or influencing the determination of the appeal if the justice participated in prehearing conference at which settlement was addressed.

Alternatives Considered

The committee considered proposing amendments that would have permitted parties to waive the prohibition on a justice who participated in prehearing conference involving settlement discussions from subsequent participation in the determination of an appeal. Ultimately, both because of the caution in the Code of Judicial Ethics discussed above and because, unlike in the trial court, waivers of potential disqualifications are not typically used in the appellate courts, the committee decided not to pursue such amendments.

The committee also considered not proposing these rule amendments at all. However, the committee concluded that narrowing the current prohibition could facilitate the use of prehearing conferences on appeal for case management purposes, which may reduce costs for litigants and the courts. Given these potential costs savings, the committee concluded that it should propose these rule amendments at this time.

Implementation Requirements, Costs, and Operational Impacts

This proposal will not impose any implementation requirements on the courts because holding these conferences is optional. This amendment should facilitate the use of prehearing conferences on appeal for case management purposes, which may reduce costs for litigants and the courts.

[1] The First Appellate District's local rule 3 relating to settlement conferences provides that "[a] justice selected by the court from outside the division to which the appeal is assigned shall preside over the settlement conference." The Fourth Appellate District's local rule 4(g) provides that "[a] justice or assigned justice who participates in a settlement conference that does not result in complete settlement shall not thereafter participate in any way in the consideration or disposition of the case on its merits."

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on whether the proposal appropriately addresses the stated purpose.

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Cal. Rules of Ct., rule 8.248

Rule 8.248 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 8.248. Prehearing conference

(a) Statement and conference

After the notice of appeal is filed in a civil case, the presiding justice may:

(1) Order one or more parties to serve and file a concise statement describing the nature of the case and the issues presented; and

(2) Order all necessary persons to attend a conference to consider ~~a narrowing of the~~ case management issues, settlement, and other relevant matters.

(b) Agreement

* * *

(c) Proceedings after conference

(1) Unless allowed by a filed agreement, no matter recited in a statement under (a)(1) or discussed in a conference under (a)(2) may be considered in any subsequent proceeding in the appeal other than in another conference.

(2) If settlement is addressed at the conference, other than an inquiry solely about the parties' interest in settlement, neither the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal.

(d) Time to file brief

* * *

Item number: 21

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal*:*
Appellate Procedure: Contents of Normal Record in Felony Appeals (amend Cal. Rules of Court, rule 8.320)

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 15 - Required content of record in criminal appeals: Consider whether to recommend amendments to rule 8.320 to require that opening statements be included in the reporter's transcripts in felony appeals

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-__

Title Appellate Procedure: Contents of Normal Record in Felony Appeals	Action Requested Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes Amend Cal. Rules of Court, rule 8.320	Proposed Effective Date January 1, 2016
Proposed by Appellate Advisory Committee Hon. Raymond J. Ikola, Chair	Contact Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

Executive Summary and Origin

To save time and costs for courts associated with making and considering requests to augment the record and with preparing and transmitting supplemental reporter's transcripts to the reviewing court, this proposal would add opening statements to the normal record in certain felony appeals—those in which a defendant appeals from a judgment of conviction other than a conviction obtained by plea or admission. This proposal originated from a suggestion submitted by the director of one of the appellate projects that assist the Courts of Appeal with appointed counsel in felony appeals.

Background

Rule 8.320 addresses the contents of the normal record in felony appeals. Subdivision (c) of this rule lists the oral proceedings that must be included in the reporter's transcript in appeals in which a defendant is appealing from a judgment of conviction or the People are appealing from an order granting a new trial. Currently, subdivision (c)(3) specifically excludes any opening statement from such transcripts. Rule 8.324 permits either the People or the defendant to apply to the superior court for inclusion of opening statements, among other things, in the record.

In the experience of members of the advisory committee, transcripts of opening statements are routinely needed when a defendant appeals from a judgment of conviction other than a conviction obtained by plea or admission. Often, during the trial, attorneys will refer back to the opening statement. To understand these references, appellate counsel need to have a transcript of the opening statement.

The Second Appellate District has adopted a local rule that provides for automatic augmentation of the record to include reporter's transcripts of opening statements in these cases. In other Court of Appeal districts, the California Rules of Court provide mechanisms to request the inclusion of additional items, such as opening statements, in the record on appeal, either through an application to the superior court under rule 8.324, as mentioned above, or through a motion to augment under rule 8.340. However, it takes additional time and resources for counsel to prepare and for the courts to consider such applications and motions. For those defendants in felony cases who are represented by appointed counsel, the time spent by counsel on such requests or motions constitutes an additional cost for the Court of Appeal. Furthermore, if the superior court or Court of Appeal routinely grant these applications or motions, it does not save trial courts any record preparation costs not to have included the opening statement in the original reporter's transcript. In fact, it may actually cost trial courts more to separately prepare and transmit to the reviewing court supplemental reporter's transcripts at a later time.

The Proposal

This proposal would amend rule 8.320 to require that opening statements be included in reporter's transcripts as part of the normal record in appeals by defendants in felony cases from a judgment of conviction other than a conviction obtained by plea or admission. This amendment is intended to reduce court costs associated with preparing and considering applications to include additional items in the record and motions to augment and with preparing and transmitting supplemental reporter's transcripts to the reviewing court.

The committee is also proposing a nonsubstantive change to subdivision (c)(3) of rule 8.320. Currently, subdivision (c)(9)(B) provides that, in defendant's appeals, closing arguments are to be included in the normal record on appeal. By implication, this means that closing arguments are not to be included in the record when the appeal is filed by the People. To make this clearer, the committee is proposing that closing statements be added to the items that subdivision (c)(3) specifies are not included in the reporter's transcript in appeals by the People.

Alternatives Considered

The committee considered proposing amendments to rule 8.324 to eliminate the reference to the defendant requesting inclusion of opening statements in the record. However, because the proposed amendment to rule 8.320 would only require inclusion of opening statements in the normal record in a portion of defendants' appeals, the committee decided not to propose a change to rule 8.324.

The committee considered proposing amendments to rules 8.865 and 8.918, which address the normal record in misdemeanor and infraction cases, to also include opening statements. However, the committee decided not to propose such amendments at this time, but to refer this issue to its Appellate Division Subcommittee for future consideration.

The committee also considered not proposing any changes to rule 8.320. But given the conclusion that adding opening statements to the normal record would save court resources, the committee concluded that it would be appropriate to propose this amendment at this time.

Implementation Requirements, Costs, and Operational Impacts

This proposal will require changes in current procedures relating to what material is included in the reporter's transcripts in criminal cases. This is likely to require some additional training for court reporters. However, as indicated above, the intent of this proposal is to reduce overall costs and increase efficiency by:

- Reducing Court of Appeal expenses for appointed counsel in felony cases associated with preparing applications to the trial court to include opening statements in the reporter's transcript and with preparing motions to augment;
- Reducing costs for the trial courts and Courts of Appeal in considering these applications and motions; and
- Reducing trial court costs associated with preparing and transmitting supplemental reporter's transcripts to the reviewing court.

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?
- Is the opening statement that would be added to the normal record on appeal under this proposal routinely needed in the substantial majority of the appeals filed by defendants from a judgment of conviction other than a conviction obtained by plea or admission? (While automatically including this statement in the record will reduce costs if routinely needed for appellate review in these cases, it may increase costs if the statement is not needed.)

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

- Will the proposal provide cost savings? If so please quantify.
- What are the implementation requirements 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 system, or modifying case management system.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Rule 8.320 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 8.320. Normal record; exhibits

(a) If the defendant appeals from a judgment of conviction, or if the People appeal from an order granting a new trial, the record must contain a clerk's transcript and a reporter's transcript, which together constitute the normal record.

(b) * * *

(c) Reporter's transcript

The reporter's transcript must contain:

(1)–(2) * * *

(3) The oral proceedings at trial, but excluding the voir dire examination of jurors, ~~and~~ any opening statement, and the closing arguments;

(4)–(8) * * *

(9) And, if the appellant is the defendant:

(A) * * *

(B) The closing arguments and, in an appeal from a judgment of conviction other than a conviction obtained by plea or admission, any opening statement; and

(C) * * *

(d)–(f) * * *

Item number: 22

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal*:*
Appellate Procedure: Appendixes (amend Cal. Rules of Court, rule 8.124)

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 11 - Appendixes: Consider whether to recommend amendments to rule 8.124 to eliminate the preference for preparation of a joint appendix

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In 2013, RUPRO approved include consideration this proposal on the committee's annual agenda as a priority 2 project with a January 1, 2015 completion date. In 2014, this project was again approved by RUPRO for inclusion on the committee's annual agenda, as was consideration of another potential amendment to rule 8.124 – adding criteria for courts to consider in ruling on a motion to overturn a defendant's election to proceed by appendix. The committee therefore developed proposal that combined amendments to rule 8.124 designed to implement both of these suggestions and sought approval to circulate this proposal for public comment. In April 2014, RUPRO declined to approve the circulation of this proposal.

Committee members and staff subsequently sought input from various bar organizations about the frequency with which practitioners encountered difficulties with both the preference for joint appendixes and seeking to overturn a respondent's election to proceed by appendix. The input collected suggested that many practitioners believed that the preference for joint appendixes is unnecessary and creates difficulties. While many practitioners expressed views about the wisdom of allowing respondents to elect to proceed by appendix, few reported actually opposing such an election. Based on this, the committee decided to try again to purse the suggestion to eliminate the preference for a joint appendix, but not to further pursue the other suggested change to rule 8.124. The annual agenda with this project included, was approved by RUPRO in December 2014.

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INVITATION TO COMMENT

SPR15-___

Title
Appellate Procedure: Appendixes

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.124

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Heather Anderson,
heather.anderson@jud.ca.gov, 415-865-7691

Executive Summary and Origin

Based on a suggestion received from an attorney, the Appellate Advisory Committee is proposing to amend the rule governing the use of appendixes in lieu of clerk's transcripts in unlimited civil appeals to eliminate the provision encouraging parties to prepare a joint appendix.

The Proposal

California Rules of Court, rule 8.124 provides for the use of appendixes prepared by the parties in lieu of clerk's transcripts in unlimited civil appeals. Under this rule, appellants and respondents may prepare either individual appendixes, which are filed with their respective briefs, or a joint appendix, which must be filed with the appellant's opening brief. Currently, subdivision (a)(3) of this rule provides that the parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix.

Attorneys have reported that the provision encouraging the use of a joint appendix is not necessary and sometimes causes problems for litigants. Both joint appendixes and appellant's appendixes are required to contain all the items required to be included in a clerk's transcript under rule 8.122 and any other item that could be included in a clerk's transcript that is necessary for proper consideration of the issues on appeal. This includes, for both joint and appellant's appendixes "any item that the appellant should reasonably assume the respondent will rely on." If the appellant is able to anticipate the items the respondent will need in the appendix, then a joint appendix will not be necessary—all the necessary items will be in the appellant's appendix. If, however, the respondent does need additional items, this will not become clear until after the appellant files his or her brief and the respondent can see the issues being raised on appeal, in which case a respondent's appendix will be needed. Since respondents generally cannot

anticipate whether additional items will be needed until after appellant's brief is filed and the deadline for filing a joint appendix is passed, attorneys report that joint appendixes generally are not used and thus it is not efficient for them to spend time trying to develop a joint appendix. Despite this, because of the provision encouraging the use of joint appendixes, the respondent may insist on trying to prepare a joint appendix, resulting in disputes between litigants and inefficiencies.

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This proposal would delete the provision in current rule 8.124 that encourages parties to file a joint appendix. This would not prevent litigants from preparing a joint appendix where it is worthwhile to do so, but it would eliminate the pressure to spend time on preparing joint appendixes where it does not make sense.

Alternatives Considered

The committee considered not proposing these rule amendments. However, the committee concluded that eliminating the encouragement to use joint appendixes would be helpful to litigants.

Implementation Requirements, Costs, and Operational Impacts

This proposed change would not impose any implementation requirements on courts and no operational impacts on courts are anticipated.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on whether the proposal appropriately addresses the stated purpose.

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Rule 8.124 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 8.124. Appendixes

(a) Notice of election

(1)–(2) * * *

(3) The parties may prepare separate appendixes~~, but are encouraged to~~ or they may stipulate to a joint appendix.

(b)–(g) * * *

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal*:*
Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rule 8.278; revise form MC-013)

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Heather Anderson, heather.anderson@jud.ca.gov, 415-865-7691

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/10/15
Project description from annual agenda: Item 13 - Costs on appeal: Consider whether to recommend (1) amendments to rule 8.278 to change the deadline for filing a memorandum of costs from 40 days after the clerk sends notice of issuance of the remittitur to 40 days after issuance of the remittitur; and (2) revisions to the memorandum of costs form (form MC-013), to better reflect costs that are typically claimed.

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-___

Title
Appellate Procedure: Costs on Appeal

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.278; revise form MC-013

Proposed by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

Based on a suggestion received from the State Bar of California's Committee on Appellate Courts, the Appellate Advisory Committee is proposing to amend the rule governing costs on appeal to modify when a request for costs must be filed and revise the form for specifying these costs to be more consistent with the rule and better reflect appellate practice.

The Proposal

California Rules of Court, rule 8.278 addresses costs on appeal. Subdivision (c)(1) establishes the timeframe within which a memorandum of costs must be filed. Currently, this provision requires that the memorandum be filed within 40 days after the clerk sends notice of issuance of the remittitur. However, because reviewing courts do not use a proof of service when sending the remittitur, parties do not have an easy way to determine when the remittitur was sent. This proposal would amend rule 8.278 to instead require the memorandum of costs to be filed within 40 days of the date of issuance of the remittitur. This date can easily be determined by the parties because it will be reflected on the docket and on the remittitur document itself.

Subdivision (d) of rule 8.278 identifies those costs that may be recovered on appeal. *Memorandum of Costs on Appeal* (form MC-013), the form that must be used in requesting costs on appeal, also lists costs that may be claimed. There are, however, some differences between the list of recoverable costs in the rule and the list on the form. Rule 8.278(d) includes among the recoverable costs the amount the party paid for any portion of the record. The accompanying advisory committee comment clarifies that this provision is intended to encompass the costs for an appendix prepared by a party under rule 8.124 in lieu of a clerk's transcript. Such appendixes are used quite frequently. However, while form MC-013 includes the cost of a clerk's transcript

on its list of recoverable costs, it does not specifically include the cost of an appendix on this list. This proposal would revise form MC-013 to specifically include the cost of an appendix among the recoverable costs listed on the form. Consistent with rule 8.278(d), the revision would also clarify that costs within this category include those for an original, a copy, or both.

Rule 8.278(d) also includes among the recoverable costs the cost to reproduce any brief. Form MC-013 lists the cost of "printing" briefs as a recoverable cost. However, briefs are commonly reproduced now through photocopying, rather than printing. This proposal would revise form MC-013 to include the cost of copying briefs among the recoverable costs listed on the form.

Both rule 8.278(d) and form MC-013 currently include notary fees on their lists of recoverable costs. However, these are relatively uncommon costs in appellate proceedings and thus, it does not seem necessary for them to be separately listed on form MC-013. Instead, if these costs occur, they can be identified in the space on form MC-013 for "other" costs. This proposal would revise form MC-013 to eliminate notary fees from among the recoverable costs specifically listed.

Form MC-013 currently separately lists "Expenses of service" and "Transmission and filing of record, briefs, and other papers" as recoverable costs. In rule 8.278(d), these costs are listed together. It is also the committee's understanding that these costs are often paid as part of a single transaction, particularly when items are served and filed electronically. To better reflect both the rule and appellate practice, this proposal would merge these two provisions into a single line on form MC-013. However, the committee would particularly appreciate input on whether the cost of service should continue to be identified separately on the memorandum of costs to facilitate identifying and determining the reasonableness of this cost.

Form MC-013 currently includes, as a second page, an optional proof of service form. The Judicial Council has also adopted a separate proof of service form, *Proof of Service (Court of Appeal* (form APP-009). Consistent with recent recommendations it has made relating to other forms, to reduce the need to maintain multiple proof of service provisions on separate forms, the committee is proposing that the proof of service on page 2 of MC-013 be deleted and a notice box added to the top of the form indicating that form APP-009 may be used to provide proof of service.

Form MC-013 is currently grouped among the miscellaneous Judicial Council forms (hence the MC designation in the form name). Because of this miscellaneous designation, this form may be difficult for some parties to locate. The committee is therefore proposing that this form be grouped among the appellate forms and renamed as APP-013. This would put the form in a more logical sequence with other forms used in appellate proceedings.

Alternatives Considered

The committee considered not proposing the rule amendments or form revisions. However, the committee concluded that these proposed changes would improve appellate proceedings by

making the time frame for filing a memorandum of costs clearer and by making the form better reflect both the rule and practice.

Implementation Requirements, Costs, and Operational Impacts

These proposed changes would not impose any implementation requirements on courts, and no operational impacts on courts are anticipated from these proposed changes.

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?
- Should the cost of service continue to be identified separately on the memorandum of costs to facilitate identifying and determining the reasonableness of this cost?

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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 8.278, at pages 4–5
2. Revised *Memorandum of Costs on Appeal* (form APP-013), at page 6

Rule 8.278 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Article 4. Hearing and Decision in the Court of Appeal

Rule 8.278. Costs on appeal

(a)–(b) * * *

(c) Procedure for claiming or opposing costs

(1) Within 40 days after ~~the clerk sends notice of~~ issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under rule 3.1700.

(2)–(3) * * *

(d) Recoverable costs

(1) A party may recover only the following costs, if reasonable:

(A) Filing fees;

(B) The amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule 8.147(b)(2) is not recoverable unless the Court of Appeal ordered the copying;

(C) The cost to produce additional evidence on appeal;

(D) The costs to notarize, serve, mail, and file the record, briefs, and other papers;

(E) The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply;

(F) The cost to procure a surety bond, including the premium, the cost to obtain a letter of credit as collateral, and the fees and net interest expenses incurred to borrow funds to provide security for the bond or to obtain a letter of credit, unless the trial court determines the bond was unnecessary; and

(G) The fees and net interest expenses incurred to borrow funds to deposit with the superior court in lieu of a bond or undertaking, unless the trial court determines the deposit was unnecessary.

(2) Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702.

Advisory Committee Comment

This rule is not intended to expand the categories of appeals subject to the award of costs. See rule 8.493 for provisions addressing costs in writ proceedings.

Subdivision (c). * * *

Subdivision (d). Subdivision (d)(1)(B) is intended to refer not only to a normal record prepared by the clerk and the reporter under rules 8.122 and 8.130 but also, for example, to an appendix prepared by a party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

"Net interest expenses" in subdivisions (d)(1)(F) and (G) means the interest expenses incurred to borrow the funds that are deposited minus any interest earned by the borrower on those funds while they are on deposit.

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 byt the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff: Defendant:	
MEMORANDUM OF COSTS ON APPEAL	CASE NUMBER:

NOTE: You may use *Proof of Service (Court of Appeal)* (form APP-009) to provide proof that this form has been served.

Prevailing party *(name):*

claims from *(name):*

the following costs on appeal:

	TOTALS
1. Filing fees	1. $
2. Preparation of the original and copies of clerk's transcript or appendix	2. $
3. Preparation of reporter's transcript	3. $
4. Printing and copying of briefs	4. $
5. Production of additional evidence	5. $
6. Transmitting, filing, and serving of record, briefs, and other papers	6. $
7. Premium on any surety bond on appeal	7. $
8. Other expenses reasonably necessary to secure surety bond	8. $
9. Other: *(specify authority):*	9. $
TOTAL COSTS:	$

I am ☐ the party ☐ counsel for the party ☐ agent for the party who claims the costs listed above.
To the best of my knowledge, the items of cost are correct and were necessarily incurred in this case on appeal.

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)

Form Adopted for Mandatory Use
Judicial Council of California
APP-013 [Rev. January 1, 2016]

Code of Civil Procedure, § 1034(b);
Cal. Rules of Court, rule 8.272
www.courts.ca.gov

Item number: 24

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Small Claims: Extraordinary Writs under Code of Civil Procedure section 116.798 (Amend Cal. Rules of Court, rule 8.930 and 8.950; adopt rules 8.970–8.977; revise forms APP-150-INFO and APP-151, and adopt forms SC-300 and 300 INFO)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricial Lucas, Chair

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2014
Project description from annual agenda: Writs on Small Claims Matters: Develop procedural rules for writ proceedings relating to actions by small claims division other than post-judgment enforcement orders.

If requesting July 1 or out of cycle, explain:

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

Judicial Council of California

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

INVITATION TO COMMENT

SPR15-__

Title
Small Claims: Extraordinary Writs under Code of Civil Procedure section 116.798

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.930 and 8.950; adopt rules 8.970–8.977; revise forms APP-150-INFO and APP-151, and adopt forms SC-300 and 300 INFO

Proposed by
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, chair

Appellate Advisory Committee
Hon. Raymond Ikola, chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2015

Contact
Anne Ronan 415-865-8933
anne.ronan@jud.ca.gov

Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Civil and Small Claims Advisory Committee and the Appellate Advisory Committee are proposing new rules and forms to comply with a statutory mandate to develop procedural rules for certain writ proceedings on small claims rulings. The proposal also provides clarifying amendments to current rules and forms that apply to writ proceedings in the appellate division generally to the extent those apply to small claims proceedings relating to postjudgment enforcement actions.

Background

Legislation was enacted in 2013 to clarify the proper jurisdiction for writs in small claims actions given trial court unification (Code Civ. Proc. § 116.798). This legislation makes the jurisdiction dependant on the stage of the small claims case at which the act being challenged took place: (1) in any small claims court action other than a post-judgment enforcement proceeding, (2) in a post-judgment enforcement proceeding, or (3) in a small claims appeal (which is essentially a trial de novo). This new statute provides that writs proceedings in the first set of matters – those challenging an action of the small claims court other than a post-judgment enforcement action – must be heard by a single judge who is assigned to the superior court appellate division. The

statute also requires the Judicial Council to promulgate new rules for writ proceedings relating to these rulings.

The new statute was recommended by the California Law Revision Commission (CLRC), as part of its work in recommending statutory amendments to address provisions of the law that were obsolete as a result of trial court unification. As part of this work, the CLRC, with input from the Civil and Small Claims Advisory Committee (CSCAC), developed recommended legislation to clarify small claims writ jurisdiction after unification, which was eventually enacted as Code of Civil Procedure § 116.798.[1]

The CLRC comments that accompanied its recommendation noted that the new law is solely to clarify which court has jurisdiction of a writ petition, not to in any way change the circumstances under which a party may seek a write or a court grant one.[2] Relief through writs—particularly the common law writs of review, mandate, and prohibition encompassed by the new statute—is deemed extraordinary and is at the discretion of the reviewing court, not available as a matter of course. The finality of small claims judgments makes courts reluctant to consider writs as an alternative means of review, but does not preclude such writs. See *Bricker v. Superior Court*, 133 Cal.App.4th 634 (Cal.App. 1 Dist. 2005).

The Proposal

The Civil and Small Claims Advisory Committee (CSCAC) and the Appellate Advisory Committee (AAC) together developed a set of proposed rule changes designed to fulfill the statutory mandate and a set of proposed form changes to help litigants participating in these proceedings. This proposal has three main parts:

1. A set of proposed new rules for writ proceedings relating to actions by small claims divisions other than postjudgment enforcement orders (rules 8.970–8.977);

2. A set of two new forms for these writ proceedings:
   - A form for the petition – *Petition for Writ (Small Claims)* (form SC-300); and
   - An information sheet explaining these writ proceedings – *Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO)

3. A set of proposed changes to the existing rules and forms relating to writ proceedings in the superior court appellate division to reflect both the new procedures for writ proceedings relating to actions by small claims divisions other than postjudgment enforcement orders and to clarify jurisdiction in other small claims writ proceedings (rules 8.930 and 8.950 and *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.
[2] See California Law Revision Commission's *Recommendations on Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case* (August 2011) (CLRC 2011 Report) at p. 340. The report may be found at . http://www.clrc.ca.gov/J1452.html.

APP-150-INFO) and *Petition for Writ (Misdemeanor, Infraction, and Limited Civil Cases)* (form APP-151)).

The new and amended rules are attached at pages 11–18. The new and revised forms are attached at pages 19–54.

Proposed new rules

In developing the new rules and forms for writ proceedings in initial small claims actions, the advisory committees looked to the current rules applicable to writ proceedings in limited civil cases (rules 8.930 et seq.) and used those as a model for the new rules. The new rules regarding small claims writ proceedings would be added to the division of the rules for the superior court appellate division that currently contain the rules regarding trial of small claims cases on appeal. The primary provisions of the proposed new rules are summarized below.

- **Rule 8.970. Application.** This rule describes which proceedings are governed by the rules, and which are not.

- **Rule 8.971. Definitions.** This rule provided definitions of the terms writ, petition, petitioner, respondent small claims court, and real party in interest. This parallels a rule setting out definitions in the rules regarding small claims appeals.

- **Rule 8.972. Petitions filed by persons not represented by an attorney.** This rule states the rules for petitions filed by self-represented parties, mandating at the start that they use a specific Judicial Council petition form unless a court finds good cause. The petitioner is to attach the court ruling objected to, any documents submitted to the small claims court that supports or opposed the petitioner's position, or is otherwise necessary for a complete understanding of the matter.

  The rule differs from the parallel rule relating to appellate division writs generally with respect to providing a record of what was said at the court proceedings. Rather than requiring a reporter's transcript (which is not available in small claims proceedings) proposed subpart (a)(2) provides that if the petition raises any issue that would require the judge considering it to understand what was said in the small claims court, the petition must include a fair summary of the proceedings, including the parties' arguments and any statement by the small claims court supporting its ruling.[3]

[3] The advisory committees request specific comments on this provision in the rule and the corresponding items in the form petition (see proposed *Petition for Writ (Small Claims)* (form SC-300) at items10.a(4), 10.b(4) and10.c(4)). The committee has some concerns over whether this item should be required by rule, possibly setting up a trap for unwary self-represented parties who do not understand when it may or may not be required. On the other hand, the committees are also concerned that including such a provision in the rule and form may lead to unnecessary paperwork, as parties may provide detailed summaries of the full proceedings even when unnecessary.

The service requirements provided here are similar to those for other writ proceedings in the appellate division, except for the addition of a requirement that the petitioner serve a copy of the form information sheet along with the petition and supporting documents (rule 8.972(d)).

- **Rule 8.973. Petitions filed by an attorney for a party.** This rule addresses petitions filed by attorneys. The advisory committees, recognizing the complexity of extraordinary writ proceedings, followed the example in the rules on writs to the appellate division generally (cf. rule 8.932) and acknowledge that attorneys will be involved for at least some writ petitions. [4] Although the petition form must be used by self-represented parties, this rule permits counsel to file individualized pleadings should they choose to do so, so long as all the information requested in the form petition is included.

- **Rule 8.974 (a). Preliminary opposition.** Because parties are permitted by statute to file a preliminary opposition to a petition for writ (see § 1107), this rule provides a procedure for doing so, including a 10-day deadline for filing the opposition, parallel to the rules for appellate division writs generally. In an effort to simplify the procedures, this new rule includes a provision stating that the preliminary opposition is not required unless requested by the court. There is no provision in this rule for a reply brief, which is intended to keep the procedure as simple as possible.

- **Rule 8.974(b). Return or opposition; reply.** This subpart sets out the procedure for filing a return if the court issues an alternative writ or order to show cause, or an opposition if the court provides notice that it is considering a peremptory writ without issuing anything further. The respondent has 30 days to respond if no other date ordered by the court, and the petitioner then has 15 days to reply. This rule is almost identical to the corresponding rule for appellate division writs generally (cf. rule 8.933(b)), with the exception that "return" is defined within the rule as a response. The committees concluded that since the provisions essentially echo the statute (see § 1089) there was no way to make it simpler for small claims parties.

- **Rule 8.976. Filing, finality, and modification of decisions; remittitur.** These provisions parallel the similar rule for appellate division writs but have been modified to reflect that the small claims writs will not be issued by the appellate division, but by a single judge in that division. They also differ in that there are no provisions or cross-references in this new rule regarding rehearings or requests to transfer a proceeding to the Court of Appeal. The committees decided that these were unnecessary for small clams cases, as the extraordinary writ proceeding is already providing a chance for a review not generally permitted in small

[4] Section 116.530(a) states that "Except as permitted by this section, no attorneys may take part *in the conduct or defense of a small claims action*." A writ proceeding is not itself a small claims action, but a new proceeding filed in the appellate division. A writ petition is similar to a complaint starting a new civil proceeding, formally against the lower court, which will be decided outside the small claims division. Hence the ban on attorneys in section 116.530(a) does not apply in writ proceedings challenging small claims actions, and some petitioners may well be represented by counsel.

claims, where speedy finality is the norm and a goal of the small claims procedures.

Proposed new forms

Two new forms are being proposed for small claims writ proceedings: *Petition for Writ (Small Claims)* (form SC-300) and *Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO). These forms parallel the petition and information sheet forms developed by the Appellate Advisory Committee (AAC) several years ago for writs in the appellate division generally.

Petition for Writ (Small Claims) (form SC-300)

This form is based on current form APP-151, the petition for use for writs in limited civil cases, misdemeanors, and infractions. Like that form, it is geared to self-represented litigants and is essentially in the style of plain language forms. It begins with a list of general instructions about when the form is applicable, when[5] and where it should be filed, and how it should be served.[6] The party is instructed to read the information sheet before completing the petition.

The first several items request information about the parties and about the court action being challenged. (See items 1–7.) The next ask whether any other writ petition or an appeal has been filed. (Items 8–9.)

The most important item is item 10, which seeks the reasons for the petition. This item, like the others, parallels a similar item in form APP-151. It is divided into four subparts, based on the type of action challenged and writ sought, described in simple language, and each of those subparts is divided into four further subparts.

- The party is first asked to describe what it believes the law requires the court to do that it did not do, or what the court did or said that the party is challenging. (See items 10a(1), 10b(1) and 10c(1).

- Then the form asks the party to identify the legal basis for the claim. (Items 10a(2), 10b(2) and 10c(2).)

- Third–and this is where it differs from the APP-151 form–it asks the parties to identify any supporting documents that show the objected to action of the court, and to describe what the small claims court did that is being challenged (see item 10a(3), 10b(3) and 10c(1) and (3)).

[5] This form and the information sheet both note that while there is not a hard deadline for common law writs, the parties should file within 30 days. This is based on the recommended timeline the council approved be included on the general appellate division writ forms.

[6] Parties are referred to the appellate forms for information about service, form APP-109 and form APP-109-INFO. These are set up for self-represented litigants, so seem reasonable for use in small claims cases going to be heard in the appellate division. There are somewhat similar small claims forms for proof of service (forms SC-104 and SC-104B), but they are set up for service of process, for the service of the claims form and cross-claims form, so are not as directly applicable.

- Finally, because there is no formal record kept of the small claims proceedings, if the petition raises an issue that would requires the appellate division judge to consider what was said in the small claims court, the party is asked to write a summary of what was said at the court, by the parties and the judge, that is relevant to the request for a writ.[7] This item implements the provisions in rule 8.972(a)(1) , which requires a summary of the proceedings in certain circumstances. (See footnote 3 above.)

***Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO).**
This proposed form is based on *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO); however, there have been changes made to the content of the form to reflect its application to writ proceedings in small claims cases. The committees considered how the limitations on review available in small claims cases should be reflected in information provided to the parties,[8] as well as making changes to reflect proposed rules 8.970 et seq. and proposed new form SC-300. The differences in the proposed small claims information form are summarized below:

- Item 1 reflects the limitations on appellate review of small claims judgments and the different jurisdiction and procedures applicable to writs challenging post-judgment actions and actions related to a trial de novo;

- Items 4, 6, and 12 also reflect the limitations on appellate review of small claims judgments, the goal of small claims court in terms of providing a quicker, lower cost resolution, and how that relates to whether a court is likely to grant a petition for a writ;

- Item 7 reflects the provisions of section 116.798 with respect to jurisdiction over writ proceedings relating to small claims cases;

[7] In the petition used for writs to the appellate division generally, the last subpart in this item asks the parties to identify sections in the transcript or record of the oral proceeding. The supporting documents for those petitions are required to include a reporter's transcript of the oral proceedings or record of some kind (see rules 8.486(b)(1)(D) and 8.931(b)(1)(D)). Because no record exists in small claims proceedings, on form SC-300 this item is used for the parties to provide a fair summary of the proceedings if needed.

[8] Under the small claims statutory scheme, a plaintiff does not have the right to appeal the small claims court judgment (§ 116.710). Essentially, in selecting to proceed in small claims court, the plaintiff trades off the right to an appeal for a quicker, less expensive dispute resolution process. Within the writ context, this means that the usual alternative of an appeal as an adequate remedy is not available. This does not mean, however, that courts readily grant writ petitions in these cases. The Courts of Appeal have historically been reluctant to review rulings in small claims matters because doing so would undermine the goal of providing a speedy and inexpensive resolution of cases falling within the jurisdiction of small claims court. (Code Civ. Proc., § 116.510.) But while disfavored, it has been held that review of small claims judgments may be available by extraordinary writ where there is "statewide importance of the general issues presented" (*Green v. Superior Court* (1974) 10 Cal.3d 616, 621, 111 Cal.Rptr. 704, 517 P.2d 1168) and "in order to secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them" (*Davis v. Superior Court* (1980) 102 Cal.App.3d 164, 168, 162 Cal.Rptr. 167). The committees tried to reflect this case law in the description of writ proceedings in the proposed information sheet for writ actions in small claims cases.

- Item 13 reflects proposed rule 8.972 in that there is no reference to providing a reporter's transcript of the oral proceedings;

- References to trial court were changed to refer to small claims court and references to small claims advisors have been added; and

- References to action by the appellate division have been changed to refer to action by the appellate division judge.

Changes to current rules and forms

Minor changes to the current rules and forms for writ proceedings in the appellate division are also being proposed to reflect the clarification provided in section 116.798 as to where writs challenging small claims actions are to be heard.

- Rule 3.930 would be amended to clarify that writs relating to postjudgment enforcement orders by the small claims division are governed by the rules pertaining to writ proceedings in the appellate division generally. A provision would also be added to clarify that other acts by the small claims division are not governed by those rules, and an advisory committee comment added as to what rules do govern such proceedings.

- *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO) would be revised to note that the procedures described in the information sheet DO apply to writs challenging acts by the small claims division relating to postjudgment enforcement orders, but DO NOT apply to other acts by the small claims division or acts relating to small claims appeals in the superior court. (See new material in items 1 and 7).[9]

- *Petition for Writ (Misdemeanor, Infraction, and Limited Civil Cases)* (form APP-151) the instructions in first paragraph would be revised to refers to those small clams writ proceedings covered by the petition and a full paragraph about small claims writ proceedings would be added at the end. In addition, the current first paragraph would be divided in two, with a separate bullet point now including a stronger instruction not to use the form for appeals and other writs.

Alternatives Considered

Whether the general statutes relating to writs of mandate, prohibition and review should apply to these small claims writ proceedings

Code of Civil Procedure sections 1068, 1085, and 1102 et seq. address extraordinary writs generally. The committees considered whether the proposed new rules, which the California Law

[9] The form would also be revised to correct an error in item 14, changing the statement that petitions for writ should be filed within 60 days after the court makes the ruling that is being challenged, to within 30 days, as noted in the instructions to the petition on form APP-151.

Review Commission report indicates could be for "relatively quick, inexpensive, and informal" procedures, had to reflect the procedural requirements for writs established by these code sections, or could provide for simpler procedures. Proceedings seeking extraordinary writs under the statutory provisions are complex and somewhat arcane. This will be especially problematic for small claims parties.

The committees concluded, however, that the existing statutory procedures for extraordinary writs were most likely applicable to these small claims writ proceedings. Although the mandate to develop new "procedural rules" was placed within the portion of the Code of Civil Procedure expressly dealing with small claims actions, rather than in the portion dealing with extraordinary writs generally, section 116.798(a) contains a cross-reference to the extraordinary writs section, providing that the small claims division is an inferior tribunal for purposes of Title 1 (commencing with section 1067) of Part 3. The committee therefore concluded that the new rules should comply with the statutory procedures for writs set out in that title of the Code of Civil Procedure.

Whether the new rules should apply only to the writ proceedings for which the statute mandated new rules or should also apply to those relating to postjudgment actions

As noted above, Code of Civil Procedure section 116.798 draws a distinction between writs on small claims division actions relating to postjudgment enforcement, and other actions by the small claims divisions (i.e., judgment at initial hearing and any motions relating to that). The statute only directs the Judicial Council to adopt rules for the latter type of proceeding. The committees considered, however, whether it might also be helpful to apply any new rules to writ proceedings relating to small claims postjudgment proceedings so that there would be a single set of procedures applicable to all writ proceedings challenging actions by the small claims court.

CSCAC had previously considered this issue in a related context, when, at the request of the California Law Revision Commission, it considered whether the new law should provide that writ petitions relating to postjudgment enforcement orders of the small claims division should be considered by a single superior court judge who is assigned to the appellate division rather than by the appellate division, so that all writ petitions relating to acts of the small claims division would be handled in the same way. At the time CSCAC recommended the that the distinction be included in the statute, as provided by common law. See *General Electric Capital Auto Financial Service, Inc. v. Appellate Division of the Superior Court*, 88 Cal. App. 4th 136 (2001) (appellate division has writ jurisdiction regarding postjudgment enforcement orders in small claims cases). The Law Revision Commission noted that a "significant advantage to this approach [having postjudgment writs go to the appellate division] is that it treats all judgments in limited civil cases the same way for enforcement purposes." CLRC 2011 Report at 337.

The committees concluded that, in light of this history, it would be preferable that postjudgment writ proceedings continue to be governed by the existing rules for writ proceedings in limited

civil cases. The committees are recommending minor amendments to those rules and forms to clarify this situation.

How to provide a record of the oral proceedings for the reviewing court

The committees considered whether, in light of the lack of any official record of small claims proceedings and the fact that many parties will be self-represented even on these writ proceedings, the rules should not include any provision requiring a record of what was said at the small claims proceedings. Ultimately, the committees decided that, if the petitioner is raising an issue that can only be understood if there is a record of the oral proceeding, then the petitioner should provide a statement that fairly summarizes the proceedings, including the parties' arguments and any statement by the small claims court supporting its ruling must be provided. As noted above, the committees seek specific comments on whether this provision is needed.

Whether to recommend any forms

Although the statute requires the council to develop new *rules* regarding writs in small claims cases, it does not mandate the development of *forms*. The committees considered the alternative of not developing a petition form, particularly in light of the fact that the existence of the form may lead to more petitions for extraordinary writs being filed in small claims actions. The committees concluded, however, that without such forms petitions that are filed would be difficult for the court to handle because they would be extremely difficult for parties to properly prepare. The petitions would have to either be individually drafted—which would be extremely difficult for self-represented parties—or somehow shoehorned into the current form APP-151. That form would not work well, however, because it assumes the lodging of some version of a record of the proceedings, which record does not exist in small claims actions and is not required under the new rules. The committee concluded that it would be less burdensome for both courts and the parties to have a specific form for these proceedings.

Implementation Requirements, Costs, and Operational Impacts

This proposal will require training of judicial officers and court staff as to the new rules and procedures for certain writs in small claims cases. The number of petitions for writs in small claims cases may be increased due to the existence of the new forms. The rules will clarify what is required of the parties in such cases, which should make it easier in the long-run for courts to adjudicate the petitions. Because the new rules are mandated by statute, the council must adopt them whether or not they place a further burden on the courts.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Should the new rules require that if the petition raises any issue that would require the judge considering it to understand what was said in the small claims court, the petition must include a fair summary of the proceedings, including the parties' arguments and any statement by the small claims court supporting its ruling? (See discussion at footnote 3.)

The advisory committees 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Amended Cal. Rules of Court, rules 8.930 and 8.950 and new rules 8.97—8.977 are at pages 11–18.
2. Revised forms APP-150-INFO and APP-151 are at pages 19–37.
3. New forms SC-300 and SC-300-INFO are at pages 38–54.

California Rules of Court, rules 8.930 and 8.950 would be amended and rules 8.970-8.977 adopted, effective January 1, 2015, as follows:

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 6. Writ Proceedings

Rule 8.930. Application

(a) Writ proceedings governed

Except as provided in (b), the rules in this chapter govern proceedings in the appellate division for writs of mandate, certiorari, or prohibition, or other writs within the original jurisdiction of the appellate division, including writs relating to a postjudgment enforcement order of the small claims division. In all respects not provided for in this chapter, rule 8.883, regarding the form and content of briefs, applies.

(b) Writ proceedings not governed

The rules in this chapter do not apply to:

(1) petitions for writs of supersedeas under rule 8.824;

(2) petitions for writs relating to acts of the small claims division other than a post-judgment enforcement order; or

(3) petitions for writs not within the original jurisdiction of the appellate division.

Advisory Committee Comment

Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (form APP-150-INFO) provides additional information about proceedings for writs in the appellate division of the superior court. This form is available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

Subdivision (b)(1). The superior courts, not the appellate divisions, have original jurisdiction in habeas corpus proceedings (see Cal. Const., art. VI, §10). Habeas corpus proceedings in the superior courts are governed by rules 4.550 et. seq.

Subdivision (b)(2). A petition that seeks a writ relating to an act of the small claims division other than a postjudgment enforcement order is heard by a single judge of the appellate division (see Code Civ. Proc. § 116.798(a)) and is governed by rules 8.970 et seq.

Rules 8.931—936. **

Division 3. Rules Relating to Appeals and Writs in Small Claims Cases

Chapter 1. Trial of Small Claims Cases on Appeal

Rule 8.950. Application

The rules in this ~~division~~ chapter supplement article 7 of the Small Claims Act, Code of Civil Procedure sections 116.710 et seq., providing for new trials of small claims cases on appeal, and must be read in conjunction with those statutes.

Rule 8.952—966. **

Chapter 2. Writ Petitions

Rule 8.970. Application

(a) Writ proceedings governed

Except as provided in (b), the rules in this chapter govern proceedings under Code of Civil Procedure section 116.798(a) for writs of mandate, certiorari, or prohibition, relating to an act of the small claims division, other that a postjudgment enforcement order. In all respects not provided for in this chapter, rule 8.883, regarding the form and content of briefs, applies.

(b) Writ proceedings not governed

The rules in this chapter do not apply to:

(1) Proceedings under Code of Civil Procedure section 116.798(c) for writs relating to a postjudgment enforcement order of the small claims division, which are governed by rules 8.930—8.936.

(2) Proceedings under Code of Civil Procedure section 117.798(b) for writs relating to an act of a superior court in a small claims appeal, which are governed by rules 8.485—8.493.

Advisory Committee Comment

Code of Civil Procedure section 116.798 provides where writs in small claims actions may be filed.

The Judicial Council form *Information on Writ Proceedings in Small Claims Actions* (form SC-300-INFO) provides additional information about proceedings for writs in small claims actions in the appellate

division of the superior court. This form is available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

Rule 8.971. Definitions

The definitions in rule 1.6 apply to these rules unless the context or subject matter requires otherwise. In addition, the following definitions apply to these rules:

(1) "Writ" means an order telling the small claims court to do something that the law says it must do, or not do something the law says it must not do. The various types of writs covered by this chapter are described in statutes beginning at section 1067 of the Code of Civil Procedure.

(2) "Petition" means a request for a writ.

(3) "Petitioner" means the person asking for the writ.

(4) "Respondent" and "small claims court" mean the court against which the writ is sought.

(5) "Real party in interest" means any other party in the small claims court case who would be affected by a ruling regarding the request for a writ

Rule 8.972. Petitions filed by persons not represented by an attorney

(a) Petitions

(1) A person who is not represented by an attorney and who asks the appellate division for a writ under this chapter must file the petition on *Petition for Writ (Small Claims)* (formSC-300). For good cause the court may permit an unrepresented party to file a petition that is not on that form.

(2) If the petition raises any issue that would require the appellate division judge considering it to understand what was said in the small claims court, it must include a statement that fairly summarizes the proceedings, including the parties' arguments and any statement by the small claims court supporting its ruling.

(b) Contents of supporting documents

(1) The petition must be accompanied by copies of the following:

(A) The small claims court ruling from which the petition seeks relief;

(B) All documents and exhibits submitted to the small claims court supporting and opposing the petitioner's position; and

(C) Any other documents or portions of documents submitted to the small claims court that are necessary for a complete understanding of the case and the ruling under review; and

(2) If the petition does not include the required documents or does not present facts sufficient to excuse the failure to submit them, the appellate division judge may summarily deny a stay request, the petition, or both.

(c) Form of supporting documents

(1) Documents submitted under (b) must comply with the following requirements:

(A) They must be attached to the petition. The pages must be consecutively numbered.

(B) They must each be given a number or letter.

(2) The clerk must file any supporting documents not complying with (1), but the court may notify the petitioner that it may strike or summarily deny the petition if the documents are not brought into compliance within a stated reasonable time of not less than five days.

(d) Service

(1) The petition and all its attachments, and a copy of *Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO) must be served personally or by mail on all the parties in the case, and the petition must be served on the small claims court.

(2) The petitioner must file a proof of service at the same time the petition is filed.

(3) The clerk must file the petition even if its proof of service is defective, but if the party asking for the writ fails to file a corrected proof of service within five days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction.

(4) The court may allow the petition to be filed without proof of service.

Advisory Committee Comment

Subdivision (a). *Petition for Writ (Small Claims)* (form SC-300) and *Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO) are available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

Rule 8.973. Petitions filed by an attorney for a party

(a) General application of rule 8.972

Except as provided in this rule, rule 8.972 applies to any petition for an extraordinary writ filed by an attorney under this chapter.

(b) Form and content of petition

(1) A petition for an extraordinary writ filed by an attorney may, but is not required to be, filed on *Petition for Writ (Small Claims)* (form SC-300). It must contain all the information requested in that form.

(2) The petition must disclose the name of any real party in interest.

(3) If the petition seeks review of small claims court proceedings that are also the subject of a pending appeal, the notice "Related Appeal Pending" must appear on the cover of the petition, and the first paragraph of the petition must state the appeal's title and any appellate division docket number.

(4) The petition must be verified.

(5) The petition must be accompanied by a memorandum, which need not repeat facts alleged in the petition.

(6) Rule 8.883(b) governs the length of the petition and memorandum, but the verification and any supporting documents are excluded from the limits stated in rule 8.883(b)(1) and (2).

(7) If the petition requests a temporary stay, it must explain the urgency.

Rule 8.974. Opposition

(a) Preliminary opposition

(1) The respondent and real party in interest are not required to file any opposition following service unless asked to do so by the appellate division judge.

(2) Within 10 days after the petition is filed, the respondent or any real party in interest may serve and file a preliminary opposition.

(3) A preliminary opposition must contain any legal arguments the party wants to make as to why the appellate division judge should not issue a writ.

(4) Without requesting opposition, the appellate division judge may grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance.

(b) Return or opposition; reply

(1) If the appellate division judge issues an alternative writ or order to show cause, the respondent or any real party in interest, individually or jointly, may serve and file a return (which is a response to the petition) by demurrer, verified answer, or both. If the appellate division judge notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or any real party in interest may serve and file an opposition.

(2) Unless the appellate division judge orders otherwise, the return or opposition must be served and filed within 30 days after the appellate division judge issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance.

(3) Unless the appellate division judge orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed.

(4) If the return is by demurrer alone and the demurrer is not sustained, the appellate division judge may issue the peremptory writ without granting leave to answer.

(c) Form of preliminary opposition, return, or opposition

Any preliminary opposition, return, or opposition must comply with rule 8.931(c). If it is filed by an attorney, it must also comply with rule 8.932(b)(3)–(7).

Rule 8. 975. Notice to small claims court

(a) Notice if writ issues

If a writ or order issues directed to any judge, court, or other officer, the appellate division clerk must promptly send a certified copy of the writ or order to the person or entity to whom it is directed.

(b) Notice by telephone

(1) If the writ or order stays or prohibits proceedings set to occur within seven days or requires action within seven days—or in any other urgent situation—the appellate division clerk must make a reasonable effort to notify the clerk of the respondent small claims court by telephone. The clerk of the respondent small claims court must then notify the judge or officer most directly concerned.

(2) The appellate division clerk need not give notice by telephone of the summary denial of a writ, whether or not a stay previously issued.

Rule 8.976. Filing, finality, and modification of decisions; remittitur

(a) Filing of decision

The appellate division clerk must promptly file all opinions and orders in proceedings under this chapter and promptly send copies showing the filing date to the parties and, when relevant, to the small claims court.

(b) Finality of decision

(1) Except as otherwise ordered by the appellate division judge, the following decisions regarding petitions for writs under this chapter are final in the issuing court when filed:

(A) An order denying or dismissing such a petition without issuance of an alternative writ, order to show cause, or writ of review; and

(B) An order denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review.

(2) Except as otherwise provided in (3), all other decisions in a writ proceeding under this chapter are final 30 days after the decision is filed.

(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, a judge in the appellate division may order early finality of a decision granting a petition for a writ under this chapter or denying such a petition after issuing an alternative writ, order to show cause, or writ of review. The decision may provide for finality on filing or within a stated period of less than 30 days.

(c) Modification of decisions

Rule 8.888(b) governs the modification of decisions in writ proceedings under this chapter.

(d) Remittitur

The appellate division must issue a remittitur after the judge issues a decision in a writ proceeding under this chapter except when the judge issues one of the orders listed in (b)(1). The remittitur is deemed issued when the clerk enters it in the record. The clerk must immediately send the parties notice of issuance of the remittitur, showing the date of entry.

Advisory Committee Comment

Subdivision (b)(1). Examples of situations in which the appellate division judge may issue an order dismissing a writ petition include when the petitioner fails to comply with an order, when the judge

recalls the alternative writ, order to show cause, or writ of review as improvidently granted, or when the petition becomes moot.

Rule 8.977. Costs

(a) Entitlement to costs

The prevailing party in an original proceeding is entitled to costs if the appellate division judge resolves the proceeding after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance.

(b) Award of costs

(1) In the interests of justice, the appellate division judge may award or deny costs as it deems proper.

(2) The opinion or order resolving the proceeding must specify the award or denial of costs.

(3) Rule 8.891(b)–(d) governs the procedure for recovering costs under this rule.

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases, and in certain small claims cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov /rules*.

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus, or for writs in certain small claims cases.

- For information about appeals, please see the box on the right side of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form MC-275).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court.
- This information sheet applies to writs relating to *postjudgment enforcement actions* of the small claims division. For information about writs relating to other actions by the small claims division, see rules 8.930-937 of the California Rules of Court and *Petition for Writ (Small Claims* (form SC-300).
- For information about writs relating to actions of the superior court on small claims appeals, see rules 8.485-8.493 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courtinfo.ca.gov /rules* for the rules or *www.courtinfo.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*.

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors: Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act

- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy: The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that he or she will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))
- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

7 Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases, and certain small claims cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. The appellate division can consider requests for writs in small claims actions relating to postjudgment enforcement orders.

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have the jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

Requests for writs relating to actions of the small claims division *other* than postjudgment enforcement orders are considered by a single judge in the appellate division. (See form SC-300-INFO.) Requests for writs relating to superior court actions in small claims cases on appeal may be made to the Court of Appeal.

8 Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 9.

9 Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 9 of this information sheet.

10 Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

11 How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

12 How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.* This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act

- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.

- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)

- Granting a motion to quash service of summons

- Granting a motion to stay or dismiss the action on the ground of inconvenient forum

- Granting a new trial

- Denying a motion for judgment notwithstanding the verdict

- Granting or dissolving an injunction or refusing to grant or dissolve an injunction

- Appointing a receiver

- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

(13) Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents: The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings: There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic

recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.

- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.

- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings, including the petitioner's arguments and any statement by the court supporting its ruling or
  - Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court: Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

***Format of the supporting documents*:** Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules.*

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 60 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for

filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

15 How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the petition to the real party in interest and the respondent court in the way required by law.
- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail or in person), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

16 How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition.

You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

17 Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out an *Application for Waiver of Court Fees and Costs* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

18 What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that he or she has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so without first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

19 What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

- Summarily denying the petition
- Issuing an alternative writ or order to show cause
- Notifying the parties that it is considering issuing a peremptory writ in the first instance

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would also be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will not grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. A preliminary opposition is therefore typically used to explain to the appellate division why you believe it should not grant an alternative writ or order to show cause.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the preliminary opposition to the other parties in the way required by law.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail or in person), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or

mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

21 I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause only if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ. Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the return to the other parties in the way required by law.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail or in person), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good ➔

idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

22 I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question 18, a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the opposition to the other parties in the way required by law.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail or in person), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

23 What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

APP-151 Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT
04.04.15
NOT APPROVED BY THE JUDICIAL COUNCIL

_____

Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

_____

Respondent
(fill in the name of the court whose action or ruling you are challenging)

_____

Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a misdemeanor, infraction, or limited civil case, or a writ challenging a postjudgment enforcement order in a small claims case (see below*).
- Do *not* use this form for other writs and for appeals. You can get forms to use for those at any courthouse or county law library or online at *www.courts.ca.gov/forms*
- Before you fill out this form, read *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO) to know your rights and responsibilities. You can get form APP-150-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- Unless a special statute sets an earlier deadline, you should file this form no later than **30 days** after the date the trial court took the action or issued the ruling you are challenging in this petition (see form APP-150-INFO, page 7, for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the respondent (the trial court whose action or ruling you are challenging) and each of the real parties in interest (the other party or parties in the trial court case).
- Serve a copy of the completed form on the respondent and on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm* .
- Take or mail the completed form and your proof of service on the respondent and each real party in interest to the clerk's office for the appellate division of the superior court that took the action or issued the ruling you are challenging.
- Small Claims cases. If you are a party in a small claims case, this form is only to be used for requesting a writ relating to a postjudgment enforcement order of a small claims division. For writs relating to other acts of a small claims division, the form to use is the *Petition for Writ (Small Claims)* (form SC-300). See also Cal. Rules of Court, rules 8.970-8.977. For writs relating to acts of a superior court in a small claims appeal see Cal. Rules of Court, rules 8.485-8.493.

(1) Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____ _____ _____ _____
Street *City* *State* *Zip*

Mailing address *(if different):* _____ _____ _____ _____
Street *City* *State* *Zip*

Phone: _____ E-mail *(if available):* _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition):*

Name: _____ State Bar number: _____

Street address: _____ _____ _____ _____
Street *City* *State* *Zip*

Mailing address *(if different):* _____ _____ _____ _____
Street *City* *State* *Zip*

Phone: _____ E-mail *(if available):* _____

Fax *(if available)*: _____

The Trial Court Action or Ruling You Are Challenging

(2) I am/My client is filing this petition to challenge an action taken or ruling made by the trial court in the following case:

a. Case name *(fill in the trial court case name):* _____

b. Case number *(fill in the trial court case number):* _____

(3) The trial court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the trial court):* _____

(4) The trial court took this action or made this ruling on the following date *(fill in the date):* _____

(5) *If you are filing this petition more than 30 days after the date that you listed in (4), explain the extraordinary circumstances that caused the delay in filing this petition:* _____

The Parties in the Trial Court Case

6 I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in 2.

b. ☐ was not a party in the case identified in 2 but will be directly and negatively affected in the following way by the action taken or ruling made by the trial court *(describe how you/your client will be directly and negatively affected by the trial court's action or ruling):*

_____

_____

_____

_____

7 The other party or parties in the case identified in 2 was/were *(fill in the names of the parties):*

_____

_____

Appeals or Other Petitions for Writs in This Case

8 Did you or anyone else file an appeal about the same trial court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the appellate division case number of the appeal):* _____

9 Have you filed a previous petition for a writ challenging this trial court action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):* _____

(2) Date petition filed *(fill in the date you filed this petition):* _____

(3) Case number *(fill in the case number of the petition):* _____

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "APP-151, item 9.")

Reasons for This Petition

10 The trial court made the following legal error or errors when it took the action or made the ruling described in 3 *(check and fill in at least one):*

a. ☐ The trial court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the trial court must do:* _____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court must do this:* _____

_____

_____

_____

10 (continued)

(3) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did not do or refused to do this:*

_____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10a."*

b. ☐ The trial court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the trial court did:* _____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did this:* _____

_____

_____

_____

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court cannot or must not do this:* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10b."*

c. ☐ The trial court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the trial court did or said it is going to do:* _____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did or said it was going to do this:*

_____

_____

_____

_____

10 (continued)

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court does not have the power to do this:*

_____

_____

_____

_____

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10c."*

☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "APP-151, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the trial court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

_____

_____

_____

_____

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:* _____

_____

_____

_____

_____

_____

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the trial court to do the following *(describe what, if anything, you want the trial court to be ordered to do):* _____

_____

_____

_____

_____

b. ☐ order the trial court not to do the following *(describe what, if anything, you want the trial court to be ordered NOT to do)*: _____

_____

_____

_____

_____

12 (continued)

c. ☐ issue a stay ordering the trial court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the trial court not take any further action and check the Stay requested box on page 1 of this form):*

_____
_____
_____
_____

I/My client:

(1) ☐ asked the trial court to stay these proceedings, but the trial court denied this request *(include in your supporting documents a copy of the trial court's order denying your request for a stay).*

(2) ☐ did not ask the trial court to stay these proceedings for the following reasons *(describe below why you did not ask the trial court to stay these proceedings):*

_____
_____
_____
_____

d. ☐ take other action *(describe):* _____
_____
_____
_____
_____
_____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Is a record of what was said in the trial court about the action or ruling you are challenging attached as required by rule 8.931(b)(1)(D) of the California Rules of Court?

a. ☐ Yes, a transcript or an official electronic recording of what was said in the trial court is attached.

b. ☐ No, a transcript or official electronic recording is not attached, but I have attached a declaration (a statement signed under penalty of perjury) *(Check (1) or (2):*

(1) ☐ stating the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

(2) ☐ explaining why the transcript or official electronic recording is not available and providing a fair summary of what was said in the trial court, including the petitioner's arguments and any statement by the trial court supporting its ruling.

14 Are the following documents attached as required by rule 8.931(b)(1)(A)–(C):

- The trial court ruling being challenged in this petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling being challenged? *(Check a or b):*

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of the substance of these documents. Note that rule 8.931 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Verification

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 your name *Signature of petitioner or attorney*

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in small claims cases. Please read this information sheet before you fill out *Petition for Writ (Small Claims)* (form SC-300). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rule the California Rules of Court identified below, which set out the procedures for writ proceedings in the different courts that consider request for writs in small claims cases.

This information sheet does NOT provide information about motions to vacate a judgment or appeals in small claims cases, or about request for writs on all types of rulings in a small claims case.

- For information about making a motion to cancel or correct a judgment in small claims court, please see Code of Civil Procedure sections 116.720–116.745 and *Notice of Motion to Vacate Judgment and Declaration* (form SC-135).

- For information about appealing a small claims judgment, which you can only do if you disagree with a judgment ordering you to pay money, please see Code of Civil Procedure sections 116.710, 116.750-795, rules 8.950-966 of the California Rules of Court and *What to Do After the Court Decides Your Small Claims Case* (form SC-200-INFO).

While this information sheet provides general information about writs and writ procedures, the procedures it describes do NOT all apply to writs in all small claims cases. These procedures only apply to requests for writs relating to actions of the small claims court *other* than postjudgment enforcement actions. These requests will be considered by a single judge from the appellate division of the superior court. The procedures are set out in more detail in rules 8.970–8.977 of the California Rules of Court.

- For information about requests for writs relating to postjudgment enforcement actions, see rules 8.930–936 of the California Rules of Court and *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO). Matters relating to enforcement of small claims judgments are treated in the same manner as enforcement of judgments in limited (smaller) civil cases.

- For information about requests for writs relating to actions of the superior court on small claims appeals, see rules 8.485–8.493 of the California Rules of Court. Those requests should be made to the Court of Appeal.

You can get these rules and forms at any courthouse or county law library or online at *www.courts.ca.gov/rules* for the rules or *www.courts.ca.gov/forms* for the forms. You can get copies of statutes at any county law library or online *www.leginfo.ca.gov/calaw.html.*

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do, or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the small claims court that took the action or issued the order being challenged.

In this information sheet, we call the lower court the "small claims court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the small claims court to do something.

- Writs of prohibition, which are orders telling the small claims court *not* to do something.

- Writs of review (sometimes called "certiorari"), which are orders telling the small claims court that a judge in the appellate division will review certain kinds of actions already taken by the small claims court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review.

4 Is a writ proceeding the same as an appeal?

No. Generally, in an **appeal,** the higher court *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned based on that error (this is called a "decision on the merits"). In choosing to go to small claims court, the party filing a claim agreed to give up the right to an appeal in exchange for a less formal and less expensive way of proceeding. The defendant in a small claim case does have the right to an appeal, in the form of a new trial, and if the defendant asks for one, the higher court *must* allow a new trial on all the claims in the case, with each side presenting evidence.

In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits or hold a new trial. Even if the small claims court made a legal error, the appellate division can decide not to consider that error, and usually will not. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, a writ proceeding is often called a proceeding for "*extraordinary*" relief, while a judgment by the small claims court, or possibly a new trial at superior court for the defendant, is the *ordinary* way that small claims court cases end.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial**. The appellate division judge will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division judge reviews what happened in the small claims court and the small claims court's ruling to see if the small claims court made the legal error claimed by the person asking for the writ. In conducting its review, the appellate division judge presumes that the small claims court's ruling is correct; the person who requests the writ must show the appellate division judge that the small claims court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a small claims court?

No.

Writs can only address certain legal errors: Writs can only address the following types of legal errors made by a small claims court:

- The small claims court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The small claims court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

Writs are not generally granted regarding small claims cases. The small claims courts exists to provide a speedy and inexpensive way for a party to obtain a judgment. This works in part by limiting what a party can do after the small claims court makes its rulings.

When a person or business chooses to make a claim in small claims court, rather than filing in a different level of the superior court, that party—the plaintiff—gives up the right to ask for an appeal of the small claims court's rulings. This is a trade-off for the faster, less formal, and and less expensive court proceedings. As a result, appellate courts have been reluctant to consider requests for writs on small claims cases.

A defendant in a small claims case does have the right to appeal the initial small claims court decisions and get a new trial in the superior court. Because the defendant already has this right, to have the case heard again, including putting on the evidence and being represented by an attorney if defendants wants to hire one, appellate courts are unlikely to see any need for a writ instead.

However, the appellate division judge does have the discretion to consider a request for an extraordinary writ challenging a ruling in a small claims case. For example, it may do so if it considers the issue raised to be of statewide importance, or in order to make sure that the

small claims division is generally being consistent in how it is acting under the law.

7 Can the appellate division consider a request for a writ in *any* small claims case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. Requests for writs in small claims cases may be considered in one of three different ways, depending on the stage of the case:

- Requests for writs relating to actions of the small claims division *other* than postjudgment enforcement orders are considered by a single judge in the appellate division. This covers requests for writs on any rulings relating to the initial small claims trial, including the judgment.
- Requests for writs relating to superior court actions in small claims cases on appeal are not considered by the appellate division, but by the Court of Appeal.
- Requests for writs relating to the enforcement of a judgment in a small claims case, whether the judgment was issued at the small claims hearing or at a new trial in the superior court, are considered by the small claims division.

8 Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on the right side of this page.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In writ proceedings challenging rulings in small claims cases, the small claims court is the respondent.

Any other party in the small claims court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 8.

9 Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.* You may also get help from the small claims advisors in your county if available. Ask the court how to contact them or look for contact information at *www.courts.ca.gov/selfhelp-advisors.*

INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 8 of this information sheet.

10 Who can ask for a writ?

Parties—the plaintiff or defendant— are usually the only ones that ask for writs challenging small claims court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the small claims court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

11 How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the small claims court, what legal error you (the petitioner) believe the small claims court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

12 How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Small Claims Case)* (form SC-300) to prepare your petition. You can get it at any courthouse or county law library or online at *www.courts.ca.gov/forms*. This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the small claims court's ruling

Your petition needs to tell the appellate division judge why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the small claims court case asks for a writ challenging a ruling in that case. If you were a party in the small claims court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the small claims court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division judge that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the small claims court made

Your petition will need to tell the appellate division judge what legal error you believe the small claims court made. Not every mistake a small claims court might make can be addressed by a writ. You must show that the small claims court made one of the following types of legal errors:

- The small claims court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act

- The small claims court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division judge that the small claims court made one of these legal errors, you will need to:

- Show that the small claims court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division judge what legal authority—what constitutional provision, statute, rule, or published court decision—establishes the small claims court's legal duty or power to act or not act in that way.

- Show the appellate division judge that the small claims court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division judge what happened in the small claims court that shows that the small claims court did not act in the way it was required to. You can do that at item 10 of the petition and, as instructed there, you can add additional pages if more room is needed. Note that you will be providing this information, and everything in the petition, under penalty of perjury.

- Because there is no formal record kept of the small claims proceedings, if the petition raises an issue that would requires the appellate division judge to consider what was said in the small claims court, you will need to write a complete and accurate summary of what was said by you and others, including the court, that is relevant to your request for a writ. You may add extra pages if you need more space.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division judge does not have to grant your petition just because the small claims court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the small claims court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the small

claims court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard to show if the small claims court's ruling can be appealed and a new trial held. If you are a defendant and the ruling you are challenging can be appealed, the appellate division will generally consider this new trial to be a good enough way to fix the small claims court's ruling (an "adequate remedy"). You will need to show the appellate division judge how you will be harmed by the small claims court's error in a way that cannot be fixed by the new trial if the appellate division judge does not issue the writ (this is called "irreparable" injury or harm). For example, the harm you want to prevent may happen before the new trial can be held.

Even if you cannot appeal the ruling you are objecting to, the court still does not have to grant the petition. As described above, small claims decisions are meant to be speedy and inexpensive, so appellate review is generally not granted in these cases. You will need to explain why your case should be treated differently.

d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division judge to order the small claims court to do or not do. Writ petitions usually ask that the small claims court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division judge to order the small claims court not to do anything more until the appellate division judge decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the small claims court for a stay. You should tell the appellate division judge whether you asked the small claims court for a stay. If you did not ask the small claims court for a stay, you should tell the appellate division why you did not do this. This information is requested in the petition form.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Small Claims Case)* (form SC-300).

e. Verifying the petition

Petitions for writs must be "verified." This means that the petitioner (or in certain circumstances the petitioner's attorney) must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Small Claim Case)* (form SC-300), there is a place for you to verify your petition.

13 Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a documents showing what happened in the small claims court (see below for an explanation of how to serve and file the petition). Since the appellate division judge was not there in the small claims court, copies of certain documents from that court that show what happened must be sent to the appellate division. These are called "supporting documents." You must also serve any other party in this case, the real party in interest, with a copy of this form *Information on Writ Proceedings in Small Claims Cases* (form SC-300).

Copies of documents from the small claims court: Copies of the following documents from the small claims court must also be included in the supporting documents:

- The small claims court ruling or judgment being challenged in the petition
- All documents and exhibits submitted to the small claims court supporting and opposing your position
- Any other documents or portions of documents submitted to the small claims court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the small claims court because of an emergency? Rule 8.972 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the small claims court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents unavailable.

***Format of the supporting documents*:** Supporting documents must be put in the format required by rule 8.972 of the California Rules of Court. You should carefully read rule 8.972. You can get a copy of rule 8.972 at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

14 Is there a deadline to ask for a writ?

Yes. There are laws (statutes) that require that certain kind of rulings may only be challenged using a writ proceeding. These are called "statutory writs" and the statute usually sets the deadline for serving and filing the petition. For example, a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)) must be filed within 10 days after notice to the parties of the decision. You will need to check whether there is a statue providing a deadline for filing a challenge to the specific ruling you are challenging. (You can find copies of statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*).

If there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, or if the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the small claims court's error be fixed. Remember, the court is not required to grant your petition even if the small claims court made an error. If you delay in filing your petition, it may make the appellate division judge think that it is not really urgent that the small claims court's error be fixed and the appellate division judge may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division judge in your petition.

15 How do I "serve" my petition?

Rule 8.972(d) requires that the petition with the attached supporting documents, along with a copy of this form, be served on any named real party in interest and that the petition be served on the respondent small claims court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the petition to the real party in interest and the respondent court in the way required by law.
- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail or in person), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *http://www.courts.ca.gov/selfhelp-serving.htm.*

16 How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition.

You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

17 Do I have to pay to file a petition?

Yes. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

18 What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition.

The appellate division judge does not have to wait for an opposition before it can act on a petition for a writ, however. Without waiting, the appellate division judge can:

a. Issue a stay.

b. Summarily deny the petition.

c. Issue an alternative writ or order to show cause.

d. Notify the parties that it is considering issuing a preemptory writ in the first instance.

Read below for more information about these options.

a. Stay of small claims court proceedings

A stay is an order from the appellate division judge telling the small claims court not to do anything more until the appellate division judge decides whether to grant your petition. A stay puts the small claims court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division judge denies the petition without deciding whether the small claims court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the small claims court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division judge why the small claims court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the small claims court to show the appellate division judge why the small claims court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division judge will issue an alternative writ or an order to show cause only if the petitioner has shown that he or she has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the small claims court made a legal error that needs to be fixed.

If the appellate division judge issues an alternative writ and the small claims court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the small claims court does not comply with an alternative writ, however, or if the appellate division judge issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division judge's order (called a "return") that explains why the small claims court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division judge may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and any oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the small claims court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division judge first issuing an alternative writ or order to show cause. It is very rare for the appellate division judge to issue a peremptory writ in the first instance, and it will not do so without first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division judge's notice (called an "opposition") that explains why the small claims

court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division judge or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division judge may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and any oral argument is completed, the appellate division will decide the case.

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the small claims court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(19) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The Code of Civil Procedure and California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division judge can take certain actions without waiting for any opposition, including:

- Summarily denying the petition
- Issuing an alternative writ or order to show cause
- Notifying the parties that it is considering issuing a peremptory writ in the first instance

Read the response in section (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division judge saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would also be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. You must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.* You may also get help from the small claims advisors in your county if available. Ask the court how to contact them or look for contact information at *www.courts.ca.gov/selfhelp-advisors.htm*.

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. The appellate division judge will not grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the preliminary opposition to the other parties in the way required by law.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail or in person), and the date the preliminary opposition was served.

- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

20 I have received a copy of an alternative writ or an order to show cause issued by the appellate division judge. Do I need to do anything?

Yes. Unless the small claims court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause only if the appellate division judge has decided that the petitioner may have shown that the small claims court made a legal error that needs to be fixed. An "alternative writ" is an order telling the small claims court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division judge why the small claims court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the small claims court to show the appellate division why the judge small claims court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division judge issues an alternative writ and the small claims court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division judge), then no further action by the appellate division judge is needed and the appellate division judge may dismiss the petition. If the small claims court does not comply with an alternative writ, however, or if the appellate division judge issues an order to show cause, then the small claims court or the real party in interest may serve and file a response to the appellate division judge's order, called a "return."

A return is your argument to the appellate division judge about why the small claims court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is a legal response either your argument about why the writ is legally inadequate, or an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–431.30 for more information about responses and answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division judge issues an alternative writ or order to show cause, it does not mean that the appellate division judge is required to issue the writ requested by the petitioner. However, the appellate division judge will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division judge will issue the requested writ.

Unless the appellate division judge sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division judge issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the return to the other parties in the way required by law.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the return, who was served with the

return, how the return was served (by mail or in person), and the date the return was served.

- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm*.

21 I have received a copy of a notice from the appellate division judge indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question 18, a "peremptory writ in the first instance" is an order telling the small claims court to do what the petitioner has requested (or some modified form of what the petitioner requested as ordered by the appellate division judge) that is issued without the appellate division judge first issuing an alternative writ or order to show cause. The appellate division judge will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division judge issues such a notice, it means that the appellate division judge is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division judge about why the small claims court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. An opposition is a response to the legal arguments made by the petitioner.

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the opposition to the other parties in the way required by law.

- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail or in person), and the date the opposition was served.

- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *http://www.courts.ca.gov/selfhelp-serving.htm.*

23 What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division judge may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and any oral argument is completed, the appellate division judge will decide the case.

SC-300 Petition for Writ (Small Claims)

Clerk stamps date here when form is filed.

DRAFT
04/06/15
Not approved
by the Judicial Council

Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

Respondent
(fill in the name of the court whose action or ruling you are challenging)

Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a small claims case which does *not* relate to an action enforcing the small claims judgment.
- Do not use this form for the appeal or trial de novo of a small claims matter or for writs on the appeal of a small claims matter. Other forms or pleadings should be used for those those kinds of actions.
- For requesting a writ relating to a court action regarding *enforcement* of a small claims judgment, you should use form APP-151, *Petition for Writ (Misdemeannor, Infraction, or Limited Case)*. You can get that form and other forms for other writs and for appeals at any courthouse or county law library or online at *www.courts.ca.gov/forms.*
- Before you fill out this form, read *Information on Writ Proceedings in Small Claims* (form SC-300-INFO) to know your rights and responsibilities. You can get form SC-300-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- Generally, you should file this form no later than **30 days** after the date the small claims court took the action or issued the ruling you are challenging in this petition (see form SC-300-INFO for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the small claims court whose action or ruling you are challenging (called the respondent) and each of the other party or parties in the small claims case (called real party in interest).
- Serve a copy of the completed form on the small claims court and serve a copy of the form and a copy of form SC-301-INFO on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp/selfhelp-serving.htm*.
- Take or mail the completed form and your proof of service to the clerk's office for the appellate division of the court that took the action or issued the ruling you are challenging.

1 Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available)*: _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition)*:

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available)*: _____

Fax *(if available)*: _____

The Small Claims Court Action or Ruling You Are Challenging

2 I am/My client is filing this petition to challenge an action taken or ruling made by the small claims court in the following case:

a. Case name *(fill in the small claims court case name)*: _____

b. Case number *(fill in the small claims court case number)*: _____

3 The small claims court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the small claims court)*: _____

4 The small claims court took this action or made this ruling on the following date *(fill in the date)*: _____

5 *If you are filing this petition more than 30 days after the date that you listed in 4, explain the extraordinary circumstances that caused the delay in filing this petition*: _____

The Parties in the Small Claims Court Case

6 I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in 2.

b. ☐ was not a party in the case identified in 2 but will be directly and negatively affected in the following way by the action taken or ruling made by the small claims court *(describe how you/your client will be directly and negatively affected by the small claims court's action or ruling):*

7 The other party or parties in the case identified in 2 was/were *(fill in the names of the parties):*

Appeals or Other Petitions for Writs in This Case

8 Did you or anyone else file an appeal about the same small claims court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the date the appeal/new trial is set for):*

9 Have you filed a previous petition for a writ challenging this action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):*

(2) Date petition filed *(fill in the date you filed this petition):*

(3) Case number *(fill in the case number of the petition):*

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "SC-300, item 9.")

Reasons for This Petition

10 The small claims court made the following legal error or errors when it took the action or made the ruling described in 3 *(check and fill in at least one):*

a. ☐ The small claims court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the small claims court must do:*

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court must do this:*

10 (continued)

(3) *Identify the supporting documents (the documents from the small claims case) and describe what the judge said or did that shows that the court did not do or refused to do this:*

_____

_____

_____

_____

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court, that is relevant to your request for writ.*

_____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10a."*

b. ☐ The small claims court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the small claims court did:* _____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court cannot or must not do this:* _____

_____

_____

_____

(3) *Identify the supporting documents (the documents from the small claims case) and describe what the judge said or did that shows that the court did not do or refused to do this:* _____

_____

_____

_____

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court, that is relevant to your request for writ.*

_____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10b."*

10 (continued)

c. ☐ The small claims court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the small claims court did or said it is going to do:* _____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court does not have the power to do this:*

(3) *Identify the supporting documents (the documents from the small claims case) that shows that the court did or said it was going to do this:*

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court, that is relevant to your request for writ.*

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10c."*

d. ☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "SC-300, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the small claims court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:* _____

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the small claims court to do the following *(describe what, if anything, you want the court to be ordered to do):* _____

b. ☐ order the small claims court not to do the following *(describe what, if anything, you want the court to be ordered NOT to do)*: _____

c. ☐ issue a stay ordering the small claims court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the small claims court not take any further action and check the Stay requested box on page 1 of this form):*

I/My client:

(1) ☐ asked the small claims court to stay these proceedings, but the small claims court denied this request *(include in your supporting documents a copy of the small claims court's order denying your request for a stay).*

(2) ☐ did not ask the small claims court to stay these proceedings for the following reasons *(describe below why you did not ask the small claims court to stay these proceedings):*

d. ☐ take other action *(describe):* _____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Are the following documents attached as required by rule 8.972(b)(1) *(Check a or b):*

- The small claims court ruling being challenged in this petition
- All documents and exhibits submitted to the small claims court supporting and opposing you/your client's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling being challenged?

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of what is in these documents. Note that rule 8.972 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

14 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____
Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____
Type or print petitioner's name *Petitioner's signature*

Item number: 25

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal*:*
Civil Practice and Procedure: Evidentiary Objections in Summary Judgment Proceedings
Amend Cal. Rules of Court, rules 3.1350 and 3.1354

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair

Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Staff contact (name, phone and e-mail):
Susan R. McMullan, 415-865-7990, susan.mcmullan@jud.ca.gov
Heather Anderson, 415-865-7691, heather.anderson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 10, 2014
Project description from annual agenda: Summary judgment objections
Consider amending rule 3.1350 to reflect Judicial Council-sponsored legislation amending Code of Civil Procedure seciton 437c to narrow the requirements to rule on evidentiary objections.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In April 2014, the advisory committees recommended that an earlier version of this proposal be circulated for public comment during the spring 2014 comment cycle. RUPRO did not approve circulation of that earlier proposal and instead requested that the advisory committees do further work, including considering whether the proposed amendment is consistent with Code of Civil Procedure section 437c.

Subdivision (b)(1) of section 437c provides, in relevant part, that papers supporting a motion for summary judgment "shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed" followed by reference to supporting evidence. (emphasis added) Similarly subdivision (b)(3) provides that the opposition papers must include a separate statement responding to each material fact that the moving party claimed were undisputed and that sets forth "plainly and concisely any other material facts that the opposing party contents are disputed" followed by reference to supporting evidence. (emphasis added)

The earlier rule proposal presented to RUPRO would have amended rule 3.1350 to provide that the separate statements (in support and opposition) must include material facts pertinent to the court's disposition of the cause of action, claim for damages, issue of duty, affirmative defense, or legal issue. The proposal was intended to reduce the number of facts that have traditionally been included in the separate statements, many of which facts are not material facts (i.e pertinent to the disposition of the motion) and which, along with the many objections thereto, have significantly increased trial courts' workloads when they are considering summary judgment and summary adjudication motions. However, RUPRO appeared to be concerned that the proposed additional language could have been interpreted as narrowing the statutory requirement to include all material facts, and thus could have been confusing or potentially inconsistent with statute.

To address RUPRO's concerns, the committees have revised the proposed rule amendments. The revised proposal no

longer adds any new language following the rule references to “material facts.” Instead, the revised proposal includes a proposed definition of “material facts” based on case law: material facts relate to a claim or defense in issue [in the motion], which could make a difference in the outcome. (L.A. Nat. Bank v. Bank of Canton, supra, at p. 1274; see Reid v. Google, Inc. (2010) 50 Cal.4th 512, 532-533.) The committees concluded that this amended proposal should not raise the kinds of concerns previously identified by RUPRO because the rule would utilize the same term – “material facts” – found in the statute and an existing definition of that statutory term found in case law.

RUPRO members also discussed whether this rule amendment would impact the obligation of the trial court to rule on objections to evidence made by the parties. Since section 437c, subdivision (b) only requires that the separate statement set forth material facts, and the rule amendment does not change that, the rule amendment would not alter the trial court’s obligation to rule on all objections; it merely clarifies what constitutes a material fact with the objective of reducing the number of immaterial facts in the separate statements and thus the number of objections that must be ruled upon. Please also note that, on the recommendation of the committees, the council is sponsoring legislation to amend section 437c to provide that the trial court need rule only on those objections to evidence that is material to the court’s disposition of the summary judgment motion and to codify the holding in Reid v. Google, Inc. (2010) 50 Cal.4th 512 that objections not ruled on by the trial court are presumed to have been overruled and are preserved for appeal.

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP15-__

Title
Civil Practice and Procedure: Evidentiary Objections in Summary Judgment Proceedings

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 3.1350 and 3.1354

Proposed by
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair

Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

To reduce the amount of immaterial facts and evidence that are presented in motions for summary judgment, the Civil and Small Claims Advisory Committee (CSCAC) and the Appellate Advisory Committee (AAC) (collectively advisory committees) recommend that the California Rules of Court relating to summary judgment motions be amended. Specifically, rule 3.1350 would be amended to define "material facts" and clarify that the separate statement of undisputed material facts in support of or in opposition to a motion for summary judgment should include only material facts and not background facts or other facts that are not pertinent to the disposition of the motion. In addition, rule 3.1354 would be amended to eliminate one example of an objection on relevance grounds to evidence in support of summary judgment.

The suggestion that led to this proposal originated with the Ad Hoc Advisory Committee on Court Efficiencies, Cost Savings, and New Revenue (ad hoc committee).

Background

In spring 2012, the ad hoc committee proposed amending Code of Civil Procedure section 437c to limit the requirement that the court rule on objections to evidence in summary judgment

proceedings.[1] The proposal, which is intended to reduce the time and expense of these proceedings, would have added to subdivision (g) the following: "The court need rule only on those objections to evidence, if any, on which the court relies in determining whether a triable issue exists." In support of this amendment, the ad hoc committee stated, in part, as follows:

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

The proposal was referred to the CSCAC, which determined that it would be helpful to work with the AAC on this issue. Through a joint subcommittee, the advisory committees developed this rule proposal and a companion proposal to amend Code of Civil Procedure section 437c.[2]

The Proposal

This proposal and the related proposal to amend Code of Civil Procedure section 437c are intended to reduce burdens on trial courts associated with evidentiary objections in summary judgment proceedings, without resulting in a corresponding negative impact on the appellate courts. Although the courts have not collected comprehensive data on the time and resources expended in ruling on objections to evidence offered in support of or opposition to summary judgment motions, anecdotal reports from advisory committee members (both judges and attorneys) indicate that they are substantial. Advisory committee members state that many objections are unnecessary and there is no need for rulings on those objections. Published opinions illustrate the large number of objections made in summary judgment papers and the huge volume of motion papers overall: "We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objection, without focusing on those that are critical [footnote omitted]." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.) In one reported case, the moving papers in support of summary judgment totaled 1,056 pages. The plaintiff's opposition was nearly three times as long and included 47 objections to evidence, and the defendants' reply included 764 objections to evidence. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 249, 250–251, and 254.)

[1] This proposal was reiterated by the Trial Court Efficiencies Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees in October 2012.

[2] The legislative proposal has circulated for comment, was approved by the Judicial Council for sponsorship, and with slight modifications is contained in Senate Bill 470. It would provide in subdivision (d) that the court need rule only on those objections to evidence that is material to the disposition of the summary judgment motion and that objections not ruled on are preserved on appeal.

Until the Supreme Court issued its opinion in *Reid v. Google, Inc., supra,* the effect of a trial court's failure to rule on evidentiary objections that were properly presented was unclear. Some Courts of Appeal had held that objections made in writing were waived if not raised by the objector at the hearing and ruled on by the court. [3] In *Reid, supra,* at 531–532, the court disapproved this prior case law as well as its own prior opinions[4] to the extent they held that the failure of the trial court to rule on objections to summary judgment evidence waived those objections on appeal.

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

The *Reid* court recognized "that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. [Footnote omitted.] Trial courts are often faced with 'innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become.' [Citation omitted.]" (*Reid v. Google, Inc., supra,* at p. 532.) The Supreme Court proposed a solution: "To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices." (*Ibid.*)

Rule 3.1350. To encourage attorneys to raise only objections to evidence truly in dispute, rule 3.1350 of the California Rules of Court would be amended to define "material facts" as "facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is subject to the motion and that could make a difference in the disposition of the motion" and provide that the separate statements in support of and opposition to summary judgment should include only material facts. The definition is based on *L.A. Nat. Bank v. Bank of Canton* (1991)

[3] For example, *Charisma R. v. Kristina S.* (2009) 175 Cal.App.4th 361, 369 and *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 711.

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

229 Cal.App.3d 1267, 1274, in which the court stated, "In order to prevent the imposition of a summary judgment, the disputed facts must be 'material,' i.e., relate to a claim or defense in issue which could make a difference in the outcome." The committees defined "material facts" to clarify that the facts to be included in a separate statement are those that show whether there is a triable issue under the statute.

In addition to the definition, the rule would be amended to provide that the separate statements in support of and opposition to summary judgment should contain only material facts and not background facts or other facts that are not pertinent to the court's disposition of the motion. Specifically, subdivision (d) would be amended to add the following provision:

> (2) The separate statement should include only material facts and not background facts or other facts that are not pertinent to the disposition of the motion.

Subdivision (f) would be amended to add the following:

> (3) If the opposing party contends that additional material facts are disputed, those facts must be set forth in the separate statement. The separate statement should include only material facts and not background facts or other facts that are not pertinent to the disposition of the motion. Each fact must be followed by the evidence that establishes the fact. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

If the facts and supporting evidence included in the separate statements are limited to material facts – facts that are pertinent to the disposition of the motion – objections to the evidence should similarly be limited, which would further the goals of the proposal. The committees expect that these changes will clarify for attorneys filing and opposing summary judgment motions that their separate statements should address only facts claimed to be without dispute that are pertinent to the court's decision on the motion. An advisory committee comment to the rule would reiterate this and cite to *L.A. Nat. Bank, supra,* and *Reid, supra*. It would state:

> Subdivision (a)(2). This definition is derived from statements in *L.A. Nat. Bank v. Bank of Canton* (1991) 229 Cal.App.3d 1267, 1274 ("In order to prevent the imposition of a summary judgment, the disputed facts must be 'material,' i.e., relate to a claim or defense in issue which could make a difference in the outcome.") and *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532–533. (Parties are encouraged "to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion.")
>
> Subdivisions (d)(2) and (f)(3). Consistent with *Reid, supra,* these provisions are intended to eliminate from separate statements facts that are not material, and, thereby reduce the number of unnecessary objections to evidence.

Rule 3.1354. Rule 3.1354 of the California Rules of Court would be amended to require that objections on specific evidence be referenced by the objection number in a column of the separate statement in opposition or reply to a motion. Currently, the rule provides that objections on specific evidence *may* be referenced in this manner.

The rule would also be amended to eliminate one particular example of an objection to evidence. The example is an objection on relevance grounds to evidence that is not pertinent to a decision on the motion. The advisory committees believe that having this example in the rule may be encouraging attorneys to list evidence in their separate statements that is not pertinent to a decision on the motion for summary judgment, thereby resulting in unnecessary objections to the evidence and increasing the total number of evidentiary objections.

These changes are intended to reduce the number of unnecessary objections and the need to rule on all objections—even those not material to disposition of the summary judgment motion—and to result in significant reduction of time spent by trial court research attorneys and judges, without causing a significant increase in appellate court time. With fewer evidentiary objections made and the amendment of Code of Civil Procedure section 437c to provide that in deciding a motion for summary judgment the court need rule only on objections to evidence that is material to the disposition of the summary judgment motion, the proposal should not have a significantly negative impact on appellate courts.

Alternatives Considered

The advisory committees considered proposing the amendment of only rule 3.1350, but concluded that also amending rule 3.1354 and Code of Civil Procedure section 437c would better achieve the goals of reducing unnecessary evidentiary objections in summary judgment proceedings and the need for rulings on all evidentiary objections. The advisory committees believe that education of the bar would be a necessary component for courts to reap the most benefits from the proposed changes, but do not believe education alone would be sufficient to achieve the desired goals.

Implementation Requirements, Costs, and Operational Impacts

The proposal is expected to benefit the judicial branch, especially superior courts, by reducing the time that must be spent in deciding summary judgment motions.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Would education of the bar be useful in fully realizing the benefits of this proposal?

The advisory committees also seek 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?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments

Cal. Rules of Court, rules 3.1350 and 3.1354, at pages 7–11

Rules 3.1350 and 3.1354 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 3.1350. Motion for summary judgment or summary adjudication

(a) ~~Motion~~ Definitions

As used in this rule:

(1) "Motion" refers to either a motion for summary judgment or a motion for summary adjudication.

(2) "Material facts" are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion.

(b)–(c) * * *

(d) Separate statement in support of motion

(1) The Separate Statement of Undisputed Material Facts in support of a motion must separately identify:

(A) Each cause of action, claim for damages, issue of duty, or affirmative defense~~,~~ that is the subject of the motion; and

(B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.

(2) The separate statement should include only material facts and not background facts or other facts that are not pertinent to the disposition of the motion.

(3) The separate statement must be in ~~a~~ the two-column format~~,~~ specified in (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

(e) Documents in opposition to motion

Except as provided in Code of Civil Procedure section 437c(r) and rule 3.1351, the opposition to a motion must consist of the following documents, separately stapled and titled as shown:

(1) [*Opposing party's*] memorandum in opposition to [*moving party's*] motion for summary judgment or summary adjudication or both;

(2) [*Opposing party's*] separate statement ~~of undisputed material facts~~ in opposition to [*moving party's*] motion for summary judgment or summary adjudication or both;

(3) [*Opposing party's*] evidence in opposition to [*moving party's*] motion for summary judgment or summary adjudication or both (if appropriate); and

(4) [*Opposing party's*] request for judicial notice in opposition to [*moving party's*] motion for summary judgment or summary adjudication or both (if appropriate).

(f) ~~Opposition to Motion;~~ Content of separate statement in opposition to motion

The Separate Statement in Opposition to Motion must be in the two-column format specified in (h).

(1) Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits.

(2) On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the response must unequivocally state whether that fact is "disputed" or "undisputed." An opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and line numbers ~~in the evidence submitted~~.

(3) If the opposing party contends that additional material facts are disputed, those facts must be set forth in the separate statement.

The separate statement should include only material facts and not background facts or other facts that are not pertinent to the disposition of the motion. Each fact must be followed by the evidence that establishes the fact. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

(g)–(i) * * *

Advisory Committee Comment

Subdivision (a)(2). This definition is derived from statements in *L.A. Nat. Bank v. Bank of Canton* (1991) 229 Cal.App.3d 1267, 1274 ("In order to prevent the imposition of a summary judgment, the disputed facts must be 'material,' i.e., relate to a claim or defense in issue which could make a difference in the outcome.") and *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532–533 (Parties are

encouraged "to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion.")

Subdivisions (d)(2) and (f)(3). Consistent with *Reid*, *supra*, these provisions are intended to eliminate from separate statements facts that are not material and thereby reduce the number of unnecessary objections to evidence.

Rule 3.1354. Written objections to evidence

(a) * * *

(b) Format of objections

All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence ~~may~~ must be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must:

(1) Identify the name of the document in which the specific material objected to is located;

(2) State the exhibit, title, page, and line number of the material objected to;

(3) Quote or set forth the objectionable statement or material; and

(4) State the grounds for each objection to that statement or material.

Written objections to evidence must follow one of the following two formats:

(First Format):

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7–8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

~~**Objection Number 2**~~

~~"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)~~

~~**Grounds for Objection 2:** Irrelevant (Evid. Code, §§ 210, 350–351).~~

(Second Format):

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**
1. Jackson declaration, page 3, lines 7–8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, § 702(a)).
~~2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."~~	~~Irrelevant (Evid. Code, §§ 210, 350–351).~~

(c) Proposed order

A party submitting written objections to evidence must submit with the objections a proposed order. The proposed order must include places for the court to indicate whether it has sustained or overruled each objection. It must also include a place for the signature of the judge. The proposed order must be in one of the following two formats:

(First Format):

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7–8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Court's Ruling on Objection 1:	Sustained: _____ Overruled:_____

~~Objection Number 2~~

~~"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)~~

~~Grounds for Objection 2:~~ ~~Irrelevant (Evid. Code, §§ 210, 350–351).~~

~~Court's Ruling on Objection 2:~~	~~Sustained: _____~~ ~~Overruled:_____~~

(Second Format):

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**	**Ruling on the Objection**
1. Jackson declaration, page 3, lines 7–8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).	Sustained: _____ Overruled:_____
~~2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."~~	~~Irrelevant (Evid. Code, §§210, 350–351).~~	~~Sustained: _____~~ ~~Overruled:_____~~
Date:	_____	_____ Judge

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Civil Cases: Continued Suspension of Case Management Rule amend Cal Rules of Court, rule 3.720)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, chair

Staff contact (Name, phone and e-mail):
Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2015
Project description from annual agenda:
Item 13. Case Management Conferences. Review rules 3.712 and 3.720 which were amended in 2013 to permit courts, by local rule and on a temporary basis, to exempt types or categories of general civil cases from mandatory case management rules.

If requesting July 1 or out of cycle, explain:

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

Judicial Council of California

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

INVITATION TO COMMENT

SPR15-__

Title Subject Civil Cases: Continued Suspension of Case Management Rules	Action Requested Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes Amend Cal. Rules of Court, rule 3.720	Proposed Effective Date January 1, 2016
Proposed by Civil and Small Claims Advisory Committee Hon. Patricia M. Lucas, chair	Contact Anne Ronan, 415-865-8933 anne.ronan@jud.ca.gov

Executive Summary and Origin

In 2013, the Judicial Council amended the statewide rules of court on civil case management to give courts the discretion to exempt certain types or categories of general civil cases from the mandatory case management rules. The amendments were an emergency measure, intended to help courts to better address the state's fiscal crisis by decreasing the time spent by court staff and judicial officers in filing case management statements, setting and holding individual case management conferences, and performing other actions required by the case management rules.

The exemption provided in the rule was intended to be temporary, and by the terms of the amended rule applies only to cases filed before January 1, 2016. The Civil and Small Claims Advisory Committee is recommending that the exemption be extended in light of the continuing fiscal crisis.

Background

The council approved the temporary exemption from the statewide rules regarding case management in 2013.[1] The initial request to amend the case management rules came from the Superior Court of Los Angeles County in December 2012, and was reiterated by the Superior Court of Sacramento County shortly thereafter. The courts sought relief from the current case management rules applicable to general civil cases.

[1] The background of the prior action is set out in detail in the Report to the Council, *Civil Cases: Temporary Suspension of Case Management Rules,* dated February 26, 2013. The report may be found at http://www.courts.ca.gov/documents/jc-20130226-itemC.pdf.

The Superior Court of Los Angeles County particularly wanted the rules relaxed because of its plan—now in place—to remove all personal injury cases, of which it then had over 16,000 pending, from its individual calendar courts (in which general civil cases are assigned to a single judge for all purposes) to two master calendars. [2] The court sought relief from the mandatory case management rules because it had concluded that, with its then very limited resources, it could not continue to provide all general civil cases with the type of individualized case supervision and management envisioned by the rules of court.

As can be seen in the 2013 report, while some commentators opposed the exemption in 2013, most were in favor, at least on a temporary basis. The council adopted the proposal and, under rule 3.720, a court currently may, by local rule, exempt types or categories of general civil cases from the mandatory case management rules. As the rule currently stands, this exemption applies only to cases filed before January 1, 2016.

Most courts throughout the state have not implemented the local exemption from the case management rules authorized by e rule 3.720, and continue to provide the supervision and management of general civil cases provided for in the case management rules. At least six courts, however, have implemented local exemptions and suspended the mandated case management procedures for some or all of the general civil cases in their courts:

- Superior Courts of Los Angeles County exempts all limited cases and all personal injury cases. (Sup. Ct. of Los Angeles County, Local Rules, rule 3.23.)[3]
- Superior Court of Monterey County exempts all civil cases, instead holding a Case Progress Conference, with a statement from plaintiff only, 180 days after the filing of the complaint. (See Alternative to Civil Case Management, policy adopted June 26, 2013.[4])
- Superior Court of Sacramento County exempts all limited cases and short cause civil cases (Sup. Ct. of Sacramento County, Local Rules, rule 2.21 and 2.52.)
- Superior Court of San Bernardino County exempts all general civil cases (all cases the case management rules apply to) and complex cases, holding a trial setting conference in place of a case management conference in those cases. (Sup. Ct. of San Bernardino, Local Rules, rule 411.)
- Superior Court of San Joaquin exempts all limited cases from the case management rules. (Sup. Ct. of San Joaquin County, Local Rules, rule 3-102.A.6.)

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[2] The court had determined that these cases typically require fewer appearances and less direct case management than other types of general civil cases.

[3] This court reported to the advisory committee that the court finds the exemption of all personal injury cases from the case management rules particularly helpful in the court's efficient processing of those cases, now handled out of only two departments. The court representative stated that the court hoped very much that the amendments continue in effect.

[4] The policy is posted on the court's website and can be found at www.monterey.courts.ca.gov/Documents/Civil/2013-Alternative-to-Civil-Case-Management.pdf . While this court has been considering how to best change back to the standardized case management of the civil cases should the current rule sunset, the civil judges apparently would prefer that the exemption remain in effect.

- Superior Court of Shasta County exempts all limited and unlimited cases. (Sup. Ct. of Shasta County, Local Rules, rule 3.02.)[5]

The Proposal

In light of the fact that the courts are continuing to face a fiscal crisis, the Civil and Small Claims Advisory Committee proposes that California Rules of Court, rule 3.720(b) be amended, to provide that the emergency suspension of the case management rules currently set to sunset in 2016, not sunset until 2020. Specifically, the amendment would permit any court's local suspension of the case management rules to apply to cases filed before January 1, 2020. This proposal would permit those courts that have already made use of this exemption to continueto do so and would permit additional courts to invoke the exemption if they so choose.

The amended rule is attached at page 5.

Alternatives Considered

The committee considered not recommending that the exemptions be extended, but concluded that, since several courts were using the exemptions to deal with the fiscal crisis and wanted to continue doing so, the authority for the voluntary exemptions should be continued.

The committee also considered for what length of time the rule should be continued, and concluded that four years was appropriate, providing the courts sufficient time to work under the emergency rules (noting that one court just started using the exemption this past January) and the committee sufficient time to consider whether further changes should be recommended regarding the case management rules on an on-going basis.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not raise any costs or place any operational impacts on the courts. The ability to exempt cases from the case management rules would remain discretionary, and only used if a court determined that it would be of some financial benefit to the court.

[5] Superior Court of Shasta County reported that the existence of this statutory exemption made it possible for that court to combine their two civil departments into one. Previously, each of the departments had a weekly CMC calendar, which the court realized would not be possible to continue when a single department was handling all aspects of all civil cases.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee [or other proponent] is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Is four years a appropriate period for extending the emergency exemption?

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.
- 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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Amended Cal. Rule of Court, rule 3.720

California Rules of Court, rule 3.720 would be amended, effective January 1, 2016, as follows:

Chapter 3. Case Management

Rule 3.720. Application

(a) General application

The rules in this chapter prescribe the procedures for the management of all applicable court cases. These rules may be referred to as "the case management rules."

(b) Emergency suspension of rules

A court by local rule may exempt specified types or categories of general civil cases filed before January 1, ~~2016~~ 2020, from the case management rules in this chapter, provided that the court has in place alternative procedures for case processing and trial setting for such actions, including, without limitation, compliance with Code of Civil Procedure sections 1141.10 et seq. and 1775 et seq. The court must post the alternative procedures on its website.

(c) Rules when case management conference set

In any case in which a court sets an initial case management conference, the rules in this chapter apply.

Advisory Committee Comment

Subdivision (b) of this rule is an emergency measure in response to the limited fiscal resources available to the courts as a result of the current fiscal crisis and is not intended as a permanent change in the case management rules.

Item number 27

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Civil Forms: Proof of Service (revise form POS-040)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, chair

Staff contact (Name, phone and e-mail):
Bruce Greenlee, 415-865-7698, bruce.greenlee@jud.ca.gov
Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2015
Project description from annual agenda:
Item 9. Proof of Service-Civil (form POS-040). Amend form to correct the provision regarding electronic service to conform to law. ...Other minor amendments to form will be considered at the same time.

If requesting July 1 or out of cycle, explain:

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

Judicial Council of California

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INVITATION TO COMMENT

SPR15-

Title
Civil Forms: Proof of Service

Proposed Rules, Forms, Standards, or Statutes
Revise form POS-040

Proposed by
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Bruce Greenlee, Legal Services
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Anne M. Ronan, Legal Services
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Executive Summary and Origin

The proposed revised form POS-040, *Proof of Service—Civil,* corrects two legal errors in the current form. First, the current form instructs that electronic service cannot be done by a party. Second, the current form states that service by leaving a copy with an individual at an attorney's office must be accomplished between the hours of 9:00 am and 5:00 pm. Neither of these provisions is legally correct.

Background

Electronic service may be performed directly by a party, by an agent of a party, including the party's attorney, or through an electronic filing service provider.[1] Current Judicial Council form POS.040, *Proof of Service—Civil,* requires that the person serving electronically state that he or she is "not a party to this action" (see Item 1 and General Instructions on Page 3: "A party to the action cannot serve the documents.").

There is a separate form POS-050 for Proof of Electronic Service. Therefore, it is not necessary that POS-040 provide for proof of electronic service as one of its options.

[1] Cal. Code Civ. Proc,, § 1010.6(a)(1)(A), Cal. Rules of Ct., Rule 2.251(e)(1).

There is also an error at Item 6a of the form. The requirement that service on an attorney by leaving a copy at the attorney's office be accomplished between the hours of 9:00 am to 5:00 pm applies only if there is no receptionist or person in charge present.[2] This error should also be fixed.

The Proposal

The Civil and Small Claims Advisory Committee proposes that POS-040 be revised to remove electronic service as one of the manners of service for which the form may be used. This will resolve the error in requiring that electronic service be effected by a nonparty in a very simple way without any loss of functionality to form users.

The committee also proposes that Item 6a of the form be revised to correctly state when the 9:00 a.m. to 5:00 p.m. limitation applies.

Alternatives Considered

The committee considered several alternatives. First: the words "other than for electronic service" could have been added before "not a party to this action" in Item 1 and in the instructions. But the committee decided that removing electronic service from the form entirely was cleaner and simpler.

Second, POS-040 could be revoked. There are separate POS forms for personal service (POS-020), service by mail (POS-030), and electronic service (POS-050). However, revocation would mean that there would not be a Judicial Council form for proof of service by fax, overnight delivery, or messenger service.

A related issue raised by POS-040 is that there is no express authority in the law, either statute or rule of court, that generally requires that the person effecting personal service be a nonparty.[3] The form requires that one effecting personal service be a nonparty. The origin of this requirement would seem to be Code of Civil Procedure section 414.10, which requires that a summons be served by a nonparty,[4] but there is no statute extending this requirement to service of other documents after the court has gained jurisdiction over a party.

Therefore, the nonparty requirement could be removed for personal service also. This decision would be far-reaching, though, changing a long standing practice and impacting many other forms, not just POS-040. It would be necessary to check all other proof-of-service forms, including proofs of service included as an integral section of other forms, to see if nonparty status is required for service of those forms.

[2] Code Civ. Proc., § 1011(a).
[3] Electronic service is the only manner of service that expressly authorizes service by a party.
[4] Statutes governing particular proceedings may expressly require that the personal service be by a nonparty. See, e.g., Pen. Code § 18755(b)(1), gun violence restraining orders.

The advisory committee rejected this option. In addition to being concerned about the large number of civil forms that might be affected, the committee felt that it should not make this decision unilaterally, because it would impact more than just civil forms. Other subject areas have proofs of service raising the same issue. See, e.g., FL-330, *Proof of Personal Service (Family Law)*. The decision to revise personal service forms across the various should not come solely from a single advisory committee, or address only a single set of forms. If the change is made, it would have to apply to all groups involved with forms development.

A possible course of action would be to ask the Judicial Council to either adopt a rule of court or sponsor legislation to address the lack of authority requiring personal service to be by a nonparty. From a policy perspective, the requirement that the person serving not be a party makes sense. , in that attempting to serve an opposing party personally could lead to a volatile confrontation. The committee notes this as a possible project for the future, but is making no recommendation at this time.

Implementation Requirements, Costs, and Operational Impacts

A very minimal amount of training may be required to alert court personnel that form POS-040 may no longer be used for electronic service. Because the current form is legally incorret, this small cost and impact is unavoidable.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

Revised Form POS-040 at pages 4-6.

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 2/26/15** **Not Approved by the** **Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
Plaintiff/Petitioner: Defendant/Respondent:	JUDICIAL OFFICER:
PROOF OF SERVICE—CIVIL **Check method of service *(only one):*** ☐ By Personal Service ☐ By Mail ☐ By Overnight Delivery ☐ By Messenger Service ☐ By Fax	DEPARTMENT:

Do not use this form to show service of a summons and complaint or for electronic service.
See USE OF THIS FORM on page 3.

1. At the time of service I was over 18 years of age **and not a party to this action**.
2. My residence or business address is:

3. ☐ The fax number from which I served the documents is *(complete if service was by fax):*

4. On *(date):* I served the following **documents** *(specify):*

   ☐ The documents are listed in the *Attachment to Proof of Service–Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:
   a. Name of person served:
   b. ☐ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*
      Business or residential address where person was served:

   c. ☐ *(Complete if service was by fax.)*
      (1) Fax number where person was served:

      (2) Time of service:

      ☐ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means *(specify):*
   a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, either with a receptionist or an individual in charge of the office, or, if there was no person in the office with whom the notice or papers could be left, in a conspicuous place in the office between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

Form Approved for Optional Use
Judicial Council of California
POS-040 [Rev. January 1, 2016]

Code of Civil Procedure, §§ 1011, 1013, 1013a, 2015.5; Cal. Rules of Court, rule 2.306
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:

   (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

   (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

   I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

c. ☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by thmessenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*

e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

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 OF DECLARANT)

▶ (SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

▶ (SIGNATURE OF DECLARANT)

INFORMATION SHEET FOR PROOF OF SERVICE—CIVIL

(This information sheet is not part of the official proof of service form and does not need to be copied, served, or filed.)

USE OF THIS FORM

This form is designed to be used to show proof of service of documents by (1) personal service, (2) mail, (3) overnight delivery, (4) messenger service, or (5) fax.

This proof of service form should **not** be used to show proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Also, this proof of service form should **not** be used to show proof of electronic service. For that purpose, use *Proof of Electronic Service* (form POS-050).

Certain documents must be personally served. For example, an order to show cause and temporary restraining order generally must be served by personal delivery. You must determine whether a document must be personally delivered or can be served by mail or another method.

GENERAL INSTRUCTIONS

A person must be over 18 years of age to serve the documents. The person who served the documents must complete the Proof of Service. **A party to the action cannot serve the documents**.

The Proof of Service should be typed or printed. If you have Internet access, a fillable version of this proof of service form is available at *www.courts.ca.gov/forms.htm.*

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person *for* whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as the address on the documents that you served.

Third box, left side: Print the names of the plaintiff/petitioner and defendant/respondent in this box. Use the same names as are on the documents that you served.

Fourth box, left side: Check the method of service that was used. You should check only one method of service and should show proof of only one method on the form. If you served a party by several methods, use a separate form to show each method of service.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side : Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Third box, right side: State the judge and department assigned to the case, if known.

Complete items 1–6:

1. You are stating that you are over the age of 18.
2. Print your home or business address.
3. If service was by fax service, print the fax number from which service was made.
4. List each document that you served. If you need more space, check the box in item 4, complete the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)), and attach it to form POS-040.
5. Provide the names, addresses, and other applicable information about the persons served. If more than one person was served, check the box on item 5, complete the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)), and attach it to form POS-040.
6. Check the box before the method of service that was used, and provide any additional information that is required. The law may require that documents be served in a particular manner (such as by personal delivery) for certain purposes. Service by fax generally requires the prior agreement of the parties.

You must sign and date the proof of service form. By signing, you are stating under penalty of perjury that the information that you have provided on form POS-040 is true and correct.

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (Jan. 1 cycle)**
RUPRO Meeting: *April 16, 2015*

Title of proposal:
Civil Forms: Gun Violence Restraining Orders (adopt forms EPO-002, GV-100, GV-100 INFO, GV-109, GV-110, GV-115, GV 116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV 710, GV 720, GV-730, GV-800, GV 800-INFO)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, chair

Staff contact (Name, phone and e-mail):
Bruce Greenlee, 415-865-7698, bruce.greenlee@jud.ca.gov
Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2015
Project description from annual agenda:
Item 20. Gun Violence Restraining Orders. Develop forms for civil restraining order procedure mandated by AB 1014.

If requesting July 1 or out of cycle, explain:

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

Judicial Council of California

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

INVITATION TO COMMENT

[ItC prefix as assigned]

Title
Civil Forms: Gun Violence Restraining Orders

Proposed Rules, Forms, Standards, or Statutes
Adopt forms EPO-002, GV-100, GV-100-INFO, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800, GV-800-INFO

Proposed by
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Bruce Greenlee, Legal Services
415 865-7698
bruce.greenlee@jud.ca.gov

Anne M. Ronan, Legal Services
415-865-8933
anne.ronan@jud.ca.gov

Executive Summary and Origin

The Civil and Small Claims Advisory Committee recommends the adoption of a group of new gun violence restraining order forms. The proposed new forms implement legislation effective January 1, 2016,[1] found at Penal Code section 18100 et seq. The statutes provide a civil process to obtain a court order requiring a person to surrender, and prohibiting him or her from possessing, firearms and ammunition before the person uses a firearm to commit a crime.[2] The Judicial Council is statutorily required to "prescribe the forms of the petitions and orders and any other documents required to implement the legislation."[3]

Background

This legislation was motivated by a situation in Santa Barbara County in which law enforcement was advised of a person who possessed firearms and other weapons and was exhibiting unstable behavior. But because the person legally possessed the firearms and had not yet committed any

[1] See Assem. Bill 1014 (Stats. 2014, ch. 872).
[2] See Pen. Code, § 18100.
[3] Pen. Code, § 18105.

crime, law enforcement was powerless to intervene. The person subsequently went on a killing spree.

A gun violence restraining order is a written court order prohibiting a named person from having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms or ammunition. Despite the location of the statutes in the Penal Code, the process to obtain a gun violence restraining order is considered a civil proceeding.[4]

The Proposal

The Civil and Small Claims Advisory Committee proposes that the following 23 new Judicial Council forms be adopted in compliance with Penal Code section 18105:[5]

- EPO-002, *Firearms Emergency Protective Order*
- GV-100, *Petition for Firearms Restraining Order*
- GV-100-INFO, *Can a Firearms Restraining Order Help Me?*
- GV-109, *Notice of Court Hearing*
- GV-110, *Temporary Firearms Restraining Order*
- GV-115, *Request to Continue Court Hearing for Firearms Restraining Order*
- GV-116, *Notice of New Hearing Date*
- GV-120, *Response to Petition for Firearms Restraining Order*
- GV-120-INFO, *How Can I Respond to a Petition for Firearms Restraining Order?*
- GV-130, *Firearms Restraining Order After Hearing*
- GV-200, *Proof of Personal Service*
- GV-200-INFO, *What Is Proof of Personal Service?"*
- GV-250, *Proof of Service of Response by Mail*
- GV-600, *Request to Terminate Firearms Restraining Order*
- GV-610, *Notice of Hearing to Terminate Firearms Restraining Order*
- GV-620, *Response to Request to Terminate Firearms Restraining Order*
- GV-630, *Order on Request to Terminate Firearms Restraining Order*
- GV-700, *Request to Renew Firearms Restraining Order*
- GV-710, *Notice of Hearing to Renew Firearms Restraining Order*
- GV-720, *Response to Request to Renew Firearms Restraining Order*
- GV-730, *Order on Request to Renew Firearms Restraining Order*
- GV-800, *Proof of Firearms Turned In or Sold*
- GV-800-INFO, *How Do I Turn In or Sell My Firearms?*

There are two different paths to a gun violence restraining order. There is a "Temporary Emergency Gun Violence Restraining Order," [6] and there is an "Ex Parte Gun Violence

[4] Pen. Code, § 18100.
[5] For all of these forms except form EPO-002, *Firearms Emergency Protective Order*, the designator GV (Gun Violence) is used.
[6] Pen. Code, § 18125 et seq.

Restraining Order."[7] The titles are particularly confusing because a "temporary" order may be issued ex parte,[8] and an "ex parte" order is temporary.[9] Therefore, the proposed forms do not use the statutory labels. Instead, what the statutes refer to as the Temporary Emergency Gun Violence Restraining Order is designated as the *Firearms Emergency Protective Order* (EPO-002), modeled after the current *Emergency Protective Order* (EPO-001). What the statutes refer to as the Ex Parte Gun Violence Restraining Order is designated as the *Temporary Firearms Restraining Order* (GV-110), modeled after the Temporary Restraining Order forms for other civil protective order proceedings (see e.g., CH-110).

There are three major differences between the "temporary" and "ex parte" orders. First, the temporary order may only be requested by a law enforcement officer, while the ex parte order may be requested by a law enforcement officer or an immediate family member (as defined).[10] Second, the temporary order expires in 21 days with no procedure for extending it or making it "permanent;" the ex parte order also expires in 21 days, but provides for a hearing to be held within 21 days to issue a GV order with a duration of one year.[11] With the temporary order, before the 21 days are up, the law enforcement officer can petition for an order after hearing.[12]

The third difference is in the showing required to get the order. The temporary order requires a showing of *immediate and present danger,*[13] while the ex parte order requires a showing of *a significant danger in the near future*.[14]

The temporary order may also be obtained by using the procedures to obtain an oral search warrant if time and circumstances do not permit the filing of a petition.[15] Hence, the temporary order is a tool to be used by law enforcement in an emergency situation, when there is a perceived need to remove guns from someone acting erratically and aggressively and to prohibit him or her from possessing a firearm. If the restraining order is issued and the restrained party has not relinquished the firearm, then under the amendments to Penal Code section 1524(a)(14), a search warrant for the firearm can be issued.

In summary, law enforcement can seek a temporary order in an emergency or an ex parte order for danger in the near future. A family member can only seek an ex parte order. Either may seek an order after hearing.

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[7] Pen. Code, § 18150 et seq.
[8] Pen. Code, §18125(a).
[9] Pen. Code, § 18155(c).
[10] Compare Penal Code section 18125(a) with Penal Code section 18150(a).
[11] Compare Penal Code sections 18125−18140 (no provision for hearing after temporary order) with Penal Code section 18165 (hearing required after ex parte order). At the hearing, the petitioner must prove the grounds for the order by clear and convincing evidence. Pen. Code, § 18170(b).
[12] See Pen. Code, § 18170(a).
[13] Pen. Code, § 18125(a)(1).
[14] Pen. Code, § 18150(b)(1).
[15] Pen. Code, § 18145(a)(2).

Scope of Forms

The advisory committee proposes a complete group of forms to cover all aspects of a gun violence restraining order proceeding, including proceedings to be held after the GV-130 Order After Hearing has been granted. The existence of similar forms for other protective order proceedings, particularly civil harassment, has made it possible to create corresponding gun violence forms without having to start from a blank page.

In addition to the initiating petition and orders discussed above, the committee believes that it is important to provide information to, and a form for use by, the respondent to respond to the petition (see GV-120, GV-120-INFO). There is a statutory provision for either party to request a continuance on a showing of good cause[16] (see GV-115, GV-116). And there is a requirement for the issuance of a receipt on surrender or sale of firearms[17] (see GV-800, GV-800-INFO). There are corresponding civil harassment forms for all of these functions, which have been used as form and format templates for the gun violence forms, with the content reflecting the gun violence statutes.

There is also a statutory process to renew a gun violence protective order before it expires.[18] There are currently civil harassment forms for a request for renewal, notice of hearing, response, and order. Corresponding gun violence forms have been created for all of these functions (see GV-700, GV-710, GV-720, GV-730).

Finally, there is a statutory process for the respondent to request a hearing to terminate a gun violence restraining order.[19] While there are currently no civil harassment form to request termination of the CH-130, *Order After Hearing,* the committee believes that the forms for renewal may be used as models for a termination proceeding. Therefore, the committee recommends the adoption of forms (1) to request termination (GV-600), (2) for a notice of hearing (GV-610), (3) for the petitioner's response to the request (GV-620), and (4) for the court's order either granting or denying termination (GV-630).

Alternatives Considered

The mandate from the Legislature is for the Judicial Council to provide forms for petitions and orders "and any other documents." "Any other documents" could perhaps have been read narrowly to provide only a few additional forms. As noted above, the advisory committee has elected to read this language broadly to provide forms for all aspects of the proceeding.

The committee considered two different formats for the emergency order (EPO-002). An option would be two separate forms, one for a petition and one for an order, in the standard plain-language format, similar to the GV-100 and GV-110. However, the committee preferred a single form modeled after the EPO-001, *Emergency Protective Order,* which has an application and

[16] Pen. Code, § 18195.
[17] Pen. Code, § 18120(b)(2).
[18] Pen. Code, § 18190.
[19] Pen. Code, § 18185.

order on a single page. The feeling was that the form would be used exclusively by law enforcement in the field in a potentially volatile situation and needed to be as simple and quick to fill out as possible.

Implementation Requirements, Costs, and Operational Impacts

There will be some training involved for court clerks and judicial officers regarding the new gun violence restraining order forms. Because forms are mandated by legislation, these costs and impact are unavoidable. Also, the process is substantially similar to other civil restraining order proceedings. Therefore, the forms will be familiar to court personnel, reducing the amount of time needed for training.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Forms EPO-002, GV-100, GV-100-INFO, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800, and GV-800-INFO, at pages 5–56.

EPO-002

FIREARMS EMERGENCY PROTECTIVE ORDER *(See reverse for important notices.)*

LAW ENFORCEMENT CASE NUMBER:

1. **RESTRAINED PERSON** *(insert name of subject):* _____

Sex: ☐ M ☐ F Ht.: _____ Wt.: ____ Hair color: ____ Eye color: ____ Race: _____ Age: ____ Date of birth: _____

2. **TO THE RESTRAINED PERSON:**
YOU MUST NOT own, possess, purchase, receive, or attempt to purchase or receive any firearm or ammunition. If you have any firearms or ammunition, you **MUST IMMEDIATELY SURRENDER THEM IN A SAFE MANNER TO LAW ENFORCEMENT ON REQUEST**. If no request has been made, you must surrender all firearms and ammunition in a safe manner to the control of your local law enforcement agency or sell them to a licensed gun dealer **within 24 hours** of being served with this order and **file the original receipt with the Court listed in Item 3** below with **within 48 hours. FAILURE TO TIMELY FILE THE RECEIPT IS A VIOLATION OF THIS ORDER** .

ON REQUEST OF ANY LAW ENFORCEMENT YOU MUST IMMEDIATELY SURRENDER ANY FIREARM AND AMMUNITION IN YOUR POSSESSION OR CONTROL

3. **THIS ORDER WILL EXPIRE ON:** _____ **TIME** _____
INSERT DATE OF 21st CALENDAR DAY
DO NOT COUNT DAY THE ORDER IS GRANTED

(Name and address of court):

4. Reasonable grounds for the issuance of this Order exist, and a Firearm Emergency Protective Order (1) is necessary because Respondent poses an immediate danger of causing personal injury to himself or herself or to another by having custody or control, owning, purchasing, possessing, or receiving a firearm; and (2) less restrictive alternatives were ineffective or have been determined to be inadequate or inappropriate under the circumstances.

To the Restrained Person: This order will last until the date and time noted above. You are required to surrender all firearms and ammunition that you own or possess in accordance with Section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, a firearm or ammunition while this order is in effect. However a more permanent gun violence restraining order may be obtained from the Court. You may seek advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

5. Judicial officer *(name):* granted this Order on *(date):* at *(time):*

APPLICATION

6. Officer has a reasonable cause to believe: an Order (1) is necessary because Respondent poses an immediate danger of personal injury to the Restrained Person or another **and** (2) less restrictive alternatives have been ineffective or have been determined to be inadequate or inappropriate under the circumstances *(give facts and dates; specify weapons—number, type and location):*

_____

_____

_____

7. ☐ Firearms were: ☐ observed ☐ reported ☐ searched for ☐ seized

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By: _____ ▶ _____
(PRINT NAME OF LAW ENFORCEMENT OFFICER) (SIGNATURE OF LAW ENFORCEMENT OFFICER)

Agency: Telephone No.: Badge No.:

PROOF OF SERVICE

8. Person served *(name):* _____
9. I personally delivered copies of this Order to the person served as follows: Date: _____ Time: _____
Address:

10. At the time of service, I was at least 18 years of age. ☐ I am a California law enforcement officer.
11. My name, address, and telephone number are *(this does not have to be server's home telephone number or 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 OF SERVER) (SIGNATURE OF SERVER)

WARNINGS AND INFORMATION

To the restrained person: You are prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm or ammunition. (Penal Code, § 18125 et seq.) A violation is subject to a $1,000 fine and imprisonment or both. Within 24 hours of receipt of this order, you must turn in your firearms to a law enforcement agency or sell them to a licensed firearms dealer until the expiration of this order. (Penal Code, § 18125 et seq.) Proof of surrender or sale must be filed with the court within 48 hours of receipt of this order.

Violation of this order is a misdemeanor punishable by a $1,000 fine, six months in jail, or both. (Penal Code, § 18205 and § 19). This protective order shall be enforced by all law enforcement officers in the State of California who are aware of or shown a copy of the order. The terms and conditions of this order remain enforceable regardless of the acts of the parties; it may be changed only by order of the court.

Every person who owns or possesses a firearm or ammunition with knowledge that he or she is prohibited from doing so by a restraining order is guilty of a misdemeanor and shall be prohibited from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a five-year period, to commence upon the expiration of the existing gun violence restraining order. (Penal Code, § 18205.)

A la persona restringida: Tiene prohibido ser dueño de un arma de fuego, poseer, comprar o tratar de comprar, recibir o tratar de recibir u obtener un arma de alguna otra manera. (Código Penal, secciones 18125 y siguientes). Una violación de esta orden está sujeta a una multa de $1000 y encarcelamiento o ambos. Dentro de las 24 horas de recibir esta orden, tiene que entregar sus armas de fuego a una agencia del orden público o venderlas a un comerciante de armas autorizado hasta el vencimiento de esta orden. (Código Penal, secciones 18125 y siguientes). Dentro de las 48 horas de recibir esta orden, se tiene que presentar a la corte una prueba de haberlas entregado o vendido.

La violación de esta orden es un delito menor que podrá ser castigado con una multa de $1000, seis meses de cárcel, o ambos. (Código Penal, secciones 18205 y 19). Todo agente del orden público del estado de California que tenga conocimiento de la orden o a quien se le muestre una copia de la misma deberá hacer cumplir esta orden de protección. Los términos y condiciones de esta orden se podrán hacer cumplir independientemente de las acciones de las partes; solo la corte podrá cambiar esta orden (Código Penal, sección 13710(b)).

Toda persona que es dueña de o posee un arma de fuego o municiones sabiendo que una orden de restricción se lo prohíbe, será culpable de un delito menor y se le prohibirá tener en su posesión o control, comprar, poseer o recibir, o intentar comprar o recibir un arma de fuego o municiones por un periodo de cinco años a partir del vencimiento de la orden de restricción actual de violencia con armas de fuego. (Código Penal, sección 18125.)

To the restrained person: This Firearms Emergency Protective Order is effective when made. It will last until the date and time in item 3 on the reverse. You can seek to terminate this order before expiration by filing a request with the Court listed in Item 3. A more permanent restraining order may be sought from the court by a law enforcement officer or agency or by a family member. You may seek the advice of an attorney on any matter connected with this order. The attorney should be consulted promptly so that the attorney may assist you in responding to the order.

A la persona restringida: Esta orden de protección de emergencia de arma de fuego entra en vigencia en el momento en que se emite. Durará hasta la fecha y hora indicadas en el punto 3 al otro lado. Sin embargo, puede pedir dar fin a esta orden antes de su fecha de vencimiento al presentar una solicitud con la Corte indicada en el punto 3. Un agente o agencia del orden público o un familiar puede pedir que la corte emita una orden de restricción más permanente de la corte. Puede consultar con un abogado sobre cualquier asunto relacionado con esta orden. Debe consultar con el abogado oportunamente para que éste le pueda ayudar a responder a la orden.

To law enforcement: The Firearms Emergency Protective Order shall be served upon the restrained person by the officer if the restrained person can reasonably be located. A copy shall be filed with the court as soon as practicable after issuance. Also, the officer shall have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice.

The provisions in this Temporary Firearms Emergency Protective Order do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

GV-100 Petition for Firearms Restraining Order

Clerk stamps date here when form is filed.

Read *Can a Firearms Restraining Order Help Me? (Form GV-100-INFO)* before completing this form.

1 Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*):

_____

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 Respondent

Full Name: _____ Age: _____
Address *(if known):* _____
City: _____ State: ____ Zip: _____

3 Venue

Why are you filing in this county? *(Check all that apply):*

a. ☐ The Respondent lives in this county.
b. ☐ Other *(specify):* _____

4 Other Court Cases

a. Are you aware of any other court cases, civil or criminal, involving the Respondent?

☐ Yes ☐ No *If yes, on the next page, check each kind of case and give as much information as you know as to where and when each was filed:*

This is not a Court Order.

Kind of Case	Filed in *(County/State)*	Year Filed	Case Number *(if known)*
(1) ☐ Civil Harassment			
(2) ☐ Domestic Violence			
(3) ☐ Divorce, Nullity, Legal Separation			
(4) ☐ Paternity, Parentage, Child Custody			
(5) ☐ Elder or Dependent Adult Abuse			
(6) ☐ Eviction			
(7) ☐ Workplace Violence			
(8) ☐ Criminal			
(9) ☐ Other *(specify):*			

b. Are there now any protective or restraining orders in effect relating to Respondent?
☐ Yes ☐ No ☐ I don't know *If yes, attach a copy if you have one.*

5 Description of Respondent's Firearms

Answer (a) or check (b).

a. I am informed, and on that basis believe, that Respondent currently possesses or controls the following firearms and ammunition. *(Describe the number, types, and locations of any firearms and ammunition that you believe that the Respondent currently possesses or controls)*:

b. ☐ I am informed, and on that basis believe, that Respondent currently possesses or controls firearms and ammunition, but I have no further specific informaton as to the number, types, and locations of those firearms and and ammunition.

6 Grounds for Issuance of a Firearms Restraining Order

I have reaonable cause to believe the following:

a. The Respondent poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing or receiving a firearm.

This is not a Court Order.

b. A gun firearms restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

c. The facts supporting the above statements are set forth:

☐ Below

☐ On the attached Form MC-031, *Attached Declaration*

7 Request for Firearms and Ammunition Restraining Order

I request that the court issue an order prohibiting Respondent from having in his or her custody or control, owning, purchasing, possessing or receiving, or attempting to purchase or receive, a firearm or ammunition. I further request that Respondent be orderd to immediately surrender all firearms and ammunition currently in his or her possession to a law enforcement officer or to sell the firearms and ammunition to a licensed gun dealer.

8 Request for Hearing

I request that the court set a hearing in this matter for the purpose of issuing a firearms restraining order that will last for one year.

9 Request for Immediate Temporary Order

Do you want the court to make a firearms restraining order now that will last until the hearing without notice to Respondent? ☐ Yes ☐ No *(If you answered yes, explain why below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 9—Request for Immediate Temporary Order" for a title.*

This is not a Court Order.

Case Number:

10 ☐ Request to Give Less Than Five Days' Notice

You must have your papers personally served on Respondent at least five days before the hearing, unless the court orders a shorter time for service. (Form GV-200-INFO explains What Is "Proof of Personal Service"? *Form GV-200,* Proof of Personal Service*, may be used to show the court that the papers have been served.)*

If you want there to be fewer than five days between service and the hearing, explain why below:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 10—Request to Give Less Than Five Days' Notice" for a title.*

_____

_____

_____

_____

_____

11 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

GV-100-INFO Can a Firearms Restraining Order Help Me?

These instructions cannot cover all of the questions that may arise in a particular case. If you do not know what to do to protect your rights, you should see a lawyer.

What is a firearms restraining order?

It is a court order that prohibits someone from having any guns or ammunition. The person must surrender any guns and ammunition that he or she currently owns.

Can I get a firearms restraining order against someone?

You can ask for one against a person who is an immediate family member. Immediate family members include (1) your spouse or domestic partner; (2) your parents, children, siblings, grandparents, and grandchildren and their spouses, including any stepparent or stepgrandparent; (3) your spouse's parents, children (your stepchildren), siblings, grandparents, and grandchildren; and (4) any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

Will the order protect me in other ways, such as keeping the person from coming near me?

No, the only order the court can make is to force the person to not have firearms and ammunition. If you need personal protection from a family member, you should proceed under the Domestic Violence Protection Act. File Form DV-100.

Will I have to pay a filing fee to request the order?

Yes, if you can afford to pay. If you cannot afford to pay the filing fee, ask the clerk how to apply for a fee waiver. Form FW-001 is available for this purpose.

What forms do I need to get the order?

You must fill out all of Form GV-100, *Petition for Firearms Restraining Order*, and Form CLETS-001, *Confidential CLETS Information*. You must also fill out items 1 and 2 on Form GV-109, *Notice of Court Hearing,* and items 1 and 2 on Form GV-110, *Temporary Firearms Restraining Order.*

Where can I get these forms?

You can get the forms from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find them at your local courthouse or county law library.

What do I need to do to get the order?

You must go to the superior court in the county where the person to be restrained lives. At the court, ask where you should file your request for a firearms restraining order. (A self-help center or legal aid association may be able to assist you in filing your request.) Give your forms to the clerk of the court. The clerk will give you a hearing date on the *Notice of Court Hearing* form.

How soon can I get the order?

You can ask for a *Temporary Firearms Restraining Order*, which will be effective right away if granted. The court may decide whether or not to grant the temporary order based only on the facts that you have stated in your petition. If so, the court will decide within 24 hours whether or not to make the temporary order. Sometimes the court will want to examine you personally under oath. The clerk will tell you whether you should wait to talk to the judge or come back later to find out if the court has signed a temporary order.

If you don't ask for a temporary restraining order, you will have to wait until the hearing, at which the court will decide whether to make an order that will last for one year.

How will the person to be restrained know about the order?

If the court issues a temporary restraining order, someone age 18 or older—**not you**—must personally "serve" (give) the person to be restrained a copy of the order. The server must then fill out Form GV-200, *Proof of Personal Service,* and give it to you to file with the court. If the person to be restrained attends the hearing, no further proof of service is required. But if he or she does not attend the hearing, then any order issued at the hearing must also be personally served. For help with service, ask the court clerk for Form GV-200-INFO, *What Is "Proof of Personal Service?"*.

GV-100-INFO Can a Firearms Restraining Order Help Me?

What do I have to prove to get the order?

You will have to convince the judge that the person to be restrained poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm.

You will also have to convince the judge that a firearms restraining order is needed to prevent personal injury to the person to be restrained or to another person because less restrictive alternatives either have been tried and haven't worked, or are inadequate or inappropriate for the current circumstances.

How can I convince the judge?

You will need to give the judge specific information. You should tell the judge everything that you know about the firearms that the person to be restrained currently owns, including how many the person owns, the types, and where they are kept.

Then you will need to present facts to show that the person to be restrained is dangerous. This could be information about any violent incident in which the person has been involved, or any crime of violence that the person has committed. It could also be evidence of any erratic or irrational behavior tending to indicate that the person suffers from a mental illness.

You should include all of this information in your Petition and also be prepared to present it to the judge at the hearing.

Do I have to go to court?

Yes. Go to court on the date the clerk gives you.

Will I see the restrained person at the court hearing?

If the person comes to the hearing, yes. But that person does not have the right to speak to you. If you are afraid, tell the court officer.

Can I bring someone with me to court?

Yes. You can bring someone to sit with you during the hearing. But that person cannot speak for you in court. Only you or your lawyer (if you have one) can speak for you.

Do I need to bring a witness to the hearing?

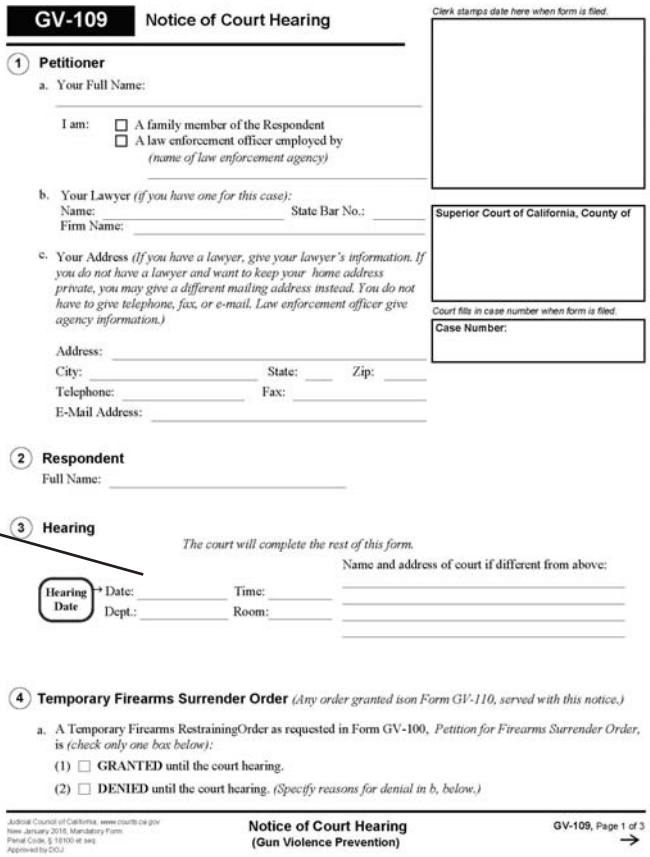
Witnesses are not required, but it helps to have more proof than just your word. For example, you can bring:

- Witnesses
- Written statements from witnesses made under oath
- Photos
- Medical or police reports
- Damaged property
- Threatening letters, e-mails, or telephone messages

The court may or may not let witnesses speak at the hearing. So, if possible, you should bring their written statements under oath to the hearing. (You can use Form MC-030, *Declaration,* for this.)

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required and you are not entitled to a free court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.



GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

1 Petitioner

a. Your Full Name:

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by *(name of law enforcement agency)*

b. Your Lawyer *(if you have one for this case)*:
Name: State Bar No.:
Firm Name:

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer give agency information.)*
Address:
City: State: Zip:
Telephone: Fax:
E-Mail Address:

Superior Court of California, County of

Court fills in case number when form is filed.
Case Number:

2 Respondent
Full Name:

3 Hearing
The court will complete the rest of this form.
Hearing Date → Date: Time:
Dept.: Room:
Name and address of court if different from above:

4 Temporary Firearms Surrender Order *(Any order granted ison Form GV-110, served with this notice.)*
a. A Temporary Firearms RestrainingOrder as requested in Form GV-100, *Petition for Firearms Surrender Order,* is *(check only one box below)*:
(1) ☐ GRANTED until the court hearing.
(2) ☐ DENIED until the court hearing. *(Specify reasons for denial in b, below.)*

Judicial Council of California, www.courts.ca.gov
New January 2016, Mandatory Form
Penal Code, § 18100 et seq.
Approved by DOJ

Notice of Court Hearing
(Gun Violence Prevention)

GV-109, Page 1 of 3

How long does the order last?

If the court makes a temporary order, it will last until your hearing date, which must be within 21 days of the date of the temporary order. If at the hearing the court issues a more permanent order, it will last for one year. It may be renewed for a longer period of time,

What if the restrained person does not obey the order?

Call the police. The restrained person can be arrested and charged with a crime.

Can I agree with the restrained person to cancel the order?

No. Once the order is issued, only the judge can change or cancel it. The restrained person would have to file a request with the court to cancel the order.

For help in your area, contact:

[Local information may be inserted.]

What if I need help to understand English?

When you file your papers, ask the clerk if a court interpreter is available. You may have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you .

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

1 Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by
(*name of law enforcement agency*):

_____

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 Respondent

Full Name: _____

3 Hearing

The court will complete the rest of this form.

Name and address of court if different from above:

_____
_____
_____
_____

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

4 Temporary Firearms Restraining Order *(Any order granted is on Form GV-110, served with this notice.)*

a. A Temporary Firearms Restraining Order as requested in Form GV-100, *Petition for Firearms Restraining Order,* is *(check only one box below):*

(1) ☐ **GRANTED** until the court hearing.

(2) ☐ **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

b. Reasons for denial of a Temporary Firearms Restraining Order as requested in Form GV-100, *Petition for Firearms Restraining Order,* are:

(1) ☐ The facts as stated in Form GV-100 do not sufficiently show that a firearms restraining order is necessary.

(2) ☐ Other *(as set forth):* ☐ Below ☐ On Attachment 4b(2).

5 Service of Documents on Respondent

At least ☐ five ☐ _____ days before the hearing, a law enforcement officer or someone age 18 or older—**and not a party to the action—**must personally give (serve) a court file-stamped copy of this Form GV-109 to the Respondent, along with a copy of all the forms indicated below:

a. GV-100, *Petition for Firearms Restraining Order* (file-stamped)
b. ☐ GV-110, *Temporary Firearms Restraining Order* (file-stamped) **IF GRANTED**
c. GV-120, *Response to Petition for Firearms Restraining Order* (blank form)
d. GV-120-INFO, *How Can I Respond to a Request for a Firearms Restraining Order?*
e. GV-250, *Proof of Service of Response by Mail* (blank form)
f. ☐ Other *(specify):* _____

Date: _____

_____
Judicial Officer

To the Petitioner in 1 :

- The court cannot make an order after the court hearing unless the Respondent has been personally given (served) a copy of the Petition and a temporary order if issued. To show that the Respondent has been served, the person who served the forms must fill out a proof of service form. Form GV-200, *Proof of Personal Service,* may be used.
- For information about service, read Form GV-200-INFO, *What Is "Proof of Personal Service"?*
- If you are unable to serve the Respondent in time, you may ask for a later hearing date, which will give you more time to serve the documents. Use Form GV-115, *Request to Continue Court Hearing for Firearms Restraining Order*.

Case Number:

To the Respondent:

- If you want to respond to the *Petition for Firearms Restraining Order* in writing, file Form GV-120, *Response to Petition for Firearms Restraining Order* and have someone age 18 or older—**not you—**mail it to the Petitioner.
- The person who mailed the form must fill out a proof of service form. Form GV-250, *Proof of Service of Response by Mail,* may be used. File the completed form with the court before the hearing and bring a copy with you to the court hearing.
- Whether or not you respond in writing, go to the hearing if you want the judge to hear from you before making an order. You may tell the judge why you agree or disagree with the order requested.
- You may bring witnesses and other evidence.
- At the hearing, the judge may order you to turn in to law enforcement, or sell to a licensed gun dealer, any firearms and ammunition that you own or possess. If issued, the order will last for one year.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Court Hearing* is a true and correct copy of the original on file in the court.

Clerk's Certificate
[seal]

Date: _____

Clerk, by _____, Deputy

GV-110 Temporary Firearms Restraining Order

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*):

_____

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____
Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address *(if known)*: _____
City: _____ State: _____ Zip: _____
Relationship to Petitioner: _____

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at the end of the hearing scheduled for the date and time below:

Date: _____ Time: _____ ☐ a.m. ☐ p.m.

This is a Court Order.

Case Number:

4 Findings

☐ Having examined ☐ Petitioner ☐ and other witnesses under oath,

☐ Having considered the declarations of ☐ Petitioner ☐ and other witnesses under penalty of perjury,

a. The court finds that there is a substantial likelihood that both of the following are true:

(1) Respondent poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm.

(2) A temporary gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that Respondent owns or possesses one or more firearms.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

☐ See the attached Form MC-025, *Attachment*

This is a Court Order.

5 Order Prohibiting All Firearms and Ammunition

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition.

b. You must:

(1) Surrender all firearms and ammunition in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition to him or her, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition within 24 hours of being served with this order. You may do so by either: (1) surrendering all of your firearms and ammunition in a safe manner to the local law enforcement agency; or (2) selling all of your firearms and ammunition to a licensed gun dealer.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms have been turned in or sold. *(You may use Form GV-800,* Proof of Firearms Turned In or Sold, *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

6 Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. You are required to surrender all firearms and ammunition that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, a firearm or ammunition while this order is in effect. A hearing will be held on the date and at the time noted on Page 1 to determine if a more permanent gun violence restraining order should be issued. Failure to appear at the hearing may result in a court making an order against you that is valid for one year. You may seek the advice of an attorney as to any matter connected with the Order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

Violation of this Order is a misdemeanor. If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be changed only by an order of the court.

This is a Court Order.

After You Have Been Served With a Temporary Order

- Obey the order by turning in your firearms and ammunition to a law enforcement agency or selling them to a licensed gun dealer.
- Read Form GV-120-INFO, *How Can I Respond to a Petition for Firearms Restraining Order?,* to learn how to respond to this Order.
- If you want to respond, fill out Form GV-120, *Response to Petition for Firearms Restraining Order,* and file it with the court clerk.
- You must have Form GV-120 served by mail on the Petitioner or the Petitioner's attorney. You cannot do this yourself. The person who does the mailing should complete and sign Form GV-250, *Proof of Service of Response by Mail*. File the completed proof of service with the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and have declarations served, signed by you and other persons who have personal knowledge of the facts. You may use Form MC-030, *Declaration,* for this purpose. It is available from the clerk's office at the court shown on page 1 of this form or at *www.courts.ca.gov/forms*. If you do not know how to prepare a declaration, you should see a lawyer.
- Whether or not you file a response, you should attend the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, the judge can make a firearms restraining order against you that lasts for one year. Tell the judge why you disagree with the order requested.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Respondent must do the following:

- Order the Respondent to immediately surrender all firearms and ammunition to him or her.
- Issue a receipt to the Respondent for all firearms and ammunition that he or she has surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms and Ammunition

The law enforcement agency that has received surrendered firearms and ammunition must do the following:

- Retain the firearms and ammunition until the expiration of this Order or of any other firearms restraining order issued by the court.
- On the expiration of this Order or of any later firearms restraining order issued by the court, return the firearms and ammunition to the respondent as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with Section 33850). Firearms or ammunition that are not claimed are subject to the requirements of Section 34000.

This is a Court Order.

Instructions for Law Enforcement

(continued)

- If someone other than the Respondent claims title to any of the firearms or ammunition surrendered, determine whether that person is the lawful owner. If so, return the firearms and ammuition to him or her as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with Section 33850).

Enforcing This Order

Before enforcing this Order, the law enforcement officer must first determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if (Pen. Code, § 836(c)(2)):

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The Respondent was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it.

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6. Agencies are encouraged to enter violation messages into CARPOS.

The provisions in this Temporary Firearms Restraining Order do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Temporary Firearms Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

GV-115 Request to Continue Court Hearing for Firearms Restraining Order

Clerk stamps date here when form is filed.

1 Party Seeking Continuance

a. Full Name:

_____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 Other Party

Full Name: _____

Address *(if known):* _____

City: _____ State: _____ Zip: _____

3 Request to Continue Hearing

I ask the court to continue the hearing currently scheduled for *(date):* _____

a. ☐ A *Temporary Firearms Restraining Order* (Form GV-110) was issued on *(date):* _____
Please attach a copy of the order.

b. I request that the hearing be continued because *(check one or both)*:

(1) ☐ The Respondent could not be served before the hearing date.

(2) ☐ Other for the reasons stated ☐ below ☐ on Attachment 3b(2)

_____

_____

_____

_____

c. (1) ☐ This is the first request for a continuance.

(2) ☐ The hearing has previously been continued ____ times.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

GV-116 Notice of New Hearing Date

Clerk stamps date here when form is filed.

Party seeking continuance complete items (1), (2), and (3)a.

(1) Party Seeking Continuance

a. Full Name:

_____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Other Party

Full Name: _____

(3) New Hearing Date

a. A hearing in this case is currently set for *(date):* _____ at *(time):* _____

b. The court orders a new hearing date:

(1) ☐ at the request of the Petitioner

(2) ☐ at the request of the Respondent

(3) ☐ in its discretion

c. Because:

(1) ☐ the Respondent could not be served before the current hearing date.

(2) ☐ the parties have agreed to postpone the hearing and ask for a new hearing date.

(3) ☐ for the reasons stated ☐ below ☐ on Attachment 3c

_____

_____

_____

(4) Order for Continuance and Notice of Hearing

The court hearing on the *Petition for Firearms Restraining Order* (Form GV-100) is continued and rescheduled:

Name and address of court if different from above:

_____

_____

_____

_____

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

Case Number:

5 Service of Order

A copy of this Order must be served by the requesting party on the other party at least ____ days before the hearing. A copy of Form GV-100, *Petition for Firearms Restraining Order,* and Form GV-110, *Temporary Firearms Restraining Order,* must also be served on the Respondent if they were not previously served and a proof of service filed with the court before the original hearing date.

Warning and Notice to the Respondent:

If you were served with a *Temporary Firearms Restraining Order* (Form GV-110), it remains in full force and effect until the new hearing date. You must continue to obey it until the end of the hearing.

Date: _____ _____

Judicial Officer

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of New Hearing Date* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

GV-120 Response to Petition for Firearms Restraining Order

Clerk stamps date here when form is filed.

Use this form to respond to the *Petition* (Form GV-100)

- Read *How Can I Respond to a Petition for Firearms Restraining Order?* (Form GV-120-INFO) to protect your rights.
- Fill out this form and take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner or to his or her lawyer. *(Use Form GV-250,* Proof of Service of Response by Mail.*)*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Petitioner

Name of person seeking order (*see Form GV-100, item* 1): _____

2 Respondent

a. Your Name: _____

Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Present your Response and any opposition at the hearing. Write your hearing date, time, and place from Form GV-109 item 3 here:

Hearing Date ➔ Date: _____ Time: _____
Dept.: _____ Room: _____

If you were served with a *Temporary Firearms Restraining Order*, you must obey it until the hearing. At the hearing, the court may make an order against you for an additional year.

3 Firearms Restraining Order

☐ I do not agree to the order requested in the Petition.

4 ☐ Denial

I did not do anything described in item 6 of Form GV-100.

5 ☐ Justification or Excuse

If I did some or all of the things that the Petitioner has accused me of, my actions were justified or excused for the following reasons *(explain):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 5—Justification or Excuse" as a title.*

Case Number:

6 Surrender of Firearms and Ammunition

If you were served with Form GV-110, *Temporary Firearms Restraining Order*, you cannot own or possess any guns, other firearms, or ammunition. (See item 5 of Form GV-110.) You must sell to a licensed gun dealer, or turn in to a law enforcement agency, any guns, other firearms, and ammunition in your immediate possession or control within 24 hours of being served with Form GV-110. You must file a receipt with the court. You may use Form GV-800, *Proof of Firearms Turned In or Sold*, for the receipt.

a. ☐ I do not own or control any guns, other firearms, or ammunition.
b. ☐ I have turned in my guns, other firearms, and ammunition to a law enforcement officer or agency, or sold them to a licensed gun dealer.
A copy of the receipt ☐ is attached. ☐ has already been filed with the court.

7 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____
Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____
Type or print your name *Sign your name*

GV-120-INFO How Can I Respond to a Petition for Firearms Restraining Order?

What is a firearms restraining order?

It is a court order that prohibits someone from having any guns or ammunition. The person must surrender any guns and ammunition that he or she currently owns.

Who can ask for a firearms restraining order?

The petition must have been filed by a law enforcement officer or an immediate family member of yours.

I've been served with a *Petition for Firearms Restraining Order*. What do I do now?

Read the papers served on you very carefully. The *Notice of Court Hearing* tells you when to appear in court. There may also be a *Temporary Firearms Restraining Order* prohibiting you from having any firearms and ammunition, and requiring you to surrender any firearms and ammunition that you currently own or possess. You must obey the order until the hearing.

What if I don't obey the order?

The police can arrest you. You can go to jail and pay a fine.

What if I don't agree with what the order says?

You still must obey the order until the hearing. If you disagree with the order that the Petitioner is asking for, fill out Form GV-120, *Response to Petition for Firearms Restraining Order*, before your hearing date and file it with the court. You can get the form from legal publishers or on the Internet at *www.courts.ca.gov*. You also may be able to find it at your local courthouse or county law library.

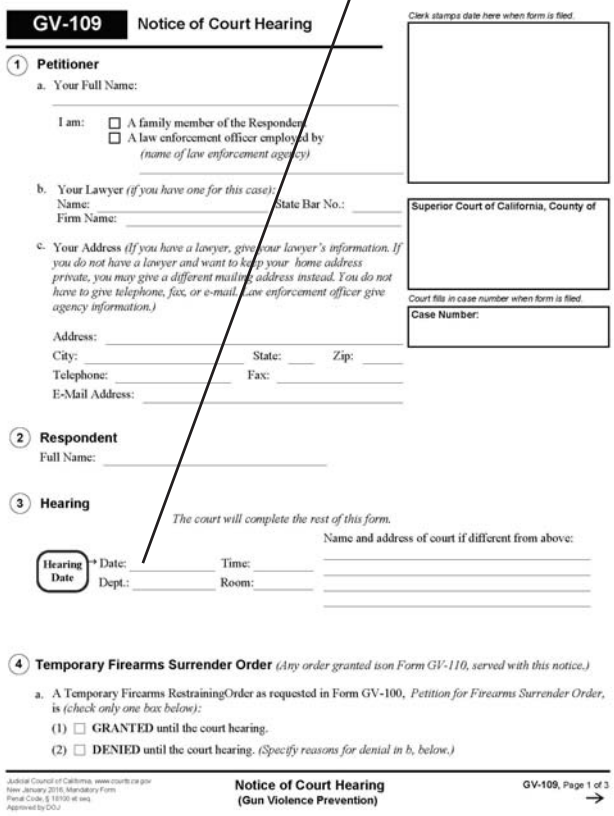
Do I have to serve the other person with a copy of my response?

Yes. Have someone age 18 or older—**not you**—mail a copy of completed Form GV-120 to the person who asked for the order (or that person's lawyer). (This is called "service by mail.")

The person who serves the form by mail must fill out Form GV-250, *Proof of Service of Response by Mail.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

Should I go to the court hearing?

Yes. You should go to court on the date listed on Form GV-109, *Notice of Court Hearing*. If you do not go to the hearing, the judge can extend the order against you for up to one year without hearing from you.



GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

1 Petitioner
a. Your Full Name:
I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (name of law enforcement agency)
b. Your Lawyer (if you have one for this case):
Name: State Bar No.:
Firm Name:
c. Your Address (If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer give agency information.)
Address:
City: State: Zip:
Telephone: Fax:
E-Mail Address:

Superior Court of California, County of

Court fills in case number when form is filed.
Case Number:

2 Respondent
Full Name:

3 Hearing
The court will complete the rest of this form.
Name and address of court if different from above:
Hearing Date * Date: Time:
Dept.: Room:

4 Temporary Firearms Surrender Order (Any order granted ison Form GV-110, served with this notice.)
a. A Temporary Firearms RestrainingOrder as requested in Form GV-100, Petition for Firearms Surrender Order, is (check only one box below):
(1) ☐ GRANTED until the court hearing.
(2) ☐ DENIED until the court hearing. (Specify reasons for denial in b, below.)

Judicial Council of California, www.courts.ca.gov
New January 2016, Mandatory Form
Penal Code, § 18150 et seq.
Approved by DOJ

Notice of Court Hearing
(Gun Violence Prevention)

GV-109, Page 1 of 3 →

How long does the order last?

If the court issued a temporary restraining order before the hearing, it will last until your hearing date. At that time, the court will decide to whether to issue a firearms restraining order that can last for one year.

GV-120-INFO How Can I Respond to a Petition for Firearms Restraining Order?

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required, and you are not entitled to a free court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

Will I see the person who asked for the order at the court hearing?

Yes. Assume that the person who is asking for the order will attend the hearing. Do not talk to him or her unless the judge or that person's attorney says that you can.

Can I bring a witness to the court hearing?

Yes. You can bring witnesses or documents that support your case to the hearing. But if possible, you should also bring the witnesses' written statements of what they saw or heard. Their statements must be made under penalty of perjury. You can use Form MC-030 for this.

Can I agree with the protected person to cancel the order?

No. Once the order is issued, only the judge can change or cancel it. You would have to file a request with the court to cancel the order.

What if I need help to understand English?

When you file your papers, ask the clerk if a court interpreter is available. You may have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five court days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

GV-130 Firearms Restraining Order After Hearing

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by
(*name of law enforcement agency*):

_____

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____
Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address *(if known)*: _____
City: _____ State: _____ Zip: _____
Relationship to Petitioner: _____

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at:

(Time): _____ ☐ a.m. ☐ p.m. ☐ midnight on *(Date):* _____

If no expiration date is written here, this Order expires one year from the date of issuance.

This is a Court Order.

Case Number:

4 Hearing

a. There was a hearing on *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____.
(Name of judicial officer): _____ made the orders at the hearing.

b. These people were at the hearing:

(1) ☐ The Petitioner (3) ☐ The lawyer for the Petitioner *(name):* _____

(2) ☐ The Respondent (4) ☐ The lawyer for the Respondent *(name):* _____

☐ Additional persons present are listed at the end of this Order on Attachment 4.

c. ☐ The hearing is continued. The parties must return to court on *(date):* _____ at *(time):* _____ .

5 Findings

a. The court finds by clear and convincing evidence that both of the following are true:

(1) Respondent poses a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing or receiving a firearm or ammunition.

(2) A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current. circumstances.

b. ☐ The court has received credible information that the Respondent owns or possesses one or more firearms.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ See the attached Form MC-025, *Attachment*

This is a Court Order.

6 Order to Prohibiting All Firearms and Ammunition

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition.

b. You must:

(1) Surrender all firearms and ammunition in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition to him or her, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition within 24 hours of being served with this order. You may do so by either: (1) surrendering all of your firearms and ammunition in a safe manner to the local law enforcement agency; or (2) selling all of your firearms and ammunition to a licensed gun dealer.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your guns or firearms have been turned in or sold. *(You may use Form GV-800,* Proof of Firearms Turned In or Sold, *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

7 Service of Order on Respondent

a. ☐ The Respondent personally attended the hearing. No other proof of service is needed.

b. ☐ The Respondent did not attend the hearing. The Respondent must be personally served with this Order.

8 Number of pages attached to this Order, if any: _____

Date: _____

_____
Judicial Officer

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms and ammunition that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, a firearm or ammunition while this order is in effect. Pursuant to section 18185, you have the right to request one hearing to terminate this order at any time during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

This is a Court Order.

Violation of this Order is a misdemeanor. If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this Order on the Respondent must do the following:

- Order the Respondent to immediately surrender all firearms and ammunition to him or her.
- Issue a receipt to the Respondent for all firearms and ammunition that he or she has surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms and Ammunition

The law enforcement agency that has received surrendered firearms and ammunition must do the following:

- Retain the firearms and ammunition until the expiration of this order or of any other firearms restraining order issued by the court.
- On the expiration of this order or of any later firearms restraining Order issued by the court, return the firearms and ammunition to the Respondent as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with Section 33850). Firearms or ammunition that are not claimed are subject to the requirements of Section 34000.
- If someone other than the Respondent claims title to any of the firearms or ammunition surrendered, determine whether that person is the lawful owner. If so, return the firearms and ammuition to him or her as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with Section 33850).

Enforcing This Order

Before enforcing this Order, the law enforcement officer must first determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if (Pen. Code, § 836(c)(2)):

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The respondent was informed of the Order by an officer.
- Item 7a is checked.

This is a Court Order.

Instructions for Law Enforcement

(continued)

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it.

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6. Agencies are encouraged to enter violation messages into CARPOS.

The provisions in this *Firearms Restraining Order After Hearing* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Firearms Restraining Order After Hearing* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

GV-200 Proof of Personal Service

Clerk stamps date here when form is filed.

1 Petitioner

Name: _____

2 Respondent

Name: _____

3 Notice to Server

The server must:

- Be 18 years of age or older.
- Not be the Petitioner unless the Petitioner is a law enforcement officer.
- Give a copy of all documents checked in 4 to the Respondent. (You cannot send them by mail.) Then complete and sign this form and give or mail it to the Petitioner.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

PROOF OF PERSONAL SERVICE

4 I personally gave the Respondent a copy of the forms checked below:

a. ☐ GV-100, *Petition for Firearms Restraining Order*
b. ☐ GV-109, *Notice of Court Hearing*
c. ☐ GV-110, *Temporary Firearms Restraining Order*
d. ☐ GV-120, *Response to Petition for Firearms Restraining Order* (blank form)
e. ☐ GV-120-INFO, *How Can I Respond to a Petition for Firearms Restraining Order?*
f. ☐ GV-130, *Firearms Restraining Order After Hearing*
g. ☐ GV-800, *Proof of Firearms Turned In or Sold* (blank form)
h. ☐ Other *(specify):* _____

5 I personally gave copies of the documents checked above to the Respondent:

a. On *(date):* _____ b. At *(time):* _____ ☐ a.m. ☐ p.m.

c. At this address: _____

City: _____ State: _____ Zip: _____

6 Server's Information

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

(If you are a registered process server):

County of registration: _____ Registration number: _____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Type or print server's name

▶ _____
Server to sign here

GV-200-INFO What Is "Proof of Personal Service?"

What is "service"?

Service is the act of giving your legal papers to the other party. There are many kinds of service—in person, by mail, and others. This form is about personal or "in-person" service. The *Petition for Firearms Restraining Order* (Form GV-100), the *Notice of Court Hearing* (Form GV-109), and the *Temporary Firearms Restraining Order* (Form GV-110) must be served "in person." That means that someone must personally "serve" (give) a copy of the forms to the respondent (the person to be prohibited from having guns).

These forms cannot be served by mail; they must be given to the respondent personally.

Service lets the respondent know:
- Why you are asking for a Firearms Restraining Order;
- The hearing date;
- How to respond.

Why do I have to get the orders served?

- The police cannot arrest anyone for violating an order unless that person knows about the order.
- No hearing can be held to extend the order for a year unless the respondent was served and knows about the hearing.

Don't serve it by mail!

Who can serve?

Any law enforcement officer may serve the respondent, even if the petition was filed by a law enforcement officer. It is recommended that you ask a law enforcement officer to serve the forms because of the potential for gun violence.

However, service may also be by any person who is at least 18 years old and not a party to the action. That means that if the petitioner is a family member rather than a law enforcement officer, that person may not serve the forms on the respondent. You may use a process server. A "registered process server" is a business that you pay to deliver court forms. Look for "Process Serving" in the Yellow Pages or on the Internet.

How to serve

Ask the server to:
- Make personal contact with the person to be served.
- Make sure it is the right person. Ask the person's name.
- Give the person copies of all papers checked on Form GV-200, *Proof of Personal Service*.
- Fill out and sign the *Proof of Personal Service* form.
- Give the signed *Proof of Personal Service* to you.

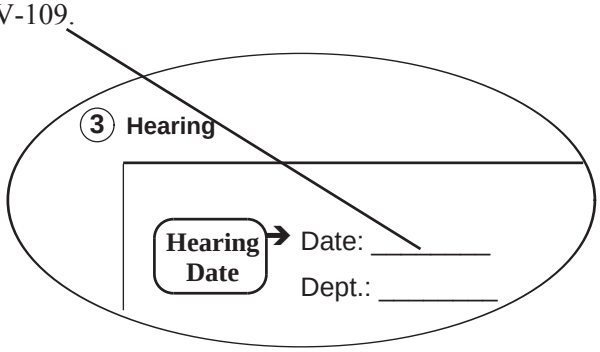
What if the person won't take the papers or tears them up?

- If the person won't take the papers, just leave them near him or her.
- It doesn't matter if the person tears them up. Service is still complete.

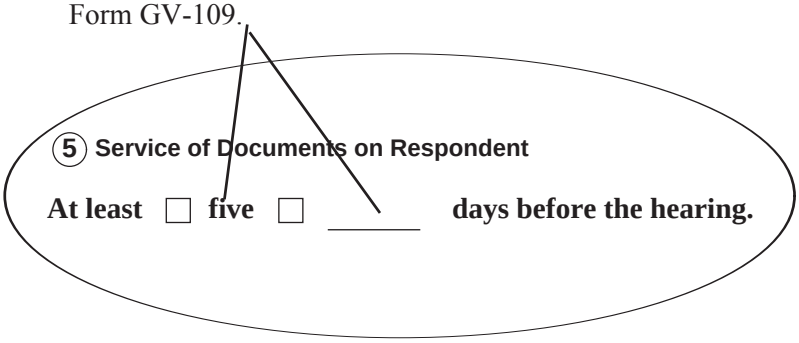
When do the orders have to be served?

It depends. To know the exact date, you have to look at two things on Form GV-109, *Notice of Court Hearing:*

First, look at the hearing date on page 1 of Form GV-109.



Next, look at the number of days in item (5) on page 2 of Form GV-109.



Look at a calendar. Subtract the number of days in (5) from the hearing date. That is the final date to have the orders served. It is always OK to serve earlier than that date. If nothing is checked or written in (5), you must serve the orders at least five days before the hearing.

Who signs the *Proof of Personal Service?*

Only the person who serves the forms can sign Form GV-200, *Proof of Personal Service*. You do not sign it; the restrained person does not need to sign it.

What do I do with the completed *Proof of Personal Service?*

If someone other than a law enforcement officer serves the papers, you should:

- Make several copies.
- File the original with the court before your hearing.
- Bring a copy of the completed *Proof of Personal Service* to your hearing.
- Always keep an extra copy of the restraining orders with you for your safety.

What happens if I can't get the orders served before the hearing date?

You will need ask the court to "continue" (postpone and reschedule) the hearing until after you are able to have the respondent served. Fill out and file Form GV-115, *Request to Continue Court Hearing for Firearms Restraining Order*. If the court grants you a continuance, the *Temporary Firearms Restraining Order* (GV-110) will remain in effect until the new hearing date.

GV-250 Proof of Service of Response by Mail

Clerk stamps date here when form is filed.

1 Petitioner

Full Name: _____

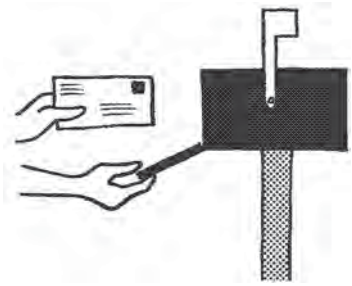
2 Respondent

Your Full Name: _____

3 Notice to Server

The server must:

- Be 18 years of age or older.
- Live or be employed in the county where the mailing took place.
- Not be the Respondent.
- Mail a copy of all documents checked in 4 to the person in 1.
- Complete and sign this form and give it to the person in 2.



Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

4 PROOF OF SERVICE BY MAIL

I am 18 years of age or older and not a party to this proceeding. I live or am employed in the county where the mailing took place. I mailed the Petitioner a copy of all documents checked below:

a. Form GV-120, *Response to Petitioner for Firearms Restraining Orders*

b. ☐ Other *(specify)*: _____

_____

5

I placed copies of the documents above in a sealed envelope and mailed them as described below:

a. Mailed to *(name)*: _____

b. To this address: _____

City: _____ State: _____ Zip: _____

c. On *(date)* _____ Mailed from: City: _____ State: _____

6 Server's Information

Name: _____ Telephone: _____

Address: _____

City: _____ State: _____ Zip: _____

(If you are a registered process server):

County of registration: _____ Registration number: _____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print server's name *Server to sign here*

GV-600 Request to Terminate Firearms Restraining Order

Clerk stamps date here when form is filed.

1 Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 Petitioner

a. Full Name: _____

b. Address *(if known)*: _____

City: _____ State: _____ Zip: _____

3 ☐ Request to Terminate Restraining Order

a. I ask the court to terminate the *Firearms Restraining Order After Hearing* (Form GV-130) because *(give reasons below):*

☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3—Reasons to Terminate Order" for a title. You may use Form MC-025,* Attachment.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

b. ☐ A copy of the current order is attached.

This is not a Court Order.

c. ☐ I have not previously requested that the court terminate the Order.

☐ The Order has been renewed. I have not previously requested that the court terminate the Order since it was renewed.

(You may only request termination of a firearms protective order once during the initial period while the order is in effect and once during any period of renewal. If the court denies your request, you may not request termination again unless the order is renewed for another year.)

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

GV-610 Notice of Hearing to Terminate Firearms Restraining Order

Clerk stamps date here when form is filed.

Respondent completes items (1) and (2).

(1) Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Petitioner

a. Full Name: _____

b. Address *(if known)*: _____

City: _____ State: _____ Zip: _____

(3) Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect until the end of the hearing.

Hearing Date →

Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

_____

To the Respondent:

(4) Service

Someone age 18 or older—**not you**—must serve a copy of the following forms on the Petitioner at least _____ days before the hearing. Service may be by mail to the Petitioner or to the Petitioner's lawyer.

- GV-600, *Request to Terminate Firearms Restraining Order;*
- GV-610, *Notice of Hearing to Terminate Firearms Restraining Order* (this form);
- GV-620, *Response to Request to Terminate Firearms Restraining Order* (blank copy);

This is a Court Order.

The person who serves the form by mail should fill out Form POS-030, *Proof of Service by First-Class Mail—Civil.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing. For help with service by mail, see the Information Sheet on page 2 of Form POS-030.

Date: _____

_____
Judicial Officer

To the Petitioner:

If you wish to make a written response to this request to terminate the current firearms restraining order, you may fill out Form GV-620, *Response to Request to Terminate Firearms Restraining Order*. File the original with the court before the hearing and have someone age 18 or older**—not you—** mail a copy of it to the other party at the address in ① at least _____ days before the hearing. Also file Form GV-250, *Proof of Service of Response by Mail,* with the court before the hearing.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410, (Civ. Code, § 54.8.)

This is a Court Order.

GV-620 Response to Request to Terminate Firearms Restraining Order

Clerk stamps date here when form is filed.

Use this form to respond to the *Request to Terminate Firearms Restraining Order* (Form GV-600).

- Fill out this form and then take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Respondent at the address in (1) below. Use Form GV-250, *Proof of Service of Response by Mail.*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Respondent

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

(2) Petitioner

a. Your Name: _____

I am: ☐ A family member of the Respondent.
☐ A law enforcement officer employed by (*name of law enforcement agency*):

_____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

The court will consider your response at the hearing. Write your hearing date, time, and place from Form GV-610 item (3) here.

Hearing Date → Date: _____

Time: _____

Dept.: _____ Room: _____

(3) Response

a. ☐ I do not oppose termination of the order.

b. ☐ I oppose termination of the order for the following reasons *(specify below)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3b—Reasons Not to Terminate" for a title. You may use Form MC-025,* Attachment.

_____

_____

_____

_____

_____

_____

Case Number:

Date: _____

_____
Lawyer's name, if you have one

_____
Lawyer's signature

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Type or print your name

_____
Sign your name

To the Petitioner:

Have someone age 18 or older—**not you**—mail a copy of this completed Form GV-620 to the Respondent or to the Respondent's lawyer, if any. This is called "service by mail." The person who serves the form by mail must fill out Form GV-250, *Proof of Service of Response by Mail.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

GV-630 Order on Request to Terminate Firearms Restraining Order

Clerk stamps date here when form is filed.

Prevailing party completes items (1) and (2). If the Order is granted, the Respondent is the prevailing party. If the Order is denied, the Petitioner is the prevailing party.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

(2) Petitioner

Full Name: _____
Address *(if known)*: _____
City: _____ State: _____ Zip: _____

(3) Hearing

There was a hearing on *(date)*: _____ at time: _____ ☐ a.m. ☐ p.m. Dept.: _____ Room: _____
(Name of judicial officer): _____ made the orders at the hearing.
These people were at the hearing:

a. ☐ The Petitioner
b. ☐ The Respondent
c. ☐ The lawyer for the Petitioner *(name):* _____
d. ☐ The lawyer for the Respondent *(name):* _____
☐ Additional persons present are listed on Attachment 3.

This is a Court Order.

To the Prevailing Party:

4 Order on Request to Terminate

The request to terminate the attached *Firearms Restraining Order After Hearing*, originally issued on *(date)*: _____ ☐ and most recently renewed on *(date)*: _____, is:

a. ☐ **GRANTED**. The attached order expired on the date of the hearing in item 3 above.

b. ☐ **DENIED**. The current expiration date remains in effect.

5 Service of Order

Have someone age 18 or older—**not you**—mail a copy of this completed Form GV-630 to the other party or that party's lawyer at the address on page 1. The person who serves the form by mail should fill out Form POS-030, *Proof of Service by First-Class Mail—Civil.* Have the person who did the mailing sign the original. Then file the completed Form POS-030 with the court clerk. For help with service by mail, see the Information Sheet on page 2 of Form POS-030.

Date: _____

_____
Judicial Officer

This is a Court Order.

GV-700 Request to Renew Firearms Restraining Order

Clerk stamps date here when form is filed.

1 Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*):

_____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 Respondent

Full Name: _____

Address (if known): _____

City: _____ State: _____ Zip: _____

3 Request to Renew Restraining Order

I ask the court to renew the *Firearms Restraining Order After Hearing* (Form GV-130) for an additional period of one year. A copy of the order is attached.

a. The order currently will end on *(date):* _____

b. ☐ This is my first request to renew the order.
☐ The order has been renewed _____ times.

c. I ask the court to renew the order because *(explain below):*

☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3c—Reasons to Renew Order" for a title. You may use Form MC-025,* Attachment.

_____

_____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

GV-710 Notice of Hearing to Renew Firearms Restraining Order

Clerk stamps date here when form is filed.

Petitioner completes items (1) and (2).

(1) Petitioner

a. Your Full Name:

_____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by
(*name of law enforcement agency*):

_____

Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____
Address *(if known)*: _____
City: _____ State: _____ Zip: _____

(3) Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect.

Hearing Date →

Date: _____ Time: _____
Dept.: _____ Room: _____

Name and address of court if different from above:

_____
_____
_____
_____

This is a Court Order.

Case Number:

To the Petitioner:

4 Service on Respondent

Someone age 18 or older**—not you—**must serve a copy of the following forms on the Respondent at least _____ days before the hearing.

- GV-700, *Request to Renew Firearms Restraining Order;*
- GV-710, *Notice of Hearing to Renew Firearms Restraining Order* (this form);
- GV-720, *Response to Request to Renew Firearms Restraining Order* (blank copy);

☐ The Respondent did not file a response to the original Petition and did not attend the hearing at which the *Firearms Restraining Order After Hearing* (Form GV-130) was granted. The Respondent must be personally served with the above forms. *(After the Respondent has been served, file Form GV-200,* Proof of Personal Service*, with the court clerk. For help with service, read Form GV-200-INFO,* What Is "Proof of Personal Service"?*)*

☐ The Respondent filed a Response to the original Petition and/or attended the hearing at which the *Firearms Restraining Order After Hearing* (Form GV-130) was granted. The Respondent may be served with the above forms by mail. *(After the Respondent has been served, the person doing the mailing should fill out Form POS-030,* Proof of Service by First-Class Mail—Civil*. File the form with the court clerk. For help with service by mail, read the Information Sheet on page 2 of Form POS-030.)*

To the Respondent:

At the hearing, the judge can renew the current restraining order for another year. You *must* continue to obey the current restraining order. At the hearing, you can tell the judge if you do not want the order against you renewed. If the restraining order is renewed, you *must* continue to obey the order even if you do not attend the hearing.

If you wish to make a written response to the request to renew the restraining order, you may fill out Form GV-720, *Response to Request to Renew Firearms Restraining Order.* File the original with the court before the hearing and have someone age 18 or older**—not you—**mail a copy of it to the Petitioner at the address in (1) at least _____ days before the hearing. Also file Form GV-250, *Proof of Service of Response by Mail, w*ith the court before the hearing.

Date: _____ _____

Judicial Officer

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

This is a Court Order.

GV-720 Response to Request to Renew Firearms Restraining Order

Clerk stamps date here when form is filed.

Use this form to respond to the *Request to Renew Firearms Restraining Order* (Form GV-700).

- Fill out this form and then take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner at the address in (1) below. Then file Form GV-250, *Proof of Service of Response by Mail* with the court.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Petitioner *(From Form GV-700, item (1))*

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

(2) Respondent

a. Your Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

The court will consider your *Response* at the hearing. Write your hearing date, time, and place from Form GV-710 item (3) here.

Hearing Date → Date: _____

Time: _____

Dept.: _____ Room: _____

You must continue to obey the current restraining order until the hearing. At the hearing, the court can extend the order against for another year.

(3) Response

a. ☐ I do not oppose renewal of the order.

b. ☐ I oppose renewal of the order for the following reasons *(specify below)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3b—Reasons Not to Renew" for a title. You may use Form MC-025,* Attachment.

_____

_____

_____

_____

_____

_____

_____

Case Number:

Date: _____

_____
Lawyer's name, if you have one

▶ _____
Lawyer's signature

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

To the Respondent:

Have someone age 18 or older—**not you**—mail a copy of this completed Form GV-720 to the Petitioner or to the Petitioner's lawyer, if any. This is called "service by mail." The person who serves the form by mail must fill out Form GV-250, *Proof of Service of Response by Mail.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

GV-730 Order on Request to Renew Firearms Restraining Order

Clerk stamps date here when form is filed.

Prevailing party completes items (1) and (2). If the Order is granted, the Petitioner is the prevailing party. If the Order is denied, the Respondent is the prevailing party.

(1) Petitioner

a. Your Full Name: _____

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by
(*name of law enforcement agency*):
_____

Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____

Address *(if known)*: _____

City: _____ State: _____ Zip: _____

(3) Hearing

There was a hearing on *(date)*: _____ at time: _____ ☐ a.m. ☐ p.m. Dept.: _____ Room: _____

(Name of judicial officer): _____ made the orders at the hearing.

These people were at the hearing:

a. ☐ The Petitioner
b. ☐ The Respondent
c. ☐ The lawyer for the Petitioner *(name):* _____
d. ☐ The lawyer for the Respondent *(name):* _____
☐ Additional persons present are listed on Attachment 3.

This is a Court Order.

Case Number:

4 Order on Request for Renewal

The request to renew the attached *Firearms Restraining Order After Hearing* (GV-130), originally issued on *(date)*: _____, is:

☐ **DENIED**. The attached order expires as stated in item 3 of the order.

☐ **GRANTED**. The attached order is renewed for one year and will now expire:

on *(date):* _____ at *(time):* _____ ☐ a.m. ☐ p.m. or ☐ midnight

If no expiration date is written here, the order expires one year from the date of the hearing in item 3.

a. The court finds by clear and convincing evidence that both of the following are true:

(1) Respondent continues to pose a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing or receiving a firearm or ammunition.

(2) A gun violence restraining order remains necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The facts as stated in the *Request to Renew Firearms Restraining Order* (GV-700) and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

_____

_____

_____

_____

_____

_____

_____

☐ See the attached Form MC-025, *Attachment*

c. **To the Respondent: This Order will last until the date and time noted above. If you have not done so already, you must surrender all firearms and ammunition that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, a firearm or ammunition while this order is in effect. Pursuant to section 18185, you have the right to request one hearing to terminate this Order at any time during its effective period. You may seek the advice of an attorney as to any matter connected with the order.**

This is a Court Order.

Case Number:

To the Prevailing Party:

5 Service of Order

Someone age 18 or older—**not you**—must serve a copy of this order on the other party.

☐ **Order Granted—Personal Service Required:** Respondent did not file a Response to the original Petition and did not attend either the hearing at which the original *Firearms Restraining Order After Hearing* (Form GV-130) was granted or the hearing at which this Order was granted. The Respondent must be personally served with this Order. *(After the Respondent has been served, file Form GV-200,* Proof of Personal Service*, with the court clerk. For help with service, read Form GV-200-INFO,* What Is "Proof of Personal Service"?*)*

☐ **Order Granted—Service by Mail:** The Respondent filed a Response to the original Petition or to this Petition to Renew, and/or attended either the hearing at which the original *Firearms Restraining Order After Hearing* (Form GV-130) was granted or the hearing at which this Order was granted. The Respondent may be served with this Order by mail. *(After the Respondent has been served, the person doing the mailing should fill out Form POS-030,* Proof of Service by First-Class Mail—Civil*. File the form with the court clerk. For help with service by mail, read the Information Sheet on page 2 of Form POS-030.)*

☐ **Order Denied—Service by Mail:** The Petitioner may be served with this Order by mail. *(After the Petitioner has been served, the person doing the mailing should fill out Form POS-030,* Proof of Service by First-Class Mail—Civil*. File the form with the court clerk. For help with service by mail, read the Information Sheet on page 2 of Form POS-030.)*

Date: _____

_____
Judicial Officer

This is a Court Order.

GV-800 Proof of Firearms Turned In or Sold

Clerk stamps date here when form is filed.

1 Petitioner

Name: _____

2 Respondent

a. Your Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

3 To the Respondent

The court has ordered you to surrender all of your firearms and ammunition by turning them in to law enforcement or surrendering them to a licensed gun dealer. You may use this form to prove to the court that you have obeyed its orders. When you deliver your unloaded weapons, ask the law enforcement officer or the licensed gun dealer to complete item 4 or 5 and item 6. After the form is signed, file it with the court clerk. Keep a copy for yourself. For help, read Form GV-800-INFO, *How Do I Turn in or Sell My Firearms?*

4 To Law Enforcement

Fill out items 4 and 6 of this form. Keep a copy and give the original to the person who turned in the firearms.

The firearms listed in 6 were turned in on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____

Name and title of law enforcement agent

_____

Name of law enforcement agency

_____

_____

Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____

Signature of law enforcement agent

5 To Licensed Gun Dealer

Fill out items 5 and 6 of this form. Keep a copy and give the original to the person who sold you the firearms.

The firearms listed in 6 were sold to me on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____

Name of licensed gun dealer

_____ _____

License number *Telephone*

_____

_____

Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____

Signature of gun dealer

Case Number:

6 Firearms

	Make	Model	Serial Number
a.			
b.			
c.			
d.			
e.			

☐ *Check here if you turned in or sold more firearms. Attach a sheet of paper and write "GV-800, Item 6—Firearms Turned In or Sold," for a title. Include make, model, and serial number of each firearm.*

7 Do you have, own, possess, or control any other firearms besides the firearms listed in (6)? ☐ Yes ☐ No

If you answered yes, have you turned in or sold those other firearms? ☐ Yes ☐ No

If yes, check one of the boxes below:

a. ☐ I filed a *Proof of Firearms Turned In or Sold* for those firearms with the court on (*date):* _____

b. ☐ I am filing the proof for those firearms along with this proof.

c. ☐ I have not yet filed the proof for the other firearms. *(Explain why not):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on the attached sheet of paper and write "Attachment 7c" for a title.*

_____

_____

_____

_____

_____

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

_____ ▶ _____

Type or print your name *Sign your name*

GV-800-INFO How Do I Turn In or Sell My Firearms?

1 What is a firearm?

A firearm is a:

- Handgun
- Rifle
- Shotgun
- Assault weapon

If you own or have any firearms or ammunition you must:

2
- If demanded, give them to the law enforcement officer when he or she serves you with the court order requiring surrender; otherwise, within 48 hours:
  - Turn them in to your local law enforcement agency; or
  - Sell them to a licensed firearms dealer.

3 How do I sell my firearms?

Find a California licensed firearms dealer in your area.
Look under "Firearms Dealers" in your local Yellow Pages or on the Internet. Make sure the dealer is licensed.

4 How do I take my firearms to law enforcement?

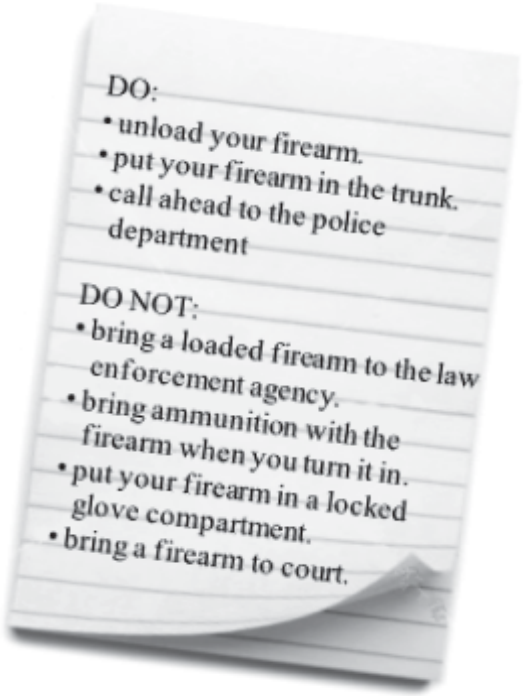
Call your local law enforcement agency to ask about their procedures. Take a copy of the court order with you. Go directly to the law enforcement agency. Do not go anywhere else with firearms in your vehicle!

5 If I turn my firearms in to law enforcement, how long will they keep them?

As long as any firearms restraining order against you remains in effect.

6 After I give my firearms to law enforcement, can sell them later if I change my mind?

Yes. You are allowed to sell them to a licensed gun dealer. To do this, the gun dealer must present a bill of sale to your local law enforcement agency. The law enforcement agency will give the licensed gun dealer the firearms that you are selling.



7 Do I have to pay the law enforcement agency to keep my firearm?

You may have to pay the agency for keeping your firearms. Contact your local law enforcement agency and ask if a fee is charged. The agency will tell you how much you need to pay.

8 Questions?

Call your local law enforcement agency:
(Insert local information here.)

Item number: 29

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: This does not work for jury instructions as we only have one "project," that of maintaining and expancing CACI.
Project description from annual agenda: No "project" to describe.

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 26 is the first CACI release for 2015. Release 25 was approved on December 12, 2014.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 57 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, the advisory committee also requests that RUPRO approve and submit to the Judicial Council 37 new, revised, renumbered, and revoked CACI instructions and verdict forms.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
March 30, 2015

To
Members of the Rules and Projects Committee

From
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Subject
Civil Jury Instructions: Instructions With Minor Revisions

Action Requested
Review and Approve Publication of Instructions With Minor Revisions Effective June 26, 2015

Deadline
N/A

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
415-865-4319 fax
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions has completed revisions and additions to the *Judicial Council of California Civil Jury Instructions (CACI)*. This report addresses 57 instructions that have only the types of revisions that the Judicial Council has given the Rules and Projects Committee (RUPRO) final authority to approve—primarily instructions with changes only to the Directions for Use or to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO, effective June 26, 2015, approve for publication 57 revised civil jury instructions, prepared by the advisory committee, that contain changes that do not require Judicial Council approval. On RUPRO's approval, these instructions will be officially published in the midyear supplement to the 2015 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

The 57 instructions and verdict forms presented for final RUPRO approval are attached at pages 10–223. The committee in a separate report requests that RUPRO recommend to the Judicial Council for adoption 37 new, revised, renumbered, and revoked instructions and verdict forms.

Previous Council Action

At the October 20, 2006, Judicial Council meeting, the Judicial Council approved authority for RUPRO to:[1]

> Review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM).

Under the implementing guidelines that RUPRO adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes,* RUPRO has final approval authority over the following:

(a) Additions of cases and statutes to the Sources and Authority;
(b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[2]
(c) Additions or changes to the Directions for Use;
(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy. A nonsubstantive change is one that does not affect or alter any fundamental legal basis of the instruction;
(e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and
(f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood by the average juror. In July 2003, the council approved its civil jury instructions for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[3]

Overview of updates

Of the 57 revised instructions that are presented for final RUPRO approval:

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[1] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sep. 12, 2006), p. 1.

[2] In light of the decision made in 2014 to remove verbatim quotes of statutes, rules, and regulations, this category (b) is now mostly moot. It might still apply if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[3] See Cal. Rules of Court, rules 2.1050(d), 10.58(a).

- All but 6 have revisions under category (a) above only (additional cases added to Sources and Authority);
- Three (CACI Nos. 107, 2701, and 3501) fall under category (c) above only (additions or changes to Directions for Use); and
- Three (CACI Nos. 1901, 2700, and 3502) fall under both categories (a) and (c) (Sources and Authority and Directions for Use).

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority, either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A United States Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

The advisory committee has deleted material from the Sources and Authority that duplicates other material that is already included or is to be added.

Nonfinal cases and incomplete citations

Only one case included in this release is not yet final. The California Supreme Court has extended time until May 8 to grant or deny review in *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974. Several excerpts from this case have been added to CACI No. 380, *Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act*. Should review be granted, these excerpts will of course be removed. CACI No. 380 will, however, remain in the release because it also has new excerpts from another case that is final.

Except for United States Supreme Court Reports, all incomplete citations will be resolved before publication. Any current citations to LEXIS will be replaced once the official citation is available.

Sources and Authority format cleanup

CACI format for cases calls for entries to the Sources and Authority to be in the format of direct quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the format of a legal statement with a citation rather than a direct quotation. Many of these out-of-format excerpts have been converted to direct quotations.

CACI format also orders excerpts with statutes, rules, and regulations first; then cases; and then any other authorities, such as a Restatement excerpt. Excerpts that were out of order have been moved to the proper location.

Comments, Alternatives Considered, and Policy Implications

Because the changes to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Rules 2.1050 and 10.58 of the California Rules of Court specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI* regularly; and to submit its recommendations to the council for approval. The proposed revisions and additions are necessary to ensure that the instructions remain clear, accurate, and complete.

Implementation Requirements, Costs, and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, will print the 2015 edition and pay royalties to the council. The official publisher will also make the new edition available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of 57 instructions for final RUPRO approval, attached at pages 10–223

CIVIL JURY INSTRUCTIONS
SUMMER 2015—TABLE OF CONTENTS

107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

New September 2003; Revised April 2004, June 2005, April 2007, December 2012, June 2015

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses.*)

~~In the last paragraph, the court may delete inapplicable categories of potential jury bias.~~

Sources and Authority

- Role of Jury. Evidence Code section 312.
- Considerations for Evaluating the Credibility of Witnesses. Evidence Code section 780.
- Direct Evidence of Single Witness Sufficient. Evidence Code section 411.
- "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

309. Contract Formation—Acceptance

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because the offer was never accepted. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***] agreed to be bound by the terms of the offer. [If [***name of defendant***] agreed to be bound only on certain conditions, or if [he/she/it] introduced a new term into the bargain, then there was no acceptance]; and**

2. **That [***name of defendant***] communicated [his/her/its] agreement to [***name of plaintiff***].**

If [*name of plaintiff***] did not prove both of the above, then a contract was not created.**

New September 2003

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

Sources and Authority

- Acceptance. Civil Code section 1585.

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856 [70 Cal.Rptr.2d 595].)

- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581].)

- "The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or

rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant." (*Guzman, supra,* 71 Cal.App.4th at pp. 1376-1377.)

- "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424].)

- "The Restatement Second of Contracts, section 60n14 provides, 'If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.' Comment a to Restatement 2d, section 60 provides, 'a. *Interpretation of offer*. If the offeror prescribes the only way in which his offer may be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.' [¶] Similarly, Restatement 2d, section 30 provides in relevant part, 'Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.' Comment b to Restatement 2d section 30 states: '*Invited form*. Insistence on a particular form of acceptance is unusual. Offers often make no express reference to the form of acceptance; sometimes ambiguous language is used. Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded. In other cases language which in terms refers to the mode of acceptance is intended and understood as referring to some more important aspect of the transaction, such as the time limit for acceptance.' " (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 311−312 [181 Cal.Rptr.3d 399], original italics, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 180–192

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.25–13.31

322. Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [*name of defendant*] would not have to [*insert duty*] unless [*insert condition precedent*]. [*Name of defendant*] contends that this condition did not occur and that [he/she/it] did not have to [*insert duty*]. To overcome this contention, [*name of plaintiff*] must prove that [*insert condition precedent*].

If [*name of plaintiff*] does not prove that [*insert condition precedent*], then [*name of defendant*] was not required to [*insert duty*].

New September 2003

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

If both the existence and the occurrence of a condition precedent are contested, use CACI No. 321, *Existence of Condition Precedent Disputed*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "[A] 'condition precedent' is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' " (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].)
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- " '[G]enerally, a party's failure to perform a condition precedent will preclude an action for breach of contract.' " (*Stephens & Stephens XII, LLC, supra,* 231 Cal.App.4th at p. 1147.)
-
- "A condition is a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor. If the promisor makes an absolute or unconditional promise, he is bound to perform when the time arrives; but if he makes a conditional promise, he binds himself to perform only if the condition precedent occurs, or is relieved from the duty if the condition subsequent occurs. The condition may be the happening of an event, or

an act of a party." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 776.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 776–791

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

323. Waiver of Condition Precedent

[*Name of plaintiff*] and [*name of defendant*] agreed in their contract that [*name of defendant*] would not have to [*insert duty*] unless [*insert condition precedent*]. That condition did not occur. Therefore, [*name of defendant*] contends that [he/she/it] did not have to [*insert duty*].

To overcome this contention, [*name of plaintiff*] must prove by clear and convincing evidence that [*name of defendant*], by words or conduct, gave up [his/her/its] right to require [*insert condition precedent*] before having to [*insert duty*].

New September 2003; Revised December 2013

Directions for Use

For an instruction on waiver as an affirmative defense, see CACI No. 336, *Affirmative Defense—Waiver*.

Sources and Authority

- "Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent." (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206 [264 P.2d 964].)

- " '[C]ase law is clear that " '[w]aiver is the intentional relinquishment of a known right after knowledge of the facts.' [Citations.] The burden … is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver' [citation]." [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1148 [180 Cal.Rptr.3d 683].)

- "All case law on the subject of waiver is unequivocal: ' "Waiver always rests upon intent. ~~Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations]. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver."~~ ' " (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515] [plaintiff's claim that defendant waived occurrence of conditions must be proved by clear and convincing evidence].)

- "A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor's manifestations to his substantial detriment." (*Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264 [26 Cal.Rptr. 610].)

- "Waiver [of a condition] … is a question of fact and not of law; hence the intention to commit a

waiver must be clearly expressed." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857 [69 Cal.Rptr. 341].)

- Section 84 of the Restatement Second of Contracts provides:

> (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless
>
> (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or
>
> (b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
>
> (2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if
>
> (a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
>
> (b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and
>
> (c) the promise is not binding apart from the rule stated in Subsection (1).

Secondary Sources

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions,* 8.48

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.44 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.231 (Matthew Bender)

324. Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that he or she will not or can not meet the requirements of the contract.

If [*name of plaintiff*] proves that [he/she/it] would have been able to fulfill the terms of the contract and that [*name of defendant*] clearly and positively indicated, by words or conduct, that [he/she/it] would not or could not meet the contract requirements, then [*name of defendant*] breached the contract.

New September 2003

Sources and Authority

- Anticipatory Breach. Civil Code section 1440.

- "Repudiation of a contract, also known as "anticipatory breach," occurs when a party announces an intention not to perform prior to the time due for performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150 [180 Cal.Rptr.3d 683].)

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455].)

- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425].)

- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies-he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22].)

- "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 [2 Cal.Rptr.2d 288], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 861–868

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)
5 California Points and Authorities, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* §§ 77.15, 77.361 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.23

380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)

[*Name of plaintiff***] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [***specify electronic means, e.g., e-mail messages***]. If the parties agree, they may form a binding contract using an electronic record. An "electronic record" is one created, generated, sent, communicated, received, or stored by electronic means. [***E.g., E-Mail***] is an electronic record.**

[*Name of plaintiff***] must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [***e.g., e-mail***] to formalize their agreement.**

[[*Name of plaintiff***] must have sent the contract documents to [***name of defendant***] in an electronic record capable of retention by [***name of defendant***] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

New December 2012

Directions for Use

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of "electronic record," such as e-mail or fax. (See Civ. Code, § 1633.2(g).) Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

If a law requires a signature, an electronic signature satisfies the law. (Civ. Code, § 1633.7(d).) The UETA defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. (Civ, Code, § 1633.2(h).) The validity of an electronic signature under this definition would most likely be a question of law for the court. If there is an issue of fact with regard to the parties' intent to use electronic signatures, this instruction will need to be modified accordingly.

Sources and Authority

- "Electronic Record" Defined Under UETA. Civil Code section 1633.2(g).
- "Electronic Signature" Defined Under UETA. Civil Code section 1633.2(h).
- Exclusions Under UETA. Civil Code section 1633.3(b).
- Agreement to Conduct Transaction by Electronic Means. Civil Code section 1633.5(b).
- Enforceability of Electronic Transactions. Civil Code section 1633.7.
- Providing Required Information by Electronic Means. Civil Code section 1633.8(a).
- Attributing Electronic Record or Signature to Person. Civil Code section 1633.9
- " 'Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. … ' The absence of an explicit agreement to conduct the transaction by electronic means is not determinative; however, it is a relevant factor to consider." (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 989 [182 Cal.Rptr.3d 154].)
- "Under Civil Code section 1633.7, enacted in 1999 as part of the Uniform Electronic Transactions Act, an electronic signature has the same legal effect as a handwritten signature." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843 [181 Cal.Rptr.3d 781], internal citations omitted.)
- "Civil Code section 1633.9 addresses how a proponent of an electronic signature may authenticate the signature—that is, show the signature is, in fact, the signature of the person the proponent claims it is." (*Ruiz, supra,* 232 Cal.App.4th at p. 843.)
- "We agree that a printed name or some other symbol might, under specific circumstances, be a signature under UETA … ." (*J.B.B. Investment Partners, Ltd., supra,* 232 Cal.App.4th at p. 988.)
- "The trial court's analysis was incomplete. Attributing the name on an e-mail to a particular person and determining that the printed name is '[t]he act of [this] person' is a necessary prerequisite but is insufficient, by itself, to establish that it is an 'electronic signature.' … UETA defines the term 'electronic signature.' Subdivision (h) of section 1633.2 states that ' "[e]lectronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and *executed or adopted by a person with the intent to sign the electronic record*.' (Italics added; see CACI No. 380 [party suing to enforce an agreement formalized by electronic means must prove 'based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [e.g., e-mail] to formalize their agreement …]' " (*J.B.B. Investment partners, supra,* 232 Cal.App.4th at pp. 988−989, original italics.)
- "In the face of [plaintiff]'s failure to recall electronically signing the 2011 agreement, the fact the

2011 agreement had an electronic signature on it in the name of [plaintiff], and a date and time stamp for the signature, was insufficient to support a finding that the electronic signature was, in fact, 'the act of' [plaintiff]." (*Ruiz, supra,* 232 Cal.App.4th at p. 844.)

- "[W]hether [defendant] 's printed name constituted an 'electronic signature' within the meaning of UETA or under the law of contract, are legal issues … ." (*J.B.B. Investment Partners, Ltd., supra,* 232 Cal.App.4th at p. 984.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Contracts § 11

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.32

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.26 (Matthew Bender)

27 California Legal Forms: Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.17 (Matthew Bender)

406. Apportionment of Responsibility

[[*Name of defendant***] claims that the [negligence/fault] of [***insert name(s) or description(s) of nonparty tortfeasor(s)***] [also] contributed to [***name of plaintiff***]'s harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **That [***insert name(s) or description(s) of nonparty tortfeasor(s)***] [was/were] [negligent/at fault]; and**

2. **That the [negligence/fault] of [***insert name(s) or description(s) of nonparty tortfeasor(s)***] was a substantial factor in causing [name of plaintiff]'s harm.]**

If you find that the [negligence/fault] of more than one person including [*name of defendant***] [and] [[***name of plaintiff***]/ [and] [***name(s) or description(s) of nonparty tortfeasor(s)***]] was a substantial factor in causing [***name of plaintiff***]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.**

["Person" can mean an individual or a business entity.]

New September 2003; Revised June 2006, December 2007, December 2009, June 2011

Directions for Use

This instruction is designed to assist the jury in completing CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue,* which must be given in a multiple-tortfeasor case to determine comparative fault. VF-402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors.

Throughout, select "fault" if there is a need to allocate responsibility between tortfeasors whose alleged liability is based on conduct other than negligence, e.g., strict products liability.

Include the first paragraph if the defendant has presented evidence that the conduct of one or more nonparties contributed to the plaintiff's harm. (See *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33 [117 Cal.Rptr.3d 791] [defendant has burden to establish concurrent or alternate causes].) "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) Include "also" if the defendant concedes some degree of liability.

If the plaintiff's comparative fault is also at issue, give CACI No. 405, *Comparative Fault of Plaintiff*, in

addition to this instruction.

Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm is not an individual.

Sources and Authority

- Proposition 51. Civil Code section 1431.2.

- "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)

- "In light of *Li,* however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. … Such a doctrine conforms to *Li's* objective of establishing 'a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.' " (*American Motorcycle Assn., supra,* 20 Cal.3d at p. 583.)

- "The comparative fault doctrine 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine "is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.' " [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.App.3d 112].)

- "[A] 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendant[s]' present in the lawsuit." (*Dafonte, supra,* 2 Cal.4th at p. 603, original italics.)

- "The proposition that a jury may apportion liability to a nonparty has been adopted in the Judicial Council of California Civil Jury Instructions (CACI) special verdict form applicable to negligence cases. (See CACI Verdict Form 402 and CACI Instruction No. 406 ['[Verdict Form] 402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors. [¶] … [¶] … "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors.']." (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 100 fn. 5 [-- Cal.Rptr.3d --], internal citation omitted.)

- "[U]nder Proposition 51, fault will be allocated to an entity that is immune from *paying* for its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious." (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 [6 Cal.Rptr.3d 695], original italics.)

- "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [129 Cal.Rptr.2d 336].)

- "[T]here must be substantial evidence that a nonparty is at fault before damages can be apportioned to that nonparty." (*Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 785 [180 Cal.Rptr.3d 479].)

- "When a defendant is liable *only* by reason of a derivative nondelegable duty arising from his status as employer or landlord or vehicle owner or coconspirator, or from his role in the chain of distribution of a single product in a products liability action, his liability is *secondary* (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51." (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [71 Cal.Rptr.3d 518], original italics, internal citations omitted.)

- "Under the doctrine of strict products liability, all defendants in the chain of distribution are jointly and severally liable, meaning that each defendant can be held liable to the plaintiff for all damages the defective product caused." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1010 [169 Cal.Rptr.3d 208].)

- Proposition 51 does not apply in a strict products liability action when a single defective product produced a single injury to the plaintiff. That is, all the defendants in the stream of commerce of that single product remain jointly and severally liable. … [I]n strict products liability asbestos exposure actions, … Proposition 51 applies when there are multiple products that caused the plaintiff's injuries and there is evidence that provides a basis to allocate fault for noneconomic damages between the defective products." (*Romine, supra,* 224 Cal.App.4th at pp. 1011−1012, internal citations omitted.)

- "[T]he jury found that defendants are parties to a joint venture. The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 50, 52–56, 59, 60, 63, 64, 68

Haning et al., California Practice Guide: Personal Injury, Ch. 9-M, *Verdicts And Judgment*, ¶ 9:662.3 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.52–1.59

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04–4.03, 4.07–4.08 (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14A, Ch. 9, *Damages*, § 9.01 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.04 et seq. (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.284, 165.380 (Matthew Bender)

409. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

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[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2004, June 2012, December 2013

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86

Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the

sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 258 [179 Cal.Rptr.3d 473 ~~[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 [59 Cal.Rptr.2d 813~~].)

- ~~"Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.' " (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)~~

- ~~"'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)~~

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether

defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 et seq. (Matthew Bender)

422. Providing Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] [sold/gave] alcoholic beverages to [***name of alleged minor***], a minor who was already obviously intoxicated.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] was [required to be] licensed to sell alcoholic beverages;]**

   [*or***]**

   [That [*name of defendant***] was authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave;]**
2. **[That [***name of defendant***] [sold/ gave] alcoholic beverages to [***name of alleged minor***];]**

   [or]

   [That [*name of defendant***] caused alcoholic beverages to be [sold/given away] to [***name of alleged minor***];]**

3. **That [***name of alleged minor***] was less than 21 years old at the time;**

4. **That when [***name of defendant***] provided the alcoholic beverages, [***name of alleged minor***] displayed symptoms that would lead a reasonable person to conclude that [he/she] was obviously intoxicated;**

5. **That [***name of alleged minor***] harmed [***name of plaintiff***]; and**

6. **That [***name of defendant***]'s [selling/ giving] alcoholic beverages to [***name of alleged minor***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of alleged minor***] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [***name of defendant***] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [***name of alleged minor***] had been drinking is not enough.**

New September 2003; Revised December 2009, June 2014, December 2014

Directions for Use

Business and Professions Code section 25602.1 imposes potential liability on those who have or are required to have a liquor license for the selling, furnishing, or giving away of alcoholic beverages to an obviously intoxicated minor. It also imposes potential liability on a person who is not required to be licensed who sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) In this latter case, omit element 1, select "sold" in the opening paragraph and in element 2, and select "selling" in element 6.

If the plaintiff is the minor who is suing for his or her own injuries (see *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 974 [221 Cal.Rptr. 97]), modify the instruction by substituting the appropriate pronoun for "[*name of alleged minor*]" throughout.

For purposes of this instruction, a "minor" is someone under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004 [207 Cal.Rptr. 60].)

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.

- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.

- "In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff's injuries or death, section 25602.1--the applicable statute in this case--permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was 'any other person' (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away--even to an obviously intoxicated minor--retains his or her statutory immunity." (*Ennabe, supra,* 58 Cal.4th at pp. 709−710, original italics.)

- "[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories--those licensed by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government--are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: 'any other person' who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks." (*Ennabe, supra,* 58 Cal.4th at p. 711.)

- "[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying

sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe, supra,* 58 Cal.4th at p. 714, orginal italics.)

- In " 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' " (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)

- "[T]he standard for determining 'obvious intoxication' is measured by that of a reasonable person." (*Schaffield, supra,* 15 Cal.App.4th at p. 1140.)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. … [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 320−321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

- "As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct." (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)

- "[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)

- "The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]] , we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue." (

Safeway, Inc. (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)

- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra,* 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.63

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-L, *Liability For Providing Alcoholic Beverages*, ¶ 2:2101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach,* § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.12, 19.52, 19.75 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing,* § 15A.21 et seq. (Matthew Bender)

427. Furnishing Alcoholic Beverages to Minors (Civ. Code, § 1714(d))

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] furnished alcoholic beverages to [him/her/[***name of minor***]], a minor, at [***name of defendant***]'s home.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was an adult;**

2. **That [***name of defendant***] knowingly furnished alcoholic beverages to [him/her/[***name of minor***]] at [***name of defendant***]'s home;**

3. **That [***name of defendant***] knew or should have known that [he/she/[***name of minor***]] was less than 21 years old at the time;**

4. **That [***name of plaintiff***] was harmed [by [***name of minor***]]; and**

5. **That [***name of defendant***]'s furnishing alcoholic beverages to [[***name of plaintiff***]/[***name of minor***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2011

Directions for Use

This instruction is for use for a claim of social host (noncommercial) liability for furnishing alcohol to a minor. (See Civ. Code, § 1714(d).) For an instruction for commercial liability, see CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors*.

Under the statute, the minor may sue for his or her own injuries, or a third person may sue for injuries caused by the minor. (Civ. Code, § 1714(d)(2).) If the minor is the plaintiff, use the appropriate pronoun throughout. If the plaintiff is a third person, select "[*name of minor*]" throughout and include "by [*name of minor*]" in element 4.

Sources and Authority

- No Social Host Liability for Furnishing Alcohol. Civil Code section 1714(c).
- Exception to Nonliability. Civil Code section 1714(d).
- "Although the claim against [host] appears to fall within the section 1714, subdivision (d) exception, plaintiffs cannot bootstrap respondents into that exception by alleging that respondents conspired with or aided and abetted [host] by providing alcoholic beverages that were furnished to [minor]. Subdivision (b) of section 1714 unequivocally states that 'the furnishing of alcoholic beverages is not

the proximate cause of injuries resulting from intoxication … .' This provision necessarily precludes liability against anyone who furnished alcohol to someone who caused injuries due to intoxication. The exception set forth in subdivision (d) vitiates subdivision (b) for a very narrow class of claims: claims against an adult who knowingly furnishes alcohol at his or her residence to a person he or she knows is under the age of 21. Because respondents are not alleged to have furnished alcohol to [minor] at their residences, plaintiffs' claims against them are barred because, as a matter of statutory law, plaintiffs cannot establish that respondents' actions proximately caused plaintiffs' injuries." (*Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 764 [157 Cal.Rptr.3d 660].)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. … [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 320−321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1070

1 Levy et al., California Torts, Ch. 1, *Duty and Breach*, § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.11, 19.13 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*, § 15A.21 et seq. (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.**

New September 2003; Revised December 2007

Directions for Use

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes,* may also be given. Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430, *Causation: Substantial Factor*.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused

thereby.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999)*,* 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a 'plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.' " (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, ~~Thoeries~~ Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, ~~Thoeries~~ Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

455. Statute of Limitations—Delayed Discovery

If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitations***], [***name of plaintiff***]'s lawsuit was still filed on time if [***name of plaintiff***] proves that before that date,**

[[*name of plaintiff***] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.]**

[*or***]**

[[*name of plaintiff***] did not discover, and a reasonable and diligent investigation would not have disclosed, that [***specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"***] contributed to [***name of plaintiff***]'s harm.]**

New April 2007; Revised December 2007, April 2009, December 2009

Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the "delayed-discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2009, the date is August 31, 2007.

If the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information, read the second option. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon's negligence and timely filed action for medical negligence against health care provider did not preclude "discovery rule" from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—*

Attorney Malpractice—Four-Year Limit). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code of Civ. il Proc., edure § section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. … It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] … [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects … that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on *inquiry*'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them to 'find him' and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)

- "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Jolly, supra,* 44 Cal.3d at p. 1113.)

- "*Jolly* 'sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

- "While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been

that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)

- "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.)

- "[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)

- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)

- "A plaintiff's inability to discover a cause of action may occur 'when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.' " (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [171 Cal.Rptr.3d 1].)

- "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant … , [he] must' proceed thus." (*Norgart, supra,* 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' " 'information of circumstances to put [them] on inquiry' " ' or if they have ' " 'the opportunity to obtain knowledge from sources open to [their] investigation.' " ' In other words, plaintiffs are

required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra,* 35 Cal.4th at pp. 807–808, internal citations omitted.)

- "Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether 'such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.' " (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)

- " [I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound. ' " '[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date … .*' " ' " (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- There is no doctrine of constructive or imputed suspicion arising from media coverage. "[Defendant]'s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation." (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)

- "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant. [¶] However, when a plaintiff relies on the discovery rule or allegations of fraudulent concealment as excuses for an apparently belated filing of a complaint, 'the burden of pleading and proving belated discovery of a cause of action falls on the plaintiff.' " (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- "More specifically, as to accrual, 'once properly pleaded, belated discovery is a question of fact.' " (*Nguyen, supra,* 229 Cal.App.4th at p. 1552.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations,* ¶¶ 5:108–5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52–143.64 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.15

McDonald, California Medical Malpractice: Law and Practice §§ 7:1-7:7 (Thomson Reuters)

600. Standard of Care

[A/An] [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill and care that a reasonably careful [*insert type of professional*] would use in similar circumstances based only on the testimony of the expert witnesses[, including [*name of defendant*],] who have testified in this case.]

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals,* should be used. See CACI No. 400, *Negligence—Essential Factual Elements,* for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid*.) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' …" … ' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)

- "[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. " (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112−113 [174 Cal.Rptr.3d 662].)

- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra,* 171 Cal.App.4th at p. 376.)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.)

- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] … .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)

- " ' … "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

- "Where … the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra,* 47 Cal.App.3d at pp. 810−811, footnote and internal citations omitted.)

- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' … . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra,* 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)

- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability,* §§ 76.50, 76.51 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.50 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice,* § 24A.20 et seq. (Matthew Bender)

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant***] used reasonable care, you may consider, among other factors, the following:**

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s)***.]**

New September 2003; Revised June 2010

Directions for Use

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [143 P.2d 929].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)

- "[T]he issue concerning a landlord's duty is not the *existence* of the duty, but rather the *scope* of the duty under the particular facts of the case. Reference to the *scope* of the landlord's duty "is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property's safety to protect a tenant from a specific class of risk." (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [179 Cal.Rptr.3d 758], original italics, internal citation omitted.)

- "The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ... ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)

- "It is well settled that a property owner is not liable for damages caused by a minor, trivial, or insignificant defect in his property. This principle is sometimes referred to as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that a plaintiff must plead and prove. … Moreover, what constitutes a minor defect may be a question of law." (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)

- In this state, duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee. The purpose of plaintiff's presence on the land is not determinative. We have recognized, however, that this purpose may have some bearing upon the liability issue. This purpose therefore must be considered along with other factors weighing for and against the imposition of a duty on the landowner." (*Ann M., supra,* 6 Cal.4th at pp. 674-675, internal citations omitted.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id*., at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486-487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121].)

- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra,* 30 Cal.3d at p. 372.)

- "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38 [180 Cal.Rptr.3d 474].~~A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479 [84 Cal.Rptr.2d 634], internal citations omitted~~.)

- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra,* 23 Cal.2d at p. 260.)

- "[A] defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care." (*Lawrence, supra,* 231 Cal.App.4th at p. 31.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1086

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01,

170.03, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.11 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:3 (Thomson Reuters ~~West~~)

1520. Abuse of Process—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully [***insert legal procedure, e.g., "took a deposition"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert legal procedure, e.g., "took the deposition of [name of deponent]"***];**

2. **That [***name of defendant***] intentionally used this legal procedure to [***insert alleged improper purpose that procedure was not designed to achieve***];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Sources and Authority

" 'The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. [Citations.] It has been 'interpreted broadly to encompass the entire range of "procedures" incident to litigation.' [Citation.] [¶] '[T]he essence of the tort [is] … misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [Citation.]' " (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41 [176 Cal.Rptr.3d 567].)

- "To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner." (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90, 718 P.2d 77], internal citations omitted.)

- "[Plaintiff]'s complaint indicates that he has pleaded the tort of abuse of process, long recognized at common law but infrequently utilized." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815], internal citation omitted.)

- "Abuse of process is not just another name for malicious prosecution. *Simply filing or maintaining a lawsuit for an improper purpose* (such as might support a malicious prosecution cause of action) *is not abuse of process*. [Citation.] [¶] Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter *concerns the misuse of the tools the law affords litigants once they are in a lawsuit* (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments [citation] or improper use of discovery [citation]." (*S.A., supra,* 229 Cal.App.4th at pp. 41−42, original italics~~Malicious prosecution and abuse of process are distinct.~~

~~The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted~~.)

- "[W]hile a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1523 [141 Cal.Rptr.3d 338].)

- "~~The gist of the tort is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose.~~ Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)

- "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)

- "~~The term 'process' as used in the tort of abuse of process has been broadly interpreted to encompass the entire range of procedures incident to litigation. ...~~ This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Younger, supra,* 38 Cal.App.3d at p. 296, internal citations omitted.)

- " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232-233 [317 P.2d 613], internal citation omitted.)

- "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)

- "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (*Adams, supra,* 2 Cal.App.4th at pp. 530-531, internal citations omitted.)

- " ' "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing

more than carry out the process to its authorized conclusion, even though with bad intentions." ' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

- "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)

- "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)

- ~~The litigation privilege of Civil Code section 47(b) can defeat an abuse-of-process claim. (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 65 [75 Cal.Rptr.2d 83].)~~

- "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. ~~Simply filing a lawsuit for an improper purpose is not abuse of process.~~" (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)

- "~~'[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [¶]~~ We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822-1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 517–528

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.20-43.25 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.51 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.70 et seq. (Matthew Bender)

1803. Appropriation of Name or Likeness—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used [*name of plaintiff*]'s name, likeness, or identity without [his/her] permission;**

2. **That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**

3. **That [*name of plaintiff*] was harmed; [and]**

4. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2014

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra* ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

- "A common law misappropriation claim is pleaded by 'alleging: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. . [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807]~~A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted~~.)

- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is … a right to prevent others from misappropriating the economic value generated … through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)

- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684−685 [166 Cal.Rptr.3d 359].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, ~~417~~419 [198 Cal.Rptr. 342]~~*Eastwood, supra,* 149 Cal.App.3d at p. 419~~.)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief

for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "[T]he fourth category of invasion of privacy, namely, appropriation, 'has been *complemented* legislatively by Civil Code section 3344, adopted in 1971.' " (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 676–678

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts § 20:16 (Thomson Reuters)

1901. Concealment

[*Name of plaintiff*] claims that [he/she] was harmed because [*name of defendant*] concealed certain information. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. **(a) That [*name of defendant*] and [*name of plaintiff*] were [*insert type of fiduciary relationship, e.g., "business partners"*]; and**

(b) That [*name of defendant*] intentionally failed to disclose certain facts to [*name of plaintiff*];]

[or]

[1. **That [*name of defendant*] disclosed some facts to [*name of plaintiff*] but intentionally failed to disclose [other/another] fact[s], making the disclosure deceptive;]**

[or]

[1. **That [*name of defendant*] intentionally failed to disclose certain facts that were known only to [him/her/it] and that [*name of plaintiff*] could not have discovered;]**

[or]

[1. **That [*name of defendant*] prevented [*name of plaintiff*] from discovering certain facts;]**

2. **That [*name of plaintiff*] did not know of the concealed fact[s];**

3. **That [*name of defendant*] intended to deceive [*name of plaintiff*] by concealing the fact[s];**

4. **That had the omitted information been disclosed, [*name of plaintiff*] reasonably would have behaved differently;**

5. **That [*name of plaintiff*] was harmed; and**

6. **That [*name of defendant*]'s concealment was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2004, December 2012, June 2014, June 2015

Directions for Use

Give this instruction if it is alleged that the defendant concealed certain information to the detriment of the plaintiff. (See Civ. Code, § 1710(3).) Element 2 may be deleted if the third option for element 1 is

selected.

Regarding element 1, before there can be liability for concealment, there must usually be a duty to disclose arising from a fiduciary or confidential relationship between the parties. However, in transactions that do not involve fiduciary or confidential relations, a duty to disclose material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render his disclosure likely to mislead (option 2); (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff (option 3); (3) the defendant actively conceals discovery from the plaintiff (option 4). (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal. Rptr. 444, 466 P.2d 996].) For the second, third, and fourth options, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, the jury should also be instructed to determine whether the requisite relationship existed. (See *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1187 [175 Cal.Rptr.3d 820].)

If element 4 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*. To avoid any possible confusion created by using "rely on the concealment" (see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].), CACI Nos. 1907 and 1908 may be modified to replace the words "rely," "relied," and "reliance" with language based on "behave differently" from element 4. It must have been reasonable for the plaintiff to have behaved differently had the omitted information been disclosed. (See *Hoffman, supra,* 228 Cal.App.4th at p. 1194 [concealment case].)

Sources and Authority

- Concealment. Civil Code section 1710(3).

- "The elements of fraud, which give rise to the tort action for deceit, are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Hackethal v. Nat'l Casualty Co.* (1987) 189 Cal.App.3d 1102, 1110 [234 Cal.Rptr. 853].)

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 [129 Cal.Rptr.3d 874].)

- ~~"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. ... Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the~~

plaintiff and defendant in which a duty to disclose can arise." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336–337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)

- "A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent." (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 860 [143 Cal.Rptr.3d 711].)

- "Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose ... [however,] '[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225], internal citations omitted.)

- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp., supra,* 2 Cal.3d at p. 294, footnotes omitted.)

- "[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)

- "[O]ther than the first instance, in which there must be a fiduciary relationship between the parties, 'the other three circumstances in which nondisclosure may be actionable presupposes: (sic) the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. … '[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts.' A relationship between the parties is present if there is 'some sort of *transaction* between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' " (*Hoffman, supra,* 228 Cal.App.4th at p. 1187, original italics, internal citations omitted.)

- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)

- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [7 Cal.Rptr.2d 859].)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "[P]laintiffs argue that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of the argument, plaintiffs cite *Affiliated Ute Citizens v. United States, supra,* 406 U.S. 128 (*Ute*) … , Interpreting Rule 10b-5, the high court held that 'positive proof of reliance is not a prerequisite to recovery' in a case 'involving primarily a failure to disclose … .' [¶] Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin, supra,* 5 Cal.4th at p. 1093.)

- "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception." (*Boschma, supra,* 198 Cal.App.4th at p. 249, original italics.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 793–799

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 11-E, *Damages For Fraud,* ¶ 11:354 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[2][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.26 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.70 et seq. (Matthew Bender)

2 California Civil Practice: Torts, § 22:16 (Thomson Reuters)

1906. Misrepresentations Made to Persons Other Than the Plaintiff

[*Name of defendant*] is responsible for a representation that was not made directly to [*name of plaintiff*] if [he/she/it] made the representation [to a group of persons including [*name of plaintiff*]] [or] [to another person, intending or reasonably expecting that it would be repeated to [*name of plaintiff*]].

New September 2003

Directions for Use

An instruction on concealment made to a person other than the plaintiff is not necessary; this point is covered by the third option of element 1 in CACI No. 1901, *Concealment*.

Sources and Authority

- Intent to Defraud Class. Civil Code section 1711.

- "It is true that in order for a defendant to be liable for fraud, he or she must intend that a particular representation (or concealment) be relied upon by a specific person or persons. However, it is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in section 533 of the Restatement Second of Torts (section 533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' Comment d to section 533 makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. Comment g goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [76 Cal.Rptr.2d 101], internal citations omitted; see also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605-606 [37 Cal.Rptr.2d 483].)

- "[L]iability for a fraud worked on an agent is imposed where it is the agent who not only places reliance on the misrepresentations, but also makes the decision and takes action based upon the misrepresentations." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 129 [173 Cal.Rptr.3d 356].)

- "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (*Hasso, supra,* 227 Cal.App.4th at p. 130.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 802–806

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.05[3] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.14 (Matthew Bender)

~~10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)~~

2 California Civil Practice: Torts § 22:34 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in determining his or her choice of action.

If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].)

See also CACI No. 1907, *Reliance.*

Sources and Authority

"After establishing actual reliance, the plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act; and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194 [175 Cal.Rptr.3d 820], internal citations omitted.)

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier, supra,* 75 Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)

- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'" (*Blankenheim, supra,* 217 Cal.App.3d at p. 1474, internal citations omitted.)

- "[G]enerally speaking, ' "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. … The effectiveness of disclaimers is assessed in light of these principles. [Citation.]" ' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 673 [172 Cal.Rptr.3d 238].)

- "[I]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 [160 Cal.Rptr.3d 718].)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)

- " 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citation omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 812–815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.229 (Matthew Bender)

2 California Civil Practice: Torts, § 22:32 (Thomson Reuters)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2007

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)
- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)
- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)
- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …' [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 133

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

3. **That this condition interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

4. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

5. **That an ordinary person would be reasonably annoyed or disturbed by** [*name of defendant*]**'s conduct;**

6. **That [***name of plaintiff***] was harmed;**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011

Directions for Use

For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.

- Acts Done Under Express Authority of Statute. Civil Code section 3482.

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)

- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)

- "Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.' " (*Koll-Irvine Center Property Owners Assn., supra,* 24 Cal.App.4th at p. 1041, internal citation omitted.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or

intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- Restatement Second of Torts, section 822 provides:
One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of

an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or
(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

- Restatement Second of Torts, section 826 provides:
  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor's conduct, or
  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

- Restatement Second of Torts, section 827 provides:
  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the extent of the harm involved;
  (b) the character of the harm involved;
  (c) the social value that the law attaches to the type of use or enjoyment invaded;
  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
  (e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:
  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the social value that the law attaches to the primary purpose of the conduct;
  (b) the suitability of the conduct to the character of the locality; and
  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**

2. **That [***name of defendant***] intentionally and substantially interfered with [***name of plaintiff***]'s property by [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**

3. **That [***name of plaintiff***] did not consent;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2009, December 2010

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283].)

Sources and Authority

- "Conversion is generally described as the wrongful exercise of dominion over the personal property of another. … The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181 [180 Cal.Rptr.3d 610].)

- ~~[Cross-complainant] maintains that he alleged the essential elements of a conversion action, which ' "are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages.~~ "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." …' " (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 [147 Cal.Rptr.3d 768].)

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1181, internal citations omitted.)

- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' " (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1183, internal citation omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of*

Cal. (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority … .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "Generally, conversion has been held to apply to the taking of intangible property rights when

'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)

- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra,* 223 Cal.App.4th at p. 212, footnote omitted.)

- "One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- "[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699–719

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial--Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles)*, ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.40–150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion*, § 51.21[3][b] (Matthew Bender)

2307. Insurance Agency Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore [responsible for/bound by] [***name of agent***]'s [conduct/representations].**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] the [authority/apparent authority] to act on behalf of [***name of defendant***], then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of plaintiff***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency; e.g., "collecting insurance payments"***] and therefore [***describe dispute; e.g., "the insurer received plaintiff's payment"***]. [***Name of defendant***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency***] and therefore [***describe dispute***].]**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give CACI No. 3709, *Ostensible Agent*, in the Vicarious Responsibility series.

Sources and Authority

- "Insurance Agent" Defined. Insurance Code section 31.
- "Insurance Broker" Defined. Insurance Code section 33.
- Actual or Ostensible Authority of Agent. Civil Code section 2315.
- "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced by a notice of agency appointment on file with the Department of Insurance. An agent is

generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732-733 [276 Cal.Rptr. 667], internal citations omitted.)

- "An agent's primary duty is to represent the insurer in transactions with insurance applicants and policyholders. Each company the agent represents must file a notice of appointment with the DOI's commissioner. Because an agent represents the insurer, an agent's representations to an insured regarding coverage are treated as representations by the insurer. Generally, some hallmarks of an insurance agent (as opposed to a broker) are licensure, notice of appointment as an agent and the power to bind the insurer. In contrast, a broker's primary duty is to represent the applicant/insured, and his or her actions are not generally binding on the insurer. 'Put quite simply, insurance brokers, with no binding authority, are *not* agents of insurance companies, but are rather independent contractors … .' Of course, these labels alone are not determinative of the relationship, and the specific facts of each transaction must be reviewed. The general laws of agency inform any such review." (*Douglas v. Fidelity National Ins. Co.* (2014) 229 Cal.App.4th 392, 410−411 [177 Cal.Rptr.3d 271], original italics, internal citations omitted.)

- "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027], internal citations omitted.)

- "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors ... ." (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)

- "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118], internal citations omitted.)

- "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra,* 115 Cal.App.2d at p. 244.)

- "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citations omitted.)

- ~~Sending notice of an automobile accident to the insured's broker did not satisfy the insured's~~

~~obligation under the policy to provide prompt notice of a claim to the insurer since the broker was the agent of the insured and not of the insurer. (*Arthur v. London Guarantee and Accident Co., Ltd.* (1947) 78 Cal.App.2d 198, 202–203 [177 P.2d 625].)~~

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 2:12–2:24, 2:31–2:43

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.4–5.8

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.2–29.5

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.02 (Matthew Bender)

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.01[4] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.114 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.18, 120.110, 120.170, 120.383, 120.392, 120.403 (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] was notified of the loss;**

3. **That [***name of defendant***], unreasonably or without proper cause, [failed to pay/delayed payment of] policy benefits;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

In determining whether [*name of defendant***] acted unreasonably or without proper cause, you should consider only the information that [***name of defendant***] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.**

New September 2003; Revised December 2007, April 2008, December 2009

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of

action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ' "does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]" ' " (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics~~[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' ... In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Servs Auto. Ass'n* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted~~.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. … 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. … On the other hand, an insurer is not entitled to judgment

as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra,* 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra,* 175 Cal.App.4th at p. 1239, original italics.)

- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. … [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)

- " '[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on

those facts which justify denial of the claim." ' " (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854].)

- "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages." (*Maslo, supra,* 227 Cal.App.4th at pp. 638−639 [uninsured motorist coverage case].)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[I]n [a bad–faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach,* not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 240–242

Croskey et al., California Practice Guide: Insurance Litigation. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action,* ~~(The Rutter Group)~~ ¶¶ 12:822–12:1016 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew

Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance,* § 308.24 (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to accept a reasonable settlement demand in a lawsuit against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand is reasonable if [*name of defendant***] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability.**

New September 2003; Revised December 2007, June 2012, December 2012

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].) For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the

third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], internal citations omitted.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- "A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." (*Graciano, supra,* 231 Cal.App.4th at p. 425.)

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- "[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, where the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*DeWitt, supra,* 204 Cal.App.4th at p. 244, original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128], internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "opportunity to settle" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases,* ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §

13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2407. Affirmative Defense—Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

New September 2003; Revised February 2007, December 2014

Directions for Use

This instruction may be given when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's

failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., California Practice Guide: Employment Litigation, ¶ 17:492 (Rutter Group).

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived … ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145~~The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459~~].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra,* 55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra,* 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn., supra,* 30 Cal.App.3d at pp. 253−254, internal citations omitted.)

- "The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao, supra,* 229 Cal.App.4th at p. 454.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

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[*Name of plaintiff***] claims [he/she] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [***specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] discharged [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge; and**

4. **That the discharge caused [***name of plaintiff***] harm.**

New September 2003; Revised June 2013~~;~~, June 2014, December 2014

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term "substantial motivating reason" to express causation between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be given instead. See also CACI No. 2510, *"Constructive Discharge" Explained*.

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992)

1 Cal.4th 1083, 1093 [4 Cal. Rptr. 2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*..

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra,* 1 Cal.4th at pp. 1090-1091, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the

basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- " '[T]here is a "fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size." (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)

- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra,* 231 Cal.App.4th at p. 1355.)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims),* ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.58 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***]'s [***protected status-for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment

agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- Perception and Association. Government Code section 12926(o).

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently

meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation ~~[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp., supra,* 411 U.S. 792], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448~~(*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the

stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two." (*Swanson, supra,* 232 Cal.App.4th at p. 966.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. That [*name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the

FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide him or her with other suitable job positions that he or she might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden

of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- "Although no particular form of request is required, ' "[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is 'aware of respondent's disability and physical limitations.' … " ' ' "[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. …" … ' " (*Avila, supra,* 165 Cal.App.4th at pp. 1252–1253, internal citations omitted.)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**

4. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her] [***e.g., physical condition***] so that [he/she] would be able to perform the essential job requirements;**

5. **That [***name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**

6. **That [***name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.
- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)
- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)

- "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971−972 [181 Cal.Rptr.3d 553].)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p. 62, fn. 23.)

- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. … To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)

- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree … with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)

- "We synthesize *Wysinger, Nadaf-Rahrov,* and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. …' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA),* ~~(The Rutter Group)~~ ¶¶ 9:2280–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation Discrimination in Employment, § 2:50 (Thomson Reuters)

2600. Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her] [family care/medical] leave] [refused to return [him/her] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse] who had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that made [him/her] unable to perform the functions of [his/her] job with [***name of defendant***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave/refused to return [***name of plaintiff***] to the same or a comparable job when [his/her] [family care/medical] leave ended/***other violation of CFRA rights***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s [decision/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2008

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term pursuant to Government Code section 12945.2(c)(8).

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.

- "The CFRA entitles eligible employees to take up to 12 unpaid workweeks in a 12-month period for family care and medical leave to care for their children, parents, or spouses, or to recover from their own serious health condition. An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted.)

- "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438] ~~Violations of the CFRA generally fall into two types of claims: (1) 'interference' claims in which an employee alleges that an employer denied or interfered with her substantive rights to protected medical leave, and (2) 'retaliation' claims in which an employee alleges that she suffered an adverse employment action for exercising her right to CFRA leave." (*Rogers, supra,* 198 Cal.App.4th at pp. 487–488, footnote omitted~~.)

- "The right to reinstatement is unwaivable but not unlimited." (*Richey, supra,* 60 Cal.4th at p. 919.)

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision ... .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' … ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942–944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes,* ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B*, Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA),* ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2612. Affirmative Defense—Employment Would Have Ceased

[*Name of defendant*] claims that [he/she/it] was not required to allow [*name of plaintiff*] to return to work when [his/her] [family care/medical] leave was over because [his/her] employment would have ended for other reasons. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] would have [discharged/laid off] [*name of plaintiff*] if [he/she] had continued to work during the leave period; and**

2. **That [*name of plaintiff*]'s [family care/medical] leave was not a reason for [discharging [him/her]/laying [him/her] off].**

An employee on [family care/medical] leave has no greater right to his or her job or to other employment benefits than if he or she had continued working during the leave.

New September 2003

Sources and Authority

- Limitations of Right to Reinstatement. Cal. Code Regs., tit. 2, § 11089(c)(1).

- "Section 11089, subdivision (c)(1) states in part: 'An employee has no greater right to reinstatement or to other benefits … of employment than if the employee had been continuously employed during the CFRA leave period.' This defense is qualified, however, by the requirement that '[a]n employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement' ." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)

Secondary Sources

Chin et al., Cal–ifornia Practice Guide: Employment Litigation ¶¶ 12:1189, 12:1191 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[4] (Matthew Bender)

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] unpaid wages. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of defendant*] owes [*name of plaintiff*] wages under the terms of the employment; and**

3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005, December 2013, June 2015

Directions for Use

This instruction is ~~intended~~ for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. All of the wage orders define hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (See, e.g., Wage Order 4, subd. 2(K).) The two parts of the definition are independent factors, each of which defines whether certain time spent is compensable as "hours worked." Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated. Courts have identified various factors bearing on an employer's control during on-call time. However, what qualifies as hours worked is a question of law. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838−840 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Therefore, the jury should not be instructed on the factors to consider in determining whether the employer has exercised sufficient control over the employee during the contested period to require compensation.

However, the jury should be instructed to find any disputed facts regarding the factors. For example, one factor is whether a fixed time limit for the employee to respond to a call was unduly restrictive. Whether there was a fixed time limit would be a disputed fact for the jury. Whether it was unduly restrictive would be a matter of law for the court.

The court may modify this instruction or write an appropriate instruction ~~in cases where~~if the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of

equipment if the employer proves that this was caused by a dishonest or willful act or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

Sources and Authority

- Right of Action for Wage Claim. Labor Code section 218.
- Wages Due on Discharge. Labor Code section 201.
- Wages Due on Quitting. Labor Code section 202.
- "Wages" Defined, Labor Code section 200.
- Wages Partially in Dispute. Labor Code section 206(a).
- Deductions From Pay. Labor Code section 221, California Code of Regulations, Title 8, section 11010, subdivision 8.
- Nonapplicability to Government Employers. Labor Code section 220.
- Employer Not Entitled to Release. Labor Code section 206.5.
- Private Agreements Prohibited. Labor Code section 219(a).
- "[A]n employee's on-call or standby time may require compensation." (*Mendiola, supra,* 60 Cal.4th at p. 840.)
- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)
- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of Wages,* ¶¶ 11:456,

11:470, 11:470.1, 11:512−11.514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:75 (Thomson Reuters)

2701. Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] the difference between the wages paid by [*name of defendant*] and the wages [*name of plaintiff*] should have been paid according to the minimum wage rate required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of plaintiff*] was paid less than the minimum wage by [*name of defendant*] for some or all hours worked; and**

3. **The amount of wages owed.**

The minimum wage for labor performed from [*beginning date*] to [*ending date*] was [*minimum wage rate*] per hour.

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., Cal. Code Regs., tit. 8, § 11000.) The jury must be instructed accordingly.

Both liquidated damages (See Lab. Code, § 1194.2) and civil penalties (See Lab. Code, § 1197.1) may be awarded on a claim for nonpayment of minimum wage.

~~The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims.~~ Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, subd. 3, § 11010, subd. 10, and § 11150, subd. 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. (Cf. CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption.*)

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- Civil Penalties, Restitution and Liquidated Damages. Labor Code section 1197.1(a).
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- Duties of Industrial Welfare Commission. Labor Code section 1173.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions-In General,* ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages,* ¶¶ 11:456, 11:499, 11:513, 11:545, 11:547 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation,* ¶ 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation,* ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:76 (Thomson Reuters)

2804. Removal or Noninstallation of Power Press Guards—Essential Factual Elements (Lab. Code, § 4558)

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] [removed/failed to install] guards on a power press. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [employer/supervisor];**

2. **That [***name of plaintiff***] was injured while operating a power press;**

3. **That [***name of defendant***] gave an affirmative instruction to [remove/not install] the guards before [***name of plaintiff***]'s injury;**

4. **That when [***name of defendant***] did so, [he/she/it] knew that the lack of guards would create a probability of serious injury or death;**

5. **That the power press's [designer/fabricator/assembler] [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and directly or indirectly conveyed this information to [***name of defendant***]; and**

6. **That [***name of defendant***]'s [removal/failure to install] the guards was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if the plaintiff alleges that the claim for injury or death falls outside of the workers' compensation exclusivity rule because the employer removed or failed to install power press guards. (See Lab. Code § 4558.)

Sources and Authority

- Exclusive Remedy: Power-Press Guard Exception. Labor Code section 4558.
- "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power

tools are run by large mechanical motors or hydraulically. These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (~~*Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377 [242 Cal.Rptr. 531], internal citation omitted~~*LeFiell Manufacturing Co. v. Superior Court* (2014) 228 Cal.App.4th 883, 892 [175 Cal.Rptr.3d 894].)

- "A cause of action under section 4558 includes the following elements: (a) that the injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press; and (b) that this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1516 [285 Cal.Rptr. 385].)

- "A power press is 'any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.' 'This definition entails four elements. The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*LeFeill, supra,* 228 Cal.App.4th at p. 893.)

- "The meaning of the term 'point of operation guard' in section 4558 is a legal question." (*LeFiell, supra,* 228 Cal.App.4th at p. 893.)

- "[T]he type of injury excluded from the workers' compensation system in section 4558 arises from the inherent danger to hands and other body parts at the point in which the die shapes the material in the absence of guards or safety devices." (*LeFiell, supra,* 228 Cal.App.4th at p. 897.)

- "Limiting the definition of 'point of operation guard' to the area where the die forms the material on a power press is consistent with the legislative purpose in enacting section 4558." (*LeFiell, supra,* 228 Cal.App.4th at p. 895.)

- "From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death. Absent facts which would establish the employer's knowledge or action regarding the absence of a point of operation guard on a power press, the incident would not come within the exception of section 4558, and an employee would not be entitled to bring 'an action at law for damages' arising from the power press injury. If such action cannot be brought on its own where the facts fail to establish all the elements of the power press exception under section 4558, it follows that individual causes of action against an employer which do not meet the requirements of section 4558 cannot be bootstrapped onto a civil action for damages which is properly brought under section 4558." (*Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1134 [279 Cal.Rptr. 459].)

- ~~"This statutory definition embraces four elements. 'The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*McCoy v. Zahniser Graphics, Inc.* (1995) 39 Cal.App.4th 107, 110 [45 Cal.Rptr.2d 871], internal citation omitted.)~~

- "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465, 991 P.2d 1256].)

- "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666].)

- "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161], internal citation omitted; cf. *Gonzalez v. Seal Methods, Inc.* (2014) 223 Cal.App.4th 405, 410 [166 Cal.Rptr.3d 895] [point of operation guard does not include unattached device, such as a safety block, that the worker moves into and out of the point of operation].)

- "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra*, 231 Cal.App.3d at p. 68.)

- "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1029–1030, internal citation omitted.)

- "The element of knowledge requires 'actual awareness' by the employer-rather than merely constructive knowledge-that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1031-1032, internal citation and footnote omitted.)

- "Liability under section 4558 can only be imposed if the employer fails to use or removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive ... . 'From the plain language of section 4558, it is

clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477], internal citation omitted.)

- "As defined in the statute, 'specifically authorized' requires an 'affirmative instruction' by the employer, as distinguished from mere acquiescence in or ratification of an act or omission." (*Mora v. Hollywood Bed & Spring* (2008) 164 Cal.App.4th 1061, 1068 [79 Cal.Rptr.3d 640].)

- "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at p. 1032, internal citation and footnote omitted.)

- "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 49–51, 102

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSH) Actions Relating To Occupational Safety And Health,* ¶ 13:953 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption,* ¶ 15:572 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][f] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[5] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, §§ 239.24, 239.41 (Matthew Bender)

3003. Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***name of local governmental entity***]'s failure to train its [officers/employees]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of local governmental entity***]'s training program was not adequate to train its [officers/employees];**

2. **That [***name of local governmental entity***] knew because of a pattern of similar violations[, or it should have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***];**

3. **That [***name of officer or employee***] violated [***name of plaintiff***]'s right [***specify right***]; and**

4. **That the failure to provide adequate training was the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***].**

New September 2003; Revised December 2010, December 2011; Renumbered from CACI No. 3009 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's failure to adequately train its officers or employees. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

The inadequate training must amount to a deliberate indifference to constitutional rights. (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.) Element 2 expresses this deliberate-indifference standard. Deliberate indifference requires proof of a pattern of violations in all but a few very rare situations in which the unconstitutional consequences of failing to train are patently obvious. (See *Connick v. Thompson* (2011) – U.S. --, -- [131 S.Ct. 1350, 1361, 179 L.Ed.2d 417].) Delete the bracketed language in element 2 unless the facts present the possibility of liability based on patently obvious violations.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements,* and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388–389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)

- "In *Canton,* the Court left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,' the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." (*Connick, supra,* 131 S.Ct. at p. 1361], internal citations omitted.)

- "To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to 'deliberate indifference' to a constitutional right. This standard is met when 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' For example, if police activities in arresting fleeing felons 'so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,' then the city's failure to train may constitute 'deliberate indifference.' " (*Clouthier, supra,* 591 F.3d at p. 1249, internal citations omitted.)

- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)

- "The ninth cause of action was for 'Failure to Train.' The elements of such cause of action are well established, and include that the City 'knew because of a pattern of similar violations that the inadequate training was likely to result in a deprivation' of some right of plaintiffs. Put otherwise, the inadequate training must amount to a deliberate indifference to constitutional rights. Such deliberate indifference requires proof of a pattern of violations (except in those few very rare situations in which the unconstitutional consequences of failing to train are patently obvious)." (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 597 [180 Cal.Rptr.3d 10], footnote and internal citations omitted~~To~~

~~prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted~~.)

- " 'The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

- "Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise." (*Flores v. County of L.A.* (9th Cir. 2014) 758 F.3d 1154, -- [no need to train officers not to sexually assault persons with whom they come in contact].)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 822

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3004. Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***specify alleged unconstitutional conduct, e.g., being denied a parade permit because of the political message of the parade***]. [***Name of official***] is the person responsible for establishing final policy with respect to [***specify subject matter, e.g., granting parade permits***] for [***name of local governmental entity***].**

To establish that [*name of local governmental entity***] is responsible for this deprivation, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]'s right [***specify right violated***] was violated;**

2. **That [***name of official***] was the person who [either] [actually [made the decision/committed the acts]/ [or] later personally ratified the [decision/acts]] that led to the deprivation of [***name of plaintiff***]'s civil rights;**

3. **That [***name of official***]'s [acts/decision] [was/were] a conscious and deliberate choice to follow a course of action from among various alternatives; and**

4. **That [***name of official***] [[made the decision/committed the acts]/ [or] approved the [decision/acts]] with knowledge of [***specify facts constituting the alleged unlawful conduct***].**

[[*Name of official***] "ratified" the decision if [he/she] knew the unlawful reason for the decision and personally approved it after it had been made.]**

New December 2010; Renumbered from CACI No. 3010 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the acts of an official with final policymaking authority. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

Liability may be based on either the official's personal acts or policy decision that led to the violation or the official's subsequent ratification of the acts or decision of another. (See *Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1346–1347.) If both theories are alleged in the alternative, include "either" in element 1. Include the last paragraph if ratification is alleged.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements,* and CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements*.

The court determines whether a person is an official policymaker under state law. (See *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

Sources and Authority

- "[A] local government may be held liable under § 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.' 'If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.' 'There must, however, be evidence of a conscious, affirmative choice' on the part of the authorized policymaker. A local government can be held liable under § 1983 'only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ' " (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1250, internal citations omitted.)

- "Two terms ago, … we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. … First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' Second, only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability. Third, whether a particular official has 'final policymaking authority' is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (*St. Louis v. Praprotnik* (1988) 485 U.S. 112, 123 [108 S.Ct. 915, 99 L.Ed.2d 107], internal citations omitted.)

- "A municipality can be liable even for an isolated constitutional violation … when the person causing the violation has final policymaking authority." (*Webb v. Sloan* (9th Cir. 2003) 330 F.3d 1158, 1164.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett, supra,* 491 U.S. at p. 737, original italics.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

- "[R]atification requires, among other things, knowledge of the alleged constitutional violation." (*Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1239, internal citations omitted.)

- "[A] policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval." (*Christie, supra,* 176 F.3d at p. 1239.)

- ~~"[Plaintiff] contends that the city ratified the officers' conduct by not disciplining them. Ratification, however, generally requires more than acquiescence. There is no evidence in the record that policymakers 'made a deliberate choice to endorse' the officers' actions. The mere failure to discipline [the officers] does not amount to ratification of their allegedly unconstitutional actions." (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1231, internal citations omitted.)~~

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 830

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.12 (Matthew Bender)

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully arrested [him/her] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant and without probable cause;**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer*.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.'. 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097−1098.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- "There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ' "totality of the circumstances." ' This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were 'reasonable *given the specific circumstances*.' " (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)

- "Because stopping an automobile and detaining its occupants, 'even if only for a brief period and for a limited purpose,' constitutes a 'seizure' under the Fourth Amendment, an official must have individualized 'reasonable suspicion' of unlawful conduct to carry out such a stop." (*Tarabochia v. Adkins* (9th Cir. 2014) 766 F.3d 1115, 1121, internal citation omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, § 2.03 (Matthew Bender)

3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely to be true than not true:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [***insert one of the following:***]**

   [[took/hid/appropriated/obtained/ [or] retained] [*name of plaintiff/decedent***]'s property;]**

   [*or***]**

   [[assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [[took/hid/appropriated/obtained/ [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee' s] conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[One way [*name of plaintiff***] can prove that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] knew or should have known that [his/her] conduct was likely to be harmful to [***name of plaintiff/decedent***].**

[[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property if [***name of plaintiff/decedent***] was deprived of the property by an agreement, gift, will, [or] trust[, or] [***specify other testamentary instrument***] regardless of whether the property was held by [***name of plaintiff/decedent***] or by [his/her] representative.]**

New September 2003; Revised June 2005, October 2008, April 2009, June 2010, December 2013, June 2014

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering.*

If the individual responsible for the financial abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

If "for a wrongful use" is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

If "by undue influence" is selected in element 3, also give CACI No. 3117, *Financial Abuse—"Undue Influence" Explained*.

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Abuse of Elder or Dependent Adult. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Financial Abuse" Defined. Welfare and Institutions Code section 15610.30.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "The Legislature enacted the Act to protect elders by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect. An elder is defined as 'any person

residing in this state, 65 years of age or older.' The proscribed conduct includes financial abuse. The financial abuse provisions are, in part, premised on the Legislature's belief that in addition to being subject to the general rules of contract, financial agreements entered into by elders should be subject to special scrutiny." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 478 [177 Cal. Rptr. 3d 320], internal citations omitted.)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

- "The probate court cited Welfare and Institutions Code section 15610.30 to impose financial elder abuse liability as to plaintiffs' first cause of action for fiduciary abuse of an elder. This liability is supported by the court's findings that '[decedent] did not know the extent of [defendant's] spending,' and that '[w]hile it is not uncommon for a spouse to spend money or purchase items of which the other is unaware, and the line between such conduct and financial abuse is not always clear, what [defendant] did in this case went well beyond the line of reasonable conduct and constituted financial abuse,' and the court's further conclusion that much of defendant's credit card spending and writing herself checks from decedent's bank account during the marriage amounted to financial abuse." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 [167 Cal.Rptr.3d 50].)

- "[T]he Legislature enacted the Act, including the provision prohibiting a taking by undue influence, to protect elderly individuals with limited or declining cognitive abilities from overreaching conduct that resulted in a deprivation of their property rights. To require the victim of financial elder abuse to wait to file suit until an agreement obtained through the statutorily proscribed conduct has been performed would not further that goal. "(*Bounds, supra,* 229 Cal.App.4th at p. 481.)

- "When the [operable pleading] was filed, former section 15610.30, subdivision (a)(3) referred to the definition of undue influence found in Civil Code section 1575. However, in 2013, the Legislature amended section 15610.30, subdivision (a)(3) to refer, instead, to a broader definition of undue influence found in the newly enacted section 15610.70." (*Bounds, supra,* 229 Cal.App.4th at p. 479.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

Balisok, Elder Abuse Litigation, §§ 5:1 et seq., 22:9−22:12 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders,* § 5.33[4] (Matthew Bender)

3501. "Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation***]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:**

1. **There is no pressure on either one to buy or sell; and**

2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

New September 2003; Revised June 2015

Directions for Use

Do not give this instruction ~~in cases where~~if there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

The jury determines the fair market value of the property based on the highest and best use for which the property is geographically and economically adaptable. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 [175 Cal.Rptr.3d 858].) If the highest and best use is disputed, give CACI No. 3502, *"Highest and Best Use" Explained*.

Sources and Authority

- "Fair Market Value" Defined. Code of Civil Procedure section 1263.320.

- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1, 500 P.2d 1345], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 698 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)

- "[T]he fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815-820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra,* 140 Cal.App.3d at p. 705, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1230

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.1-4.2

4 Nichols on Eminent Domain, Ch. 12, *Valuation Generally*, §§ 12.01-12.05, Ch. 13, *Fair Market Value-Physical Character*, § 13.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.135 (Matthew Bender)

3502. "Highest and Best Use" Explained

You must determine fair market value based on the property's highest and best use. The highest and best use is the most profitable legally permissible use for which the property is physically, geographically, and economically adaptable.

Do not consider any personal value of the property to [*name of property owner*] or [his/her/its] need for the property. Also, do not consider the particular need of [*name of condemnor*] for the property.

New September 2003; Revised June 2015

Directions for Use

Give this instruction if the owner claims that the property's fair market value should be determined based on some use for which the property is geographically and economically adaptable other than the current use. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 [175 Cal.Rptr.3d 858].)

Sources and Authority

- "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citation omitted.)

- "The highest and best use is defined as 'that use, among the possible alternative uses, that is physically practical, legally permissible, market supportable, and most economically feasible … . The appraiser must make a determination of highest and best use as part of the appraisal process.' " (*San Diego Gas & Electric Co., supra,* 228 Cal.App.4th at p. 1289.)

- "It is long settled that the condemned property may not be valued based on its special value to the property owner. ... Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business." (*County of San Diego, supra*, 16 Cal.App.4th at pp. 1058-1059.)

- "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego, supra*, 16 Cal.App.4th at p. 1061, internal citation omitted.)

- "Simply stated, purchasers of property that is known to be condemned are prevented from inflating the value of the property by conjecturing what the condemner will actually pay for the property." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1156 [238 Cal.Rptr. 826], internal citation omitted.)

- "In condemnation cases it is a firmly established principle that the compensation payable is to be

based upon the loss to the owner rather than upon the benefit received by the taker. The California Supreme Court early stated that 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.' This has been construed to mean that '[the] beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' This rule, however, does not mean that evidence of the highest and best use of the property must be excluded simply because that is the use that the condemner intends to make of the property. ... [I]n *City of Los Angeles v. Decker,* the court reiterated that it is improper to award compensation based upon the value to the condemner, but held that it was proper in that case to consider the value of the property for parking purposes (the highest and best use) despite the fact that the city intended to use it for such purposes." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1127 [234 Cal.Rptr. 630], internal citations omitted.)

- " 'The right to future exploitation of undeveloped natural resources has a present and ascertainable value for purposes of eminent domain.' Accordingly, ' " [i]n determining just compensation in eminent domain proceedings, the existence of valuable mineral deposits in the land taken constitutes an element which may be considered insofar as it influences the market value of the land." [Citations.]' " (*San Diego Gas & Electric Co., supra,* 228 Cal.App.4th at p. 1289, internal citation omitted.)

- "[Defendant] also argues that the developer's rule precluded defendants' experts from testifying that the highest and best use of the property was a mining operation because such an operation did not currently exist on the property. We reject this assertion as a condemnee may present evidence that the property is suitable for a particular purpose even if the property has not yet been developed to that particular highest and best use. Moreover, ample authority supported the income approach used by defendants where, as here, the property at issue contains undeveloped natural resources." (*San Diego Gas & Electric Co., supra,* 228 Cal.App.4th at p. 1294, internal citation omitted.)

- "Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815-820 set forth various methodologies sanctioned for use by valuation experts, including considering sales contracts of comparable properties and capitalizing income from the subject land and its existing improvements." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 926 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1230

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.9-4.21

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.134 (Matthew Bender)

3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of actor*]'s [*insert tort theory, e.g., assault and battery*] and that [*name of defendant*] is responsible for the harm because [he/she] aided and abetted [*name of actor*] in committing the [*e.g., assault and battery*].

If you find that [*name of actor*] committed [a/an] [*e.g., assault and battery*] that harmed [*name of plaintiff*], then you must determine whether [*name of defendant*] is also responsible for the harm. [*Name of defendant*] is responsible as an aider and abetter if [*name of plaintiff*] proves all of the following:

1. That [*name of defendant*] knew that [a/an] [*e.g., assault and battery*] was [being/going to be] committed by [*name of actor*] against [*name of plaintiff*];

2. That [*name of defendant*] gave substantial assistance or encouragement to [*name of actor*]; and

3. That [*name of defendant*]'s conduct was a substantial factor in causing harm to [*name of plaintiff*].

Mere knowledge that [a/an] [*e.g., assault and battery*] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.

New April 2008

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and

abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141 [69 Cal.Rptr.3d 445].)

- "The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014) No. 3610 …)." *Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 [179 Cal.Rptr.3d 813].)

- "[C]ausation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476 [171 Cal.Rptr.3d 548].)

- "The fact the instruction [CACI No. 3610] does not use the word 'intent' is not determinative. 'California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." (*Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 [173 Cal.Rptr.3d 784], original italics, internal citations omitted.)

- "As noted, some cases suggest that a plaintiff also must plead specific intent to facilitate the underlying tort. We need not decide whether specific intent is a required element because, read liberally, the fifth amended complaint alleges that [defendant] intended to assist the Association in breaching its fiduciary duties. In particular, plaintiffs allege that, with knowledge of the Association's breaches, [defendant] 'gave substantial encouragement and assistance to [the Association] *to breach its fiduciary duties.'* Fairly read, that allegation indicates intent to participate in tortious activity." (*Nasrawi, supra,* 231 Cal.App.4th at p. 345, original italics, internal citations omitted.)

- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be

a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*American Master Lease LLC, supra,* 225 Cal.App.4th at p. 1475.)

- "Restatement Second of Torts … recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] … [¶] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself … .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. … It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra,* 152 Cal.App.4th at pp. 93–94, internal citations omitted.)

- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. … A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. … [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra,* 127 Cal.App.4th at p. 1146, original italics, internal citations omitted.)

- " 'Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " ' " (*Stueve Bros.*

Farms, LLC v. Berger Kahn (2013) 222 Cal.App.4th 303, 324 [166 Cal.Rptr.3d 116].)

- " '[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. …' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at pp. 1475–1476.)

- It appears that one may be liable as an aider and abetter of a negligent act. (See *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708] ["James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement …), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser."], original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 44

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability,* §§ 9.01, 9.02 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.04 (Matthew Bender)

3706. Special Employment—General Employer and/or Special Employer Denies Responsibility

[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant first employer***] when the incident occurred, and that [***name of defendant first employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant first employer***] claims that [***name of worker***] was the temporary employee of [***name of defendant second employer***] when the incident occurred, and therefore [***name of defendant second employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred, the most important factor is whether [***name of defendant second employer***] had the right to fully control the activities of [***name of worker***], rather than just the right to specify the result. It does not matter whether [***name of defendant second employer***] exercised the right to control.**

In addition to the right of control, you must consider all the circumstances in deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred. The following factors, if true, may tend to show that [***name of worker***] was the temporary employee of [***name of defendant second employer***]:**

(a) **[***Name of defendant second employer***] supplied the equipment, tools, and place of work;**

(b) **[***Name of worker***] was paid by the hour rather than by the job;**

(c) **The work being done by [***name of worker***] was part of the regular business of [***name of defendant second employer***];**

(d) **[***Name of defendant second employer***] had an unlimited right to end the relationship with [***name of worker***];**

(e) **The work being done by** [*name of worker*] **was the only occupation or business of [***name of worker***];**

(f) **The kind of work performed by [***name of worker***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of worker***] does not require specialized or professional skill;**

(h) **The services performed by [***name of worker***] were to be performed over a long period of time;**

(i) **[***Name of worker***]'s duties to [***name of defendant second employer***] were only for the benefit of [***name of defendant second employer***];**

(j) **[***Name of worker***] consented to the temporary employment with [***name of defendant second employer***]; and**

(k) **[***Name of worker***] and [***name of defendant second employer***] acted as if they had a temporary employment relationship.**

(l) **[***Specify any other relevant factors.***]**

New September 2003; Revised June 2013

Directions for Use

This instruction is for use if the worker's regular (general) employer claims that at the time of injury, the worker was actually working for a different (special) employer. It may be adapted for use if the plaintiff's claim is against the special employer. The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.

In addition to the alleged special employer's control over the employee, there are a number of relevant secondary factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors from the Restatement Second of Agency, section 220 to be used in an independent contractor analysis. (See CACI No. 3704, *Existence of "Employee" Status Disputed.*) See also *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355] and *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176−177 [151 Cal.Rptr. 671, 588 P.2d 811] for additional factors. In the employee-contractor context, it has been held to be error not to give the secondary factors. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303−304 [111 Cal.Rptr.3d 787].)

Sources and Authority

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "When an employer -- the 'general' employer -- lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51, 645 P.2d 102], internal citations omitted.)

- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)

- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has " '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ...' " However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski, supra,* 23 Cal.3d at p. 175, internal citations omitted.)

- "[S]pecial employment is most often resolved on the basis of 'reasonable *inferences* to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, ... ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248-1249 [250 Cal.Rptr. 718], internal citations omitted.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held." (*Kowalski, supra,* 23 Cal.3d at p. 176.)

- "California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The common law also recognizes factors secondary to the right of control. We have looked to other considerations discussed in the Restatement of Agency to assess whether an employer-employee relationship exists. The comments to section 227 of the Restatement Second of Agency, which covers servants lent by one master to another, note that '[m]any of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer.' The secondary Restatement factors that we have

adopted are: ‘ “(a) [W]hether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.” [Citations.]’ ” (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1013−1014 [-- Cal.Rptr.3d --, -- P.3d --], internal citations omitted.)

- “Evidence that the alleged special employer has the power to discharge a worker ‘is strong evidence of the existence of a special employment relationship. … The payment of wages is not, however, determinative.’ Other factors to be taken into consideration are ‘the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools.’ Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship. [¶¶] In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship.” (*Kowalski, supra,* 23 Cal.3d at pp. 176-178, footnotes and internal citations omitted.)

- [T]he jury need not find that [the worker] remained exclusively defendant's employee in order to impose liability on defendant. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a ‘dual employment’ arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts.” (*Marsh, supra,* 26 Cal.3d at pp. 494−495.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers’ Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers’ Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters ~~West~~)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014

Directions for Use

This instruction sets forth the required-vehicle exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' This exception to the going and coming rule … has been referred to as the 'required-vehicle' exception. The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- "If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932 [237 Cal.Rptr. 718], internal citations omitted.)

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to

and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "[T]he employee's trip was outside the scope of his employment despite the payment of the travel allowance." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1041 [222 Cal.Rptr. 494].)

- "[A]lthough the employment relationship is ordinarily suspended when the employee is going or coming, 'the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of "going and coming," … . Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident to the employment. [Citations.] It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work.' " (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes."(*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 184

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability,* ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3800. Comparative Fault Between and Among Tortfeasors

[*Name of indemnitee***] claims that [he/she] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [name of plaintiff]"***] and that [***name of indemnitor***] must reimburse [***name of indemnitee***] based on [***name of indemnitor***]'s share of responsibility. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [was negligent/[***describe underlying tort***]]; and**

2. **That [***name of indemnitor***]'s [negligence/[***describe tortious conduct***]] contributed as a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [***name of indemnitee***] [and] [***insert identification of others***] [[was/were] negligent/[***other basis of responsibility***]]; and**

2. **That [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***][,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003

Directions for Use

Read the last bracketed portion when the indemnitor claims he or she was not the sole cause.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see CACI No. 406, *Apportionment of Responsibility*.

Sources and Authority

- "[T]he right to indemnity flows from payment of a joint legal obligation on another's behalf." (*AmeriGas Propane, LP v. Landstar Ranger, Inc.* (2014) 230 Cal.App.4th 1153, 1167 [179 Cal.Rptr.3d 330].)

- "The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is … equitably

responsible." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217 [131 Cal.Rptr.3d 41].)

- "In order to attain ... a system ... in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182, 578 P.2d 899], internal citation omitted.)

- "Unlike subrogation, in which the claimant stands in the shoes of the injured party, 'The basis for the remedy of equitable indemnity is restitution. "[O]ne person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." [Citations.] [¶] California common law recognizes a right of partial indemnity under which liability among multiple tortfeasors may be apportioned according to the comparative negligence of each.' The test for indemnity is thus whether the indemnitor and indemnitee jointly caused the plaintiff's injury." (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989 [109 Cal.Rptr.3d 686], internal citation omitted.)

- "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202, 760 P.2d 399], internal quotation marks and citation omitted.)

- "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303].)

- "[W]e hold that ... the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550, 579 P.2d 441].)

- "[Indemnitor]'s liability was not based on its independent acts or omissions, but was based solely on its role as retailer of [manufacturer]'s defectively designed product. As a matter of fundamental fairness, a manufacturer … cannot seek equitable indemnification from a retailer found not to have been negligent or independently at fault, but found to be liable solely under the strict liability theory of design defect. Under these limited circumstances the retailer is not 'at fault' within the meaning of a cause of action for equitable indemnification." (*Bailey, supra,* 199 Cal.App.4th at p. 215.)

- For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781].)

- "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232].)

- Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] [Lab. Code, § 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 112, 115

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, §§ 1.52–1.59

5 Levy et al., California Torts, Ch. 74, *Comparative Negligence*, §§ 74.01–74.13 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 4:14–4:18 (Thomson Reuters~~ West~~)

3900. Introduction to Tort Damages—Liability Contested

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

[*Insert applicable instructions on items of damage.*]

New September 2003

Directions for Use

Read last bracketed sentence and insert instructions on items of damages here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Sources and Authority

- Measure of Tort Damages. Civil Code section 3333.
- Recovery of Damages Generally. Civil Code section 3281.
- Recovery of Future Damages. Civil Code section 3283.
- Damages Must Be Reasonable. Civil Code section 3359.
- " 'Damages' are monetary compensation awarded to parties who suffer detriment for the unlawful act or omission of another; they are assessed by a court against wrongdoers for the commission of a legal wrong of a private nature." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396 [178 Cal.Rptr.3d 604].)
- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- " 'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.' 'The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.… .' " (*Meister, supra,* 230 Cal.App.4th at pp. 396−397, original italics, internal citation omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1552, 1555–1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.41 (Matthew Bender)

~~6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)~~

1 California Civil Practice: Torts, § 5:1 (Thomson Reuters)

3901. Introduction to Tort Damages—Liability Established

If you decide that [*name of plaintiff*] was harmed and that [*name of defendant*]'s [*insert description of cause of action, e.g., "negligence"*] was a substantial factor in causing the harm, you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

[*Insert applicable instructions on items of damage.*]

New September 2003; Revised October 2004, June 2005

Directions for Use

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. See CACI No. 424, *Negligence Not Contested—Essential Factual Elements*.

Read last bracketed sentence and insert instructions on items of damage here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and CACI No. 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items

Read CACI No. 430, *Causation: Substantial Factor*, as the definition of "substantial factor."

Sources and Authority

See the Sources and Authority to CACI No. 3900, Introduction to Tort Damages—Liability Contested.

- ~~Measure of Tort Damages. Civil Code section 3333.~~
- ~~Recovery of Damages Generally. Civil Code section 3281.~~
- ~~Recovery of Future Damages. Civil Code section 3283.~~
- ~~Damages Must Be Reasonable. Civil Code section 3359.~~
- ~~Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for *all* of the~~

damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)

- "Whatever its measure in a given case, it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[there] is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)

- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219.)

- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1552, 1555–1558

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2-1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.41 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts, § 5:1 (Thomson Reuters)

3903N. Lost Profits (Economic Damage)

[*Insert number, e.g.,* "13."**] Lost profits.**

To recover damages for lost profits, [*name of plaintiff***] must prove it is reasonably certain [he/she/it] would have earned profits but for [***name of defendant***]'s conduct.**

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff***] would have received but for [***name of defendant***]'s conduct and then subtract from that amount the expenses [including the value of the [***specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed***]] [***name of plaintiff***] would have had if [***name of defendant***]'s conduct had not occurred.**

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction is not intended for personal injury cases. Instead, use CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207–208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64], internal citations omitted.)

- "In business cases, damages are based on net profits, as opposed to gross revenue." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 397 [178 Cal.Rptr.3d 604].)

- " 'Lost profits, if recoverable, are more commonly special rather than general damages … , and subject to various limitations. Not only must such damages be pled with particularity [citation], but they must also be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 754 [118

Cal.Rptr.3d 531].)

- " '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773−774 [149 Cal.Rptr.3d 614, 288 P.3d 1237]), internal citation omitted.)

- "It is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972 [166 Cal.Rptr.3d 134].)

- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 773.)

- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a … breach of contract … , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] … But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Sargon Enterprises, Inc., supra,* 55 Cal.4th at p. 774.)

- "[I]f the business is … new … or … speculative … , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Meister, supra,* 230 Cal.App.4th at p. 397.)

- "In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr.

815], internal citations omitted.)

- "[T]he case law requires reasonable certainty, not absolute certainty, and once the occurrence of lost profits is established a plaintiff has greater leeway in establishing the extent of lost profits, particularly if the defendant was shown to have prevented the relevant data from being collected through its wrongful behavior." (*Asahi Kasei Pharma Corp., supra,* 222 Cal.App.4th at p. 975.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1729

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:66–3:233 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.27 (Matthew Bender)

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

New September 2003; Revised April 2008, December 2009, December 2011

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional

distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1671–1675

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

1 California Civil Practice Torts, § 5:10 (Thomson Reuters ~~West~~)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of

wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,*

549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of

reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does

not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the

conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- Evidence of Profits or Financial Condition. Civil Code section 3295(d).

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury

that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

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stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

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- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

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425, internal citation omitted.)

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- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

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If you decide that [*name of employee/agent*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages against [*name of defendant*] for [*name of employee/agent*]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of defendant*] for [*name of employee/agent*]'s conduct only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of employee/agent*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of employee/agent*] acted with intent to cause injury or that [*name of employee/agent*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of employee/agent*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

[*Name of plaintiff*] must also prove [one of] the following by clear and convincing evidence:

1. **[That [*name of employee/agent*] was an officer, a director, or a managing agent of [*name of defendant*], who was acting on behalf of [*name of defendant*]; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately

determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents,

use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.:

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an

employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The

precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions

(Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true, … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate

decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168, internal citations omitted.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of defendant*] only if [*name of plaintiff*] proves that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*], who acted on behalf of [*name of defendant*]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**

3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d

525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294..

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA,*

Inc. (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward

> others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee

is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that [*name of individual defendant*]'s or [*name of entity defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of individual defendant*] only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of individual defendant*] engaged in that conduct with malice, oppression, or fraud.

You may award punitive damages against [*name of entity defendant*] only if [*name of plaintiff*] proves that [*name of entity defendant*] acted with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [*name of entity defendant*], who acted on behalf of [*name of entity defendant*]; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of entity defendant*] had advance knowledge of the unfitness of [*name of individual defendant*] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of entity defendant*]; [or]]**

4. **[That one or more officers, directors, or managing agents of [*name of entity defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated,* or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not*

Bifurcated. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's

definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294..

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury

that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate

decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/its] conduct]?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422].) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens,*

supra, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an

award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an

individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due

process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … .” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v.*

Daley (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

4100. "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]].**

New June 2006; Revised December 2010

Directions for Use

This instruction may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.

Sources and Authority

- "A fiduciary relationship is ' " ' any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)

- "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433 [140 Cal.Rptr.3d 569].)

- " ' " [B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." [Citation.]' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338 [147 Cal.Rptr.3d 772].)

- "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency.' But, '[t]hose categories are merely illustrative of fiduciary relationships in which fiduciary duties are imposed by law.' " (*Cleveland, supra,* 209 Cal.App.4th at p. 1339, internal citation omitted.)

- "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140 [173 Cal.Rptr.3d 356].)

- "There is a 'strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders.' " (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395 [178 Cal.Rptr.3d 604].)

- "Any persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill, and ability for the benefit of the company. It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure." (*Cleveland, supra,* 209 Cal.App.4th at p. 1339.)

- "[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 585 [169 Cal.Rptr.3d 39].)

- "It is a question of fact whether one is either an investment adviser or a party to a confidential relationship that gives rise to a fiduciary duty under common law." (*Hasso, supra,* 227 Cal.App.4th at p. 140, internal citations omitted.)

- "[A] third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust." (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 325 [166 Cal.Rptr.3d 116].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 58

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:158 et seq. (The Rutter Group)

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425 et seq. (The Rutter Group)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 167, *Corporations*: *Directors and Management*, § 167.53 et seq. (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.12, 427.23 (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations*, § 52.112 et seq. (Matthew Bender)

6 California Legal Forms, Ch. 12C, *Limited Liability Companies*, § 12C.24[6] (Matthew Bender)

4200. Actual Intent to Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] fraudulently [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases in which the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's fraudulent intent is required. (See Civ. Code, § 3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns a fraudulently incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of fraudulent intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform Fraudulent Transfer Act. Civil Code section 3439.04.
- "Claim" Defined for UFTA. Civil Code section 3439.01(b).
- Creditor Remedies Under UFTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal.Rptr.3d 390, 74 P.3d 166].)
- "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' ~~'A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.'~~" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884]~~, internal citations omitted~~.)
- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became

due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121−122 [173 Cal.Rptr.3d 356], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for … 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment,* which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior

> action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgments, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 4-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:320 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

Item number: 30

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: This does not work for jury instructions as we only have one "project," that of maintaining and expancing CACI.
Project description from annual agenda: No "project" to describe.

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 26 is the first CACI release for 2015. Release 25 was approved on December 12, 2014.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 37 new, revised, renumbered, and revoked CACI instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 57 revised CACI instructions30 under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on June 26, 2015

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
June 26, 2015

Date of Report
April 6, 2015

Contact
Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, revoked, and renumbered civil jury instructions prepared by the committee.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 26, 2015, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the midyear supplement to the official 2015 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new, revised, renumbered, and revoked civil jury instructions and verdict forms are attached at pages 36–155.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council voted to approve the *CACI* 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 *CACI.*

This is the 26th release of *CACI.* The council approved *CACI* release 25 at its December 2014 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 37 instructions and verdict forms: 201, 303, 328, VF-300, VF-303, VF-304, 456, 550, VF-501, 601, 1230, 1500, 1504, 1731, 1806, 1808, 2308, 2432, 2508, 2512, 2702, VF-2702, 3020, 3040, 3041, 3043, 3071, VF-3021, VF-3022, 3700, 3704, 4110, and 4600-4604. Of these, 27 are proposed to be revised, 4 are newly drafted, 1 is proposed to be revoked (CACI No. 1808), and 5 are proposed to be renumbered by moving them to a new series on Whistleblower Actions (CACI Nos. 4600−4604, discussed below).

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 56 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant changes recommended to the council.

New instructions

A recent case, *Holguin v. Dish Network LLC.,* suggested a new instruction in the Contracts series.[3] In this case, the satellite TV company did major damage to a home in the course of performing a contract for installation of a dish. The court held that there is implied in every

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[1] Rule 10.58(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 civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

[3] *Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310.

contract a duty to perform the contract with due care. Not only was the company negligent, but the negligent performance was also a breach of contract. In response, the committee proposes new instruction CACI No. 328, *Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements*.

A judicial officer member of the committee noted that in the Malicious Prosecution series, CACI No. 1500, *Former Criminal Proceeding,* element 1 requires that the defendant have been "actively involved" in causing the prosecution. She suggested that it would be helpful to the courts and counsel to instruct on the substantial body of law as to what constitutes active involvement. The committee now proposes new CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

In the last release, the committee revised CACI 1803, *Appropriation of Name or Likeness—Essential Factual Elements,* to remove a balancing of privacy rights and public interest as an optional element. The Directions for Use were revised to note that even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.[4] But it was further noted that if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense.[5]

In commenting on this change, the State Bar of California Litigation Section Jury Instructions Committee suggested that a new instruction be created on the affirmative defense that requires balancing the plaintiff's right of privacy against the public interest in the dissemination of news and information. In considering the suggestion, the committee decided that the First Amendment balancing test applies as an affirmative defense not only to misappropriation of name and likeness, but also to the other common law torts for invasion of privacy (false light, intrusion into private affairs, and public disclosure of private facts).[6] The committee now proposes new CACI No. 1806, *Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest*.

A recent case, *Kao v. University of San Francisco*, included a cause of action under Civil Code section 56.20(b) for retaliation against an employee for refusing to disclose medical information requested by the employer without good cause.[7] The committee proposes new instruction CACI No. 3071, *Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements,* for use in claims under this statute.

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[4] See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409.

[5] Cf. *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407; CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.

[6] See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214−242; *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278−279.

[7] *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437.

CACI currently includes three instructions on Eighth Amendment violations of prisoners' federal civil rights under title 42 United States Code section 1983. Until the last release, CACI No. 3040 addressed "general conditions of confinement."[8]

In reviewing the substantial case law coming from the federal courts in prisoner rights cases, the committee concluded that the "general conditions of confinement" cases really fell into two separate categories: those involving a substantial risk of serious harm to the prisoner (*risk* cases) and those involving depriving the prisoner of necessities of life (*deprivation* cases). And while there is considerable overlap in the elements of the two kinds of claims, there are also some differences.

Therefore, in the last release, the committee narrowed and renamed CACI No. 3040 to apply only to risk cases.[9] In this release, the committee now proposes new CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities,* for use in deprivation cases.

Revoked instruction (CACI No. 1808)

CACI No. 1808, *Stalking,* is for use in a statutory tort claim for stalking made under Civil Code section 1708.7. In 2014, the Legislature amended this statute substantially so that the current instruction no longer completely and accurately expresses the statutory elements.[10] The legislative amendments made the statute considerably more complex. For example, emotional distress is now presented not as the harm resulting from the stalking, but as an alternative to the element requiring reasonable fear for safety (current element 2 of 1808). Then both an objective "reasonable person" and a subjective standard are now required to constitute sufficient distress.[11]

Staff drafted a revision of CACI No. 1808 that addressed the statutory changes. The committee agreed that the draft accurately reflected the statute as amended but found the resulting instruction to be exceedingly complex and confusing. Efforts to make the draft more user-friendly in plain language proved unsuccessful.

Committee members noted that there are no annotations for this statute on Lexis.com. Further, no judicial officers on the committee had ever presided over or heard of an action brought under the statute. Stalking cases are commonly addressed under the various protective order statutes. Given the lack of any indication that the statute is ever used and the struggle to draft a comprehensible revision, the committee decided to present the possible revocation of the instruction for public comment.

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[8] The other two are CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care,* and CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force.*

[9] CACI No. 3040 is now titled *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm.*

[10] See Assem. Bill 1356 (Stats 2014, ch 853).

[11] Civ. Code, § 1708.7(a)(2)(B).

No comments were received objecting to the revocation of the instruction. Therefore, the committee proposes revocation of CACI No. 1808, either permanently or provisionally. Some members have not given up on drafting a usable replacement instruction, so it is possible that a proposal to revise and restore the instruction in the next release could be presented. However, such a course is in no way assured, and the assumption at this time is that revocation will most likely be permanent.

New series on Whistleblower Actions (CACI Nos. 4600−4604)

CACI currently has five instructions under three whistleblower statutes. CACI No. 2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements,* is based on Government Code section 12653 in the False Claims Act. It is currently located in the Wrongful Termination Series. CACI No. 2442, *Protected Disclosure by State Employee─California Whistleblower Protection Act─Essential Factual Elements,* is based on Government Code section 8547.8(c); it is also in the Wrongful Termination Series.[12] CACI No. 2730, *Whistleblower Protection—Disclosure of Legal Violation—Essential Factual Elements,* is based on Labor Code section 1102.5; it is located in the Labor Code Actions series.[13]

The committee has struggled with the limitation imposed by the title Wrongful *Termination* for the 2400 series. Statutes protecting employees from wrongful termination, including these whistleblower statutes, also protect employees from other adverse employment actions other than termination. The committee's current approach is to limit the text of the instructions in the 2400 series to termination and then to mention in the Directions for Use that other adverse actions are within the statute.

Several members felt that the whistleblower statutes were not good fits in the Wrongful Termination series. Claims for whistleblower protection are becoming increasingly common, and there are other statutes that are candidates for instructions in the future.[14] Therefore, the committee proposes moving the current whistleblower instructions to their own series, CACI No. 4600 et seq.

Breach of contract─plaintiff's performance and conditions precedent

CACI No. 303, *Breach of Contract—Essential Factual Elements,* includes two optional elements. Optional element 2 requires that the plaintiff either have performed all of the significant things that the contract required him or her to do to trigger the defendant's duty to perform, or that the plaintiff was excused from having to do those things. Optional element 3 requires that all conditions precedent either have occurred or were excused. These same optional

[12] See also CACI No. 2443, *Affirmative Defense─Same Decision,* under Gov. Code, § 8547.8(e).

[13] See also CACI No. 2731, *Affirmative Defense─Same Decision,* under Lab. Code, § 1102.6.

[14] See, e.g., Health & Saf. Code, § 1278.5 (complaints about hospital patient care), Lab. Code, § 6310 (complaints about workplace health and safety conditions).

elements are presented as optional questions in CACI Nos. VF-300, *Breach of Contract*, and VF-303, *Breach of Contract—Contract Formation at Issue*.

In two recent unpublished cases, the jury struggled with these questions on the verdict form.[15] The jury appeared to confuse the occurrence or waiver of conditions precedent with waiver of the defendant's performance. In neither case was the court or counsel able to give proper guidance to the jury as to how to work through these questions on the verdict form.[16] From the facts presented, whether any conditions precedent actually were at issue in either case was unclear.

The committee was concerned that these cases indicated that there may be a lack of clarity as to how to address plaintiff's performance, conditions precedent, and defendant's performance, all of which present a possibility of excuse or waiver. It was noted that CACI No. 303 and verdict forms VF-300 and VF-303 were inconsistent in the way that these elements and questions are presented.

The committee concluded that part of the problem might be because the same verdict form question asked about both performance/occurrence and excuse/waiver as alternatives. It decided to divide the questions so as to first ask whether plaintiff performed the contractual requirements. If the jury answers no, it is then asked (if waiver is alleged) whether the plaintiff's performance was excused or waived. Similarly, the jury is first asked whether all of the conditions precedent required to trigger the defendant's obligation to perform occurred. If the jury answers no, it is then asked whether occurrence was waived or excused (if at issue). CACI No. 303 was conformed to present the elements in the same way as done in the verdict form questions.[17]

Finally, the committee decided that if the occurrence of conditions precedent is an issue in the case, it is important to let the jury know just exactly what those conditions precedent are. CACI No. 300 has been revised to require the drafter to specify the conditions precedent that must occur before the defendant's duty to perform the contract is triggered. The committee hopes that this revision will alert bench and bar not to include the conditions precedent element and question if no conditions precedent are at issue in the case.

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[15] See *Wang v. TDS Group* (2014) Cal.App.Unpub. Lexis 8109, and *Hines v. Premier Power Renewable Energy* (2014) Cal.App.Unpub. Lexis 8489. While the committee never cites unpublished cases in CACI, it does look to them for information about how CACI is being implemented in the courts.

[16] In *Wang,* the judge told the jury to continue to answer questions even if it found that conditions precedent neither occurred nor were waived, contrary to the transitional language in the verdict form, which tells the jury to stop if there is neither occurrence nor waiver (excuse). The appellate court found this to be reversible error.

[17] CACI No. VF-304, *Breach of Implied Covenant of Good Faith and Fair Dealing,* has also been conformed.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 19 to February 27, 2015. Comments were received from 10 different commentators. No proposal generated a particularly large number of comments. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 9–32.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. The proposed new, revised, revoked, and renumbered instructions are presented to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a midyear supplement to the 2015 edition and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Charts of comments, at pages 9–32
2. Full text of *CACI* instructions, at pages 36–155

Instruction	Commentator	Comment	Committee Response
201, *Highly Probable—Clear and Convincing Proof*	Kenneth N. Greenfield Attorney at Law, San Diego	Rather than simply have the term "highly probable," I believe the term should be "very highly probable." This is because the "clear and convincing" burden of proof generally applies to a finding of punitive damages. Punitive damages are a penalty and should be as close to the "beyond a reasonable doubt" standard.	*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 endorses the instruction as written. The court says it does not need to be augmented with stronger language.
	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I like the change in the title of CACI 201. Definitely clearer explanation of standard.	No response is necessary.
303, *Breach of Contract—Essential Factual Elements*	Kenneth N. Greenfield Attorney at Law, San Diego	Element 5: Rather than say just "that [*plaintiff*] was harmed," since causation is an important element in breach of contract cases, the element could read "that [*plaintiff*] was harmed by the defendant's breach of the contract."	The committee agreed with the comment and has made the proposed change.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The committee agrees with the revisions to element 2.	No response is necessary.
		We disagree with the revisions to the first option in element 3. We believe that listing all conditions precedent in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.	The committee was concerned that in two unpublished cases, *Wang v. TDS Group,* 2014 Cal. App. Unpub. LEXIS 8109 and *Hines v. Premier Power Renewable Energy,* 2014 Cal. App. Unpub. LEXIS 8489, the jury was unable to properly answer the verdict form question on conditions precedent and their waiver. In *Wang*, the court gave the jury incorrect information as to how to address this question, which was held to be reversible error. The committee's hope is that by requiring that the conditions actually be identified, this confusion will be eliminated.

Instruction	Commentator	Comment	Committee Response
		We agree with the proposed revisions to the second option in element 3, but we suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected.	There already is a cross reference to CACI No. 323, *Waiver of Condition Precedent*.
328, *Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that listing all conditions precedent in the first option in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.	See response above to similar comment on CACI No. 303.
		We suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected in the second option in element 3.	The committee does not believe that the discussion in the Directions for Use to CACI No. 303 on the elements of a breach of contract needs to be repeated in other instructions. However, a cross reference to No. 303 for this discussion is appropriate and has been added.
		The first two sentences in the Directions for Use may be misconstrued to mean that this proposed new instruction should be given in every breach of contract case. We suggest adding an initial sentence to dispel that impression, stating, "Give this instruction if the plaintiff alleges a failure to perform a contractual obligation with reasonable care."	The committee agreed with the comment and has added a slightly modified version of the suggested opening sentence.
VF-300, VF-303: Breach of Contract Verdict Forms	Kenneth N. Greenfield Attorney at Law, San Diego	Question 7 (of VF-300) should follow the same language as CACI No. 303 in that there should be a finding that plaintiff was "harmed by defendant's breach of the contract."	The committee agreed with the comment and has made the change. The same change has also been made to CACI No. VF-303.
VF-300, VF-303, VF-304: Breach of Contract Verdict Forms	Orange County Bar Association, by Ashleigh E. Aitken, President	The proposed changes are acceptable, except for the "alternative" provisions dealing with performance/excused performance (VF 300 question 2, VF 303 question 4, VF 304 question 2), and satisfaction/excused conditions (VF 300 question 7, VF 303 question 7, VF 304 question 4). The existing language for these questions in verdict forms 300, 303 and 304 is somewhat confusing, but the	The committee appreciates that this comment shows clear understanding of the reasons for the proposed changes. But the only change proposed is to the transitional language between questions 2 and 3. The commentator's

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		proposed changes do not really improve the verdict forms, and may confuse things even more. Specifically, the verdict forms attempt to address the fact that, in a contract case, a plaintiff must either have performed all, or substantially all, of the things required of him/her/it under the contract, OR must have been excused from performance in some way. Likewise, any conditions precedent for performance must have occurred OR have been excused. Using the question of "performance" as an example (the same analysis applies to the wording for the "conditions" question), the proposed new wording attempts to give the jury the ability to either find the plaintiff has performed, and thereby move on to other questions, or to find that the plaintiff has not performed, but then decide whether plaintiff's performance was excused before moving on to the next questions. However, the proposed wording and parenthetical alternatives are confusing, and although they may be no more confusing than the existing language, if the verdict forms are going to be revised, the revisions should accomplish the task. The recommended language for Paragraph 2 of VF-300 and VF-304, and Paragraph 4 of VF-303, would be as follows: 2. Did (plaintiff) do all, or substantially all, of the significant things that the contract required (him/her/it) to do? ____Yes ____No If your answer to question 2 is yes, skip question 3 and answer question 4. [(If excuse is at issue) (If you answered no, then answer question 3] [If excuse is not at issue) (If you	questions themselves are the same, and the transitional language between questions 3 and 4 is the same. The committee does not find that the commentator's proposed language is an improvement. And it is not completely correct because it does not bracket "skip question 3." If excuse is not at issue, there will be no question 3.

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		answered no, then answer no further questions, and have the presiding juror sign and date this form.] The same type of clarification would be in order for the questions on conditions precedent met or excused.	
VF-303, VF-303. *Breach of Contract—Contract Formation at Issue*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest adding the words "waiver or" before "excuse" in the transitional language following question 6 because question 7 concerns not only excuse but also waiver.	The committee agreed and has added "waiver or."
		We agree with the other revisions to this verdict form and the Directions for Use.	No response is necessary.
456, *Defendant Estopped From Asserting Statute of Limitations Defense*	Arthur Curley, Attorney at Law, Bradley, Curley, Larkspur	CACI 456 element 5 is worse when substituting "facts". Better to simply say: "discovered #4 above."	The committee does not see any concerns with the requirement that the plaintiff have acted once the "need to proceed" was discovered.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that element 4 does not accurately state the law and that making it optional as proposed fails to solve this basic problem. Element 4 makes no allowance for the situation in which the defendant induces the plaintiff to refrain from filing a lawsuit, and the plaintiff discovers the falsity before the statute has run and proceeds diligently after discovering the facts, but files suit after the statute has run. *Lantzy v. Centex Homes* (2003) 31 Cal.4th 836 did not discuss this possibility. It seems unlikely that *Lantzy* at page 384 ("(3) the representation proves false after the limitations period has expired"), without even discussing this possibility, intended to preclude equitable estoppel in those circumstances. Other language in *Lantzy* suggests to the contrary that equitable estoppel may arise if the defendant induced the plaintiff to refrain from filing suit and the plaintiff acted diligently after he or she learned the true facts. (*Id.* at pp. 384-385.) *Superior Disptach, Inc. v. Insurance Corp. of New York* (2010) 181	The commentator's concern appears to be that that discovery might come so late that a complaint cannot be drafted before the statute runs. But to address what would seem to be a rare occurrence, the committee would need some direct authority. *Superior Dispatch* does not provide that authority. It does not involve "too late to respond" facts. Further, the language quoted is that "the defendant's act or omission caused the plaintiff to refrain from filing a *timely* suit." If the deadline is missed, the suit is not "timely."

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		Cal.App.4th 175, 186 (citing *Lantzy* and other cases), stated the rule in language that does not require the plaintiff to discover the falsity after the limitations period has expired: "A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable." We believe that this is correct and that *Lantzy* did not hold otherwise	
		We also believe that element 4 should be mandatory and should state the basic requirement that the defendant's representations by words or conduct were false. Accordingly, we would modify element 4 as follows: "~~[~~That ~~after the limitations period had expired,~~ [*name of defendant*]'s representations by words or conduct ~~proved to not be true~~ were false; and~~]~~"	The court in *J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323, 335 clearly pointed out that falsity is not required in all cases.
		We would prefer greater specificity in element 5 and consistent use of the term "lawsuit" rather than "suit." We would modify element 5 as follows: "That [*name of plaintiff*] proceeded to diligently file a lawsuit once [he/she/it] discovered that [*name of defendant*]'s representations were false~~ the need to proceed~~."	The committee does not believe that there is any need to avoid "file suit" in this element.
		We would delete the new language added at the end of the Sources and Authority for the reasons stated above.	The committee does not know what language the commentator is referring to. The only additions to the Sources and Authority are two excerpts from *JP,* one of which explains why element 4 is not mandatory.
		We note that a petition for review was filed in *J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323 and suggest keeping an eye on that.	Review was denied on February 25

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601, *Negligent Handling of Legal Matter*	Hon. Harold W. Hopp, Judge of the Superior Court, Riverside County	The last sentence of instruction 601 is awkward. Either "[*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred anyway" OR "[*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred without that conduct" but not "if the same harm would have occurred anyway without that conduct." Including "anyway" and "without that conduct" seems unnecessary and to read poorly.	The committee believes that both "anyway" and "without that conduct" aid comprehension.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Under "Sources and Authority", the second bullet point citing *Namikas v. Miller*, add ", citing *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 591 [40 Cal.Rptr.3d 446].)	CACI format is to generally not to note that a case excerpt is citing another case. That is a very common situation, which would complicate citation format. The notation "internal citations omitted" sufficiently advises the user that the case is relying on prior authority.
1230, *Express Warranty—Essential Factual Elements*	Orange County Bar Association, by Ashleigh E. Aitken, President	New last case excerpt under Sources and Authority: should read: "Neither Magnuson–Moss nor the ~~California Uniform~~ Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song–Beverly." (*Orichian, supra,* 226 Cal.App.4th at 1331, **fn. 9**; see CACI No. 3204, "Substantially Impaired" Explained.)	The commentator is correct about adding fn. 9, but the words "California Uniform" are in the opinion.
1504, *Former Criminal Proceeding—"Actively Involved" Explained*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that this proposed new instruction does not clearly express the two requirements for "actively involved" as articulated in the case law: (1) seeking out the police or prosecuting authorities and (2) reporting false information to them. (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720; *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481-1482.) We would prefer an	The committee agreed with the comment and has revised the instruction accordingly.

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		instruction clearly enumerating these two requirements using similar language.	
		We also believe that the final sentence in the instruction could be misconstrued to mean that giving false testimony or providing false information to law enforcement cannot support active involvement. If the point is that giving false testimony or providing false information alone is insufficient if the person did not seek out the police or prosecuting authority, that should be stated more clearly.	This sentence is not about *false* testimony; just testimony in general. The word "merely" leaves open the possibility that giving false testimony could be "active involvement."
1731, *Trade Libel—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that this revised instruction does not clearly express the essential elements. The current instruction does not state that the disparagement must be either express or by clear implication. The proposed revision adds the optional language "[would be clearly or necessarily understood to have]" describing the disparaging statement. This covers by clear implication, but does not cover expressly. We suggest replacing element 1 with two elements stating: 1. That [*name of defendant*] made a statement that [expressly] [or] [by clear implication] specifically referred to [*name of plaintiff*]'s [product/service]. 2. That [*name of defendant*]'s statement [expressly] [or] [by clear implication] disparaged the quality of [*name of plaintiff*]'s [product/service]."	The committee believes that its proposed language is sufficiently clear and that two separate elements are unnecessary. If the statement "disparaged" the product, it implicitly "referred to" the product.
		We would modify the Directions for Use to state that one of the two alternatives in elements 1 and 2 should be selected, or select both in the disjunctive if the evidence could support either alternative.	As the committee disagrees with the above comment, this comment is moot.
		We suggest adding to the Sources and Authority the following language from *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277 stated: "We hold that a claim of disparagement	*Hartford* is cited in the Directions for Use, and there are four excerpts in the Sources and Authority. The committee believes that the case is sufficiently

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		requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication." (59 Cal.4th at p. 284.) ". . . The related requirements of derogation and specific reference may be satisfied by implication where the suit alleges that the . . . false and misleading statement necessarily refers to and derogates a competitor's product." (Id. at p. 294.) "A 'reasonable implication' in this context means a clear or necessary inference."	addressed.
2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*	David diRobertis, on behalf of the California Employment Lawyers Association	CELA commends and agrees with the concepts sought to be covered by the proposed revision to the last paragraph of CACI No. 2432. Consistent with *Turner v. Anheuser Busch, Inc.* (1994) 7 Ca1.4th 1238, the instruction should make clear that a constructive discharge can occur based on *either* an unusually aggravated situation *or* a continuous pattern of employer-created intolerable working conditions, as we believe the proposed change seeks to do.	No response is necessary.
		Nonetheless, CELA submits that the addition of the phrase "employer misconduct" results in a misstatement of law because it instructs the jury that the "continuous pattern" must be a "continuous pattern *of employer misconduct*." The fact that the court in *Turner* recognized that an employer can be held to have constructively terminated an employee by merely *knowingly permitting intolerable working conditions to exist* reinforces the point that the employer itself need not actually commit any "misconduct" for a constructive discharge to be proven. (*Turner, supra,* 7 Cal.4th at p. 1250 [constructive termination can be established by proof that employer "created or knowingly permitted working conditions to remain intolerable"].)	The committee agreed with the comment and has replaced "employer misconduct" with "mistreatment." The "intentionally created or knowingly permitted" requirement is contained in element 3. That encompasses the level of involvement required to establish employer liability. *Turner* does not otherwise tie the continuous pattern to employer misconduct.
	Joseph M. Earley	I strongly oppose the addition of the	To the extent that the

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	III, Attorney at Law, Paradise	"continuous pattern of employer misconduct" language to the instruction. It is not only effectively a bar to most valid constructive discharge claims, but it is also inconsistent with very case from which the language arises. If anything, the instruction should clarify that "in some cases a single intolerable event ... may constitute a constructive discharge." That is also in the *Turner* case. Clearly someone is proposing that unreasonably difficult standard to prevent valid cases from going forward. It should not be considered.	commentator is making the same point that CELA made above about "employer misconduct," the committee agreed.
	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 2432 is an improvement that will make the instruction easier for jurors to understand.	No response is necessary.
2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation*	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 2508 is an improvement that will make the instruction easier for jurors to understand	No response is necessary.
2512, *Limitation on Remedies—Same Decision*	David diRobertis, on behalf of the California Employment Lawyers Association	CELA commends and agrees with the change to include the requirement that the employer would have made the same decision at the same time as consistent with *Harris v. City of Santa Monica* (2013) 56 Ca1.4th 203. This requirement is expressly stated in *Harris*, and it is key limitation on the defense, which must be incorporated into the instruction to ensure it accurately states the law. (*Harris, supra,* 56 Ca1.4th at 224 ["To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*."], italics added.)	No response is necessary.
2702, *Nonpayment of Overtime Compensatio*	Joseph M. Earley III, Attorney at Law, Paradise	I strongly oppose the addition of the nearly impossible to prove standard for unpaid overtime that the employer must have "known or should have known" its	This revision is compelled by a recent appellate opinion.. (See *Jong v. Kaiser*

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n—Essential Factual Elements		employee was not receiving legal compensation. The public policy is that employees are to be compensated fully and that should not depend on the employer's negligence. Whoever is suggesting this revision wants to prevent valid cases from going forward - and to prevent employees from getting paid for their work.	*Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 ["[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation"].)
3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P. Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	The proposed instruction incorrectly implies that the jury is to make a retrospective determination about what would have been the most appropriate use of force. This would be legal error as courts are instructed not to view events with new information or hindsight.	This comment is beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle. However, the committee notes that what the United States Supreme Court has said about hindsight is: "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham v. Connor* (1989) 490 U.S. 386, 396.) So application of the objective "reasonable officer" standard is not a retrospective determination.

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		The proposed revisions to the instruction assume incorrectly that the existence of one reasonable use of force in response to a situation precludes the possibility that other responses might also have been in the range of reasonable responses.	This comment is also beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle.
		The proposed new paragraph for the Directions for Use incorrectly instruct juries not to consider the third element (whether force was used in the performance of official duties) in the context of a common-law negligent-use-of-force claim. While the elements of a general negligence claim do not include an "official duty," negligent use of force in the context of an arrest or other seizure is necessarily a function of law enforcement. For peace officers, the "duty" element of negligent use of force derives from their performance of "official" duties; hence, the third element should not be omitted.	The committee agreed with the comment and has removed the reference to deleting the third element in a negligence case.
		Revise paragraph between elements and factors as follows: Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine <u>whether a reasonable law enforcement officer could have used the same force</u> under the same or similar circumstances. <u>As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.</u> You should consider, among other factors, the following:	This comment is also beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle. The committee did make several minor clarifying revisions to this paragraph.
		Add to the *Graham* factors:	The committee agreed

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		(d). The amount of time during which the officer had to determine the type and amount of force that appeared to be necessary and any changing circumstances; (e). The type and amount of force used; [(f). The availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;] [(g). Other factors particular to the case.]	to add an "other" option per the comment's suggested optional factor (g). With regard to suggested additional factors (d), (e), and (f), the Directions for Use say: "The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case." The committee believes that specific additional factors are not appropriate as they would be seen as equal to the *Graham* factors.
		In Sources and Authority, delete excerpts from *Torres v. City of Madera* and *Sandoval v. Las Vegas Metro. Police Dep't*. These are jury instructions; for brevity, statements regarding whether summary judgment is appropriate should be omitted.	The committee is more concerned with providing guidance to CACI users rather than in brevity. The *Torres* excerpt is particularly appropriate because it states that the question of excessive force is one of fact, not of law. This is an important point for every jury instruction and a CACI standard for inclusion. The *Sandoval* excerpt also addresses the court's intrusion into the role of the factfinder.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Statement of law and citation to *Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F. 3d 1154, 1167 may need to be withdrawn as a Petition for Certiorari is pending (Nov. 6, 2014) and statement of law and citation to Sheehan v. City & County of San Francisco (9th Cir. 2014) 743 F.3d 1211 should be withdrawn as a Petition for Certiorari has been granted in *City & County of San*	The excerpt from *Sheehan* has been removed. The committee is not inclined to remove an excerpt solely on the filing of a petition for certiorari given the small number of

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		Francisco v. Sheehan (135 S. Ct. 702, 190 L. Ed. 2d 434, 2014 U.S. LEXIS 7830, 83 U.S.L.W. 3326).	certiorari grants.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The two cases cited in the new third paragraph both recognize a negligence claim based on a peace officer's unreasonable use of deadly force. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 628-639 [referred repeatedly to a duty relating to the use of deadly force]; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 505-506, 512-514 [plaintiffs alleged unreasonable use of deadly force].) These cases support potential negligence liability in cases involving use of deadly force, but they do not necessarily support negligence liability in other excessive force cases. We would describe the potential negligence claim more specifically as a claim based on the use of deadly force, rather than "a negligence claim under California common law based on the same events and facts." The "same events and facts" as a section 1983 case may or may not involve the use of deadly force. Accordingly, we would modify this paragraph as follows: "This instruction may be used without element 3 in a negligence claim under California common law based on the ~~same event and facts~~ use of deadly force. The *Graham* factors apply under California negligence law in those circumstances. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if ~~earlier~~ tactical conduct and decisions preceding the use of deadly force show, as part of the totality of circumstances, that the ~~make the~~ ultimate use of deadly force was unreasonable."	*Hayes* and *Hernandez* are both deadly force cases, so the courts repeatedly refer to a duty relating to the use of deadly force. But nowhere do they expressly limit their scope to wrongful death cases. The committee believes that their holdings apply to other excessive force cases also. The result should not be different with an injured plaintiff rather than a decedent.
		We would note the potential need to modify this instruction in light of the differing state and federal standard. "Federal law under the Fourth Amendment, in contrast, "tends to focus	The committee agreed with the comment. The committee has revised the last paragraph along the lines of the suggested additional last

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		more narrowly on the moment when deadly force is used [citation]." (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal. Rptr. 3d 684, 305 P.3d 252].) In light of this difference, this instruction may be modified if the negligence claim is based in part on tactical conduct and decisions preceding the use of deadly force."	sentence, but with some specific directions on how to modify the instruction.
		We believe that the proposed new eighth bullet point in the Sources and Authority adds nothing of value to the other cases cited, so we would delete it.	The committee disagrees. As noted above, the committee believes that the excerpt from *Sandoval* appropriately notes the intrusion of the court into the proper role of the jury.
3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest that the first sentence in the second paragraph of the Directions for Use be modified in the same manner as in the Directions for Use for CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*: "duties created ~~pursuant to~~ by any state county, or municipal law . . ."	The committee agreed and has made this change.
		The Directions for Use for CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities,* include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction. with an appropriate citation.	The committee agreed and has added this introductory paragraph.
3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P.	The proposed revision breaks up the "deliberate indifference" inquiry into two elements, which is appropriate. But the text of the elements as proposed misstates the law. The proposed version does not make clear the true nature of the claim, i.e., that a prison official's deliberate indifference to a prisoner's serious medical need is a form of cruel and	The committee's view is that the term "deliberate indifference" should be avoided. All that the committee is proposing is to convert the explanation of "deliberate indifference" from an

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	Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	unusual punishment within the meaning of the Eighth Amendment. This is mitigated somewhat by the current specific references to deliberate indifference, most significantly in the third full paragraph ("To establish 'deliberate indifference'. . ."). However, deletion of these specific references to deliberate indifference would further widen the gap between the true nature of the claim and the description in CACI 3041. In fact, the proposed instruction would describe a claim closer to negligence than a federal constitutional violation. It could also confuse juries since the natural alternative claim is medical negligence. The revision focuses upon "treating" a condition, i.e., whether the need "went untreated" and whether the defendant failed to take "reasonable steps to treat" that need. But the concept of deliberate indifference in violation of the Constitution's Eighth Amendment is both broader and narrower than the revision reflects. Thus, the focus upon "reasonable steps to treat" a condition or whether such condition went untreated is both too narrow and too broad. It excludes defendants who may delay or interfere with medical treatment, and may encompass unreasonable, negligent conduct. Three alternative approaches are proposed. The first is to make no changes; the second is to adopt the 9th Circuit instruction. The third is to revise elements 2 and 3 as follows: ~~2. That [name of defendant] knew that [name of plaintiff] faced a substantial risk of serious harm if [his/her] medical need went untreated;~~ 2. The [*name of defendant*] knew of [*name of plaintiff*]'s serious medical need;	explanatory paragraph into elements so as to avoid use of the term. The commentator's preferred option is for no change to the instruction. This would seem to indicate acceptance of the current paragraph on deliberate indifference. The committed does not understand why the same language is unacceptable as converted into elements. The committee does not believe that CACI should adopt 9th Circuit instructions. Nor does the committee find the commentator's proposed language for deliberateindifference in elements 2 and 3, for the most part, to be an improvement. First, "substantial risk of serious harm" is omitted, which is the most important language for medical care cases. "Conscious disregard of an excessive risk" is proposed, and this language comes directly from the new case *Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066, which is now included in the Sources and Authority. Because "excessive" is not the same as "substantial," the committee does not

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		~~3. That [name of defendant] disregarded that risk by failing to take reasonable steps to treat [name of plaintiff]'s medical need;~~ 3. That, with conscious disregard for an excessive risk to [*name of plaintiff*]'s health or wellbeing, [*name of defendant*] failed to take reasonable measures to address that need;	agree that this language should be used. The committee does agree that perhaps its proposed language "[defendant] disregarded the risk by failing to take" sounds too much like negligence. Element 3 has been revised by adding "conscious" to "disregard" and replacing "failing to take" with "not taking." The committee believes that these changes move the language away from suggesting that nothing more than negligence is required.
		The proposed instruction also eliminates the passage "[n]egligence is not enough to establish deliberate indifference" under the Eighth Amendment. But this is an accurate statement of the law and so should remain. (See *Farmer v. Brennan* (1994) 511 U.S. 825, 835; *Estelle, supra,* 429 U.S. at 106; accord *Ochoa, supra,* 39 Cal.3d at 175 ["a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."].)	The committee agreed and has restored this sentence, omitting use of "deliberate indifference."
		The instruction should include an explanation that a difference of opinion between medical providers, or between a physician and patient, regarding the appropriate course of treatment does not establish a claim for violation of the Eighth Amendment. (See *Sanchez v. Vild* (9th Cir. 1989) 891 F.2d 240, 242; *Franklin v. State of Oregon* (9th Cir. 1981) 662 F.2d 1337, 1344; see also *Estelle, supra,* 429 U.S. at 107 [whether additional tests were indicated is "a classic example of a matter for medical judgment" and not an Eighth Amendment	The committee has added reference to differences of opinion as not being sufficient.

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		violation].)	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The Directions for Use for CACI No. 3043, Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities, include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3040, Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Harm. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction.	The committee agreed and has added this introductory paragraph.
3071, *Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements*	Orange County Bar Association, by Ashleigh E. Aitken, President and State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Reference to Civil Code § 52.20(b) in title should be Civil Code § 56.20(b)	This error has been fixed.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest adding the word "Even" at the beginning of the last paragraph in the instruction.	The committee agreed and added "Even."
		Although the trial court in *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 253, instructed that the refusal to release medical information must be "the motivating reason" for the retaliation and that necessity is a defense, and the Court of Appeal stated that the instruction was consistent with the statute and case authority, the issue in *Kao* was not the causation standard but the necessity defense. *Kao* held that the evidence supported the finding that the defendant's business necessity justified the plaintiff's discharge for refusing to release medical information. *Kao* did not hold that "the motivating reason" was the proper causation standard, and we believe that the opinion should not be cited on that point. Accordingly, we would modify the third paragraph of the	The committee does not see any reason to make this change. The fact that causation was not the issue in *Kao* does not mean that it is wrong or misleading to note that the instruction given in the case used "motivating reason."

Instruction	Commentator	Comment	Committee Response
		Directions for use as follows: "The statute requires that the employer's retaliatory act be 'due to' the employee's refusal to release the medical information. (Civ. Code, § 56.20(b).) ~~One court has instructed the jury that the refusal to release must be 'a motivating reason' for the retaliation. (See *Kao*, *supra*, 229 Cal.App.4th at p. 452.) With regard to the causation standard under the Fair Employment an dHousing Act, t~~The California Supreme Court has held that the protected activity must have been a *substantial* motivating reason to establish causation under the Fair Employment and Housing Act. (~~See~~ *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49] see also CACI No. 2507, *'Substantial Motivating Reason' Explained*.)"	
VF-3022, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P. Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	Same issues as with CACI No. 3041	The committee has made the same minor changes to question 3 that it made to the corresponding element in 3041.
3700, *Introduction to Vicarious Responsibilit y* 56	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 3700 is an improvement that will make the instruction easier for jurors to understand	No response is necessary.

Instruction	Commentator	Comment	Committee Response
3704, *Existence of "Employee" Status Disputed*	Joseph M. Earley III, Attorney at Law, Paradise	I strongly oppose the suggested alteration of factor (i) from "acted as if" to "believed that". This creates a virtual impossibility to utilize this factor to prove a valid employment relationship if one must prove that both parties "believed" anything. Adding a requirement of that level of mental state will make that factor ALWAYS argue against an employer-employee relationship. The original standard of "acting as if" there was such a relationship makes infinite better sense – unless someone is trying to unfairly tilt the scales against a finding of an employer-employee relationship. Unfortunately, that seems to be the case here.	Both the Restatement and the California Supreme Court have phrased this factor in terms of beliefs, not acts. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [factor (h) "whether or not the parties *believe* they are creating the relationship of employer-employee"]; Restatement 2d of Agency, § 220, factor (i).)
	Horvitz & Levy, by Robert H. Wright	The right to discharge does not tend to show an employment relationship because, both under the ordinary understanding of that term and under the case law addressing the right to discharge, employees and independent contractors are equally subject to discharge. A right of "discharge" is distinct from the "unlimited" right of discharge. The CACI instructions already provide that one factor tending to show an employer-employee relationship is the employer's "*unlimited* right to end the relationship." (CACI No. 3704, emphasis added.) Similar language can be found in case law. (*Burlingham v. Gray* (1943) 22 Cal.2d 87, 100 [" 'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so' " (emphasis added)]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 875 ["the *unlimited right* to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment" (emphasis added)].) The courts have reasoned that an unlimited right to end the relationship shows the element of control that is the hallmark of an	The committee share's the commentator's concern that the statement from the California Supreme Court in *Ayala*: "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause," raises concerns. The committee agrees that the hirer of an independent contract can also terminate the relationship with or without cause. But the committee does not accept the comment's attempts to rationalize the statement on the basis of whether the right to terminate is "unlimited." Either relationship may include a contractual provision limiting this right of termination. So

Instruction	Commentator	Comment	Committee Response
		employer-employee relationship. (*Press Pub. Co. v. Industrial Acc. Com.* (1922) 190 Cal. 114, 119-120.) Indeed, cases recognize that independent contractors, just like employees, are subject to discharge. Thus, an at-will clause in an independent contractor agreement "does not, in and of itself, change the independent contractor relationship into an employee-employer relationship. If it did, independent contractor arrangements could only be established through agreements which limited the right of a party, or perhaps both parties, to terminate the agreement. *This would be absurd, and it is not the law.*" (*Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107, emphasis added.) Whether an individual is subject to discharge has no significance in differentiating between his or her status as either an employee or an independent contractor. (*Varisco, supra,* 166 Cal.App.4th at p. 1107; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 589 ["a termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee"];)	the committee finds no significant distinction between the commentator's "unlimited" right to discharge (which means employment) and a "limited" right to discharge (which does not). For either employee or contractor, the right can be either unlimited, or limited by contract. Therefore, the committee has concluded that the best course is to closely track the *Ayala* language.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	In *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531, the court stated, "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause." We believe that the words "without cause" are essential in this statement. Discharging a worker for cause does not demonstrate the right to control supporting an employment relationship because any worker, employee or independent contractor, can be discharged for cause. Rather than make the words "without cause" optional, we believe that the entire sentence should be made optional: "[One indication of the right to	The committee does not agree that the whole sentence should be optional. There must be some language in the instruction about the right to end the relationship. The committee does agree, however, that bracketing "without cause" is not appropriate. The safest course is to closely track language from *Ayala*.

Instruction	Commentator	Comment	Committee Response
		control is that the hirer can discharge the worker without cause.]"	
		We would delete the second paragraph in the Directions for Use and replace it with a statement that the optional sentence discussed above should be included unless a contract provides that the relationship may only be terminated for cause.	Because the committee has removed the brackets from "without cause," this paragraph is no longer needed and has been deleted.
4110, *Breach of Duty by Real Estate Seller's Agent—Inaccurate Information in Multiple Listing Service—Essential Factual Elements* 34	Orange County Bar Association, by Ashleigh E. Aitken, President	In *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077, after discussing negligent misrepresentation as a form actual fraud, the court noted that, "[a] real estate agent, also has a statutory liability for negligence … ." (emphasis added) In *Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568 a claim under Section 1088 was said to be for statutory negligence. While the proposed Instruction is titled, "Breach of Duty …," the second sentence of the paragraph states that the statutory remedy is, "… for a species of misrepresentation …." It seems that viewing this as a type of misrepresentation has resulted in drafting problems as to the element or elements regarding "reliance" by the plaintiff. Though Section 1088 deals with falsehoods or inaccuracies, it basically sets up a standard of conduct or a duty in the agent which, if violated, would be negligence – statutory negligence as the *Furla* and *Saffie* courts noted. This would seem to trigger the application of Evidence Code Section 669(a), which creates a presumption of negligence arising from a statutory violation. To raise this presumption, there is no requirement of "reliance," actual or reasonable, on the part of a plaintiff; he or she must only be a member of the class to be protected by the statute.	The committee does not believe Evidence Code section 669(a) is applicable.The rest of the *Furla* quote, represented by the elipsis in the comment, is "[i]f an agent . . . places a listing or other information in the multiple listing service, that agent . . . shall be responsible for the truth of all representations . . . of which that agent . . . had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy." Similarly the reference to "statutory negligence" in *Saffie* is followed by "for 'anyone injured' by the 'falseness or inaccuracy' of such representations and statements." Therefore, the "statutory negligence" is actually for negligent misrepresentation. And "injured by" requires actual reliance.
		The real concern with an Instruction based on Section 1088 is that the statute's language or requirement for MLS accuracy cannot be viewed in a vacuum. It would only apply in connection with	The committee believes that the instruction adequately and accurately conveys the requirement that there

Instruction	Commentator	Comment	Committee Response
		the purchase of real property. Before the adoption of an instruction on the cause of action under Section 1088, the exact nature of that action or theory of recovery should be determined, and necessary elements clearly set forth so that the instruction is an accurate and effective aid to users. Consideration should be given to the context of such actions and other applicable statutes as may impact elements and burdens of proof.	must be misinformation on the MLS listing, and that the plaintiff must have read it and done something that s/he otherwise would not have done.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that it is unnecessary to describe the alleged misstatement in the instruction (element 2). The MLS listing presumably will be in evidence, so there is no need to describe what it stated. We would combine elements 2 and 3 into a single element referring to the alleged misstatement generically, as in CACI No. 1903, *Negligent Misrepresentation,* and other instructions in the fraud series.	The committee agreed and has removed this requirement.
		We believe that actionable reliance under Civil Code section 1088 is not limited a buyer's decision whether to purchase, as suggested by element 5. A buyer could rely on a misstatement by paying more than he or she otherwise would have paid, and perhaps in other ways (e.g., incurring investigation costs or permit fees based on a misrepresentation that the property was suitable for a particular use). Perhaps other persons also could act in reliance on a misstatement and be entitled to damages under the statute. We would revise element 5 to make the required reliance less restrictive.	The committee agreed and has revised element 5 along the lines suggested.
		The proposed new instruction does not state that the plaintiff's reliance must be reasonable. Reasonable reliance is an essential element of negligent misrepresentation. (See CACI No. 1903, *Negligent Misrepresentation,* element 5.) *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077-1079, held that triable issues of fact on justifiable or reasonable reliance precluded summary judgment on the plaintiff's claims for negligence and negligent misrepresentation, which were based in	The committee agrees that *Furla* does require that the buyer reasonably and justifiably have relied on the MLS information. The instruction has been revised to remove discussion of this point as being unsettled.

Instruction	Commentator	Comment	Committee Response
		part on Civil Code section 1088. We believe that reasonable reliance is an element of a claim under Civil Code section 1088.	
		We believe that the substantial factor element (element 7) is more precisely and better stated in CACI No. 1903, Negligent Misrepresentation, element 7 ("That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm"). We would use similar language here	The committee did not agree with this comment. It is the totality of the defendant's conduct as expressed in all the elements that caused the harm, not just reliance.
4600 New Whistleblower Protection Series	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that it would be helpful to group together instructions on whistleblower protection that are currently included in other series, and agree with the creation of a new series on whistleblower protection.	No response is necessary.
4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest either adding optional language after the word "discharged" in the first and last sentences in the introductory paragraph in the instruction to allow for other adverse action, or adding language to the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.	The committee agreed with the comment. In the first sentence, optional "other" language has been added. In last sentence, "[his/her] unlawful discharge claim" has been changed to "this claim."
4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements* 12	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest either adding optional language after the word "discharged" in the introductory paragraph in the instruction to allow for other adverse action, or adding language to the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.	The committee agreed with the comment. In the introductory paragraph, optional "other" language has been added.
		We find the statement in the Directions for Use "These elements may be modified to allege constructive discharge" somewhat awkward because jury instructions do not "allege." We would modify this as follows:	The committee agreed and has adopted the commentator's suggested rewrite.

Instruction	Commentator	Comment	Committee Response
		"These elements may be modified ~~to allege~~ if constructive discharge is alleged."	
4604, *Affirmative Defense—Same Decision* 12	David deRobertis, on behalf of the California Employment Lawyers Association	For the same reasons set forth above in connection with the proposed change to CACI No. 2512, CELA commends and agrees with the proposed change in the proposed CACI No. 4604.	No response is necessary.
	Orange County Bar Association, by Ashleigh E. Aitken, President	The proposed revision adds the words "at that time" but those words do not appear in the language of Labor Code Section 1102.6 providing for this affirmative defense.	While it is true that the words do not appear in the statute, they do appear in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239. And while *Harris* is not a Labor Code 1102.6 case, the reasonable implication is that its standard applies whenever a same-decision defense is raised.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revision to the instruction. We suggest that a citation to *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 224, be added to the Sources and Authority with the following quotation: "To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision at the time it made its actual decision."	The committee agreed and has added the excerpt.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Approve of all except as noted above	No response is necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Approve of all except as noted above	No response is necessary.

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BREACH OF FIDUCIARY DUTY SERIES

WHISTLEBLOWER ACTIONS (NEW) SERIES

201. ~~More Likely True~~Highly Probable—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.

New September 2003; Revised October 2004, June 2015

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Burden of Proof. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390).)
- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)
- "We decline to hold that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." ' Neither *In re Angelia P., supra,* 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases." (*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 [163 Cal.Rptr.3d 874].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 39, 40

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, *Burdens of Proof and Persuasion*, 9.16

303. Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant***] for breach of contract, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

[2. That [*name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/it] to do;]**

[or]

[2. That [*name of plaintiff***] ~~or that [he/she/it]~~ was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***~~doing those things~~];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***] ~~[had occurred;~~]**

[or]

[3. ~~/ [or]~~ That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

[4. That [*name of defendant***] failed to do something that the contract required [him/her/it] to do; and]**

[*or*]

[4. That [*name of defendant***] did something that the contract prohibited [him/her/it] from doing; and]**

5. That [*name of plaintiff***] was harmed by ~~that failure~~[***name of defendant***]'s breach of contract.**

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013; June 2015

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal. App. 4th 1131, 1147 (Cal. App. 1st Dist. 2014) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform~~may be needed if there is an issue of performance of the plaintiff's obligations under the contract~~. Include the second option if

the plaintiff alleges that he or she was excused from having to perform some or all of the contractual conditions ~~acts referenced in question 2~~.

Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material;* element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent,* meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered~~is needed if conditions for performance are at issue~~. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed,* CACI No. 322, *Occurrence of Agreed Condition Precedent,* and CACI No. 323, *Waiver of Condition Precedent*.

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Contract Defined. Civil Code section 1549.
- "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)
- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc., v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown, supra,* 192 Cal.App.4th at pp. 277–278, internal citations omitted.)

- "Whether breach of the agreement not to molest bars [plaintiff]'s recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. (*Verdier, supra,* 133 Cal.App.2d at p. 334.)

- "The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. The trial court relied upon parol evidence to determine the content and interpretation of the fee-sharing agreement between the parties. Accordingly, that determination is a question of fact that must be upheld if based on substantial evidence." (*Brown, supra,* 192 Cal.App.4th at p. 279, internal citation omitted.)

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*, original italics.)

- "b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of ,'waiver' in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this

Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225.)

- " ' "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." [Citation.]' " ((*Stephens & Stephens XII, LLC, supra,* 231 Cal. App. 4th at p. 1144.)
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Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847

13 California Forms of Pleading and Practice, Ch. 140, *Contracts,* § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50*, Contracts,* § 50.10 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.03–22.50

328. Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements

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The parties' contract requires that [*name of defendant***] [***specify performance alleged to have been done negligently, e.g., install cable television service***]. It is implied in the contract that this performance will be done competently and with reasonable care. [***Name of plaintiff***] claims that [***name of defendant***] breached this implied condition. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of plaintiff***] and [***name of defendant***] entered into a contract;**

[2. That [*name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

4. That [*name of defendant***] failed to use reasonable care in [***specify performance***]; and**

5. That [*name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New June 2015

Directions for Use

Give this instruction if the plaintiff alleges harm from the defendant's failure to perform a contractual obligation with reasonable care. Every contract includes an implied duty to perform required acts competently. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1324 [178 Cal.Rptr.3d 100].) If negligent performance is alleged, the jury should be instructed that the contract contains this implied duty. The jury must then decide whether the duty has been breached. It must also find all of the other elements required for breach of contract. (See CACI No. 303, *Breach of Contract─Essential Factual Elements*.)

This instruction may be adapted for use as an affirmative defense if the defendant asserts that the plaintiff

is not entitled to recover on the contract because of the plaintiff's failure to perform its duties competently. (See *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376−378 [130 P.2d 477].)

For discussion of issues with the options for elements 2 and 3, see the Directions for Use to CACI No. 303, *Breach of Contract, Essential Factual Elements*.

Sources and Authority

- "[E]xpress contractual terms give rise to implied duties, violations of which may themselves constitute breaches of contract. ' "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation].' " (*Holguin, supra,* 229 Cal.App.4th at p. 1324.)

- "A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774 [69 Cal.Rptr.2d 466].)

- "[T]he statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use,' as stated by the trial court." (*Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2010) Contracts, §§ 798, 800

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.12 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Crompton et al., Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particle Construction of Contract*, 21.79

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. ~~[~~Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No~~]~~

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[3. ~~[or]~~

~~[~~Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No~~]~~

If your answer to ~~[either option for]~~ question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no ~~[to both options]~~, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[~~3~~4. Did all the conditions that were required for [*name of defendant*]'s performance occur ~~or were they excused~~?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[5. Were the required conditions that did not occur [excused/waived]?
Yes No

If your answer to question ~~3~~ 5 is yes, then answer question ~~4~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~4~~6. [Did [*name of defendant*] fail to do something that the contract required [him/her/it]

to do?
____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?
____ Yes ____ No]

If your answer to [either option for] question ~~4~~ 6 is yes, then answer question ~~5~~7. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract~~that failure~~?
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~8. What are [*name of plaintiff*]'s damages?

[a. Past [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New April 2004; Revised December 2010, June 2011, June 2013, June 2015

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question ~~3~~ 4 if the occurrence of conditions for performance ~~are~~ is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.)

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question ~~6~~8.

If specificity is not required, users do not have to itemize the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-303. Breach of Contract—Contract Formation at Issue

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the parties agree to give each other something of value?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the parties agree to the terms of the contract?
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[4. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No

If your answer to question 4 is yes, [~~then~~ skip question 5 and] answer question 6. If you answered no, [answer question 5 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date the form].]

[5. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did all the conditions ~~occur~~ that were required for [*name of defendant*]'s performance occur?
____ Yes ____ No

If your answer to question 6 is yes, [skip question 7 and] ~~then~~ answer question ~~7~~8. If you answered no, [answer question 7 *if excuse or waiver is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].

[7. Were the required conditions that did not occur [excused/waived]?
Yes No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~7~~8. [Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?
____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?
Yes No]

If your answer to [either option for] question ~~7~~ 8 is yes, then answer question ~~8~~9. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

~~8~~9. Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract~~that failure~~?
____ Yes ____ No

If your answer to question ~~8~~ 9 is yes, then answer question ~~9~~10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~9~~10. What are [*name of plaintiff*]'s damages?

[a. Past [economic] loss [including] [*insert descriptions of claimed damages*]:

$ _____]

[b. Future [economic] loss [including] [*insert descriptions of claimed damages*]:
$ _____]

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New October 2004; Revised December 2010,, June 2015

Directions for Use

~~The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.~~

This verdict form is based on CACI No. 302, *Contract Formation—Essential Factual Elements*, and CACI No. 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Optional questions 4 and 5 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 4 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 5 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 6 and 7 address conditions precedent to the defendant's performance. Include question 6 if the occurrence of conditions for performance are at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 7 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.)

Note that questions 6 and 7 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 8. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse on waiver should be included after question 8.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 10.

If specificity is not required, users do not have to itemize all the damages listed in question ~~9~~10. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

Draft−Not Approved by Judicial Council

VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. [Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No]

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]
~~[or]~~

[3. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No~~]~~

If your answer to ~~[either option for]~~ question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no ~~[to both options]~~, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[~~3~~4. Did all the conditions that were required for [*name of defendant*]'s performance occur ~~or were they excused~~?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[5. Were the required conditions that did not occur [excused/waived]?
Yes No

If your answer to question ~~3~~ 5 is yes, then answer question ~~4~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~4~~6. Did [*name of defendant*] unfairly interfere with [*name of plaintiff*]'s right to receive the benefits of the contract?

____ Yes ____ No

If your answer to question ~~4~~ 6 is yes, then answer question ~~5~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s interference?
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~8. What are [*name of plaintiff*]'s damages?

[a. Past [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New June 2014; Revised June 2015

Directions for Use

This verdict form is based on CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

The special verdict forms in this series are intended only as models. They may need to be modified depending on the facts of the case.

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included

dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance are at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.) Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused.

~~Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) However, do not include question 2 if the plaintiff alleges that the reason for his or her nonperformance was because of the defendant's bad-faith interference (question 4).~~

~~Include question 3 if conditions for performance are at issue.~~

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question ~~6~~8.

If specificity is not required, users do not have to itemize the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. If counts for both breach of express contractual terms and breach of the implied covenant are alleged, this verdict form may be combined with CACI No. VF-300, *Breach of Contract*. Use VF-3920 to direct the jury to separately address the damages awarded on each count and to avoid the jury's awarding the same damages on both counts. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff*] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [*name of defendant*] did or said something that caused [*name of plaintiff*] to delay filing the lawsuit. In order to establish the right to proceed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] said or did something that caused [*name of plaintiff*] to believe that it would not be necessary to file a lawsuit;**

2. **That [*name of plaintiff*] relied on [*name of defendant*]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [*name of plaintiff*]'s position would have relied on [*name of defendant*]'s conduct; [and]**

4. **[That after the limitation period had expired, [*name of defendant*]'s representations by words or conduct proved to not be true; and]**

5. **That [*name of plaintiff*] proceeded diligently to file suit once [he/she/it] discovered the ~~actual facts~~need to proceed.**

It is not necessary that [*name of defendant*] have acted in bad faith or intended to mislead [*name of plaintiff*].

New October 2008; Revised December 2014, June 2015

Directions for Use

Equitable estoppel, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included. However, the California Supreme Court has stated that element 4 is to be given in a construction defect case in which the defendant has assured the plaintiff that all defects will be repaired. (See *Lantzy, supra,* 31 Cal.4th at p. 384.)

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel … ." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra,* 31 Cal.4th at pp. 383–384, internal citations omitted.)

- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra,* 31 Cal.4th at p. 384, internal citations omitted.)

- "Equitable estoppel does not require factually misleading statements in all cases." (*J. P. v.*

Carlsbad Unified Sch. Dist. (2014) 232 Cal.App.4th 323, 335 [181 Cal.Rptr.3d 286].)

- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- " 'Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when the plaintiff establishes by a preponderance of the evidence: (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment.' " (*J.P. supra,* 232 Cal.App.4th at p. 333.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts,

representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation

are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations,* ¶ 5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

Draft−Not Approved by Judicial Council

550. Affirmative Defense—Plaintiff Would Have Consented

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] would have consented to the procedure, even if [he/she] had been informed of the risks. To establish this defense, [***name of defendant***] must prove that had ~~even if a reasonable person in [***name of plaintiff***]'s position might not have consented to the [***insert medical procedure***] if he or she had been given enough information about its risks,~~ [***name of plaintiff***] been adequately informed about the risks of the [***insert medical procedure***], [he/she] ~~still~~ would have consented, even if a reasonable person in [***name of plaintiff***]'s position might not have consented.~~to the procedure.~~**

~~**If you decide [***name of defendant***] has proved that [***name of plaintiff***] would have consented, you must conclude that [his/her] failure to inform [***name of plaintiff***] of the risks was not a substantial factor in causing [***name of plaintiff***]'s harm.**~~

New September 2003; Revised June 2015

Directions for Use

~~"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)~~

Give this instruction if the defendant asserts as an affirmative defense that the plaintiff would have consented (and thereby have suffered the same harm) had he or she been informed of the risks. This instruction ~~could~~ can be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, he or she still would have refused the test.

Sources and Authority

- "Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." ~~The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed.~~ (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "The prudent person test for causation was established to protect defendant physicians from the

unfairness of having a jury consider the issue of proximate cause with the benefit of the '20/20 vision of hindsight . . .' This standard should not be employed to prevent a physician from raising the defense that even given adequate disclosure the injured patient would have made the same decision, regardless of whether a reasonably prudent person would have decided differently if adequately informed." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 294 fn. 5 [165 Cal. Rptr. 308, 611 P.2d 902 ~~However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573~~].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

VF-501. Medical Negligence—Informed Consent—Affirmative Defense—Plaintiff Would Have Consented Even If Informed

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] give [his/her] informed consent for the [***insert medical procedure***]?**
   ____ Yes ____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if he or she had been ~~fully~~adequately informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would [***name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she] had been given ~~enough~~ adequate information about the risks of the [***insert medical procedure***]?**
   ____ Yes ____ No

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2010, June 2015

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual*

Elements, and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements,* and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

601. ~~Damages for~~ Negligent Handling of Legal Matter

To recover damages from [*name of defendant*], [*name of plaintiff*] must prove that [he/she/it] would have obtained a better result if [*name of defendant*] had acted as a reasonably careful attorney. [*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred anyway without that conduct.

New September 2003; Revised June 2015

Directions for Use

In ~~*Matteo Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780], the trial-within-a-trial method was applied to accountants.~~ In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney." (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829−830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)

The plaintiff must prove that *but for* the attorney's negligent acts or omissions, he or she would have obtained a more favorable judgment or settlement in the underlying action. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [135 Cal. Rptr. 2d 629, 70 P.3d 1046].) The second sentence expresses this "but for" standard. ~~The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506 [33 Cal.Rptr.2d 219].)~~

Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749−750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)

- "In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes." (*Viner, supra,* 30 Cal.4th at p. 1235.)

- "[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and

conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge Inc., supra,* 52 Cal.App.4th at p. 834.)

- " 'Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* … .' Conversely, ' " '[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.' " ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165−166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)

- ~~"For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046], original italics.)~~

- "One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506−1507 [33 Cal.Rptr.2d 219]~~*DiPalma, supra,* 27 Cal.App.4th at pp. 1506-1507~~, original italics.)

- " 'The element of collectibility requires a showing of the debtor's solvency. " ['W]here a claim is alleged to have been lost by an attorney's negligence, … to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent*.' [Citation.]" The loss of a collectible judgment "by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage." ' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)

- "Collectibility is part of the plaintiff's case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate." (*Wise, supra,* 220 Cal.App.4th at p. 1191.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)

- "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million-the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)

- "[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases … ." (*Filbin, supra,* 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)

- "In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- " 'The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done … ." … Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. …' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710], original italics.)

- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks, supra,* 171 Cal.App.4th at pp. 357–358.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 319−322

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

Draft−Not Approved by Judicial Council

1230. Express Warranty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by the [***product***] because [***name of defendant***] represented, either by words or actions, that the [***product***] [***insert description of alleged express warranty, e.g., "was safe"***], but the [***product***] was not as represented. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or more of the following:***]**

[gave [*name of plaintiff*] a written warranty that the [*product*] [*insert description of written warranty*];] [or]

[made a [statement of fact/promise] [to/received by] [*name of plaintiff***] that the [***product***] [***insert description of alleged express warranty***];] [or]**

[gave [*name of plaintiff***] a description of the [***product***];] [or]**

[gave [*name of plaintiff***] a sample or model of the [***product***];]**

2. **That the [***product***] [***insert one or more of the following:***]**

[did not perform as [stated/promised];] [or]

[did not meet the quality of the [description/sample/model];]

[3. **[That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not as represented, whether or not [***name of defendant***] received such notice;]**

4. **That [*name of defendant*] failed to [repair/*specify other remedy provided by warranty*] the [*product*] as required by the warranty;**

45. **That [***name of plaintiff***] was harmed; and**

56. **That the failure of the [***product***] to be as represented was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. But a warranty is not created if [***name of defendant***] simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.]**

New September 2003; Revised February 2005, June 2015

Directions for Use

This instruction is for use if breach of an express warranty is alleged under the California Commercial Code. (See *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333−1334 [172 Cal.Rptr.3d 876]; Comm. Code, § 2313.) If a breach of written warranty under the federal Magnuson-Moss Warranty Act (see 15 U.S. Code, § 2301 et seq.) is alleged, give the first option for element 1. (See 15 U.S.C. §§ 2310(d)(1), 2301(6).)

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Express Warranties. Commercial Code section 2313.
- Applicable to "Transactions in Goods." Commercial Code section 2102.
- "Goods" Defined. Commercial Code section 2105.
- Damages Under Commercial Code. Commercial Code section 2714.
- "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)
- "The essential elements of a cause of action under the California Uniform Commercial Code for breach of an express warranty to repair defects are (1) an express warranty to repair defects given in connection with the sale of goods; (2) the existence of a defect covered by the warranty; (3) the buyer's notice to the seller of such a defect within a reasonable time after its discovery; (4) the seller's failure to repair the defect in compliance with the warranty; and (5) resulting damages." (*Orichian, supra,* 226 Cal.App.4th at pp. 1333−1334, internal citations omitted.)
- ~~"A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)~~
- "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- " 'The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.' " (*Keith, supra,* 173 Cal.App.3d at p. 21, internal citation omitted.)

- "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra,* 173 Cal.App.3d at p. 21.)

- "It is important to note ... that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra,* 14 Cal.3d at p. 115, fn. 10.)

- ~~The California Supreme Court has stated that~~ "~~[t]~~The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra,* 14 Cal.3d at p. 115, internal citations omitted.) ~~However, the Court also noted that there is some controversy as to the role, if any, of reliance in this area.~~

- ~~The court in *Keith, supra,* 173 Cal.App.3d at p. 23, held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.~~

- "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)

- "[A] sale is ordinarily an essential element of any warranty, express or implied ... ." (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417], internal citations omitted.)

- "Neither Magnuson-Moss nor the California Uniform Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song-Beverly." (*Orichian, supra,* 226 Cal.App.4th at p. 1331; fn. 9, see CACI No. 3204, *"Substantially Impaired" Explained.*)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 56–66

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.23, 502.42-502.50, 502.140-502.150 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.60 et seq. (Matthew Bender)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff*]'s favor;]

[3. That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested or prosecuted;]

4. **That [*name of defendant*] acted primarily for a purpose other than to bring [*name of plaintiff*] to justice;**

5. **That [*name of plaintiff*] was harmed; and**

6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether a reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested or prosecuted. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)
- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)
- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- ~~" 'One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding.' ' "The test is whether the defendant was actively instrumental in causing the prosecution." ' " (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 463-464 [156 Cal.Rptr.3d 901], internal citation omitted.)~~

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901]~~*Greene, supra,* 216 Cal.App.4th at p. 465~~.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action

would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745]~~, original italics, internal citations omitted~~, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 469–485, 511

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

Draft−Not Approved by Judicial Council

1504. Former Criminal Proceeding—"Actively Involved" Explained

[*Name of defendant*] was "actively involved" in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution] if after learning that there was no probable cause that [*name of plaintiff*] had committed a crime, [he/she] sought out the police or prosecutorial authorities and falsely reported facts to them indicating that [*name of plaintiff*] had committed a crime. Merely giving testimony or responding to law enforcement inquiries is not active involvement.

New June 2015

Directions for Use

Give this instruction in a malicious prosecution case arising from an earlier criminal proceeding. This instruction explains what is meant by "active involvement" in a criminal prosecution, as used in element 1 of CACI No. 1500, *Former Criminal Proceeding—Essential Factual Elements*.

Sources and Authority

- "Although a criminal prosecution normally is commenced through the action of government authorities, a private person may be liable for malicious prosecution under certain circumstances based on his or her role in the criminal proceeding. 'The relevant law is clear: "One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding." "' " (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481 [178 Cal.Rptr.3d 363, internal citation omitted.)

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under *lawful* process, but from *malicious* motives and without probable cause. . . . . [Italics in original.] The test is whether the defendant was actively instrumental in causing the prosecution.' " (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal. Rptr. 241, 527 P.2d 865].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 464 [156 Cal.Rptr.3d 901].)

- "Public policy requires that 'private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused.' " (*Cedars-Sinai Medical Ctr. v. Superior Court* (1988) 206 Cal.App.3d 414, 418 [253 Cal.Rptr. 561].)

- "[M]erely giving testimony and responding to law enforcement inquiries in an active criminal proceeding does not constitute malicious prosecution." (*Zucchet, supra,* 229 Cal.App.4th at p. 1482.)

- "[T]o create liability for malicious prosecution … [t]he person must 'take[some affirmative action to encourage the prosecution by way of advice or pressure, as opposed to merely providing information.' " (*Zucchet, supra,* 229 Cal.App.4th at p. 1485.)

- "According to section 655 of the Restatement, '[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.' " (*Zucchet, supra,* 229 Cal.App.4th at p. 1483.)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her] by making a statement that disparaged [*name of plaintiff*]'s [*specify product*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [*name of plaintiff*]'s [*product/service*];**

2. **That the statement was made to a person other than [*name of plaintiff*];**

3. **That the statement was untrue;**

4. **That [*name of defendant*] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**

5. **That [*name of defendant*] knew or should have recognized that someone else might act in reliance on the statement, causing [*name of plaintiff*] financial loss;**

6. **That [*name of plaintiff*] suffered direct financial harm because someone else acted in reliance on the statement;**

7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New December 2013; Revised June 2015

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram Records, Inc.*, *supra*, 170 Cal.App.3d at p. 548.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*, 224 Cal.App.2d at pp. 73−74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A "reasonable implication" means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is

required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege. For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, ~~*Qualified Privilege*~~*Common Interest Privilege—Malice*.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' … is a form of action somewhat related to trade libel … ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- "Confusion surrounds the tort of 'commercial disparagement' because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim." (*Hartford Casualty Ins. Co.*, *supra,* ~~*v. Swift Distribution, Inc.* (2014)~~ 59 Cal.4th at p.~~277,~~ 289 ~~[172 Cal. Rptr. 3d 653, 326 P.3d 253]~~.)

- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to

liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- "According to section 629 of the Restatement Second of Torts (1977), '[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.' " (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 288.)

- "What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 294, original italics.)

- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- "While … general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,*

202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion—'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'—is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005), Torts, §§ 642-645

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1806. Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest

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[*Name of defendant***] claims that [he/she] has not violated [***name of plaintiff***]'s right of privacy because the public interest served by [***name of defendant***]'s [***specify privacy violation, e.g., use of [name of plaintiff's name, likeness, or identity***] outweighs [***name of plaintiff***]'s privacy interests. In deciding whether the public interest outweighs [***name of plaintiff***]'s privacy interest, you should consider all of the following:**

a. Where the information was used;

b. The extent of the use;

c. The public interest served by the use;

d. The seriousness of the interference with [*name of plaintiff***]'s privacy; and**

e. [*specify other factors***].**

New June 2015

Directions for Use

This instruction sets forth a balancing test for a claim for invasion of privacy. A defendant's First Amendment right to freedom of expression and freedom of the press can, in some cases, outweigh the plaintiff's right of privacy (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409-410 [114 Cal.Rptr.2d 307]; see also *Gill v. Hearst Publishing Co. Inc.* (1953) 40 Cal.2d 224, 228−231 [253 P.2d 441].) This balancing test is an affirmative defense. (See *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.)

A First-Amendment defense based on newsworthiness has been allowed for the defendant's use of the plaintiff's name or likeness. (See *Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-411; see CACI No. 1804A.) It has also been allowed for privacy claims based on intrusion into private affairs (see CACI No. 1800) and public disclosure of private facts (see CACI No. 1802) (See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214−242 [74 Cal.Rptr.2d 843, 955 P.2d 469].) It has also been allowed for a claim that the plaintiff had been presented in a false light (see CACI No. 1802). (See *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278−279 [239 P.2d 630] [magazine's use of plaintiffs' picture in connection with article on divorce suggested that they were not happily married].)

Sources and Authority

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury*

News, Inc. (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 208 [74 Cal. Rptr. 2d 843, 955 P.2d 469].)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "[T]he common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)

- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 687 [166 Cal.Rptr.3d 359].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2010) Torts, § 681 et seq.

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.35 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.27 (Matthew Bender)

1808. Stalking (Civ. Code, § 1708.7)

Revoked June 2015. See Stats 2014, Ch. 853 (AB 1356), substantially amending Civ. Code, § 1708.7. The committee may consider revising this instruction in the next release.

~~[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:~~

~~1. That [*name of defendant*] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [*name of plaintiff*]. The pattern of conduct must be supported by evidence in addition to [*name of plaintiff*]'s testimony;~~

~~2. That as a result of this conduct [*name of plaintiff*] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and~~

~~3. (a) That, as part of the pattern of conduct, [*name of defendant*] made a believable threat with the intent to place [*name of plaintiff*] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and~~

~~(b) That [*name of plaintiff*] clearly demanded at least once that [*name of defendant*] stop; and~~

~~(c) That [*name of defendant*] persisted in [his/her] pattern of conduct;~~

~~*[or]*~~

~~That [*name of defendant*] violated a restraining order prohibiting the pattern of conduct;~~

~~4. That [*name of plaintiff*] was harmed; and~~

~~5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.~~

~~["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff*] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [*name of plaintiff*]].~~

~~A "pattern of conduct" means a series of words or actions over a period of time, however short, that reflects an ongoing purpose.~~

~~*New September 2003*~~

~~Sources and Authority~~

- ~~Stalking. Civil Code section 1708.7.~~

~~Secondary Sources~~

~~5 Witkin, Summary of California Law (10th edition 2005) Torts, §662~~

~~6 California Forms of Pleading and Practice, Ch. *Assault and Battery*, Ch. 58, § 58.28 (Matthew Bender)~~

~~2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.28 (Matthew Bender)~~

2308. Affirmative Defense—~~Rescission for~~ Misrepresentation or Concealment in Insurance Application~~—Essential Factual Elements~~

[*Name of insurer*] claims that no insurance contract was created because [*name of insured*] [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this ~~claim~~defense, [*name of insurer*] must prove all of the following:

1. **That [*name of insured*] submitted an application for insurance with [*name of insurer*];**

2. **That in the application for insurance [*name of insured*], whether intentionally or unintentionally, ~~[intentionally]~~ [failed to state/represented] that [*insert omission or alleged misrepresentation*];**

3. **[That the application asked for that information;]**

4. **That [*name of insured*] knew that [*specify facts that were misrepresented or omitted*]; and~~[*select one of the following:*]~~**

   ~~[knew that [*insert omission*];]~~

   ~~[knew that this representation was not true;]~~

5. **That [*name of insurer*] would not have issued the insurance policy if [*name of insured*] had stated the true facts in the application~~;~~.**

~~6. That [*name of insurer*] gave [*name of insured*] notice that it was rescinding the insurance policy; and~~

~~7. That [*name of insurer*] [returned/offered to return] the insurance premiums paid by [*name of insured*].~~

New September 2003; Revised April 2004, October 2004, June 2015

Directions for Use

This instruction presents an insurer's affirmative defense to a claim for coverage. The defense is based on a misrepresentation or omission made by the insured in the application for the insurance. (See *Douglas v. Fid. Nat'l Ins. Co.* (2014) 229 Cal.App.4th 392, 408 [177 Cal.Rptr.3d 271].) If the policy at issue is a standard fire insurance policy, replace "intentionally or unintentionally" in element 2 with "willfully." (See Ins. Code, § 2071.) Otherwise, the insurer is not required to prove an intent to deceive; negligence or inadvertence is enough if the misrepresentation or omission is material. (*Douglas, supra,* 229 Cal.App.4th at p. 408.) Element 5 expresses materiality.~~Use the bracketed word "intentionally" for cases involving Insurance Code section 2071.~~

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. ~~Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, § 1691.)~~

While no intent to mislead is required, the insured must know the facts that constitute the omission or misrepresentation (see element 4). For example, if the application does not disclose that property on which insurance is sought is being used commercially, the applicant must have known that the property is being used commercially. (See Ins. Code, § 332.) It is not a defense, however, if the insured gave incorrect or incomplete responses on the application because he or she failed to appreciate the significance of some information known to him or her. (See *Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].)~~If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.~~

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Time of Insurer's Rescission of Policy. Insurance Code section 650.
- Concealment by Failure to Communicate. Insurance Code section 330.
- Concealment Entitles Insurer to Rescind. Insurance Code section 331.
- Duty to Communicate in Good Faith. Insurance Code section 332.
- Materiality. Insurance Code section 334.
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Represe~~i~~ntation: Time for Rescission. Insurance Code section 359.
- "It is well established that material misrepresentations or concealment of material facts in an application for insurance entitle an insurer to rescind an insurance policy, even if the misrepresentations are not intentionally made. Additionally, '[a] misrepresentation or concealment of a material fact in an insurance application also establishes a complete defense in an action on the policy. [Citations.] As with rescission, an insurer seeking to invalidate a policy based on a material misrepresentation or concealment as a defense need not show an intent to deceive. [Citations.]' " (*Douglas, supra,* 229 Cal.App.4th at p. 408, internal citations omitted.)
- "When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under section 650 of the Insurance Code as an affirmative

defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson, supra,* ~~*v. Occidental Life Insurance Co. of California* (1973)~~ 9 Cal.3d at pp.~~904,~~ 915-916 ~~[109 Cal.Rptr. 473, 513 P.2d 353]~~, internal citations omitted.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra,* 9 Cal.3d at p. 916, internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "To prevail, the insurer must prove that the insured made a material 'false representation' in an insurance application. 'A representation is false when the facts fail to correspond with its assertions or stipulations.' The test for materiality of the misrepresentation or concealment is the same as it is for rescission, 'a misrepresentation or concealment is material if a truthful statement would have affected the insurer's underwriting decision.' " (*Douglas, supra,* 229 Cal.App.4th at p. 408, internal citations omitted.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished ... ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation ~~(The Rutter Group)~~ ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.18 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250–120.251, 120.260 (Matthew Bender)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was treated required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment. Trivial acts are insufficient ~~or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position~~.

New September 2003; Revised December 2014, June 2015

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66,

80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Whether conditions are so intolerable as to justify the employee's decision to quit rather than endure them is to be judged by an objective reasonable-employee standard. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) This standard is captured in element 4. The paragraph at the end of the instruction gives the jury additional guidance as to what makes conditions intolerable. (See *id.* at p. 1247.) Note that in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. (*Id.* at p. 1247, fn.3.)

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 91 [276 Cal.Rptr. 130, 801 P.2d 373].)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner,supra, ~~v. Anheuser-Busch, Inc. (1994)~~* 7 Cal.4th at pp.~~1238,~~ 1244-1245 ~~[32 Cal.Rptr.2d 223, 876 P.2d 1022]~~, internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign

is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge~~In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.'~~ " (*Turner, supra,* 7 Cal.4th at p. 1247, footnote and internal citation omitted~~fn. 3~~.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170,

5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].**

[*Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as [***name of plaintiff***] proves that all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the DFEH was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

~~**The burden is on [*name of plaintiff/name of defendant*] to prove that the complaint [was/was not] filed on time with the department.**~~

New June 2010; Revised December 2011, June 2015

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof would appear to extend to any excuse or justification for the failure to timely file, such as the continuing violation exception. (See *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945 [65 Cal.Rptr.3d 145] [plaintiff's burden to establish an exception that would deem the administrative complaint to be timely].)~~No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.~~

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* ~~*v. Konad USA* Distribution, Inc. (2014)~~ 226 Cal.App.4th at p.~~1336,~~ 1345 ~~[172 Cal.Rptr.3d 686]~~.)

- "Before maintaining a legal action, a plaintiff must exhaust the administrative remedy of filing a timely complaint with the DFEH and obtaining permission to pursue legal remedies. The one-year period specified in the statute begins to run when the administrative remedy accrues, which is the occurrence of the unlawful practice. In the present case, the allegedly unlawful suspension occurred on July 2, 2002, and therefore the one-year period began to run on that date. As a result, plaintiff's July 2003 administrative complaint was not timely on its face, his allegations to the contrary notwithstanding. This made it his burden to establish an exception that would deem the administrative complaint to be timely." (*Holland, supra,* 154 Cal.App.4th at p. 945, internal citations omitted.)

- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720–721, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies,* ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she] was [discharged/[***other adverse employment action***]] because of [his/her] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time based on [***e.g., plaintiff's poor job performance***] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] only for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013; Revised June 2015

Directions for Use

Give this instruction along with CACI No. 2507, *"Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214−215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- "[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)

- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of

discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214−215.)

- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra,* 56 Cal.App.4th at p. 240].)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- "Pretext may … be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005)~~,~~ Constitutional Law, §§ 928, 950

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of plaintiff*] worked overtime hours;**

3. **That [*name of defendant*] knew or should have known that [*name of plaintiff*] had worked overtime hours;**

4. **That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**

5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].

Overtime pay is [*insert applicable formula*].

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]~~For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171~~).The assertion of an employee's exemption ~~from overtime laws~~ is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].)~~ An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*)~~ For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*,

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1, 11:499 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws*

Regulating Employee Compensation, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

Draft−Not Approved by Judicial Council

VF-2702. Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] perform work for [*name of defendant*]?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] work overtime hours?
Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] know, or should [*name of defendant*] have known, that [*name of plaintiff*] had worked overtime hours?
Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~2~~4. Was [*name of plaintiff*] paid at a rate lower than the legal overtime compensation rate for any overtime hours that [he/she] worked for [*name of defendant*]?
____ Yes ____ No

If your answer to question ~~2~~ 4 is yes, then answer question ~~3~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~3~~5. What is the amount of wages owed? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2010, June 2015

Directions for Use

This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements.*~~

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**

2. **That the force used by [*name of defendant*] was excessive;**

3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**

4. **That [*name of plaintiff*] was harmed; and**

5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider~~, among other factors,~~ the following:

(a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][;/.] [and]

(d) (*specify other factors particular to the case*).

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015

Directions for Use

The "official duties" referred to in element 3 must be duties created ~~pursuant to~~by a~~ny~~ state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors listed are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490

U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

This instruction may be modified for use in a negligence claim under California common law based on the same event and facts. The *Graham* factors apply under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if tactical conduct and decisions preceding the use of force, as part of the totality of circumstances, make the ultimate use of force unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment, which focuses more narrowly on the moment when force is used. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr. 3d 684, 305 P.3d 252].) If the negligence claim is based in part on tactical conduct and decisions made before the use of force, this instruction may be modified to specifically instruct the jury to consider the officers' pre-force decisions and conduct.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra, ~~v. County of San Diego~~* ~~(2013)~~ 57 Cal.4th at p.~~622,~~ 639 ~~[160 Cal.Rptr.3d 684, 305 P.3d 252]~~.)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a

threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat." (*Gonzalez v. City of Anaheim* (9th Cir. 2013) 715 F.3d 766, 770.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "[W]e have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the

plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the

circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, ~~[*name of plaintiff*] was~~ [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That there was no reasonable justification for the conduct;**

5. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012~~,~~; Revised December 2014, June 2015

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer, supra, ~~v. Brennan (1994)~~* 511 U.S. at p.~~825,~~ 834 ~~[114 S.Ct. 1970, 128 L.Ed.2d 811]~~.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the

prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety. Second, the inmate must show that the prison officials had no "reasonable" justification for the ~~deprivation~~conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The "official duties" referred to in element 5 must be duties created ~~pursuant to~~by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 5.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- ~~"A deprivation is sufficiently serious when the prison official's act or omission results 'in the denial of the minimal civilized measure of life's necessities.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)~~

- ~~"The objective question of whether a prison officer's actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt." (*Lemire, supra,* 726 F.3d at pp. 1075−1076.)~~

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- ~~"The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's~~

~~health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnotes and internal citations omitted.)~~

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- ~~"[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)~~

- ~~"Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)~~

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. … The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a serious medical need;**

2. **That [***name of defendant***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her] medical need went untreated~~acted with deliberate indifference to this need~~;**

3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**

4~~3~~. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

5~~4~~. **That [***name of plaintiff***] was harmed; and**

6~~5~~. **That [***name of defendant***]'s ~~deliberate indifference~~conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff***]'s constitutional rights.~~To establish "deliberate indifference," [*name of plaintiff*] must prove (1) that [*name of defendant*] knew [*name of plaintiff*] faced a substantial risk of serious harm and (2) that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.~~**

[In determining whether [*name of defendant***] consciously disregarded a substantial risk~~was deliberately indifferent~~, you should consider the personnel, financial, and other resources available to [him/her] or those that [he/she] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*."

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra, ~~v. Brennan (1994)~~* 511 U.S. at p.~~825,~~ 834 ~~[114 S.Ct. 1970, 128 L.Ed.2d 811]~~, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

- "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...'" (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is "'pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States,* ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities,* § 196.183 (Matthew Bender)

3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that deprived [him/her] of basic rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that deprived [him/her] of [***describe deprivation, e.g., clothing***];**

2. **That this deprivation was sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life;**

3. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] knew that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

5. **That there was no reasonable justification for the deprivation;**

6. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New June 2015

Directions for Use

Give this instruction in a prisoner case involving deprivation of something serious. (See *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150-1151.) For an instruction involving the creation of a risk, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction on deprivation of medical care, see CACI no. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care.*

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials

were aware of a substantial risk of serious harm to the inmate's health or safety. Second, the inmate must show that the prison officials had no reasonable justification for the conduct, in spite of that risk. (*Thomas, supra,* 611 F.3d at p. 1150.) Elements 4 and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)
- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)
- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)
- "[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'… ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)
- "'[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)
- "[A]n inmate seeking to prove an Eighth Amendment violation must 'objectively show that he was deprived of something "sufficiently serious," ' and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnote and internal citations omitted.)

- "Next, the inmate must 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' To satisfy this subjective component of deliberate indifference, the inmate must show that prison officials 'kn[e]w[] of and disregard[ed]' the substantial risk of harm, but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074, internal citations omitted.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2010) Constitutional Law, § 816

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

18 California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

Draft−Not Approved by Judicial Council

3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements (Civ. Code, § 56.20(b))

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her] because [he/she] refused to authorize disclosure of [his/her] medical information to [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] asked [***name of plaintiff***] to sign an authorization so that [***name of defendant***] could obtain medical information about [***name of plaintiff***] from [his/her] health care providers;**

2. **That [***name of plaintiff***] refused to sign the authorization;**

3. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**

4. **That [***name of plaintiff***]'s refusal to sign the authorization was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Even if [*name of plaintiff***] proves all of the above, [***name of defendant***]'s conduct was not unlawful if [***name of defendant***] proves that the lack of the medical information made it necessary to [***e.g., terminate plaintiff's employment***].**

New June 2015

Directions for Use

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release his or her medical information to the employer. (Civ. Code, § 56.20(b).). However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid*.)

Give this instruction if an employee claims that his or her employer retaliated against him or her for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define "medical information." (See Civ. Code, § 56.05(j) ["medical information" defined].)

The statute requires that the employer's retaliatory act be "due to" the employee's refusal to release the medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release

must be a "motivating reason" for the retaliation. (See *Kao, supra,* 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.

- Employee's Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).

- "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21)." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal. Rptr. 2d 696, 927 P.2d 1200], original italics.)

- "[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was 'the motivating reason for [his] discharge,' [defendant] 'nevertheless avoids liability by showing that … its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.' " (*Kao, supra,* 229 Cal.App.4th at p. 453.)

Secondary Sources

Witkin, California Evidence (4th ed. 2012) Witnesses § 681

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202 (Matthew Bender)

VF-3021. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. ~~**Was [***name of plaintiff***]**~~**While imprisoned,** ~~**under conditions that**~~ **[***describe violation that created risk of serious harm, e.g., was [name of plaintiff] placed in a cell block with rival gang members~~*deprived [him/her] of out-of-cell exercise*~~**]?**
   ____ **Yes** ____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ **Yes** ____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] know** ~~**or was it obvious**~~ **that [his/her**~~**/its**~~**] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ **Yes** ____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was there a reasonable justification for the conduct?**
   ____ **Yes** ____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her] official duties?**
   ____ **Yes** ____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of*

plaintiff]**?**
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2010, June 2011; Renumbered from CACI No. VF-3008 December 2012; Revised June 2015

Directions for Use

This verdict form is based on CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

VF-3022. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] have a serious medical need?
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] know that [*name of plaintiff*] faced a substantial risk of serious harm if [his/her] medical need went untreated~~act with deliberate indifference to that medical need~~?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [*name of defendant*] consciously disregard the risk by not taking reasonable steps to treat [*name of plaintiff*]'s medical need?
Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~3~~4. Was [*name of defendant*] acting or purporting to act in the performance of [his/her] official duties?
____ Yes ____ No

If your answer to question ~~3~~ 4 is yes, then answer question ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~5. Was [*name of defendant*]'s deliberate indifference a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~4~~ 5 is yes, then answer question ~~5~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3009 December 2012; Revised June 2014, June 2015

Directions for Use

This verdict form is based on CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care.*

The special verdict forms in this section are intended only as models. They may need to be modified

depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

3700. Introduction to Vicarious Responsibility

[One may authorize another to act on his or her behalf in transactions with third persons. This relationship is called "agency." The person giving the authority is called the "principal"; the person to whom authority is given is called the "agent."]

~~A [person/partnership/corporation]~~[An employer/A principal] is responsible for harm caused by the wrongful conduct of [his/her/its] [employees/agents~~/[*insert other relationship, e.g., "partners"*]~~] while acting within the scope of their [employment/authority].

[An [employee/agent] is always responsible for harm caused by [his/her/its] own wrongful conduct, whether or not the [employer/principal] is also liable.]

New September 2003; Revised June 2015

Directions for Use

This instruction provides the jury with some basic background information about the doctrine of respondeat superior. Include the first paragraph if the relationship at issue is one of principal-agent. If the employee or agent is also a defendant, give the third paragraph.

This instruction should be followed by either CACI No. 3703, *Legal Relationship Not Disputed,* CACI No. 3704, *Existence of "Employee" Status Disputed,* or CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Sources and Authority

- "Agency" Defined. Civil Code section 2295.
- Principal's Responsibility for Acts of Agent. Civil Code section 2338.
- "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304 [1 Cal.Rptr.2d 680].)
- "Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on " 'a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business.' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)
- ~~Under the theory of respondeat superior, a principal/employer is vicariously liable for an agent/employee's torts committed within the scope of agency/employment. (*Perez v. Van Groningen*~~

~~*& Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)~~

- "[U]nder the Tort Claims Act, public employees are liable for injuries caused by their acts and omissions to the same extent as private persons. Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. As the Act provides, '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would … have given rise to a cause of action against that employee,' unless 'the employee is immune from liability.' (Gov. Code, § 815.2, subds. (a), (b).)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "[W]here the liability of an employer in tort rests solely on the doctrine of respondeat superior, a judgment on the merits in favor of the employee is a bar to an action against the employer … ." (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 176 [71 Cal.Rptr. 275]~~If a principal's potential liability is based solely on the acts of his or her agent, then the principal cannot be held liable if the agent is exonerated. (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 167~~.)

- "An agent or employee is always liable for his own torts, whether his employer is liable or not." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1411 [178 Cal.Rptr.3d 18].)

- ~~Liability may result from a principal's authorization or direction to perform a tortious act, resulting in direct liability of the principal for his or her wrongful conduct. (3 Witkin, *supra*, § 167.) Such authorization may be found in ratification of the agent's conduct and in delegation of a nondelegable duty.~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163–168

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.14 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.24A (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:1–3:4 (Thomson Reuters~~ West~~)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] ~~claims~~ must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker without cause. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

~~**In addition to the right of control, you must also consider all of the circumstances in deciding whether [***name of agent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of agent***] was the employee of [***name of defendant***]:**~~

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d~~e~~) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

~~**(d)** **[***Name of defendant***] had an unlimited right to end the relationship with [***name of agent***];**~~

(e) ~~**The work being done by**~~ **[~~*name of*~~ *Name of agent*] was ~~[his/her] only~~ not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) [*Name of defendant*] and [*name of agent*] ~~acted as if~~believed that they had an employer-employee relationship[./; and]

(j) [*Specify other factor*].

New September 2003; Revised December 2010, June 2015

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,)- They have been phrased ~~in a way~~ so that a yes answer~~o suggest whether or not they~~ points toward an employment relationship. Omit any that are not relevant~~supported by the evidence~~. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].) Therefore, an "other" option (j) has been included.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra, ~~v. Antelope Valley Newspapers, Inc.~~* ~~(2014)~~ 59 Cal.4th ~~522,~~at p. 528 ~~[173 Cal.Rptr.3d 332, 327 P.3d 165]~~.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)
- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by

the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without

supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.41 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

4110. Breach of Duty by Real Estate Seller's Agent─Inaccurate Information in Multiple Listing Service─Essential Factual Elements (Civ. Code, § 1088)

[*Name of defendant***], as the real estate [broker/salesperson/appraiser] for [***name of seller***], listed the property for sale in a multiple listing service (MLS). [***Name of plaintiff***] claims that [he/she] was harmed because information in the MLS was false or inaccurate. [***Name of defendant***] is responsible for this harm if [***name of plaintiff***] proves all of the following:**

1. **That [***name of defendant***] listed the property for sale in a MLS;**

2. **That information posted on the MLS was false or inaccurate;**

3. **That [***name of defendant***] knew, or reasonably should have known, that the information was false or inaccurate;**

4. **That [***name of plaintiff***] reasonably relied on the false or inaccurate information in the MLS;**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2015

Directions for Use

A real estate agent or appraiser has a duty to a buyer of real estate to post only accurate information on a multiple listing service (MLS). The buyer has a right of action against an agent or appraiser for harm caused by inaccurate information on an MLS if the agent or broker knew or should have known that the information was false or inaccurate. (Civ. Code, § 1088; see *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077 [76 Cal.Rptr.2d 911].)

The statute provides a remedy for anyone "injured by" the false or inaccurate information. (Civ. Code, § 1088.) As a statutory remedy for a species of misrepresentation, the plaintiff must show causation in the form of both actual and justifiable reliance on the inaccurate information on the MLS (element 4). (See *Furla, supra,* 65 Cal.App.4th at p. 1078; CACI No. 1907, *Reliance;* CACI No. 1908, *Reasonable Reliance*.)

Sources and Authority

- False or Inaccurate Information in Multiple Listing Service. Civil Code section 1088.

- A real estate agent also has a statutory liability for negligence: '[i]f an agent . . . places a listing or

other information in the multiple listing service, that agent . . . shall be responsible for the truth of all representations . . . of which that agent . . . had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.' " (*Furla, supra,* 65 Cal.App.4th at p. 1077.

- "A broker's duties with respect to any listing or other information posted to an MLS are specified in section 1088. Section 1088 states in relevant part that the broker 'shall be responsible for the truth of all representations and statements made by the agent [in an MLS] … of which that agent … had knowledge or reasonably should have had knowledge,' and provides a statutory negligence claim for 'anyone injured' by the 'falseness or inaccuracy' of such representations and statements." (*Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568 [168 Cal.Rptr.3d 766].)

- "There is nothing in section 1088, or any other source of law, imposing responsibility on a seller's broker to ensure that true statements in an MLS are not misconstrued, or to make certain that the buyer and the buyer's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes." (*Saffie, supra,* 224 Cal.App.4th at p. 570.)

- "Defendants contend there is no triable issue of fact and as a matter of law plaintiff did not reasonably rely upon the misrepresentations, and plaintiff unreasonably failed to exercise due care for his own interest as buyer. They contend plaintiff was repeatedly warned by language in the Multiple Listing Service and the sales agreement that statements concerning square footage were approximations only, and that plaintiff could obtain accurate determinations of square footage by a professional pursuant to the buyer's right to inspect the property. But whether a plaintiff reasonably relied on a defendant's misrepresentations or failed to exercise reasonable diligence is also ordinarily a question of fact for the trier of fact." (*Furla, supra,* 65 Cal.App.4th at p. 1078.)

- "To be sure, an omission of information may sometimes render an otherwise true statement false or inaccurate, in the meaning of section 1088." (*Saffie, supra,* 224 Cal.App.4th at p. 570.)

- "Absent anything untrue or inaccurate about the statement seller's broker actually made in the MLS, and absent damage to buyer from such falsity or inaccuracy, seller's broker is not liable under section 1088." (*Saffie, supra,* 224 Cal.App.4th at pp. 571−572.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2010) Real Property, § 473.

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.76 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.147 (Matthew Bender)

~~2440~~4600. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/***specify other adverse action***] [him/her] because [he/she] acted [in furtherance of a false claims action/~~ ~~to stop a false claim by [***name of false claimant***]]. A false claims action is a lawsuit against a person or entity that is alleged to have submitted a false claim to a government agency for payment or approval. A false claim is a claim for payment with the intent to defraud the government. In order to establish ~~[his/her] unlawful discharge~~this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
2. **That [***name of false claimant***] was alleged to have defrauded the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**
3. **That [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***];**
4. **That [***name of plaintiff***] acted [in furtherance of a false claims action/to stop a false claim];**
5. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**
6. **That [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] were a substantial motivating reason for [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[An act is "in furtherance of" a false claims action if

[[*name of plaintiff***] actually filed a false claims action [himself/herself].]**

[*or***]**

[someone else filed a false claims action but [*name of plaintiff***] [***specify acts in support of action, e.g., gave a deposition in the action***], which resulted in the retaliatory acts.]**

[*or***]**

[no false claims action was ever actually filed, but [*name of plaintiff***] had reasonable suspicions of a false claim, and it was reasonably possible for [***name of plaintiff***]'s conduct to lead to a false claims action.]**

The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff***] need only show a genuine and reasonable concern that the government was being defrauded.]**

New December 2012; Revoked June 2013; Restored and Revised December 2013; Renumbered from CACI No. 2440 and Revised June 2015

Directions for Use

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) takes steps in furtherance of a false claims action or (2) makes efforts to stop a false claim violation. (See Gov. Code, § 12653(a).)

The second sentence of the opening paragraph defines a false claims action in its most common form: a lawsuit against someone who has submitted a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the steps that the plaintiff took that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(a).) If the case involves an adverse employment action other than termination, specify the action in eElements 5 and 6. These elements may also be modified to allege constructive discharge. ~~or adverse acts other than actual discharge.~~ See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses the term "substantial motivating reason" to express both intent and causation between the employee's actions and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases under the False Claims Act has not been addressed by the courts.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

Sources and Authority

- False Claims Act: Whistleblower Protection. Government Code section 12653.
- "The False Claims Act prohibits a 'person' from defrauding the government of money, property, or services by submitting to the government a 'false or fraudulent claim' for payment." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134

Cal.Rptr.3d 883].)

- "To establish a prima facie case, a plaintiff alleging retaliation under the CFCA must show: '(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.' " (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455 [152 Cal.Rptr.3d 595].)

- " 'As a statute obviously designed to prevent fraud on the public treasury, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose.' " (*McVeigh, supra,* 213 Cal.App.4th at p. 456.)

- "The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a 'person' being liable for defrauding the government, but of an 'employer' who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been 'characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1274.)

- "[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged 'in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1276.)

- "Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action." (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)

- "We do not construe *Kaye's* requirement that it be 'reasonably possible for [the employee's conduct] to lead to a false claims action' to mean that a plaintiff is not protected under the CFCA unless he or she has discovered grounds for a *meritorious* false claim action. … [T]he plaintiff need only show a genuine and reasonable concern that the government was possibly being defrauded in order to establish that he or she engaged in protected conduct. Any more limiting construction or significant burden would deny whistleblowers the broad protection the CFCA was intended to provide." (*McVeigh, supra,* 213 Cal.App.4th at pp. 457−458, original italics.)

- "There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra,* 179 Cal.App.4th at pp. 59–60.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 767

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

~~2442~~4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she] made a protected disclosure in good faith and that [***name of defendant***] [discharged***/specify other adverse action***] [him/her] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**
2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**
3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**
4. **That [***name of defendant***] [discharged***/specify other adverse action***] [***name of plaintiff***];**
5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to [discharge***/other adverse action***] [***name of plaintiff***];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2014; Renumbered from CACI No. 2442 and Revised June 2015

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

The statute prohibits acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment. (See Gov. Code, § 8547.8(b).) If the case involves an adverse employment action other than termination, specify the action in elements 4 and 5. These elements may also be modified if constructive discharge is alleged.~~While retaliatory discharge is clearly within the statute, adverse employment actions short of discharge are also prohibited. For adverse actions other than termination, replace "discharged" in the opening paragraph and in element 4, and "discharge" in element~~

~~5, with the applicable action.~~ See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. ~~2443~~4602, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].), However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220

Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)

- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party …' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not … available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112−1113 [150 Cal.Rptr.3d 405], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency, §§ 284 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, Employment Torts And Related Claims: Other Statutory Claims (WPA), ¶¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

~~2443~~4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her] [discharge/*specify other adverse action*], [*name of defendant*] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have discharged [*name of plaintiff*] anyway at that time, for legitimate, independent reasons.

New December 2014; Renumbered from CACI No. 2443 and Revised June 2015

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. ~~2442~~4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order. (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. ~~2442~~4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) ~~,~~ Agency, §~~§~~ 284 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, Employment Torts And Related Claims: Other Statutory Claims (WPA), ¶¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

~~2730~~4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff*] claims that [*name of defendant*] [discharged/[*other adverse employment action*]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s employer;**

2. **[That [*name of defendant*] believed that [*name of plaintiff*] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [*name of plaintiff*]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [*specify information disclosed*];]**

   [*or*]

   [That [*name of plaintiff*] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]

   [*or*]

   [That [*name of plaintiff*] refused to [*specify activity in which plaintiff refused to participate*];]

3. **[That [*name of plaintiff*] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or*]

   [That [*name of plaintiff*] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

   [*or*]

   [That [*name of plaintiff*]'s participation in [*specify activity*] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

4. **That [*name of defendant*] [discharged/[*other adverse employment action*]] [*name of plaintiff*];**

5. **That [*name of plaintiff*]'s [disclosure of information/refusal to [*specify*]] was a contributing factor in [*name of defendant*]'s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*];**

6. **That [*name of plaintiff*] was harmed; and**

7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No.2730 and Revised June 2015

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c).) Liabiliity may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that protection is not limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. ~~2731~~4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- "[T]he purpose of … section 1102.5(b) 'is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202

Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict

the purpose of the statute." (*Hager, supra,* 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

~~2731~~4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff*] proves that [his/her] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her] [discharge/[*other adverse employment action*]], [*name of defendant*] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time for legitimate, independent reasons.

New December 2013; Renumbered from CACI No. 2731 and Revised June 2015

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. ~~2730~~4603, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.)

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.
- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)
- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.03 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

Item 31

For information only

No materials to be distributed

Item number: 32

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 04/16/15

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Trial Court Management: Public Access to Administrative Decisions of Trial Courts
Amend rule 10.620

Committee or other entity submitting the proposal:
Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee

Staff contact (name, phone and e-mail):
Claudia Ortega, 415-865-7623
claudia.ortega@jud.ca.gov

Katherine Sher, 415-865-8031
katherine.sher@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved by E&P on December 11, 2014
Project description from annual agenda:
Review Rule 10.620 (Public access to administrative decisions of trial courts)

Rule 10.620 addresses public access to certain administrative decisions made by trial courts. It sets forth requirements for trial courts to provide public notice, and seek public input, regarding budget recommendations made by trial courts to the Judicial Council and specified administrative decisions. The decisions subject to public notice and comment requirements include any decision to close or reduce the hours of a court location. (Cal. Rules of Court, rule 10.620(d)(3).) When notice is required, the rule specifies the ways in which it must be given, including a requirement that notice be posted at all court locations that accept papers for filing. (Cal. Rules of Court, rule 10.620(g)(3).)

Amendments to Government Code section 68106, which took effect on January 1, 2012, created new requirements for public notice and comment when trial courts decide to close court facilities or reduce hours. These requirements are inconsistent with the requirements of rule 10.620, and trial courts have faced confusion in determining how notice is to be provided. The TCPJAC and CEAC will jointly propose amending the rule to repeal those provisions that are inconsistent with Gov. Code section 68106, leaving the statute as the sole governing authority regarding notice where it is applicable, and to make the language of the rule regarding posting of notice at court facilities consistent with section 68106.

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

SPR15-__

Title
Trial Court Management: Public Access to Administrative Decisions of Trial Courts

Action Requested
Review and submit comments by June 17, 2015

Proposed Rules, Forms, Standards, or Statutes
Amend rule 10.620

Proposed Effective Date
January 1, 2016

Proposed by
Trial Court Presiding Judges Advisory Committee
Hon. Marsha G. Slough, Chair

Court Executives Advisory Committee
Ms. Mary Beth Todd, Chair

Contact
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katherine.sher@jud.ca.gov

Executive Summary and Origin

Rule 10.620 addresses public access to certain administrative decisions made by trial courts. It sets forth requirements for trial courts to provide public notice, and seek public input, regarding budget recommendations made by trial courts to Judicial Council and specified administrative decisions. The decisions subject to public notice and comment requirements include any decision to close or reduce the hours of a court location. (Cal. Rules of Court, rule 10.620(d)(3).) When notice is required, the rule specifies the ways in which it must be given, including a requirement that notice be posted at all court locations that accept papers for filing. (Cal. Rules of Court, rule 10.620(g)(3).)

Amendments to Government Code section 68106, which took effect on January 1, 2012, created new requirements for public notice and comment when trial courts decide to close court facilities or reduce hours. These requirements are inconsistent with the requirements of rule 10.620, and trial courts have faced confusion in determining how notice is to be provided. The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC) jointly propose amending the rule to repeal those provisions that are inconsistent with Gov. Code section 68106, leaving the statute as the sole governing authority regarding notice where it is applicable, and to make the language of the rule regarding posting of notice at court facilities consistent with section 68106.

Background

Rule 10.620 was adopted in 2004 (as Rule 6.620) pursuant to Government Code section 68511.6, which requires that Judicial Council adopt rules providing for public notice and an opportunity to comment regarding trial court administrative and financial decisions. Government Code section 68106 then took effect in 2010, putting in place specific requirements for public notice and opportunity to comment on decisions to close courtrooms, or to close or reduce the hours of clerks' offices.

Under the previous language of section 68106, subsection (b), sixty day advance written public notice was required before closing any courtroom or closing or reducing the hours of a clerks' office. To reconcile the requirements of the statute and of the rule, some courts used a two-step notice procedure. A first notice would be issued, pursuant to the rule, fifteen court days before the decision was made, with public comment invited. Then, pursuant to the statute, another notice would be provided sixty days before the decision was implemented, but no further public comment would be solicited.

Section 68106 was amended effective January 1, 2012, to add the following requirements: 1) that notice be given "by electronic distribution to individuals who have subscribed to the court's electronic distribution service …." (subd. (b)(1)); 2) that the notice include "information on how the public may provide written comments during the 60-day period on the court's plan …." (subd. (b)(2)(A)); 3) that the court "review and consider all public comments received" (*ibid*.); and 4) that the court "immediately provide notice to the public," if it changes its plans during the comment period (*ibid*.).

The existing notice requirements of rule 10.620, as applied to court closures and reduction of hours, are inconsistent with these new provisions of section 68106. In particular, rule 10.620 requires that public notice be given at least fifteen court days before a decision is made, including a decision to close or significantly reduce the hours of a court location, and that public comment be allowed within that notice period. The rule further requires that a second public notice be given of such closures or service reductions within fifteen court days after the action is taken. By contrast, Government Code section 68106 now requires public notice to be provided no less than sixty days before a courtroom is closed or a clerks' office closed or its hours reduced, with the public comment period running concurrent with the notice period.

Courts have continued to struggle with the question of how to provide notice due to the inconsistency of rule 10.620 with the new statutory requirements.

The Proposal

Subdivision (d)(3) and (f)(5) of rule 10.620 would be repealed to eliminate the application of the rule's notice requirements to decisions to close court locations or significantly reduce the hours of a court location. In addition, the proposed amendments conform the language of rule 10.620 (g)(3) regarding the posting of notice at court locations to the language of Government Code section 68106.

Currently, rule 10.620 requires a trial court to seek input from the public regarding specified decisions by providing public notice at least fifteen court days before the date on which the decision is to be made or the action is to be taken. (Cal. Rules of Court, rule 10.620(e).) The rule further requires that public notice be given of specified actions not later than fifteen court days after the event. (Cal. Rules of Court, rule 10.620(f).)

Under rule 10.620, subdivision (d)(3), the pre-decision notice requirement is applicable to "[t]he planned, permanent closure of any court location for an entire day or for more than one-third of the hours the court location was previously open for either court sessions or filing of papers." Under subdivision (f)(5), the post-implementation notice requirement is applicable to "[a] significant permanent decrease in the number of hours that a court location is open during any day for either court sessions or filing of papers, except those governed by (d)(3)." (Closures and reductions governed by (d)(3) are subject to the post-implementation notice requirement under subdivision (f)(6), which applies to any action for which public input was required under any part of subsection (d).)

Finally, Rule 10.620 (g)(3) currently requires that notice be posted "at all locations of the court that accept papers for filing." The amended provision would require notice to be posted "within or about court facilities."

Trial court leadership have conveyed to members of both the TCPJAC and CEAC that the existing inconsistency between the rule and the statute has led to difficulty in determining how to provide notice and an opportunity to comment on court closures or reductions in service. A number of trial courts have asked Judicial Council's Legal Services Office for guidance regarding the notice requirements. Other courts, unaware of the statutory changes and resulting conflict, have mistakenly followed the now superseded requirements of the rule rather than the new statutory requirements.

With the repeal of subdivisions (d)(3) and (f)(5), rule 10.620 would no longer apply to notice of court closures or reductions in service. Notice of such decisions would be subject solely to the statutory requirements of Government Code section 68106, eliminating any confusion over how to provide for public notice and comment.

Alternatives Considered

No change to rule 10.620

The committees considered not recommending the repeal of subdivisions (d)(3) and (f)(5), but concluded that inaction would leave in place rule requirements that are incompatible with the statutory requirements under Government Code section 68106, resulting in continued confusion.

Conform rule 10.620 to Government Code section 68106

The committees considered amending the rule to conform the notice and comment requirements regarding court closures and service reductions to the requirements of Government Code section 68106. The committees concluded that such amendment would require significant revision of the rule to leave existing notice and comment requirements in place for the other types of decisions covered under the rule while creating new specially applicable provisions for court closures and service reductions. The end result, however, would be the same as is accomplished by the simpler alternative of repealing subdivisions (d)(3) and (f)(5). Moreover, rewriting the rule to conform to the statute runs the risk of the statute once again being amended, leaving courts facing inconsistent requirements yet again.

Implementation Requirements, Costs, and Operational Impacts

The repeal of subdivisions (d)(3) and (f)(5) should have a positive operational impact on the trial courts, as they will no longer face conflicting requirements for public notice and comment regarding court closures and service reductions. There is a potential cost savings as courts will no longer have to give the two-step notification previously required to comply with both the statute and the rule.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The advisory committees also seek 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 10.620, at pages 5-8.

Rule 10.620 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 10.620. Public access to administrative decisions of trial courts

(a)–(c) * * *

(d) Other decisions requiring public input

Each trial court must seek input from the public, as provided in (e), before making the following decisions:

(1)–(2) * * *

~~(3) The planned, permanent closure of any court location for an entire day or for more than one-third of the hours the court location was previously open for either court sessions or filing of papers. As used in this subdivision, planned closure does not include closure of a location on a temporary basis for reasons including holidays, illness, or other unforeseen lack of personnel, or public safety.~~

~~(4)~~(3) The cessation of any of the following services at a court location:

(A) The Family Law Facilitator; or

(B) The Family Law Information Center.

(e) * * *

(f) Information about other trial court administrative matters

A trial court must provide notice, not later than 15 court days after the event, of the following:

(1) Receipt of the annual allocation of the trial court budget from the Judicial Council after enactment of the Budget Act.

(2) The awarding of a grant to the trial court that exceeds the greater of $400,000 or 10 percent of the total trial court budget.

(3) The solicitation of proposals or the execution of a contract that exceeds the greater of $400,000 or 10 percent of the trial court budget.

(4) A significant permanent increase in the number of hours that a court location is open during any day for either court sessions or filing of papers. As used in this paragraph,

a significant increase does not include an emergency or one-time need to increase hours.

~~(5) A significant permanent decrease in the number of hours that a court location is open during any day for either court sessions or filing of papers, except those governed by (d)(3). As used in this paragraph, a significant decrease does not include a decrease in response to an emergency need to close a location on a temporary basis for reasons including illness or other unforeseen lack of personnel or public safety.~~

~~(6)~~(5) The action taken on any item for which input from the public was required under (d). The notice must show the person or persons who made the decision and a summary of the written and e-mail input received.

(g) Notice

When notice is required to be given by this rule, it must be given in the following ways:

(1) Posted on the trial court's Web site, if any.

(2) Sent to any of the following persons or entities—subject to the requirements of (h)—who have requested in writing or by electronic mail to the court executive officer to receive such notice:

(A) A newspaper, radio station, and television station in the county;

(B) The president of a local or specialty bar association in the county;

(C) Representatives of a trial court employees organization;

(D) The district attorney, public defender, and county counsel;

(E) The county administrative officer; and

(F) If the court is sending notice electronically using the provisions of (h), any other person or entity that submits an electronic mail address to which the notice will be sent.

(3) Posted ~~at all locations of the~~ within or about court facilities~~that accept papers for filing~~.

(h)–(k) * * *

Item number: 33

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Trial Courts: Permanent Authorization for Remote Video Proceedings in Traffic Infraction Cases (amend rule 4.220; revise form TR-500-INFO) (Action Required – Approval for circulation for comment)

Committee or other entity submitting the proposal:
Court Technology Advisory Committee and Traffic Advisory Committee

Staff contact (name, phone and e-mail): Tara Lundstrom, 415-865-7650, tara.lundstrom@jud.ca.gov
Courtney Tucker, 415-865-7611, courtney.tucker@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 10, 2014 (Traffic Advisory Committee)
Approved by JCTC: February 9, 2015 (Court Technology Advisory Committee)

Project description from annual agenda:
COURT TECHNOLOGY ADVISORY COMMITTEE
Remote Courtroom Video.
Develop Remote Courtroom Video Standards, a Pilot Program, and Update to Rules
Major Tasks:
(c) Seek extension of Rule of Court 4.220 (Remote Video Proceedings in Traffic Infraction Cases). Consider Expansion to other case types.

TRAFFIC ADVISORY COMMITTEE
Remote Video Proceedings for Traffic Infractions.
Review pilot program for remote video proceedings in traffic infraction cases for recommendation on whether the pilot program under rule 4.220 should be extended or made permanent.

If requesting July 1 or out of cycle, explain:

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

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INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Trial Courts: Permanent Authorization for Remote Video Proceedings in Traffic Infraction Cases

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 4.220; amend form TR-500-INFO

Proposed by
Traffic Advisory Committee
Hon. Mark S. Borrell, Chair

Court Technology Advisory Committee
Hon. Terence L. Bruiniers, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
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Executive Summary and Origin

The Traffic Advisory Committee and Court Technology Advisory Committee propose amending rule 4.220 of the California Rules of Court and corresponding *Instructions to Defendant for Remote Video Proceeding* (form TR-500-INFO). Rule 4.220 authorizes trial courts to establish remote video pilot projects by local rule, subject to the approval of the Judicial Council, in cases involving traffic infraction violations. The rule only remains in effect until January 1, 2016, unless the council amends the rule.

This proposal would remove the sunset language in rule 4.220 and convert the rule into a standing rule of court. The amendments would allow trial courts to conduct remote video proceedings (RVP) in eligible traffic cases after January 1, 2016, so long as the courts adopt a local rule permitting RVP, notify the council, and comply with a semiannual reporting requirement. Minor changes would also be made to form TR-500-INFO to eliminate references to the pilot project. This proposal originated from the Superior Court of Fresno County, which has successfully implemented a pilot project under the current rule.

Background

The Judicial Council adopted rule 4.220 and corresponding forms, effective February 1, 2013, to January 1, 2016. The Court Technology Advisory Committee and Traffic Advisory Committee

recommended rule 4.220 based on a suggestion from the Superior Court of Fresno County. Seeking to ameliorate the impact of multiple court closures on the public, the court saw RVP as an effective way to continue offering services to outlying areas.

In trial courts that institute RVP pilot projects under rule 4.220, defendants in eligible cases may elect to appear at trial by two-way video from remote locations designated by the court. Under the rule, RVP is authorized in cases involving alleged infractions of the Vehicle Code or any local ordinance adopted under the Vehicle Code, excluding alcohol and drug infractions under article 2 of chapter 12 of division 11 of the Vehicle Code and cases filed with an informal juvenile and traffic court under Welfare and Institutions Code sections 255 and 256. (Cal. Rules of Court, rule 4.220(b)(1).) Participation in the RVP pilot project is voluntary; the defendant must request to proceed by RVP and submit a signed notice of rights and waiver form to the court (form TR-505 or form TR-510). (*Id.,* rule 4.220(e).)

The Superior Court of Fresno County applied for and received council approval for an RVP pilot project under rule 4.220. It then adopted a local rule establishing the pilot project that became effective March 1, 2013. The court began offering RVP in April at two remote sites located in Mendota and Coalinga. To date, the Superior Court of Fresno County is the only court to have requested and received council authorization for an RVP pilot project.

The Superior Court of Fresno County has submitted four semiannual reports describing its experience under the pilot project. RVP usage has steadily increased since the court initiated the pilot project, although these cases still represent a small fraction of the total number of citations issued near the remote sites. Technical issues have been infrequent and minor, and they have been resolved promptly by onsite court staff. Postappearance surveys reflect the participants' overall high satisfaction with RVP and the quality of the services provided. Based on its positive experience under the pilot project, the Superior Court of Fresno County has requested that rule 4.220 be amended to allow it to continue offering RVP in eligible cases after January 1, 2016.

The Proposal

Without amending rule 4.220, trial courts will no longer be authorized to offer RVP in traffic infraction cases after January 1, 2016. This proposal is necessary to allow courts to continue conducting RVP in eligible cases. It would not make any substantive changes to the rule's procedural requirements or scope.

Eliminate sunset and convert to standing rule of court

This proposal would eliminate the sunset language in rule 4.220 and convert it into a standing rule. Trial courts could offer RVP in eligible cases after they have adopted a local rule permitting RVP and have notified the Judicial Council. Trial courts would no longer be required to request and receive council authorization for pilot projects implementing RVP.

Specifically, subdivision (q), which currently provides the effective dates for the rule, would be removed, as would other references to effective dates in subdivisions (a)(1) and (c). Subdivision

(a), which provides the authorization for RVP, would be amended by removing subpart (2) because this subpart requires that courts request and receive council authorization to conduct pilot projects. Other "pilot project" references would also be stricken from subdivisions (a), (c), (e), (o), and (p). In addition, language would be added to subdivision (p) to provide that courts must notify the council that they will begin offering RVP under the rule.

Retain current reporting requirement

The reporting requirement in subdivision (p) would be retained. Under subdivision (p), trial courts "must institute procedures as required by the Judicial Council for collecting and evaluating information about that court's pilot project and must prepare semiannual reports to the Judicial Council that include an assessment of the costs and benefits of the project." (Cal. Rules of Court, rule 4.220(p).)

Under the current guidelines, these reports contain information about the number and types of RVP conducted for arraignments, trials, and other proceedings; the locations and facilities used to conduct RVP; details on the type of technology used to conduct RVP; the number of appeals from RVP and the outcome of the appeals; and the number of cases where the law enforcement officer appeared at court instead of at the remote location with the defendant. They should also include information that would help the council evaluate whether it should modify rule 4.220 or expand RVP to other case types.

Retaining this semiannual reporting requirement would enable the council to continue monitoring the use of this new technology in the courts. This information and data might provide valuable feedback to the council as it considers whether to expand RVP to other case types.

Retain current procedural requirements and scope

This proposal would not make substantive changes to the procedural requirements under the rule for implementing RVP at the trial courts, nor does it expand RVP to other case types. The Superior Court of Fresno County has expressed its satisfaction with the current requirements and has not sought any modification to the RVP procedure set forth in the rule. Its semiannual reports do not reflect any issues with the implementation of this procedure.

Make minor changes to form TR-500-INFO

Form TR-500-INFO provides information and instructions to defendants in RVP, including how to request RVP, the opportunity to appeal the court's ruling, and which rights the defendant will be waiving by requesting to appear in RVP. This proposal would make the language of the form consistent with the amendments to rule 4.220 by removing references to a "pilot project."

Alternatives Considered

The Traffic Advisory Committee and Court Technology Advisory Committee considered the following alternatives to this proposal:

- Amend rule 4.220 by removing not only the sunset language, but also any requirement that trial courts provide notice and semiannual reports to the Judicial Council;

- Amend rule 4.220 by extending the effective date for an additional period of years, but not eliminating the sunset language; or
- Not seek an amendment to the rule.

Alternative 1: Eliminate notice and semiannual reporting requirements

The first alternative considered has the benefit of reducing the time that trial courts must spend preparing and submitting notices and semiannual reports to the council, and that the council and its staff must devote to reviewing them. In light of this concern, the advisory committees have requested comments regarding the costs and benefits of retaining the semiannual reporting requirement, and whether subdivision (p) of rule 4.220 should be amended to include a sunset provision, such that courts would only be required to submit semiannual reports for a certain period of years.

Implementing the first alternative would limit the council's oversight of RVP at the trial court level. The council and its staff would have no effective means of knowing which trial courts are conducting RVP or of gathering information and data about the implementation of RVP by trial courts, including any issues, concerns, and creative solutions. Such information and data presented in the semiannual reports could prove useful to the advisory committees as they review possibilities for expanding RVP at the trial courts.

Alternative 2: Extend pilot project

The second alternative—extending the pilot project—would continue the provisional nature of the rule for an additional period of years. This option would give the council an opportunity to carefully review each court's request for a pilot project. In comparison with the above proposal, however, this alternative would result in an additional cost to trial courts as they would need to prepare and present an application to the Judicial Council for its approval before they could start offering RVP in traffic infraction cases. It would also require that the council and its staff spend time reviewing these applications and, if desired, amend the rule to extend or eliminate the effective date at a later time. The benefit of this additional oversight is minimal in light of the notice and semiannual reporting requirements contained in the above proposal.

Alternative 3: Allow rule to sunset

The last alternative is not to seek an amendment to the rule and allow it to sunset. Weighing in favor of this approach is the fact that only one trial court has requested and implemented an RVP pilot project since rule 4.220 was adopted two years ago. And no other courts have expressed an interest in establishing a pilot project to the advisory committees or Judicial Council staff. Yet, this alternative would effectively end the Superior Court of Fresno County's RVP program on January 1, 2016. The Superior Court of Fresno County has successfully implemented the pilot project, has reported its overall satisfaction with the project, and has expressed an interest in continuing to offer these services in outlying areas. Moreover, this alternative would prevent other courts from conducting RVP in traffic cases in the future. As trial courts are forced to close courthouses in the face of budget constraints, they may follow the Superior Court of Fresno County's lead and elect to offer RVP in remote locations in an effort to increase public access.

Implementation Requirements, Costs, and Operational Impacts

Implementation of this proposal will allow the Superior Court of Fresno County to continue offering this service, which has preserved access to the public in outlying areas and resulted in efficiencies and cost savings for the court. Otherwise, it will have no effect on the court since it is currently preparing and submitting semiannual reports.

For other trial courts that may decide to offer RVP under the rule in the future, the implementation costs will decrease slightly. These courts will no longer be required to apply for and receive Judicial Council approval before offering RVP in eligible cases under the rule. Instead, they will only need to notify the council. Otherwise, implementation and its associated costs will remain the same as they are under the current rule. Collaboration between courts, local cities and counties, law enforcement, and members of the public will be required.

There will be a need for planning and the allocation of resources—including physical locations, technology, and staffing. There will also be a need to train public employees to act as deputy clerks and provide security for the remote video trials at the local community facilities and to provide information to the public. These additional expenses may be offset by savings for the courts in terms of reduced maintenance of court facilities, and for the public and law enforcement in terms of reduced travel time and expense. Because implementation is voluntary, each court will determine if the benefits outweigh the costs in deciding whether to offer RVP.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

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

- Should the semiannual reporting requirement be retained? Do the benefits outweigh the costs of preparing and submitting the reports?

- Should subdivision (p) include sunset language providing that courts only be required to submit semiannual reports for a certain period of years?

Attachments

1. Cal. Rules of Court, rule 4.220, at pages 7–12
2. Form TR-500-INFO, at page 13

Rule 4.220 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Rule 4.220. Remote video proceedings in traffic infraction cases

(a) Authorization for ~~pilot project~~ remote video proceedings

~~(1) With the approval of the Judicial Council, a~~ A superior court may ~~establish~~ by local rule ~~a pilot project through December 31, 2015, to~~ permit arraignments, trials, and related proceedings concerning the traffic infractions specified in (b) to be conducted by two-way remote video communication methods under the conditions stated below.

~~(2) To obtain approval of the Judicial Council to conduct a pilot project for remote video proceedings under this rule, a court must submit an application to the council that includes details on what procedures and forms the court intends to institute for processing cases in the pilot project.~~

(b) Definitions

For the purposes of this rule:

(1) "Infraction" means any alleged infraction involving a violation of the Vehicle Code or any local ordinance adopted under the Vehicle Code, other than an infraction cited under article 2 (commencing with section 23152) of chapter 12 of division 11 of the Vehicle Code, except that the procedures for remote video trials authorized by this rule do not apply to any case in which an informal juvenile and traffic court exercises jurisdiction over a violation under sections 255 and 256 of the Welfare and Institutions Code.

(2) "Remote video proceeding" means an arraignment, trial, or related proceeding conducted by two-way electronic audiovisual communication between the defendant, any witnesses, and the court in lieu of the physical presence of both the defendant and any witnesses in the courtroom.

(3) "Due date" means the last date on which the defendant's appearance is timely under this rule.

(c) Application

This rule establishes the minimum procedural requirements and options for courts that conduct ~~a pilot project for~~ remote video proceedings for cases in which a defendant is charged with an infraction as defined in (b) and the defendant~~'s~~ request<u>s</u> to proceed according to this rule ~~is for a trial or related proceeding that is set for a date after January 31, 2013~~.

(d) Designation of locations and presence of court clerk

(1) The court must designate the location or locations at which defendants may appear with any witnesses for a remote video proceeding in traffic infraction cases.

(2) The locations must be in a public place, and the remote video proceedings must be viewable by the public at the remote location as well as at the courthouse.

(3) A court clerk must be present at the remote location for all remote video proceedings.

(e) ~~Scope of court pilot project~~ Required procedures and forms and request by defendant

A court that conducts remote video proceedings under this rule must comply with the ~~The~~ following procedures and required forms in this section ~~must be included in the court's pilot project for remote video proceedings~~. In addition to following the standard provisions for processing traffic infraction cases, the defendant may request to proceed by remote video proceeding as provided below.

(1) *Arraignment and trial on the same date*

The following procedures apply to a remote video proceeding when the court grants a defendant's request to have an arraignment and trial on the same date:

(A) The defendant must review a copy of the *Instructions to Defendant for Remote Video Proceeding* (form TR-500-INFO).

(B) To proceed by remote video arraignment and trial, the defendant must sign and file a *Notice and Waiver of Rights and Request for Remote Video Arraignment and Trial* (form TR-505) with the clerk by the appearance date indicated on the *Notice to Appear* or a continuation of that date granted by the court and must deposit bail when filing the form.

(C) A defendant who is dissatisfied with the judgment in a remote video trial may appeal the judgment under rules 8.901–8.902.

(2) *Arraignment on a date that is separate from a trial date*

The following procedures apply to a remote video proceeding when the court grants a defendant's request to have an arraignment that is set for a date that is separate from the trial date:

(A) The defendant must review a copy of the *Instructions to Defendant for Remote Video Proceeding* (form TR-500-INFO).

(B) To proceed by remote video arraignment on a date that is separate from a trial date, the defendant must sign and file a *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510) with the clerk by the appearance date indicated on the *Notice to Appear* or a continuation of that date granted by the court.

(3) *Trial on a date that is separate from the date of arraignment*

The following procedures apply to a remote video proceeding when the court grants a defendant's request at arraignment to have a trial set for a date that is separate from the date of the arraignment:

(A) The defendant must review a copy of the *Instructions to Defendant for Remote Video Proceeding* (form TR-500-INFO).

(B) To proceed by remote video trial, the defendant must sign and file a *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510) with the clerk by the appearance date indicated on the *Notice to Appear* or a continuation of that date granted by the court and deposit bail with the form as required by the court.

(C) A defendant who is dissatisfied with the judgment in a remote video trial may appeal the judgment under rules 8.901–8.902.

(4) *Judicial Council forms for remote video proceedings*

The following forms must be made available by the court and used by the defendant to implement the procedures that are required ~~by a court's pilot project~~ under this rule:

(A) *Instructions to Defendant for Remote Video Proceeding* (form TR-500-INFO);

(B) *Notice and Waiver of Rights and Request for Remote Video Arraignment and Trial* (form TR-505); and

(C) *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510).

(f) Deposit of bail

(1) If a defendant requests to proceed by remote video arraignment and trial as provided in section (e)(1), the defendant must deposit bail, at the same time the request is filed, in the amount established in the uniform traffic penalty schedule under Vehicle Code section 40310.

(2) If a defendant requests to proceed by remote video proceeding for a trial as provided in section (e)(3), the judicial officer may require deposit of bail, at the same time the request for remote video proceeding is filed, in the amount established in the uniform traffic penalty schedule under Vehicle Code section 40310.

(g) Appearance of witnesses

On receipt of the defendant's waiver of rights and request to appear for trial as specified in section (e)(1) or (e)(3), the court may permit law enforcement officers and other witnesses to testify at the remote location or in court and be cross-examined by the defendant from the remote location.

(h) Authority of court to require physical presence of defendant and witnesses

Nothing in this rule is intended to limit the authority of the court to issue an order requiring the defendant or any witnesses to be physically present in the courtroom in any proceeding or portion of a proceeding if the court finds that circumstances require the physical presence of the defendant or witness in the courtroom.

(i) Extending due date for remote video trial

If the clerk receives the defendant's written request for a remote video arraignment and trial on form TR-505 or remote video trial on form TR-510 by the appearance date indicated on the *Notice to Appear* and the request is granted, the clerk must, within 10 court days after receiving the defendant's request, extend the appearance date by 25 calendar days and must provide notice to the defendant of the extended due date on the *Notice and Waiver of Rights and Request for Remote Video Arraignment and Trial* (form TR-505) or *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510) with a copy of any required local forms.

(j) Notice to arresting officer

If a court grants the defendant's request for a remote video proceeding after receipt of the defendant's *Notice and Waiver of Rights and Request for Remote Video Arraignment and Trial* (form TR-505) or *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510) and bail deposit, if required, the clerk must deliver, mail, or e-mail a notice of the remote video proceedings to the arresting or citing law enforcement officer. The notice to the officer must specify the location and date for the remote video proceeding and provide an option for the officer to request at least five calendar days before the appearance date to appear in court instead of at the remote location.

(k) Due dates and time limits

Due dates and time limits must be as stated in this rule, unless extended by the court. The court may extend any date, and the court need not state the reasons for granting or denying an extension on the record or in the minutes.

(l) Ineligible defendants

If the defendant requests a remote video proceeding and the court determines that the defendant is ineligible, the clerk must extend the due date by 25 calendar days and notify the defendant of the determination and the new due date.

(m) Noncompliance

If the defendant fails to comply with this rule (including depositing the bail amount, signing and filing all required forms, and complying with all time limits and due dates), the court may deny a request for a remote video proceeding and may proceed as otherwise provided by statute.

(n) Fines, assessments, or penalties

This rule does not prevent or preclude the court from imposing on a defendant who is found guilty any lawful fine, assessment, or other penalty, and the court is not limited to imposing money penalties in the bail amount, unless the bail amount is the maximum and the only lawful penalty.

(o) Local rules and forms

A court establishing ~~a~~ remote video ~~trial project~~ proceedings under this rule may adopt such local rules and additional forms as may be necessary or appropriate to implement the rule and the court's local procedures not inconsistent with this rule.

(p) Notice and collection of information and reports on remote video proceedings ~~pilot project~~

Each court that establishes a local rule authorizing remote video proceedings ~~a pilot project~~ under this rule must notify the Judicial Council, institute procedures as required by the ~~Judicial~~ council for collecting and evaluating information about that court's ~~pilot project~~ program, and ~~must~~ prepare semiannual reports to the ~~Judicial~~ council that include an assessment of the costs and benefits of remote video proceedings at that court ~~the project~~.

~~(q) Effective dates~~

~~This rule is adopted effective February 1, 2013, and remains in effect only until January 1, 2016, and as of that date is repealed, unless a rule adopted before January 1, 2016, repeals or extends that date.~~

INSTRUCTIONS TO DEFENDANT FOR REMOTE VIDEO PROCEEDING

A court may by local rule permit remote video arraignments and trials for traffic infraction cases. (Cal. Rules of Court, rule 4.220.) If the court where your case is filed permits remote video proceedings (RVP), you may be able to appear by video as allowed by local rule at a remote location designated by the court without having to appear in person at court. RVP is available in cases involving Vehicle Code infractions or local ordinances adopted under the Vehicle Code. The procedure does not apply to traffic offenses that involve drugs or alcohol or are filed in Informal Juvenile and Traffic Court. The procedure provides a convenient process for resolving cases by consideration of disputed facts and evidence with the use of two-way audiovisual communication between the court and a local facility. Defendants who request to appear by RVP must waive (give up) certain rights that apply to trial of criminal offenses, including traffic infractions. The instructions below explain procedures for requesting RVP for traffic infraction cases:

1. To request arraignment and trial on the same day, you may file a *Notice and Waiver of Rights and Request for Remote Video Arraignment and Trial* (form TR-505). To request RVP for arraignment or trial on separate days, you may file a *Notice and Waiver of Rights and Request for Remote Video Proceeding* (form TR-510).

2. Return the completed and signed form to the clerk with payment of the bail amount required by local rule or as ordered by the court. A completed form TR-505 or TR-510 with a deposit of the required bail payment must be received by the clerk by the appearance date on the Notice to Appear citation or continuation date granted by the court. If the form is received after the due date or without deposit of bail as required, the court may require a court appearance or bail deposit to schedule an arraignment or trial. ***Failure to file the form and deposit bail as required by local rule by the due date may subject you to other charges, penalties, assessments, and actions, including a civil assessment under Penal Code section 1214.1 of up to $300 and a hold on your driver's license.***

3. When the clerk receives a timely request for RVP with payment of the bail required by local rule or as ordered by the court, the court will rule on the request and provide notice of the court's decision on eligibility for RVP. If the court denies the request, the court may order you to respond within 10 court days of the notice of the order to schedule an arraignment or trial or appear in court. If the court approves the request, the court will notify you and the officer of the extended date and location to appear. The court may grant a request by the officer that issued the ticket and any other witnesses to appear in court to testify and be cross-examined while you appear at the remote location.

4. After a remote video trial is completed, if you are dissatisfied with the court's judgment, you may file an appeal under California Rules of Court, rules 8.901–8.902 within 30 days of the judgment. A new trial ("trial de novo") is not allowed. Always include your citation number in any correspondence with the court.

5. **IMPORTANT:** You have the right to appear for an in-person arraignment and trial at the court. If you appear at court for your case, your rights include:
   - The right to be represented by an attorney employed by you;
   - The right to request court orders without cost to subpoena and compel the attendance of witnesses and the production of evidence on your behalf;
   - The right to appear in person in court before a judicial officer for an arraignment to be informed of the charges against you, to be advised of your rights, and to enter a plea;
   - The right to request that a trial be scheduled for a date that is after your arraignment in court;
   - The right to have a speedy trial;
   - The right to be physically present in court at all stages of the proceedings including, but not limited to, presentation of testimony and evidence and arguments on questions of law at trial and sentencing; and
   - The right to have the witnesses testify under oath in court and to confront and cross-examine witnesses in court.

   By voluntarily requesting to appear for arraignment and/or trial by RVP, you will agree to waive (give up):
   - Your right to appear in person in court before a judicial officer for arraignment and/or trial;
   - Your right to a speedy trial within 45 days; and
   - Your right to be physically present in court for trial and sentencing and all stages of the proceedings, including, but not limited to, presentation of testimony and evidence and arguments on questions of law, and confrontation and cross-examination in person of the officer that issued the ticket and other witnesses.

Item number: 34

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules Modernization Project: Modernize the Rules of Court to Facilitate E-Business, E-Filing, and E-Service

Committee or other entity submitting the proposal:
Court Technology Advisory Committee, Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, Traffic Law Advisory Committee, and Appellate Law Advisory Committee.

Staff contact (name, phone and e-mail): Patrick O'Donnell, patrick.o'donnell@jud.ca.gov, 415-864-7665; Tara Lundstrom, tara.lundstrom@jud.ca.gov, 415-865-7650;

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved by JCTC 2/9/2015
Project description from annual agenda:
Modernize Rules of Court Modernize Trial and Appellate Court Rules to Support E-Business Major Tasks: (a) In collaboration with other advisory committees, review rules and statutes in a systematic manner and develop recommendations for comprehensive changes to align with modern business practices (e.g., eliminating paper dependencies).

This project also appears on the annual agendas for the Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, Traffic Law Advisory Committee, and Appellate Law Advisory Committee

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Rules Modernization Project: Modernize the Rules of Court to Facilitate E-Business, E-Filing, and E-Service

Proposed Rules, Forms, Standards, or Statutes
Amend titles 2, 3, 4, 5, 7, and 8 (Cal. Rules of Court, rules 2.3, 2.102–2.108, 2.111, 2.113–2.115, 2.117, 2.130, 2.133, 2.134, 2.150, 2.550, 2.551, 2.577, 2.816, 2.831, 2.1055, 2.1100, 3.254, 3.524, 3.544, 3.670, 3.815, 3.823, 3.827, 3.931, 3.1010, 3.1109, 3.1110, 3.1113, 3.1202, 3.1300, 3.1302, 3.1304, 3.1320, 3.1326, 3.1327, 3.1330, 3.1340, 3.1346, 3.1347, 3.1350, 3.1351, 3.1354, 3.1590, 3.1700, 3.1900, 3.2107, 4.102, 5.50, 5.83, 5.91, 5.215, 5.242, 5.275, 5.534, 5.906, 7.802, 8.10, 8.40, 8.42, 8.44–8.47, 8.50, 8.100, 8.104, 8.108, 8.112, 8.122–8.124, 8.128, 8.130, 8.137, 8.140, 8.144, 8.147, 8.150, 8.204, 8.208, 8.212, 8.220, 8.224, 8.248, 8.252, 8.264, 8.272, 8.278, 8.304, 8.308, 8.336, 8.344, 8.346, 8.360, 8.380, 8.384–8.386, 8.405, 8.406, 8.411, 8.412, 8.474, 8.482, 8.486, 8.488, 8.495, 8.496, 8.498, 8.504, 8.512, 8.540, 8.548, 8.610, 8.616, 8.630, 8.702, 8.703, 8.800, 8.803, 8.804, 8.806, 8.814, 8.821–8.824, 8.832–8.835, 8.838, 8.840, 8.842, 8.843, 8.852, 8.853, 8.862, 8.864, 8.866, 8.868, 8.870, 8.872, 8.874, 8.881–8.883, 8.888, 8.890, 8.891, 8.901, 8.902, 8.911, 8.915, 8.917, 8.919, 8.921, 8.922, 8.924, 8.926–8.928, 8.931, and 8.1018); and adopt rules 2.10, 7.802, and 8.11

Proposed by
Court Technology Advisory Committee
Hon. Terence L. Bruiniers

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Tara Lundstrom, 415-865-7650
tara.lundstrom@jud.ca.gov

Executive Summary and Origin

The Court Technology Advisory Committee (CTAC) proposes to amend various rules in titles 2, 3, 4, 5, 7, and 8 of the California Rules of Court. This proposal would introduce minor, non-substantive amendments to the rules in order to facilitate modern e-business practices, e-filing, and e-service. The Civil and Small Claims Advisory Committee, the Traffic Advisory Committee, the Family and Juvenile Law Advisory Committee, the Probate and Mental Health Advisory Committee, and the Appellate Advisory Committee also recommend the amendments to the rules in their respective subject matter areas.

Background

Recognizing that courts are swiftly proceeding to a paperless world, CTAC is leading the Rules Modernization Project, a collaborative effort to comprehensively review and modernize the California Rules of Court so that they will be consistent with and foster modern e-business practices. To ensure that each title is revised in view of any statutory requirements and policy concerns unique to that area of law, CTAC is coordinating with five other advisory committees with relevant subject matter expertise.

The Rules Modernization Project is being carried out in two phases. This rules proposal marks the culmination of phase 1: an initial round of technical rule amendments to address language in the rules that is incompatible with the current statutes and rules governing e-filing and e-service and with e-business practices in general. Next year, CTAC will undertake phase 2, which will involve a more in-depth examination of any statutes and rules that may hinder e-business practices.

The Proposal

This proposal would make minor, technical amendments to the rules in titles 2, 3, 4, 5, 7, and 8.

Proposed amendments to title 2

The proposed amendments to title 2 would:

- Define "papers" as including not only papers in a tangible or physical form, but also in an electronic form (see amended rule 2.3(2));[1]
- Strike references to "typewriter," "typewriting," and "typewritten" (see amended rules 2.3(3) and 2.150(a));

[1] Rule 2.3(3) currently defines "written," "writing," "typewritten," and "typewriting" as "includ[ing] other methods equivalent in legibility to typewriting." In striking references to "typewritten" and "typewriting" in rule 2.3(3), the Civil and Small Claims Advisory Committee proposed revising the rule as follows: "'Written' and 'writing' include other methods of printing letters and words equivalent in legibility to printing on a word processor." Alternatively, the rule could allow for legibility equivalent "to computer word processing." CTAC's Rules and Policy Subcommittee subsequently considered alternate language based on its concern that the reference to word processors may quickly become outdated. The subcommittee proposed defining "written" and "writing" as "includ[ing] any method of legibly printing or displaying letters and words." The committee requests comments on the proposed amendments to this rule.

- Add a new rule defining the scope of the trial court rules to include documents filed both on paper and electronically (see proposed new rule 2.10);
- Amend language to clarify when certain formatting rules apply to electronic documents (see amended rules 2.103, 2.104, 2.105, 2.106, 2.107, 2.108(4)), 2.111(3), 2.113, 2.114, 2.115, and 2.117), electronic forms (see amended rules 2.133 and 2.134(a)–(c), 2.150), and jury instructions filed electronically (see amended rule 2.1055(b)(4));
- Extend the application of the general rules on forms in chapter 2 to forms filed electronically (see amended rule 2.130);
- Amend the definition of "record" to apply to records filed or lodged electronically (see amended rule 2.550(b)(1));
- Amend the rule for filing records under seal to recognize that records and notices may be transmitted electronically and kept by the court in electronic form (see amended rule 2.551);[2]
- Amend the rule for filing confidential name change records under seal to recognize that petitions may be transmitted electronically (see amended rule 2.577(d) and (f));
- Amend the rules governing motions to withdraw stipulations to court-appointed temporary judges to allow the moving party to provide copies of the motion to the presiding and temporary judge by electronic means (see amended rules 2.816(e)(3) and 2.831(f)); and
- Allow electronic service on the Attorney General of copies of a judgment and notice of judgment declaring a state statute or regulation unconstitutional (see amended rule 2.1100).

Proposed amendments to title 3

The proposed amendments to title 3 would:

- Insert an e-service exception to the duties associated with maintaining and updating the list of parties and their addresses (see amended rule 3.254(a) and (b));
- Amend language in the rules to recognize e-filing and e-service (see amended rules 3.524(a)(2), 3.544(a), 3.670(h)(1)(B), 3.815(b)(2)–(3), 3.823(d), 3.827(b), 3.1010(b)(1), 3.1109(a), 3.1300(a), 3.1302(a), 3.1320(c), 3.1326, 3.1327(a) and (c), 3.1330, 3.1340(b), 3.1346, 3.1347(a) and (c), 3.1350(e),[3] 3.1351(a) and (c), 3.1700(a)(1) and (b)(1), 3.1900, and 3.2107(a)–(b));

[2] The proposed amendments to rule 2.551 on filing sealed records in the trial courts, unlike most of the other proposed rule amendments, are not solely technical and non-substantive. However, they are closely based on the recent amendments to rule 8.46 that changed the appellate rule on sealed records to reflect modern business practices. It should be noted that CTAC's Rules and Policy Subcommittee voted to use the present tense ("has access") in rule 2.551(b)(2), instead of the past tense ("had access") used in rule 8.46. The committee requests comments on this proposed amendment.

[3] CTAC's Rules and Policy Subcommittee voted to remove the reference to separately stapling documents in rule 3.1350(e). The subcommittee recommended instead that subdivision (e) refer to "separate documents" since this would indicate that the documents must be filed separately with the court whether filed in paper or electronic form. The committee requests comments on the proposed amendment to this rule.

- Establish that the times prescribed in the rule governing evidence at arbitration hearings are increased by two days where service is accomplished by electronic means (see amended rule 3.823(d));
- Require that appointed referees provide their e-mail addresses (see amended rule 3.931(b));
- Correct a cross-reference to the appellate court rules (see amended rule 3.1109(c));
- Clarify when certain formatting rules apply to motion papers filed electronically (see amended rules 3.1110(e)–(f) and 3.1113(i)(1)–(2) and (m));
- Require that ex parte applications state the e-mail addresses of attorneys or parties (see amended rule 3.1202(a));
- Recognize that rule 2.259(c) applies to motion papers filed electronically (see amended rule 3.1300(e));
- Require that any materials lodged electronically specify an electronic address to which they may be returned and allow the clerk to return them by electronic means (see amended rule 3.1302(b));
- Require the clerk to post electronically a general schedule for law and motion hearings (see amended rule 3.1304(a));
- Authorize a court to require that a party submitting written objections provide the proposed order accompanying the objections in electronic form (see amended rule 3.1354(c)); and
- Recognize that the court may electronically sign written judgments (see amended rule 3.1590(*l*).

Proposed amendments to title 4

The proposed amendment to title 4 would:

- Allow courts to e-mail copies of countywide bail and penalty schedules to the Judicial Council (see amended rule 4.102).

Proposed amendments to title 5

The proposed amendments to title 5 would:

- Delete references to the back side of a summons (see amended rules 5.50(b) and (c)(1)–(2) and 5.91);
- Allow court employees to notify parties of deficiencies in their paperwork by any means approved by the court (see amended rule 5.83(d)(5));
- Replace references to "videotapes" (see amended rules 5.215(d)(5) and 5.242(k)(4)(G)); and
- Add a definition for "software" (see amended rule 5.275(g).)

Proposed amendments to title 7
The proposed amendment to title 7 would:

- Clarify that Code of Civil Procedure section 1010.6 and rules 2.250 to 2.261 apply in contested probate proceedings (see new rule 7.802).

Proposed amendments to title 8
The proposed amendments to title 8 would:

- Add definitions of "attach or attachment," "copy or copies," "cover," and "written or writing" to clarify their application to electronically filed documents (see amended rules 8.10 and 8.803);
- Add a new rule (proposed rule 8.11) and amend another rule (8.800(b)) to clarify that the rules are intended to apply to documents filed and served electronically;
- Replace references to "mail" with "send" throughout;
- Replace references to "file-stamped" with "filed-endorsed" throughout;
- Clarify that requirements for numbers of copies of documents and for the colors of covers of documents apply only to documents filed on paper (see amended rules 8.40 and 8.44);
- Add language requiring that all confidential or sealed documents must be transmitted in a secure manner, clarifying that this requirement applies to documents transmitted electronically (see amended rules 8.45(c), 8.46(d), 8.47(b) and (c), and 8.482(g));
- Add language stating that all or part of the record on appeal, including a clerk's transcript, a record of administrative proceedings, or a copy of a reporter's transcript may be in electronic format (see amended rules 8.123, 8.124, 8.130, 8.144, and 8.838);
- Clarify which requirements about form apply to electronically filed records, briefs, supporting documents, or petitions (see amended rules 8.144, 8.204, 8.486, 8.504, 8.610, 8.824, 8.838, 8.883, 8.928, and 8.931);
- Replace references to "type," "typeface," "type style" and "type size" with "font" "font style" and "font size" (see amended rules 8.204, 8.883, and 8.928 and the amended advisory committee comment to rule 8.204);
- Expand advisory committee comments to note that the recoverable costs to notarize, serve, mail, and file documents are intended to include fees charged by electronic service providers for filing or service (see amended comments to rules 8. 278 and 8.891);
- Clarify when requirements for multiple copies to be filed or served only apply to paper documents (see amended rules 8.44, 8.144(c), 8.346(c), 8.380(c), 8.385(b), 8.386(b), 8.495(a), 8.540(b), 8.548(d), 8.630(g), 8.843(d), 8.870(d), 8.921(d), and 8.1018(c));
- Correct a typographical error (see amended rule 8.474(b));
- Clarify that the record and exhibits need only be returned to a lower court if they were transmitted in paper form (see amended rules 8.224, 8.512(a), 8.843(e), 8.870(e), 8.890(b), 8.921(e) and 8.1018(d));
- Clarify that signatures on electronically filed documents must comply with rule 8.77 (see amended rule 8.804 and amended rule 8.882(b)); and
- Amend two advisory committee comments to add provisions that the clerk's transcripts may be in electronic form (see comments to rules 8.122 and 8.832).

Alternatives Considered

As an alternative to making technical changes at this time, CTAC considered deferring action and proposing a single rules proposal that would include both substantive and technical changes to the rules at a later date. One benefit of this approach would be to increase the project's overall efficiency by reviewing and ultimately implementing all changes at the same time. By dividing the work into technical and substantive phases, however, the council would be able modernize the rules, to the extent possible, on a more responsive timeline for those courts that are already implementing e-filing and e-service and adopting e-business practices.

Implementation Requirements, Costs, and Operational Impacts

Because the proposal does not introduce substantive changes to the rules, CTAC does not anticipate that the rule would incur any new costs or require implementation. To the extent that the proposal clarifies existing law, it would facilitate e-business, e-filing, and e-service in the trial and appellate courts and provide cost-efficiencies.

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?
- Specific comments are invited on rules 2.3(3), 2.105, 2.551(b)(2), and 3.1350(e).
- Specific comments are also invited on the term "filed-endorsed."

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

- Would the proposal provide cost savings?
- What would the implementation requirements be for courts?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments

1. Cal. Rules of Court, amendments to title 2, at pages 7–16
2. Cal. Rules of Court, amendments to title 3, at pages 17–30
3. Cal. Rules of Court, amendments to title 4, at page 31
4. Cal. Rules of Court, amendments to title 5, at pages 32–35
5. Cal. Rules of Court, amendments to title 7, at pages 36
6. Cal. Rules of Court, amendments to title 8, at pages 37–93

Rules 2.3, 2.10, 2.102, 2.103, 2.104, 2.105, 2.106, 2.107, 2.108, 2.111, 2.113, 2.114, 2.115, 2.117, 2.130, 2.133, 2.134, 2.150, 2.550, 2.551, 2.577, 2.816, 2.831, 2.1055, and 2.1100, of the California Rules of Court would be amended, and rule 2.10 would be adopted, effective January 1, 2016, to read:

Title 2. Trial Court Rules

Rule 2.3. Definitions

As used in the Trial Court Rules, unless the context or subject matter otherwise requires:

(1) "Court" means the superior court~~;~~.

(2) "Papers" includes all documents, except exhibits and copies of exhibits, that are offered for filing in any case, but does not include Judicial Council and local court forms, records on appeal in limited civil cases, or briefs filed in appellate divisions. ~~; and~~ Unless the context clearly provides otherwise, "papers" need not be in a tangible or physical form but may be in an electronic form.

(3) "Written~~,~~" and "writing~~,~~" ~~"typewritten," and "typewriting"~~ include other methods of printing letters and words equivalent in legibility to ~~typewriting~~ printing on a word processor.

Rule 2.10. Scope of rules ~~[Reserved]~~

These rules apply to documents filed and served electronically as well as in paper form, unless otherwise provided.

Rule 2.102. One-sided paper

When papers are not filed electronically, ~~On papers,~~ only one side of each page may be used.

Rule 2.103. Size, quality, and color~~, and size~~ of paper

All papers filed must be 8½ by 11 inches. All papers not filed electronically must be on opaque, unglazed paper, white or unbleached, of standard quality not less than 20-pound weight~~,8½ by 11 inches~~.

Rule 2.104. Printing; ~~type~~ font size

All papers not filed electronically must be printed ~~or typewritten~~ or be prepared by a photocopying or other duplication process that will produce clear and permanent copies equally as legible as printing in ~~type~~ a font not smaller than 12 points.

Rule 2.105. ~~Type~~ Font style

The ~~typeface~~ font must be essentially equivalent to Courier, Times New Roman, or Arial.

Rule 2.106. Font color ~~of print~~

The font color ~~of print~~ must be black or blue-black.

Rule 2.107. Margins

The left margin of each page must be at least one inch from the left edge ~~of the paper~~ and the right margin at least 1/2 inch from the right edge ~~of the paper~~.

Rule 2.108. Spacing and numbering of lines

The spacing and numbering of lines on a page must be as follows:

(1)–(3) * * *

(4) Line numbers must be placed at the left margin and separated from the text ~~of the paper~~ by a vertical column of space at least 1/5 inch wide or a single or double vertical line. Each line number must be aligned with a line of type, or the line numbers must be evenly spaced vertically on the page. Line numbers must be consecutively numbered, beginning with the number 1 on each page. There must be at least three line numbers for every vertical inch on the page.

Rule 2.111. Format of first page

The first page of each paper must be in the following form:

(1)–(2) * * *

(3) On line 8, at or below 3 1/3 inches from the top of the ~~paper~~ page, the title of the court.

(4)–(11) * * *

Rule 2.113. Binding

Each paper not filed electronically must consist entirely of original pages without riders and must be firmly bound together at the top.

Rule 2.114. Exhibits

Exhibits submitted with papers not filed electronically may be fastened to pages of the specified size and, when prepared by a machine copying process, must be equal to ~~typewritten~~ computer processed materials in legibility and permanency of image.

Rule 2.115. Hole punching

When papers are not filed electronically, each paper presented for filing must contain two prepunched normal-sized holes, centered 2½ inches apart and 5/8 inch from the top of the paper.

Rule 2.117. Conformed copies of papers

All copies of papers served must conform to the original papers filed, including the numbering of lines, pagination, additions, deletions, and interlineations except that, with the agreement of the other party, a party serving papers by non-electronic means may serve that other party with papers printed on both sides of the page.

Rule 2.130. Application

The rules in this chapter apply to Judicial Council forms, local court forms, and all other official forms to be filed in the trial courts. The rules apply to forms filed both in paper form and electronically, unless otherwise specified.

Rule 2.133. Hole punching

All forms not filed electronically must contain two prepunched normal-sized holes, centered 2½ inches apart and ⅝ inch from the top of the form.

Rule 2.134. Forms longer than one page

(a) Single side may be used

If a form not filed electronically is longer than one page, the form may be printed on sheets printed only on one side even if the original has two sides to a sheet.

(b) Two-sided forms must be tumbled

If a form not filed electronically is filed on a sheet printed on two sides, the reverse side must be rotated 180 degrees (printed head to foot).

(c) Multiple-page forms must be bound

If a form not filed electronically is longer than one page, it must be firmly bound at the top.

Rule 2.150. Authorization for computer-generated ~~or typewritten~~ forms for proof of service of summons and complaint

(a) Computer-generated ~~or typewritten~~ forms; conditions

Notwithstanding the adoption of mandatory form *Proof of Service of Summons* (form POS-010), a form for proof of service of a summons and complaint prepared entirely by word processor~~, typewriter,~~ or similar process may be used for proof of service in any applicable action or proceeding if the following conditions are met:

(1)–(4) * * *

(5) The text of form POS-010 must be copied in the same order as it appears on ~~the printed~~ form POS-010 using the same item numbers. A declaration of diligence may be attached to the proof of service or inserted as item 5b(5).

(6) Areas marked "For Court Use" must be copied in the same general locations and occupy approximately the same amount of space as on ~~the printed~~ form POS-010.

(7)–(8) * * *

(9) Material that would have been ~~typed~~ entered onto ~~the printed~~ form POS-010 must be ~~typed~~ entered with each line indented 3 inches from the left margin.

(b) * * *

Advisory Committee Comment

This rule is intended to permit process servers and others to prepare their own shortened versions of *Proof of Service of Summons* (form POS-010) containing only the information that is relevant to show the method of service used.

Rule 2.550. Sealed records

(a) * * *

(b) Definitions

As used in this chapter:

(1) "Record." Unless the context indicates otherwise, "record" means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, by electronic means or otherwise.

(2)–(3) * * *

(c)–(e) * * *

Rule 2.551. Procedures for filing records under seal

(a) * * *

(b) Motion or application to seal a record

(1) * * *

(2) *Service of motion or application*

A copy of the motion or application must be served on all parties that have appeared in the case. Unless the court orders otherwise, any party that already ~~possesses copies of~~ has access to the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version. Other parties must be served with only the public redacted version. If a party's attorney but not the party has access to the record, only the party's attorney may be served with the complete, unredacted version.

(3) *Procedure for party not intending to file motion or application*

(A) * * *

(B) If the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly remove all the documents in (A)(i) from the envelope, ~~or~~ container, or secure electronic file where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain

conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court.

(4) * * *

(5) *Redacted and unredacted versions*

If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete, unredacted version conditionally under seal. The cover of the redacted version must identify it as "Public—Redacts materials from conditionally sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record."

(6) *Return of lodged record*

If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing ~~within 10 days after the order denying the motion or application~~ that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application.

(c) * * *

(d) Procedure for lodging of records

(1) A record that may be filed under seal must be transmitted to the court in a secure manner that preserves the confidentiality of the records to be lodged. If the record is transmitted in paper form, it must be put in an envelope or other appropriate container, sealed in the envelope or container, and lodged with the court.

(2) The materials to be lodged under seal must be clearly identified as "CONDITIONALLY UNDER SEAL." If the materials are transmitted in paper form, the envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL."

(3) The party submitting the lodged record must affix to the electronic transmission, the envelope or the container a cover sheet that:

(A)–(B) * * *

(4) * * *

(e) Order

(1) If the court grants an order sealing a record, the clerk ~~must substitute on the envelope or container for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT ON *(DATE)*," and~~ must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court's order. In addition, if the confidential record is in paper format, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT ON *(DATE)*~~,~~." If the sealed record is in an electronic format, the clerk must place the record ordered sealed in a secure electronic file clearly identified as sealed by court order on a specified date.

(2) The order must state whether—in addition to the sealed records ~~in the envelope or container~~ —the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.

(3) * * *

(4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed ~~records or papers~~.

(f)–(g) * * *

(h) Motion, application, or petition to unseal records

(1)–(2) * * *

(3) If the court proposes to order a record unsealed on its own motion, the court must ~~mail~~ give notice to the parties stating the reason for unsealing the record ~~therefor~~. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is provided ~~mailed or within such time as the court specifies.~~ and any other party may file a response within 5 days after the filing of an opposition.

(4) * * *

(5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope, ~~or~~ container, or secure electronic file, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

Rule 2.577. Procedures for filing confidential name change records under seal

(a)–(c) * * *

(d) Procedure for lodging of petition for name change

(1) The records that may be filed under seal must be lodged with the court. If they are transmitted on paper, they must be placed in a sealed envelope. If they are transmitted electronically, they must be transmitted to the court in a secure manner that preserves the confidentiality of the documents to be lodged.

(2) If the petitioner is transmitting the petition on paper, the petitioner must complete and affix to the envelope a completed *Confidential Cover Sheet—Name Change Proceeding Under Address Confidentiality Program* (*Safe at Home)* (form NC-400) and in the space under the title and case number mark it "CONDITIONALLY UNDER SEAL." If the petitioner is transmitting electronically, the first page of the electronic transmission must be a completed *Confidential Cover Sheet—Name Change Proceeding Under Address Confidentiality Program* (*Safe at Home)* (form NC-400) with the space under the title and case number marked "CONDITIONALLY UNDER SEAL."

(3) On receipt of a petition lodged under this rule, the clerk must endorse the ~~affixed~~ cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed.

(4) * * *

(e) * * *

(f) Order

(1)–(2) * * *

(3) For petitions transmitted in paper form, if the court grants an order sealing a record, the clerk must strike out the notation required by (d)(2) on the *Confidential Cover Sheet* that the matter is filed "CONDITIONALLY UNDER SEAL," ~~and~~ add a notation to that sheet prominently stating "SEALED BY ORDER OF THE COURT ON *(DATE)*." and file the documents under seal. For petitions transmitted electronically, the clerk must replace the cover sheet with a filed-endorsed copy of the court's order and place the record in a secure electronic file clearly identified as sealed by the court on a specific date.

(4)–(5) * * *

(g)–(h) * * *

Rule 2.816. Stipulation to court-appointed temporary judge

(a)–(d) * * *

(e) Application or motion to withdraw stipulation

An application or motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation. In addition:

(1)–(2) * * *

(3) The application or motion must be served and filed, and the moving party must ~~mail or deliver~~ provide a copy to the presiding judge.

(4) * * *

Rule 2.831. Temporary judge—stipulation, order, oath, assignment, disclosure, and disqualification

(a)–(e) * * *

(f) Motion to withdraw stipulation

A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation, and must be heard by the presiding judge or a judge designated by the presiding judge. A declaration that a ruling is based on

error of fact or law does not establish good cause for withdrawing a stipulation. Notice of the motion must be served and filed, and the moving party must ~~mail or deliver~~ provide a copy to the temporary judge. If the motion to withdraw the stipulation is based on grounds for the disqualification of the temporary judge first learned or arising after the temporary judge has made one or more rulings, but before the temporary judge has completed judicial action in the proceeding, the provisions of rule 2.816(e)(4) apply. If a motion to withdraw a stipulation is granted, the presiding judge must assign the case for hearing or trial as promptly as possible.

Rule 2.1055. Proposed jury instructions

(a) * * *

(b) Form and format of proposed instructions

(1)–(3) * * *

(4) Each set of proposed jury instructions filed on paper must be bound loosely.

(c)–(e) * * *

Rule 2.1100. Notice when statute or regulation declared unconstitutional

Within 10 days after a court has entered judgment in a contested action or special proceeding in which the court has declared unconstitutional a state statute or regulation, the prevailing party, or as otherwise ordered by the court, must ~~mail~~ serve a copy of the judgment and a notice of entry of judgment ~~to~~ on the Attorney General and file a proof of service with the court.

Rules 3.254, 3.524, 3.544, 3.670, 3.815, 3.823, 3.827, 3.931, 3.1010, 3.1109, 3.1110, 3.1113, 3.1202, 3.1300, 3.1302, 3.1304, 3.1320, 3.1326, 3.1327, 3.1330, 3.1340, 3.1346, 3.1347, 3.1350, 3.1351, 3.1354, 3.1590, 3.1700, 3.1900, and 3.2107, of the California Rules of Court would be amended, effective January 1, 2016, to read:

Title 3. Civil Rules

Rule 3.254. List of parties

(a) Duties of first-named plaintiff or petitioner

Except as provided under rule 2.251 for electronic service, if more than two parties have appeared in a case and are represented by different counsel, the plaintiff or petitioner named first in the complaint or petition must:

(1)–(2) * * *

(b) Duties of each party

Except as provided under rule 2.251 for electronic service, each party must:

(1)–(3) * * *

Rule 3.524. Order assigning coordination motion judge

(a) Contents of order

An order by the Chair of the Judicial Council assigning a coordination motion judge to determine whether coordination is appropriate, or authorizing the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases, must include the following:

(1) The special title and number assigned to the coordination proceeding; and

(2) The court's address or electronic service address for submitting all subsequent documents to be considered by the coordination motion judge.

(b) * * *

Rule 3.544. Add-on cases

(a) Request to coordinate add-on case

A request to coordinate an add-on case must comply with the requirements of rules 3.520 through 3.523, except that the request must be submitted to the coordination

trial judge under Code of Civil Procedure section 404.4, with proof of ~~mailing~~ service of one copy ~~to~~ on the Chair of the Judicial Council and proof of service as required by rule 3.510.

(b)–(d) * * *

Rule 3.670. Telephone appearance

(a)–(g) * * *

(h) Notice by party

(1) Except as provided in (6), a party choosing to appear by telephone at a hearing, conference, or proceeding, other than on an ex parte application, under this rule must either:

(A) Place the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers; or

(B) At least two court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least two court days before the appearance and by serving the notice at the same time on all other parties by personal delivery, fax transmission, express mail, ~~e-mail~~ electronic service if such service is required by local rule or court order or agreed to by the parties, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day.

(2)–(6) * * *

(i)–(q) * * *

Rule 3.815. Selection of the arbitrator

(a) * * *

(b) Selection absent stipulation or local procedures

If the arbitrator has not been selected by stipulation and the court has not adopted local rules or procedures for the selection of the arbitrator as permitted under (c), the arbitrator will be selected as follows:

(1) * * *

(2) The administrator must select at random a number of names equal to the number of sides, plus one, and ~~mail~~ send the list of randomly selected names to counsel for the parties.

(3) Each side has 10 days from the date ~~of mailing~~ on which the list was sent to file a rejection, in writing, of no more than one name on the list; if there are two or more parties on a side, they must join in the rejection of a single name.

(4)–(5) * * *

(c)–(f) * * *

Rule 3.823. Rules of evidence at arbitration hearing

(a)–(c) * * *

(d) Delivery of documents

For purposes of this rule, "delivery" of a document or notice may be accomplished manually, by electronic means under Code of Civil Procedure section 1010.6 and rule 2.251, or by mail in the manner provided by Code of Civil Procedure section 1013. If service is by electronic means, the times prescribed in this rule for delivery of documents, notices, and demands are increased by two days. If service is by mail, the times prescribed in this rule ~~for delivery of documents, notices, and demands~~ are increased by five days.

Rule 3.827. Entry of award as judgment

(a) * * *

(b) Notice of entry of judgment

Promptly upon entry of the award as a judgment, the clerk must ~~mail~~ serve notice of entry of judgment ~~to~~ on all parties who have appeared in the case and must execute a certificate of ~~mailing~~ service and place it in the court's file in the case.

(c) * * *

Rule 3.931. Open proceedings, notice of proceedings, and order for hearing site

(a) * * *

(b) Notice regarding proceedings before referee

(1) In each case in which he or she is appointed, a referee must file a statement that provides the name, telephone number, e-mail address, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge. This statement must be filed at the same time as the referee's certification under rule 3.904(a) or 3.924(a). If there is any change in this contact information, the referee must promptly file a revised statement with the court.

(2) In addition to providing the information required under (1), the statement filed by a referee may also provide the address of a publicly accessible website ~~Web site~~ at which the referee will maintain a current calendar setting forth the date, time, location, and general nature of any hearings scheduled in the matter that would be open to the public if held before a judge.

(3) * * *

(c) * * *

Rule 3.1010. Oral depositions by telephone, videoconference, or other remote electronic means

(a) * * *

(b) Appearing and participating in depositions

Any party may appear and participate in an oral deposition by telephone, videoconference, or other remote electronic means, provided:

(1) Written notice of such appearance is served by personal delivery, e-mail, or fax at least three court days before the deposition;

(2) The party so appearing makes all arrangements and pays all expenses incurred for the appearance.

(c)–(e) * * *

Rule 3.1109. Notice of determination of submitted matters

(a) Notice by clerk

When the court rules on a motion or makes an order or renders a judgment in a matter it has taken under submission, the clerk must immediately notify the parties of the ruling, order, or judgment. The notification, which must specifically identify the matter ruled on, may be given by serving electronically or mailing the parties a copy of the ruling, order, or judgment, and it constitutes service of notice only if the clerk is required to give notice under Code of Civil Procedure section 664.5.

(b) * * *

(c) Time not extended by failure of clerk to give notice

The failure of the clerk to give the notice required by this rule does not extend the time provided by law for performing any act except as provided in rules 8.104(a) or ~~8.824~~ 8.822(a).

Rule 3.1110. General format

(a)–(d) * * *

(e) Binding

For motions filed on paper, all pages of each document and exhibit must be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read.

(f) Format of exhibits

For motions filed on paper, each exhibit must be separated by a hard 8½ x 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. For all motions, an index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit.

(g) * * *

Rule 3.1113. Memorandum

(a)–(h) * * *

(i) Copies of authorities

(1) A judge may require that if any authority other than California cases, statutes, constitutional provisions, or state or local rules is cited, a copy of the authority must be lodged with the papers that cite the authority and tabbed or separated as required by rule 3.1110(f).

(2) If a California case is cited before the time it is published in the advance sheets of the Official Reports, the party must include the title, case number, date of decision, and, if from the Court of Appeal, district of the Court of Appeal in which the case was decided. A judge may require that a copy of that case must be lodged and tabbed or separated as required by rule 3.1110(f).

(3) * * *

(j)–(*l*) * * *

(m) Proposed orders or judgments

If a proposed order or judgment is submitted, it must be lodged and served with the moving papers but must not be attached to them. The requirements for proposed orders, including the requirements for submitting proposed orders by electronic means, are stated in rule 3.1312.

Rule 3.1202. Contents of application

(a) Identification of attorney or party

An ex parte application must state the name, address, e-mail address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, e-mail address, and telephone number of the party if known to the applicant.

(b)–(c) * * *

Rule 3.1300. Time for filing and service of motion papers

(a) In general

Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed in accordance with Code of Civil Procedure section 1005 and, when applicable, the statutes and rules providing for electronic filing and service.

(b)–(d) * * *

(e) Computation of time

A paper submitted before the close of the clerk's office to the public on the day the paper is due is deemed timely filed. Under rule 2.259(c), a court may provide by local rule that a paper filed electronically before midnight on a court day is deemed filed on that court day.

Rule 3.1302. Place and manner of filing

(a) Papers filed in clerk's office

Unless otherwise provided by local rule or specified in a court's protocol for electronic filing, all papers relating to a law and motion proceeding must be filed in the clerk's office.

(b) Requirements for lodged material

Material lodged physically with the clerk must be accompanied by an addressed envelope with sufficient postage for mailing the material. Material lodged electronically must clearly specify the electronic address to which the materials may be returned. After determination of the matter, the clerk may mail or send the material back to the party lodging it.

Rule 3.1304. Time of hearing

(a) General schedule

The clerk must post electronically and at the courthouse a general schedule showing the days and departments for holding each type of law and motion hearing.

(b)–(d) * * *

Rule 3.1320. Demurrers

(a)–(b) * * *

(c) Notice of hearing

A party filing a demurrer must serve and file therewith a notice of hearing that must specify a hearing date in accordance with the provisions of Code of Civil Procedure section 1005 and, if service is by electronic means, in accordance with the requirements of Code of Civil Procedure section 1010.6(a)(4) and rule 2.251(h)(2).

(d)–(j) * * *

Rule 3.1326. Motions for change of venue

Following denial of a motion to transfer under Code of Civil Procedure section 396b, unless otherwise ordered, 30 calendar days are deemed granted defendant to move to strike, demur, or otherwise plead if the defendant has not previously filed a response. If a motion to transfer is granted, 30 calendar days are deemed granted from the date the receiving court ~~mails~~ sends notice of receipt of the case and its new case number.

Rule 3.1327. Motions to quash or to stay action in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a motion to quash service of summons on the ground of lack of jurisdiction or to stay or dismiss the action on the ground of inconvenient forum must be given in compliance with Code of Civil Procedure sections 1010.6 or 1013 and 1167.4.

(b) * * *

(c) Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, electronic service, fax ~~facsimile~~ transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1010.6, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1330. Motion concerning arbitration

A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference.

Rule 3.1340. Motion for discretionary dismissal after two years for delay in prosecution

(a) * * *

(b) Notice of court's intention to dismiss

If the court intends to dismiss an action on its own motion, the clerk must set a hearing on the dismissal and ~~mail~~ send notice to all parties at least 20 days before the hearing date.

(c) * * * *

Rule 3.1346. Service of motion papers on nonparty deponent

A written notice and all moving papers supporting a motion to compel an answer to a deposition question or to compel production of a document or tangible thing from a nonparty deponent must be personally served on the nonparty deponent unless the nonparty deponent agrees to accept service by mail or electronic service at an address or electronic service address specified on the deposition record.

Rule 3.1347. Discovery motions in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a discovery motion must be given in compliance with Code of Civil Procedure sections 1010.6 or 1013 and 1170.8.

(b) * * *

(c) Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be served and filed on or before the court day before the hearing. Service must be by personal delivery, electronic service, fax ~~facsimile~~ transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1010.6, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1350. Motion for summary judgment or summary adjudication

(a)–(d) * * *

(e) Documents in opposition to motion

Except as provided in Code of Civil Procedure section 437c(r) and rule 3.1351, the opposition to a motion must consist of the following separate documents, ~~separately stapled and~~ titled as shown:

(1)–(4) * * *

(f)–(i) * * *

Rule 3.1351. Motions for summary judgment in summary proceeding involving possession of real property

(a) Notice

In an unlawful detainer action or other action brought under chapter 4 of title 3 of part 3 of the Code of Civil Procedure (commencing with section 1159), notice of a motion for summary judgment must be given in compliance with Code of Civil Procedure sections 1010.6 or 1013 and 1170.7.

(b) * * *

(c) Written opposition in advance of hearing

If a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing. Service must be by personal delivery, electronic service, fax ~~facsimile~~ transmission, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1010.6, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court

day before the hearing. The court, in its discretion, may consider written opposition filed later.

Rule 3.1354. Written objections to evidence

(a)–(b) * * *

(c) Proposed order

A party submitting written objections to evidence must submit with the objections a proposed order. The proposed order must include places for the court to indicate whether it has sustained or overruled each objection. It must also include a place for the signature of the judge. The court may require that the proposed order be provided in electronic form. The proposed order must be in one of the following two formats:

(First Format):

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7–8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Court's Ruling on Objection 1:	Sustained: _____ Overruled:_____

Objection Number 2

"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)

Grounds for Objection 2: Irrelevant (Evid. Code, §§ 210, 350–351).

Court's Ruling on Objection 2:	Sustained: _____ Overruled:_____

(Second Format):

Objections to Jackson Declaration

Material Objected to:	Grounds for Objection:	Ruling on the Objection
1. Jackson declaration, page 3, lines 7–8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).	Sustained: _____ Overruled:_____
2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."	Irrelevant (Evid. Code, §§ 210, 350–351).	Sustained: _____ Overruled:_____
Date:	_____	_____ Judge

Rule 3.1590. Announcement of tentative decision, statement of decision, and judgment

(a)–(k) * * *

(*l*) Signature and filing of judgment

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held under (k), within 10 days after the hearing. An electronic signature by the court is as effective as an original signature. The judgment constitutes the decision on which judgment is to be entered under Code of Civil Procedure section 664.

(m)–(n) ***

Rule 3.1700. Prejudgment costs

(a) Claiming costs

(1) *Trial costs*

A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of ~~mailing~~ service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case.

(2) * * *

(b) Contesting costs

(1) *Striking and taxing costs*

Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in Code of Civil Procedure section 1013. If the cost memorandum was served electronically, the period is extended as provided in Code of Civil Procedure section 1010.6(a)(4).

(2)–(4) * * *

Rule 3.1900. Notice of renewal of judgment

A copy of the application for renewal of judgment must be physically or electronically attached to the notice of renewal of judgment required by Code of Civil Procedure section 683.160.

Rule 3.2107. Request for court order

(a) Request before trial

If a party files a written request for a court order before the hearing on the claim, the requesting party must mail, ~~or~~ personally deliver, or if agreed on by the parties electronically serve a copy to all other parties in the case. The other parties must be given an opportunity to answer or respond to the request before or at the hearing. This subdivision does not apply to a request to postpone the hearing date if the plaintiff's claim has not been served.

(b) Request after trial

If a party files a written request for a court order after notice of entry of judgment, the clerk must ~~mail~~ send a copy of the request to all other parties in the action. A party has 10 calendar days from the date on which the clerk ~~mailed~~ sent the request to file a response before the court makes an order. The court may schedule a hearing on the request, except that if the request is to vacate the judgment for lack of appearance by the plaintiff, the court must hold a hearing. The court may give notice of any scheduled hearing with notice of the request, but the hearing must be scheduled at least 11 calendar days after the clerk has ~~mailed~~ sent the request.

Rule 4.102 of the California Rules of Court would be amended, effective January 1. 2016, to read:

Title 4. Criminal Rules

Rule 4.102. Uniform bail and penalty schedules—traffic, boating, fish and game, forestry, public utilities, parks and recreation, business licensing

The Judicial Council of California has established the policy of promulgating uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses.

In general, bail is used to ensure the presence of the defendant before the court. Under Vehicle Code sections 40512 and 13103, bail may also be forfeited and forfeiture may be ordered without the necessity of any further court proceedings and be treated as a conviction for specified Vehicle Code offenses. A penalty in the form of a monetary sum is a fine imposed as all or a portion of a sentence imposed.

To achieve substantial uniformity of bail and penalties throughout the state in traffic, boating, fish and game, forestry, public utilities, parks and recreation, and business licensing cases, the trial court judges, in performing their duty under Penal Code section 1269b to annually revise and adopt a schedule of bail and penalties for all misdemeanor and infraction offenses except Vehicle Code infractions, must give consideration to the Uniform Bail and Penalty Schedules approved by the Judicial Council. The Uniform Bail and Penalty Schedule for infraction violations of the Vehicle Code will be established by the Judicial Council in accordance with Vehicle Code section 40310. Judges must give consideration to requiring additional bail for aggravating or enhancing factors.

After a court adopts a countywide bail and penalty schedule, under Penal Code section 1269b, the court must, as soon as practicable, mail <u>or e-mail</u> a copy of the schedule to the Judicial Council with a report stating how the revised schedule differs from the council's uniform traffic bail and penalty schedule, uniform boating bail and penalty schedule, uniform fish and game bail and penalty schedule, uniform forestry bail and penalty schedule, uniform public utilities bail and penalty schedule, uniform parks and recreation bail and penalty schedule, or uniform business licensing bail and penalty schedule.

The purpose of this uniform bail and penalty schedule is to:

(1)–(2) *** * ***

Rules 5.50, 5.83, 5.91, 5.215, 5.242, 5.275, 5.534 and 5.906 of the California Rules of Court would be amended, effective January 1, 2016, to read:

Title 5. Family and Juvenile Rules

Rule 5.50. Papers issued by the court

(a) * * *

(b) Automatic temporary family law restraining order in summons; handling by clerk

Under Family Code section 233, in proceedings for dissolution, legal separation, or nullity of a marriage or domestic partnership and in parentage proceedings, the clerk of the court must issue a summons that includes automatic temporary (standard) restraining orders ~~on the reverse side of the summons~~.

(1)–(2) * * *

(c) Individual restraining order

(1) On application of a party and as provided in the Family Code, a court may issue any individual restraining order that appears to be reasonable or necessary, including those automatic temporary restraining orders in (b) included ~~on the back of~~ in the family law summons under Family Code section 233.

(2) Individual restraining orders supersede the standard family law restraining orders ~~on the back of~~ in the Family Law and Uniform Parentage Act summonses.

Rule 5.83. Family centered case resolution

(a)–(c) * * *

(d) Family centered case resolution conferences

(1)–(4) * * *

(5) Nothing in this rule prohibits an employee of the court from reviewing the file and notifying the parties of any deficiencies in their paperwork before the parties appear in front of a judicial officer at a family centered case resolution conference. This type of assistance can occur by telephone, in person, ~~or~~ in writing, or by other means approved by the court, on or before each scheduled family centered case resolution conference. However, this type of procedural assistance is not intended to replace family centered case resolution plan management or to create a barrier to litigants' access to a judicial officer.

(e)–(g) * * *

Rule 5.91. Individual restraining order

On a party's request for order and as provided in the Family Code, a court may issue any individual restraining order that appears to be reasonable or necessary, including those automatic temporary restraining orders included ~~on the back of~~ in the family law summons. Individual orders supersede the standard family law restraining orders ~~on the back of~~ in the Family Law and Uniform Parentage Act summonses.

Rule 5.215. Domestic violence protocol for Family Court Services

(a)–(c) * * *

(d) Family Court Services: Description and duties

(1)–(4) * * *

(5) *Providing information*

Family Court Services staff must provide information to families accessing their services about the effects of domestic violence on adults and children. Family Court Services programs, including but not limited to orientation programs, must provide information and materials that describe Family Court Services policy and procedures with respect to domestic violence. ~~Where~~ Whenever possible, ~~the videotapes provided~~ information delivered in video or audiovisual format should be closed-captioned.

(6)–(8) * * *

(e)–(j) * * *

Rule 5.242. Qualifications, rights, and responsibilities of counsel appointed to represent a child in family law proceedings

(a)–(j) * * *

(k) Other considerations

Counsel is not required to assume the responsibilities of a social worker, probation officer, child custody evaluator, or mediator and is not expected to provide nonlegal services to the child. Subject to the terms of the court's order of appointment, counsel for a child may take the following actions to implement his or her statutory duties in representing a child in a family law proceeding:

(1)–(3) * * *

(4) Conduct thorough, continuing, and independent investigations and discovery to protect the child's interest, which may include:

(A)–(F) * * *

(G) Reviewing relevant photographs, video or audio~~tapes~~ recordings, and other evidence;

(H)–(L) * * *

(5) * * *

Rule 5.275. Standards for computer software to assist in determining support

(a)–(f) * * *

(g) Definitions

As used in this ~~rule~~ chapter:

(1) "Software" refers to any program or digital application used to calculate the appropriate amount of child or spousal support.

~~(1)~~(2) "Default settings" refers to the status in which the software first starts when it is installed on a computer system. The software may permit the default settings to be changed by the user, either on a temporary or a permanent basis, if (1) the user is permitted to change the settings back to the default without reinstalling the software, (2) the computer screen prominently indicates whether the software is set to the default settings, and (3) any printout from the software prominently indicates whether the software is set to the default settings.

~~(2)~~(3) "Contains" means, with reference to software, that the material is either displayed by the program code itself or is found in written documents supplied with the software.

(h)–(j) * * *

Rule 5.534. General provisions—all proceedings

(a)–(m) * * *

(n) Caregiver notice and right to be heard (§§ 290.1–297, 366.21)

For cases filed under section 300 et seq.:

(1)–(5) * * *

(6) When form JV-290 or a caregiver letter is filed, the court clerk must provide the social worker, all unrepresented parties and all attorneys with a copy of the completed form or letter immediately upon receipt. The clerk also must complete, file, and distribute *Proof of Service—Juvenile* (form JV-510). The clerk may use any technology designed to speed the distribution process, including drop boxes in the courthouse, e-mail ~~or,~~ fax, or other electronic transmission, as defined in rule 2.250, to distribute the JV-290 form or letter and proof of service form.

(o)–(p) * * *

Rule 5.906. Request by nonminor for the juvenile court to resume jurisdiction (§§ 224.1(b), 303, 388(e))

(a)–(b) * * *

(c) Filing the request

(1) * * *

(2) For the convenience of the nonminor, the form JV-466 and, if the nonminor wishes to keep his or her contact information confidential, the *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) may be:

(A) Filed with the juvenile court that maintained general jurisdiction; or

(B) Submitted to the juvenile court in the county in which the nonminor currently resides, after which:

(i) The court clerk must record the date and time received on the face of the originals submitted and provide a copy of the originals marked as received to the nonminor at no cost to ~~the~~ him or her.

(ii)–(v) * * *

(C) * * *

(3)–(5) * * *

(d)–(i) * * *

Rule 7.802 of the California Rules of Court would be adopted, effective January 1, 2016, to read:

Title 7. Probate Rules

Chapter 17. Contested Hearings and Trials

Rule 7.802. Electronic filing and service in contested probate proceedings

The provisions of Code of Civil Procedure 1010.6 and rules 2.250–2.261 of the California Rules of Court concerning filing and service by electronic means apply to contested proceedings under the Probate Code and the Probate Rules to the same extent as they apply to other contested civil proceedings in each superior court in this state.

Rules 8.10, 8.40, 8.42, 8.44, 8.45, 8.46, 8.47, 8.50, 8.100, 8.104, 8.108, 8.112, 8.122, 8.123, 8.124, 8.128, 8.130, 8.137, 8.140, 8.144, 8.147, 8.150, 8.204, 8.208, 8.212, 8.220, 8.224, 8.248, 8.252, 8.264, 8.272, 8.278, 8.304, 8.308, 8.336, 8.344, 8.346, 8.360, 8.380, 8.384, 8.385, 8.386, 8.405, 8.406, 8.411, 8.412, 8.474, 8.482, 8.486, 8.488, 8.495, 8.496, 8.498, 8.504, 8.512, 8.540, 8.548, 8.610, 8.616, 8.630, 8.702, 8.703, 8.800, 8.803, 8.804, 8.806, 8.814, 8.821, 8.822, 8.823, 8.824, 8.832, 8.833, 8.834, 8.835, 8.838, 8.840, 8.842, 8.843, 8.852, 8.853, 8.862, 8.864, 8.866, 8.868, 8.870, 8.872, 8.874, 8.881, 8.882, 8.883, 8.888, 8.890, 8.891, 8.901, 8.902, 8.911, 8.915, 8.917, 8.919, 8.921, 8.922, 8.924, 8.926, 8.927, 8.928, 8.931, and 8.1018 of the California Rules of Court would be amended, and rule 8.11 would be adopted, effective January 1. 2016, to read:

Title 8. Appellate Rules

Rule 8.10. Definitions and use of terms

Unless the context or subject matter requires otherwise, the definitions and use of terms in rule 1.6 apply to these rules. In addition, the following apply:

(1)–(7) * * *

(8) The words "attach" or "attachment" may refer to either physical attachment or electronic attachment, as appropriate.

(9) The words "copy" or "copies" may refer to electronic copies, as appropriate.

(10) The word "cover" includes the cover page of a document filed electronically.

(11) "Written" and "writing" include electronically created written materials, whether or not those materials are printed on paper.

Rule 8.11. Scope of rules

These rules apply to documents filed and served electronically as well as in paper form, unless otherwise provided.

Rule 8.40. Form of filed documents

(a) * * *

(b) Cover color

(1) As far as practicable, the covers of briefs and petitions filed in paper form must be in the following colors:

Appellant's opening brief or appendix	green
Respondent's brief or appendix	yellow
Appellant's reply brief or appendix	tan
Joint appendix	white
Amicus curiae brief	gray
Answer to amicus curiae brief	blue

Petition for rehearing	orange
Answer to petition for rehearing	blue
Petition for original writ	red
Answer (or opposition) to petition for original writ	red
Reply to answer (or opposition) to petition for original writ	red
Petition for transfer of appellate division case to Court of Appeal	white
Answer to petition for transfer of appellate division case to Court of Appeal	blue
Petition for review	white
Answer to petition for review	blue
Reply to answer to petition for review	white
Opening brief on the merits	white
Answer brief on the merits	blue
Reply brief on the merits	white

(2) In appeals under rule 8.216, the cover of a combined respondent's brief and appellant's opening brief filed in paper form must be yellow, and the cover of a combined reply brief and respondent's brief filed in paper form must be tan.

(3) * * *

(c) * * *

Rule 8.42. Requirements for signatures of multiple parties on filed documents

When a document to be filed~~,~~ in paper form, such as a stipulation, requires the signatures of multiple parties, the original signature of at least one party must appear on the document filed in the reviewing court; the other signatures may be in the form of copies of the signed signature page of the document. Electronically filed documents must comply with the relevant provisions of rule 8.77.

~~**Advisory Committee Comment**~~

~~Please note that rule 8.77 establishes different requirements for documents that are electronically filed.~~

Rule 8.44. Number of copies of filed documents

~~Except as these rules provide otherwise, the number of copies of every brief, petition, motion, application, or other document that must be filed in a reviewing court is as follows:~~

(a) Documents filed in the Supreme Court

Except as these rules provide otherwise, the number of copies of every brief, petition, motion, application, or other document that must be filed in the Supreme Court and that is filed in paper form is as follows:

(1)–(6) * * *

(b) Documents filed in a Court of Appeal

Except as these rules provide otherwise, the number of copies of every brief, petition, motion, application, or other document that must be filed in a Court of Appeal and that is filed in paper form is as follows:

(1)–(7) * * *

(c) Electronic copies

A court that permits electronic filing will specify any requirements regarding electronically filed documents in the electronic filing requirements published pursuant to rule 8.74. In addition, a court may provide by local rule for the submission of an electronic copy of a document that is not electronically filed either in addition to the copies of a document required to be filed under (a) or (b) or as a substitute for one or more of these copies. The local rule must specify the format of the electronic copy and provide for an exception if it would cause undue hardship for a party to submit an electronic copy.

Rule 8.45. General provisions

(a) * * *

(b) Definitions

As used in this article:

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court by electronic means or otherwise.

(2)–(7) * * *

(c) Format of sealed and confidential records

(1) Unless otherwise provided by law or court order, sealed or confidential records that are part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be kept separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court and in a secure manner that preserves their confidentiality.

(A)–(D) * * *

(2) * * *

(3) Records relating to a request for funds under Penal Code section 987.9 or other proceedings the occurrence of which is not to be disclosed under the court order or applicable law must not be bound together with, or electronically transmitted as a single document with, other sealed or confidential records and must not be listed in the index required under (1)(D) or the alphabetical or chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents to a petition, or other records sent to the reviewing court.

(d) * * *

Rule 8.46. Sealed records

(a)–(c) * * *

(d) Record not filed in the trial court; motion or application to file under seal

(1)–(2) * * *

(3) To lodge a record, the party must transmit the record to the court in a secure manner that preserves the confidentiality of the record to be lodged. The record must be transmitted separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court with a cover sheet that complies with rule 8.40(c) and labels the contents as "CONDITIONALLY UNDER SEAL." If the record is in paper format, it must be placed in a sealed envelope or other appropriate sealed container.

(4)–(9) * * *

(e) Unsealing a record in the reviewing court

(1)–(2) * * *

(3) If the reviewing court proposes to order a record unsealed on its own motion, the court must send ~~mail~~ notice to the parties. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is sent ~~mailed~~, and any other party may serve and file a response within 5 days after an opposition is filed.

(4)–(7) * * *

(f) * * *

Rule 8.47. Confidential records

(a) * * *

(b) Records of *Marsden* hearings and other in-camera proceedings

(1)–(2) * * *

(3) A defendant may serve and file a motion or application in the reviewing court requesting permission to file under seal a brief, petition, or other filing that raises a *Marsden* issue or an issue related to another in-camera hearing covered by this subdivision and requesting an order maintaining the confidentiality of the relevant material from the reporter's transcript of or documents filed or lodged in connection with the in-camera hearing.

(A)–(B) * * *

(C) At the time the motion or application is filed, the defendant must:

(i) * * *

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record."

(D) * * *

(c) Other confidential records

Except as otherwise provided by law or order of the reviewing court:

(1) * * *

(2) To maintain the confidentiality of material contained in a confidential record, if it is necessary to disclose such material in a filing in the reviewing court, a party may serve and file a motion or application in the reviewing court requesting permission for the filing to be under seal.

(A)–(B) * * *

(C) At the time the motion or application is filed, the party must:

(i) * * *

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Material from a confidential record disclosed in this version must be identified and accompanied by a citation to the statute, rule of court, case, or other authority establishing that the record is required by law to be closed to inspection in the reviewing court.

(D) * * *

Rule 8.50. Applications

(a)–(b) * * *

~~**(c) Envelopes**~~

~~An application to a Court of Appeal must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties.~~

~~**(d)**~~**(c) Disposition * * ***

Rule 8.100. Filing the appeal

(a) * * *

(b) Fee and deposit

(1) Unless otherwise provided by law, the notice of appeal must be accompanied by the $775 filing fee under Government Code sections 68926 and 68926.1(b), an application for a waiver of court fees and costs on appeal under rule 8.26, or an order granting such an application. The fee ~~should~~ may be paid by check or money order payable to "Clerk, Court of Appeal"; if the fee is paid in cash, the clerk must give a receipt. The fee may also be paid by any method permitted by the court pursuant to rules 2.258 and 8.78.

(2)–(3) * * *

(c)–(d) * * *

(e) Superior court clerk's duties

(1) The superior court clerk must promptly ~~mail~~ send a notification of the filing of the notice of appeal to the attorney of record for each party, to any unrepresented party, and to the reviewing court clerk.

(2) The notification must show the date it was ~~mailed~~ sent and must state the number and title of the case and the date the notice of appeal was filed. If the information is available, the notification must include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) * * *

(C) The name, address, ~~and~~ telephone number and e-mail address of any unrepresented party.

(3) * * *

(4) The ~~mailing~~ sending of a notification under (1) is a sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney.

(5)–(6) * * *

(f) * * *

(g) Civil case information statement

(1) Within 15 days after the superior court clerk ~~mails~~ sends the notification of the filing of the notice of appeal required by (e)(1), the appellant must serve and file in the reviewing court a completed *Civil Case Information Statement* (form APP-004), attaching a copy of the judgment or appealed order that shows the date it was entered.

(2) If the appellant fails to timely file a case information statement under (1), the reviewing court clerk must notify the appellant ~~by mail~~ in writing that the appellant must file the statement within 15 days after the clerk's notice is ~~mailed~~ sent and that if the appellant fails to comply, the court may either impose monetary sanctions or dismiss the appeal. If the appellant fails to file the statement as specified in the notice, the court may impose the sanctions specified in the notice.

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). * * *

Subdivision (c)(2). * * *

Subdivision (e). Under subdivision (e)(2), a notification of the filing of a notice of appeal must show the date that the clerk ~~mailed~~ sent the document. This provision is intended to establish the date when the 20-day extension of the time to file a cross-appeal under rule 8.108(e) begins to run.

Subdivision (e)(1) requires the clerk to ~~mail~~ send a notification of the filing of the notice of appeal to the appellant's attorney or to the appellant if unrepresented. Knowledge of the date of that notification allows the appellant's attorney or the appellant to track the running of the 20-day extension of time to file a cross-appeal under rule 8.108(e).

Rule 8.104. Time to appeal

(a) Normal time

(1) Unless a statute, rule 8.108, or rule 8.702 provides otherwise, a notice of appeal must be filed on or before the earliest of:

(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-~~stamped~~endorsed copy of the judgment, showing the date either was served;

(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-~~stamped~~endorsed copy of the judgment, accompanied by proof of service; or

(C) * * *

(2) * * *

(3) If the parties stipulated in the trial court under Code of Civil Procedure section 1019.5 to waive notice of the court order being appealed, the time to appeal under (1)(C) applies unless the court or a party serves notice of entry of judgment or a filed-~~stamped~~endorsed copy of the judgment to start the time period under (1)(A) or (B).

(b)–(e) * * *

Rule 8.108. Extending the time to appeal

(a)–(e) * * *

(f) Public entity actions under Government Code section 962, 984, or 985

If a public entity defendant serves and files a valid request for a mandatory settlement conference on methods of satisfying a judgment under Government Code section 962, an election to pay a judgment in periodic payments under Government Code section 984 and rule 3.1804, or a motion for a posttrial hearing on reducing a judgment under Government Code section 985, the time to appeal from the judgment is extended for all parties until the earliest of:

(1) 90 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment, or a filed ~~-stamped~~endorsed copy of the judgment, showing the date either was served;

(2) 90 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed ~~-stamped~~endorsed copy of the judgment, accompanied by proof of service; or

(3) * * *

(g)–(h) * * *

Rule 8.112. Petition for writ of supersedeas

(a) Petition

(1)–(3) * * *

(4) If the record has not been filed in the reviewing court:

(A)–(B) * * *

(C) The documents listed in (B) must comply with the following requirements:

(i) If filed in paper form, they must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered;

(ii) If filed in paper form, they must be index-tabbed by number or letter, and

(iii) They must begin with a table of contents listing each document by its title and its index ~~-tab~~ number or letter.

(5) * * *

(b)–(d) * * *

Rule 8.122. Clerk's transcript

(a)–(d) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). * * *

Subdivision (c). The provisions of this rule, together with rule 8.144, allow the clerk's transcript to be in electronic form, when permitted under the reviewing court's local rules.

Under subdivision (c)(2), a clerk who sends a notice under subdivision (c)(1) must include a certificate stating the date on which the clerk sent it. This provision is intended to establish the date when the 10-day period for depositing the cost of the clerk's transcript under this rule begins to run.

The superior court will make the determination on any application to waive the fees for preparing, certifying, copying, and transmitting the clerk's transcript.

Subdivision (d). * * *

Rule 8.123. Record of administrative proceedings

(a)–(b) * * *

(c) Transmittal to the reviewing court

Except as provided in (d), if any administrative record is designated by a party, the superior court clerk must transmit the original administrative record, or electronic administrative record, with any clerk's or reporter's transcript sent to the reviewing court under rule 8.150. If the appellant has elected under rule 8.121 to use neither a clerk's transcript nor a reporter's transcript, the superior court clerk must transmit any administrative record designated by a party to the reviewing court no later than 45 days after the respondent files a designation under (b)(2) or the time for filing it expires, whichever first occurs.

(d)–(e) * * *

Rule 8.124. Appendixes

(a)–(b) * * *

(c) Document or exhibit held by other party

If a party preparing an appendix wants it to contain a copy of a document or an exhibit in the possession of another party:

(1)–(2) * * *

(3) If the party possessing the document or exhibit sends it to the requesting party non-electronically, that party must copy and return it to the possessing party within 10 days after receiving it.

(4) * * *

(5) On request, the reviewing court may return a document or an exhibit to the party that sent it non-electronically. When the remittitur issues, the reviewing court must return all documents or exhibits to the party that sent them, if they were sent non-electronically.

(d) Form of appendix

(1) An appendix must comply with the requirements of rule 8.144(~~a~~b)–(~~c~~d) for a clerk's transcript.

(2) * * *

(3) An appendix must not be bound or transmitted electronically as one document with a brief.

(e)–(g) * * *

Rule 8.128. Superior court file instead of clerk's transcript

(a) * * *

(b) Cost estimate; preparation of file; transmittal

(1) Within 10 days after a stipulation under (a) is filed, the superior court clerk must send ~~mail~~ the appellant an estimate of the cost to prepare the file, including the cost of sending the index under (3). The appellant must deposit the cost or file an application for, or an order granting, a waiver of the cost within 10 days after the clerk sends ~~mails~~ the estimate.

(2)–(4) * * *

Rule 8.130. Reporter's transcript

(a) * * *

(b) Deposit or substitute for cost of transcript

(1) * * *

(2) If the reporter believes the deposit is inadequate, within 15 days after the clerk ~~mails~~ sends the notice under (d)(1) the reporter may file with the clerk and send ~~mail~~ to the designating party an estimate of the transcript's total cost at the statutory rate, showing the additional deposit required. The party must deposit the additional sum within 10 days after the reporter ~~mails~~ sends the estimate.

(3) * * *

**(c) * * *

(d) Superior court clerk's duties

(1) * * *

(2) The clerk must promptly ~~mail~~ send the reporter notice of the designation and of the deposit or substitute and notice to prepare the transcript, showing the date the notice was sent ~~mailed~~ to the reporter, when the court receives:

(A)–(C) * * *

(3) If the appellant does not present the deposit under (b)(1) or a substitute under (b)(3) with its notice of designation or does not present an additional deposit required under (b)(2):

(A) The clerk must promptly notify the appellant in writing ~~by mail~~ that, within 15 days after the notice is sent ~~mailed~~, the appellant must take one of the following actions or the court may dismiss the appeal:

(i)–(v) * * *

(B) * * *

.

(4)–(5) * * *

**(e) * * *

(f) Filing the transcript; copies; payment

(1) Within 30 days after notice is ~~mailed~~ sent under (d)(2), the reporter must prepare and certify an original of the transcript and file it in superior court. The reporter must also file one copy of the original transcript, or more than one copy if multiple appellants equally share the cost of preparing the record (see rule 8.147(a)(2)). Only

the reviewing court can extend the time to prepare the reporter's transcript (see rule 8.60).

(2)–(4) * * *

(g) * * *

(h) Agreed or settled statement when proceedings cannot be transcribed

(1) If any portion of the designated proceedings cannot be transcribed, the superior court clerk must so notify the designating party in writing ~~by mail~~; the notice must show the date it was sent ~~mailed~~. The party may then substitute an agreed or settled statement for that portion of the designated proceedings by complying with either (A) or (B):

(A) Within 10 days after the notice is sent ~~mailed~~, the party may file in superior court, under rule 8.134, an agreed statement or a stipulation that the parties are attempting to agree on a statement. If the party files a stipulation, within 30 days thereafter the party must file the agreed statement, move to use a settled statement under rule 8.137, or proceed without such a statement; or

(B) Within 10 days after the notice is sent ~~mailed~~, the party may move in superior court to use a settled statement. If the court grants the motion, the statement must be served, filed, and settled as rule 8.137 provides, but the order granting the motion must fix the times for doing so.

(2)–(3) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). * * *

Subdivision (c). * * *

Subdivision (d). Under subdivision (d)(2), the clerk's notice to the reporter must show the date on which the clerk sent ~~mailed~~ the notice. This provision is intended to establish the date when the period for preparing the reporter's transcript under subdivision (f)(1) begins to run.

Subdivision (e). * * *

Subdivision (f). * * *

Rule 8.137. Settled statement

(a) Motion to use settled statement

(1)–(2) * * *

(3) If the court denies the motion, the appellant must file a new notice designating the record on appeal under rule 8.121 within 10 days after the superior court clerk sends ~~mails~~, or a party serves, the order of denial.

(b) Time to file; contents of statement

(1) Within 30 days after the superior court clerk sends ~~mails~~, or a party serves, an order granting a motion to use a settled statement, the appellant must serve and file in superior court a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal. Subject to the court's approval in settling the statement, the appellant may present some or all of the evidence by question and answer.

(2)–(5) * * *

(c) * * *

Rule 8.140. Failure to procure the record

(a) Notice of default

Except as otherwise provided by these rules, if a party fails to timely do an act required to procure the record, the superior court clerk must promptly notify the party in writing ~~by mail~~ that it must do the act specified in the notice within 15 days after the notice is sent ~~mailed~~, and that if it fails to comply, the reviewing court may impose one of the following sanctions:

(1)–(2) * * *

(b)–(c) * * *

Rule 8.144. Form of the record

(a) Paper and format

(1) Where the local rules of the reviewing court so allow, all or part of the record may be in electronic format.

~~(1)~~(2) In the clerk's and reporter's transcripts:

(A) All documents filed must have a page size of 8½ by 11 inches. If filed in paper form, the paper must be white or unbleached~~, 81/2 by 11 inches,~~ and of at least 20-pound weight;

(B)–(D) * * *

(E) The margin must be at least 1¼ inches from the left edge ~~on the bound side of the page~~.

~~(2)~~(3) If filed in paper form, in the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.

~~(3)~~(4) In the reporter's transcript the lines on each page must be consecutively numbered, and must be double-spaced or one-and-a-half-spaced; double-spaced means three lines to a vertical inch.

~~(4)~~(5) The clerk's and reporter's transcripts must comply with rules 8.45–8.47 relating to sealed and confidential records.

(b) Indexes

Except as provided in rule 8.45, at the beginning of the first volume of each:

(1) The clerk's transcript must contain alphabetical and chronological indexes listing each document and the volume, where applicable, and page where it first appears;

(2) The reporter's transcript must contain alphabetical and chronological indexes listing the volume, where applicable, and page where each witness's direct, cross, and any other examination, begins; and

(3) The reporter's transcript must contain an index listing the volume, where applicable, and page where any exhibit is marked for identification and where it is admitted or refused. The index must identify each exhibit by number or letter and a brief description of the exhibit.

(c) Binding and cover

(1) If filed in paper form, clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets.

(2)–(3) * * *

(d)–(f) * * *

Advisory Committee Comment

Subdivisions (a) and (b). Subdivisions (a)(~~1~~5) and (b)~~(1)~~ refer to special requirements concerning sealed and confidential records established by rules 8.45–8.47. Rule 8.45(c)(2) and (3) establish special requirements regarding references to sealed and confidential records in the alphabetical and chronological indexes to clerk's and reporter's transcripts.

Rule 8.147. Record in multiple or later appeals in same case

(a) * * *

(b) Later appeal

In an appeal in which the parties are using either a clerk's transcript under rule 8.122 or a reporter's transcript under rule 8.130:

(1) A party wanting to incorporate by reference all or parts of a record in a prior appeal in the same case must specify those parts in its designation of the record.

(A) The prior appeal must be identified by its case name and number. If only part of a record is being incorporated by reference, that part must be identified by citation to the volume, where applicable, and page numbers of the record where it appears and either the title of the document or documents or the date of the oral proceedings to be incorporated. The parts of any record incorporated by reference must be identified in a separate section at the end of the designation of the record.

(B)–(C) * * *

(2) * * *

Rule 8.150. Filing the record

(a) * * *

(b) Reviewing court clerk's duties

On receiving the record, the reviewing court clerk must promptly file the original and send ~~mail~~ notice of the filing date to the parties.

Rule 8.204. Contents and form of briefs

(a) * * *

(b) Form

(1) A brief may be reproduced by any process that produces a clear, black image of letter quality. All documents filed must have a page size of 8½ by 11 inches. If filed

in paper form, the paper must be white or unbleached~~, 81/2 by 11 inches,~~ and of at least 20-pound weight.

(2) Any conventional font ~~typeface~~ may be used. The font ~~typeface~~ may be either proportionally spaced or monospaced.

(3) The font ~~type~~ style must be roman; but for emphasis, italics or boldface may be used or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters.

(4) Except as provided in (11), the font ~~type~~ size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used.

(5)–(7) * * *

(8) If filed in paper form, the brief must be bound on the left margin. If the brief is stapled, the bound edge and staples must be covered with tape.

(9) * * *

(10) If filed in paper form, the cover must be in the color prescribed by rule 8.40(b). ~~and, in~~ In addition to providing the cover information required by rule 8.40(c), the cover must state:

(A)–(D) * * *

(11) * * *

**(c)–(e) * * *

Advisory Committee Comment

Subdivision (b). The first sentence of subdivision (b)(1) confirms that any method of reproduction is acceptable provided it results in a clear black image of letter quality. The provision is derived from subdivision (a)(1) of rule 32 of the Federal Rules of Appellate Procedure (28 U.S.C.) (FRAP 32).

Paragraphs (2), (3), and (4) of subdivision (b) state requirements of *font* ~~*typeface, font type*~~ *style*, and *font*~~*type*~~ *size* (see also subd. (b)(11)(C)). ~~The first two terms are defined in *The Chicago Manual of Style* (15th ed., 2003) p. 839. Note that computer programs often refer to typeface as "font."~~

Subdivision (b)(2) allows the use of any conventional font ~~typeface~~—e.g., Times New Roman, Courier, Arial, Helvetica, etc.—and permits the font ~~typeface~~ to be either proportionally spaced or monospaced.

Subdivision (b)(3) requires the font ~~type~~ style to be roman, but permits the use of italics, boldface, or underscoring for emphasis; it also requires case names to be italicized or underscored. These provisions are derived from FRAP 32(a)(6).

Subdivision (b)(5) allows headings to be single-spaced; it is derived from FRAP 32(a)(4). The provision also permits quotations of any length to be block-indented and single-spaced at the discretion of the brief writer.

See also rule 1.200 concerning the format of citations. Brief writers are encouraged to follow the citation form of the *California Style Manual* (4th ed., 2000).

Subdivision (c). * * *

Subdivision (d). * * *

Subdivision (e). * * *

Rule 8.208. Certificate of Interested Entities or Persons

(a)–(c) * * *

(d) Serving and filing a certificate

(1)–(2) * * *

(3) If a party fails to file a certificate as required under (1), the clerk must notify the party in writing ~~by mail~~ that the party must file the certificate within 15 days after the clerk's notice is sent ~~mailed~~ and that if the party fails to comply, the court may impose one of the following sanctions:

(A)–(B) * * *

(4) * * *

(e)–(f) * * *

Rule 8.212. Service and filing of briefs * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). Extensions of briefing time are limited by statute in some cases. For example, under Public Resources Code section 21167.6(h) in cases under section 21167, extensions are limited to one 30-day extension for the opening brief and one 30-day extension for "preparation of responding brief."

Under rule 8.42, the original signature of only one party is required on the stipulation filed with the court; the signatures of the other parties may be in the form of copies of the signed signature page of the document. Signatures on electronically filed documents are subject to the requirements of rule 8.77.

Subdivision (b)(2) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule 8.50 rather than by motion under rule 8.54.

Subdivision (c). * * *

Rule 8.220. Failure to file a brief

(a) Notice to file

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 in writing ~~by mail~~ that the brief must be filed within 15 days after the notice is sent ~~mailed~~ and that if the party fails to comply, the court may impose one of the following sanctions:

(1)–(2) * * *

(b)–(d) * * *

Rule 8.224. Transmitting exhibits

(a) * * *

(b) Transmittal

Unless the reviewing court orders otherwise, within 20 days after the first notice under (a) is filed:

(1) The superior court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the reviewing court ~~with two copies of a list of the exhibits sent~~. The superior court clerk must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the superior court clerk must send two copies of the list. If the reviewing court clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the superior court clerk.

(2) Any party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court ~~with two copies of a list of the exhibits sent.~~ The party must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the party must send two copies of the list. If the reviewing court clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the party.

(c) * * *

(d) Request and return by reviewing court

At any time the reviewing court may direct the superior court or a party to send it an exhibit. On request, the reviewing court may return an exhibit to the superior court or to the party that sent it. When the remittitur issues, the reviewing court must return all exhibits not transmitted electronically to the superior court or to the party that sent them.

Rule 8.248. Prehearing conference

(a)–(c) * * *

(d) Time to file brief

The time to file a party's brief under rule 8.212(a) is tolled from the date the Court of Appeal sends ~~mails~~ notice of the conference until the date it sends ~~mails~~ notice that the conference is concluded.

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (d). If a prehearing conference is ordered before the due date of the appellant's opening brief, the time to file the brief is not *extended* but *tolled,* in order to avoid unwarranted lengthening of the briefing process. For example, if the conference is ordered 15 days after the start of the normal 30-day briefing period, the rule simply *suspends* the running of that period; when the period resumes, the party will not receive an automatic extension of a full 30 days but rather the remaining 15 days of the original briefing period, unless the period is otherwise extended.

Under subdivision (d) the tolling period continues "until the date [the Court of Appeal] sends ~~mails~~ notice that the conference is *concluded"* (italics added). This provision is intended to accommodate the possibility that the conference may not conclude on the date it begins.

Whether or not the conference concludes on the date it begins, subdivision (d) requires the Court of Appeal clerk to send ~~mail~~ the parties a notice that the conference is concluded. This provision is intended to facilitate the calculation of the new briefing due dates.

Rule 8.252. Judicial notice; findings and evidence on appeal

(a)–(b) * * *

(c) Evidence on appeal

(1)–(2) * * *

(3) For documentary evidence, a party may offer the original, a certified copy, ~~or~~ a photocopy, or, in a case in which electronic filing is permitted, an electronic copy. The court may admit the document in evidence without a hearing.

Rule 8.264. Filing, finality, and modification of decision

(a)–(c) * * *

(d) Consent to increase or decrease in amount of judgment

If a Court of Appeal decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless, before the decision is final under (b), the party serves and files ~~two copies~~ a copy of a consent in the Court of Appeal. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one filed ~~stamped~~endorsed copy of the consent to the superior court with the remittitur.

Rule 8.272. Remittitur

(a) * * *

(b) Clerk's duties

(1) If a Court of Appeal decision is not reviewed by the Supreme Court:

(A) * * *

(B) The clerk must send the lower court or tribunal the Court of Appeal remittitur and a filed ~~stamped~~endorsed copy of the opinion or order.

(2) After Supreme Court review of a Court of Appeal decision:

(A) * * *

(B) The clerk must send the lower court or tribunal the Court of Appeal remittitur, a copy of the Supreme Court remittitur, and a filed ~~stamped~~endorsed copy of the Supreme Court opinion or order.

(c)–(d) * * *

Rule 8.278. Costs on appeal

(a)–(d) * * *

Advisory Committee Comment

This rule is not intended to expand the categories of appeals subject to the award of costs. See rule 8.493 for provisions addressing costs in writ proceedings.

Subdivision (c). * * *

Subdivision (d). Subdivision (d)(1)(B) is intended to refer not only to a normal record prepared by the clerk and the reporter under rules 8.122 and 8.130 but also, for example, to an appendix prepared by a party under rule 8.124 and to a superior court file to which the parties stipulate under rule 8.128.

Subdivision (d)(1)(D), allowing recovery of the "costs to notarize, serve, mail, and file the record, briefs, and other papers," is intended to include fees charged by electronic filing service providers for electronic filing and service of documents.

"Net interest expenses" in subdivisions (d)(1)(F) and (G) means the interest expenses incurred to borrow the funds that are deposited minus any interest earned by the borrower on those funds while they are on deposit.

Rule 8.304. Filing the appeal; certificate of probable cause

(a)–(b) * * *

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly send ~~mail~~ a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. If the defendant also files a statement under (b)(1), the clerk must not send ~~mail~~ the notification unless the superior court files a certificate under (b)(2).

(2) The notification must show the date it was sent ~~mailed~~, the number and title of the case, and the dates the notice of appeal and any certificate under (b)(2) were filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) * * *

(C) The name, address, ~~and~~ telephone number and e-mail address of any unrepresented defendant.

(3)–(4) * * *

(5) The sending ~~mailing~~ of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) * * *

Rule 8.308. Time to appeal

(a) * * *

(b) Cross-appeal

If the defendant or the People timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is either the time specified in (a) or 30 days after the superior court clerk sends ~~mails~~ notification of the first appeal, whichever is later.

(c)–(d) * * *

Rule 8.336. Preparing, certifying, and sending the record

(a)–(c) * * *

(d) Reporter's transcript

(1)–(3) * * *

(4) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and combined ~~bound~~ with any portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but, if the transcript is in paper form, must be prepared by photocopying or an equivalent process.

(5) * * *

(e)–(h) * * *

Rule 8.344. Agreed statement

If the parties present the appeal on an agreed statement, they must comply with the relevant provisions of rule 8.134, but the appellant must file an original and, if the statement is filed in paper form, three copies of the statement in superior court within 25 days after filing the notice of appeal.

Rule 8.346. Settled statement

(a)–(b) * * *

(c) Serving and filing the settled statement

The applicant must prepare, serve, and file in superior court an original and, if the statement is filed in paper form, three copies of the settled statement.

Rule 8.360. Briefs by parties and amici curiae

(a)–(b) * * *

(c) Time to file

(1)–(4) * * *

(5) 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 in writing ~~by mail~~ that the brief must be filed within 30 days after the notice is sent ~~mailed~~, and that failure to comply may result in one of the following sanctions:

(A)–(B) * * *

(6) * * *

**(d)–(f) * * *

Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by an attorney

**(a)–(b) * * *

(c) Number of copies

In the Court of Appeal, the petitioner must file the original of the petition under (a) and one set of any supporting documents. In the Supreme Court the petitioner must file an original and, if the petition is filed in paper form, 10 copies of the petition and an original and, if the document is filed in paper form, 2 copies of any supporting document accompanying the petition unless the court orders otherwise.

Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party

(a) Form and content of petition and memorandum

(1)–(2) * * *

(3) The petition and any memorandum must support any reference to a matter in the supporting documents by a citation to its index number or letter ~~tab~~ and page.

**(b)–(d) * * *

Rule 8.385. Proceedings after the petition is filed

**(a) * * *

(b) Informal response

(1) * * *

(2) The response must be served and filed within 15 days or as the court specifies. If the petitioner is not represented by counsel in the habeas corpus proceeding, one copy of the informal response and any supporting documents must be served on the petitioner. If the petitioner is represented by counsel in the habeas corpus proceeding, ~~two copies~~ the response must be served on the petitioner's counsel. If the response is served in paper form, two copies must be served on the petitioner's counsel. If the petitioner is represented by court-appointed counsel other than the State Public Defender's Office or Habeas Corpus Resource Center, one copy must also be served on the applicable appellate project.

(3) * * *

(c)–(f) * * *

Rule 8.386. Proceedings if the return is ordered to be filed in the reviewing court

(a) * * *

(b) Serving and filing return

(1)–(2) * * *

(3) ~~Two copies of the~~ The return and any supporting documents must be served on the petitioner's counsel~~, and if~~. If the return is served in paper form, two copies must be served on the petitioner's counsel. If the petitioner is represented for the habeas corpus proceeding by court-appointed counsel other than the State Public Defender's Office or Habeas Corpus Resource Center, one copy must be served on the applicable appellate project.

(c) Form and content of return

(1) * * *

(2) Rule 8.486(c)(1) and (2) govern the form of any supporting documents accompanying the return. The return must support any reference to a matter in the supporting documents by a citation to its index ~~tab~~ number or letter and page.

(3) * * *

(d)–(g) * * *

Rule 8.405. Filing the appeal

(a) * * *

(b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) ~~Mail~~ Send a notification of the filing to:

(i)–(vi) * * *

(B) * * *

(2) The notification must show the name of the appellant, the date it was ~~mailed~~ sent, the number and title of the case, and the date the notice of appeal was filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) * * *

(C) The name, address, ~~and~~ telephone number and e-mail address of any unrepresented party.

(3)–(4) * * *

(5) The sending ~~mailing~~ of a notification is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) * * *

Advisory Committee Comment

Subdivision (a). *Notice of Appeal—Juvenile (California Rules of Court, Rule 8.400)* (form JV-800) may be used to file the notice of appeal required under this rule. This form is available at any courthouse or county law library or online at ~~*www.courtinfo.ca.gov/forms*~~ www.courts.ca.gov/forms.

Rule 8.406. Time to appeal

(a) * * *

(b) Cross-appeal

If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is either the time specified in (a) or 20 days after the superior court clerk sends ~~mails~~ notification of the first appeal, whichever is later.

(c)–(d) * * *

Rule 8.411. Abandoning the appeal

(a)–(b) * * *

(c) Clerk's duties

(1) If the abandonment is filed in the superior court, the clerk must immediately send ~~mail~~ a notification of the abandonment to:

(A)–(C) * * *

(2) If the abandonment is filed in the reviewing court and the reviewing court orders the appeal dismissed, the clerk must immediately send ~~mail~~ a notification of the order of dismissal to every party.

Rule 8.412. Briefs by parties and amici curiae

(a)–(c) * * *

(d) Failure to file a brief

(1) Except in appeals governed by rule 8.416, 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 ~~by mail~~ that the brief must be filed within 30 days after the notice is sent ~~mailed~~ and that failure to comply may result in one of the following sanctions:

(A)–(B) * * *

(2)–(3) * * *

(e) * * *

Rule 8.474. Procedures and data

(a) * * *

(b) Data

The clerks of the superior courts and the reviewing courts must ~~the~~ provide the data required to assist the Judicial Council in evaluating the effectiveness of the rules governing appeals and writs in juvenile cases.

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

(a)–(b) * * *

(c) Superior court clerk's duties

After entering the judgment, the clerk must immediately:

(1) * * *

(2) Send ~~Mail~~ certified copies of the judgment to the Court of Appeal and the Attorney General.

(d)–(f) * * *

(g) Confidential material

(1) * * *

(2) Material under (1) must be sent to the reviewing court in a secure manner that preserves its confidentiality. If the material is in paper format, it must be sent to the reviewing court in a sealed envelope marked "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT A COURT ORDER."

(h)–(i) * * *

Rule 8.486. Petitions

(a)–(b) * * *

(c) Form of supporting documents

(1) Documents submitted under (b) must comply with the following requirements:

(A) If submitted in paper form, they must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered.

(B) If submitted in paper form, t~~T~~hey must be index-tabbed by number or letter.

(C) They must begin with a table of contents listing each document by its title and its index ~~tab~~ number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(2) The clerk must file any supporting documents not complying with (1), but the court may notify the petitioner that it may strike or summarily deny the petition if the documents are not brought into compliance within a stated reasonable time of not less than 5 days.

(3) Rule 8.44(a) governs the number of copies of supporting documents to be filed in the Supreme Court. Rule 8.44(b) governs the number of supporting documents to be filed in the Court of Appeal.

(d)–(e) * * *

Rule 8.488. Certificate of Interested Entities or Persons

(a)–(c) * * *

(d) Failure to file a certificate

(1) If a party fails to file a certificate as required under (b) and (c), the clerk must notify the party in writing ~~by mail~~ that the party must file the certificate within 10 days after the clerk's notice is sent ~~mailed~~ and that if the party fails to comply, the court may impose one of the following sanctions:

(A)–(B) * * *

(2) * * *

Rule 8.495. Review of Workers' Compensation Appeals Board cases

(a) Petition

(1)–(2) * * *

(3) The petition must be accompanied by proof of service of ~~two copies~~ a copy of the petition on the Secretary of the Workers' Compensation Appeals Board in San Francisco, or two copies if the petition is served in paper form, and one copy on each party who appeared in the action and whose interest is adverse to the petitioner. Service on the board's local district office is not required.

(b) * * *

(c) Certificate of Interested Entities or Persons

(1)–(2) * * *

(3) If a party fails to file a certificate as required under (1) and (2), the clerk must notify the party in writing ~~by mail~~ that the party must file the certificate within 10 days

after the clerk's notice is ~~mailed~~ sent and that failure to comply will result in one of the following sanctions:

(A)–(B) * * *

(4) * * *

Rule 8.496. Review of Public Utilities Commission cases

(a)–(b) * * *

(c) Certificate of Interested Entities or Persons

(1)–(2) * * *

(3) If a party fails to file a certificate as required under (1) and (2), the clerk must notify the party ~~by mail~~ in writing that the party must file the certificate within 10 days after the clerk's notice is ~~mailed~~ sent and that failure to comply will result in one of the following sanctions:

(A)–(B) * * *

(4) * * *

Rule 8.498. Review of Agricultural Labor Relations Board and Public Employment Relations Board cases

(a)–(c) * * *

(d) Certificate of Interested Entities or Persons

(1)–(2) * * *

(3) If a party fails to file a certificate as required under (1) and (2), the clerk must notify the party ~~by mail~~ in writing that the party must file the certificate within 10 days after the clerk's notice is ~~mailed~~ sent and that failure to comply will result in one of the following sanctions:

(A)–(B) * * *

(4) * * *

Rule 8.504. Form and contents of petition, answer, and reply

(a) * * *

(b) Contents of a petition

(1)–(3) * * *

(4) If the petition seeks review of a Court of Appeal opinion, a copy of the opinion showing its filing date and a copy of any order modifying the opinion or directing its publication must be bound at the back of the original petition and each copy filed in the Supreme Court or, if the petition is not filed in paper form, attached.

(5) If the petition seeks review of a Court of Appeal order, a copy of the order showing the date it was entered must be bound at the back of the original petition and each copy filed in the Supreme Court or, if the petition is not filed in paper form, attached.

(6)–(7) * * *

(c)–(e) * * *

Rule 8.512. Ordering review

(a) Transmittal of record

On receiving a copy of a petition for review or on request of the Supreme Court, whichever is earlier, the Court of Appeal clerk must promptly send the record to the Supreme Court. If the petition is denied, the Supreme Court clerk must promptly return the record to the Court of Appeal if the record was transmitted in paper form.

(b)–(d) * * *

Rule 8.540. Remittitur

(a) * * *

(b) Clerk's duties

(1) * * *

(2) After review of a Court of Appeal decision, the Supreme Court clerk must address the remittitur to the Court of Appeal and send that court ~~two copies~~ a copy of the remittitur and ~~two~~ a filed ~~stamped~~endorsed ~~copies~~ copy of the Supreme Court opinion or order. The clerk must send two copies of any document sent in paper form.

(3) After a decision in an appeal from a judgment of death or in a cause transferred to the court under rule 8.552, the clerk must send the remittitur and a filed ~~stamped~~endorsed copy of the Supreme Court opinion or order to the lower court or tribunal.

(4) * * *

**(c) * * *

Rule 8.548. Decision on request of a court of another jurisdiction

(a)–(c) * * *

(d) Serving and filing the request

The requesting court clerk must file an original, and if the request is filed in paper form, 10 copies, of the request in the Supreme Court with a certificate of service on the parties.

(e) * * *

(f) Proceedings in the Supreme Court

(1)–(5) * * *

(6) After filing the opinion, the clerk must promptly send filed ~~stamped~~endorsed copies to the requesting court and the parties and must notify that court and the parties when the decision is final.

(7) * * *

Rule 8.610. Contents and form of the record

(a)–(b) * * *

(c) Juror-identifying information

Any document in the record containing juror-identifying information must be edited in compliance with rule 8.332. Unedited copies of all such documents and a copy of the table required by the rule, under seal and bound together if filed in paper form, must be included in the record sent to the Supreme Court.

(d) * * *

Rule 8.616. Preparing the trial record

(a) * * *

(b) Reporter's duties

(1) * * *

(2) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and ~~bound~~ combined with any portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but, if the transcript is in paper form, must be prepared by photocopying or an equivalent process.

(3) * * *

(c)–(d) * * *

Rule 8.630. Briefs by parties and amicus curiae

(a)–(f) * * *

(g) Service

(1) * * *

(2) The Attorney General must serve two paper copies or one electronic copy of the respondent's brief on each defendant's appellate counsel and, for each defendant sentenced to death, one copy on the California Appellate Project in San Francisco.

(3) * * *

(h) * * *

Rule 8.702. Appeals

(a) * * *

(b) Notice of appeal

(1) *Time to appeal*

The notice of appeal must be served and filed on or before the earlier of:

(A) Five court days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file~~d-stamped~~endorsed copy of the judgment, showing the date either was served; or

(B) Five court days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file~~d-stamped~~endorsed copy of the judgment, accompanied by proof of service.

(2) * * *

(c)–(g) * * *

Rule 8.703. Writ proceedings

(a) * * *

(b) Petition

(1) *Time for filing petition*

A petition for a writ challenging a superior court judgment or order governed by the rules in this chapter must be served and filed on or before the earliest of:

(A) Thirty days after the superior court clerk serves on the party filing the petition a document entitled "Notice of Entry" of judgment or order, or a file<u>d</u>-~~stamped~~<u>endorsed</u> copy of the judgment or order, showing the date either was served; or

(B) Thirty days after the party filing the petition serves or is served by a party with a document entitled "Notice of Entry" of judgment or order, or a file<u>d</u>-~~stamped~~<u>endorsed</u> copy of the judgment or order, accompanied by proof of service.

(2) * * *

Rule 8.800. Application of division <u>and scope of rules</u>

<u>(a) Application</u>

The rules in this division apply to:

(1)–(2) * * *

<u>(b) Scope of rules</u>

<u>The rules in this division apply to documents filed and served electronically as well as in paper form, unless otherwise provided.</u>

Rule ~~8.804~~ <u>8.803</u>. Definitions

As used in this division, unless the context or subject matter otherwise requires:

(1)–(22) * * *

(23) The words "attach" or "attachment" may refer to either physical attachment or electronic attachment, as appropriate.

(24) The words "copy" or "copies" may refer to electronic copies, as appropriate.

(25) The word "cover" includes the cover page of a document filed electronically.

(26) "Written" and "writing" include electronically created written materials, whether or not those materials are printed on paper.

Rule 8.804. Requirements for signatures on documents

Except as otherwise provided, or required by order of the court, signatures on electronically filed documents must comply with the requirements of rule 8.77.

Rule 8.806. Applications

(a)–(b) * * *

(c) Envelopes

If any party or parties in the case are served in paper form, a~~A~~n application must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to ~~all~~ those parties.

(d) * * *

Rule 8.814. Substituting parties; substituting or withdrawing attorneys

(a)–(b) * * *

(c) Withdrawing attorney

(1) * * *

(2) The proof of service need not include the address of the party represented. But if the court grants the motion, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address, e-mail address, and telephone number.

(3) * * *

Rule 8.821. Notice of appeal

(a)–(c) * * *

(d) Notification of the appeal

(1) When the notice of appeal is filed, the trial court clerk must promptly ~~mail~~ send a notification of the filing of the notice of appeal to the attorney of record for each party and to any unrepresented party. The clerk must also ~~mail~~ send or deliver this notification to the appellate division clerk.

(2) The notification must show the date it was ~~mailed~~ sent and must state the number and title of the case and the date the notice of appeal was filed.

(3) * * *

(4) The ~~mailing~~ sending of a notification under (1) is a sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney.

(5) * * *

(e) * * *

Rule 8.822. Time to appeal

(a) Normal time

(1) Unless a statute or rule 8.823 provides otherwise, a notice of appeal must be filed on or before the earliest of:

(A) 30 days after the trial court clerk serves the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-~~stamped~~endorsed copy of the judgment, showing the date it was served;

(B) 30 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-~~stamped~~endorsed copy of the judgment, accompanied by proof of service; or

(C) * * *

(2) * * *

(3) If the parties stipulated in the trial court under Code of Civil Procedure section 1019.5 to waive notice of the court order being appealed, the time to appeal under (1)(C) applies unless the court or a party serves notice of entry of judgment or a filed-~~stamped~~endorsed copy of the judgment to start the time period under (1)(A) or (B).

(b)–(d) * * *

Rule 8.823. Extending the time to appeal

(a)–(e) * * *

(f) Public entity actions under Government Code section 962, 984, or 985

If a public entity defendant serves and files a valid request for a mandatory settlement conference on methods of satisfying a judgment under Government Code section 962, an election to pay a judgment in periodic payments under Government Code section 984 and rule 3.1804, or a motion for a posttrial hearing on reducing a judgment under Government Code section 985, the time to appeal from the judgment is extended for all parties until the earliest of:

(1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file<u>d</u>~~-stamped~~<u>endorsed</u> copy of the judgment, showing the date either was served;

(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file<u>d</u>~~-stamped~~<u>endorsed</u> copy of the judgment, accompanied by proof of service; or

(3) * * *

(g)–(h) * * *

Rule 8.824. Writ of supersedeas

(a) Petition

(1)–(3) * * *

(4) If the record has not been filed in the reviewing court:

(A)–(B) * * *

(C) The documents listed in (B) must comply with the following requirements:

(i) <u>If filed in paper form, t</u>hey must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered;

(ii) <u>If filed in paper form, t</u>hey must be index-tabbed by number or letter; and

(iii) They must begin with a table of contents listing each document by its title and its index ~~tab~~ number or letter.

(5) * * *

**(b)–(d) * * *

Rule 8.832. Clerk's transcript * * *

Advisory Committee Comment

Under rule 8.838, the clerk's transcript may be in electronic form, when permitted under the reviewing court's local rules.

Subdivision (a). * * *

Subdivision (d). * * *

Rule 8.833. Trial court file instead of clerk's transcript

(a) * * *

(b) Cost estimate; preparation of file; transmittal

(1) Within 10 days after the appellant serves a notice under rule 8.831 indicating that the appellant elects to use a clerk's transcript, the trial court clerk may ~~mail~~ send the appellant a notice indicating that the appellate division for that court has elected by local court rule to use the original trial court file instead of a clerk's transcript and providing the appellant with an estimate of the cost to prepare the file, including the cost of sending the index under (4).

(2) Within 10 days after the clerk ~~mails~~ sends the estimate under (1), the appellant must deposit the estimated cost with the clerk, unless otherwise provided by law or the party submits an application for a waiver of the cost under rule 8.818 or an order granting a waiver of this cost.

(3)–(5) * * *

Rule 8.834. Reporter's transcript

(a) Notice

(1)–(3) * * *

(4) Except when a party deposits a certified transcript of all the designated proceedings under (b)(2)(D) with the notice of designation, the clerk must promptly ~~mail~~ send a copy of each notice to the reporter. The copy must show the date it was ~~mailed~~ sent.

(b) Deposit or substitute for cost of transcript

(1) Within 10 days after the clerk ~~mails~~ sends a notice under (a)(4), the reporter must file the estimate with the clerk—or notify the clerk in writing of the date that he or she notified the appellant directly—of the estimated cost of preparing the reporter's transcript at the statutory rate.

(2) * * *

(3) With its notice of designation, a party may serve and file a copy of its application to the Court Reporters Board for payment or reimbursement from the Transcript Reimbursement Fund under Business and Professions Code section 8030.2 et seq.

(A)–(C) * * *

(D) If the Court Reporters Board provisionally approves the application, the reporter's time to prepare the transcript under (d)(1) begins when the clerk ~~mails~~ sends notice of the provisional approval under (4).

(4) * * *

(c)–(e) * * *

(f) Notice when proceedings cannot be transcribed

(1) If any portion of the designated proceedings were not reported or cannot be transcribed, the trial court clerk must so notify the designating party ~~by mail~~ in writing; the notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 10 days after the notice under (1) is ~~mailed~~ sent, the designating party must file a new election notifying the court whether the party elects to proceed with or without a record of the identified oral proceedings. If the party elects to proceed with a record of these oral proceedings, the notice must specify which form of the record listed in rule 8.830(a)(2) the party elects to use.

(A)–(C) * * *

(3) * * *

Rule 8.835. Record when trial proceedings were officially electronically recorded

(a)–(c) * * *

(d) Notice when proceedings were not officially electronically recorded or cannot be transcribed

(1) If the appellant elects under rule 8.831 to use a transcript prepared from an official electronic recording or the recording itself, the trial court clerk must notify the appellant ~~by mail~~ in writing if any portion of the designated proceedings was not officially electronically recorded or cannot be transcribed. The notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 10 days after the notice under (1) is ~~mailed~~ sent, the appellant must file a new election notifying the court whether the appellant elects to proceed with or without a record of the oral proceedings that were not recorded or cannot be transcribed. If the appellant elects to proceed with a record of these oral proceedings, the notice must specify which form of the record listed in rule 8.830(a)(2) the appellant elects to use.

(A)–(C) * * *

Rule 8.838. Form of the record

(a) Paper and format

(1) Where the local rules for the appellate division so allow, all or part of the record may be in electronic format.

(2) Except as otherwise provided in this rule, clerk's and reporter's transcripts must comply with the paper and format requirements of rule 8.144(a).

(b) Indexes

At the beginning of the first volume of each:

(1) The clerk's transcript must contain alphabetical and chronological indexes listing each document and the volume, where applicable, and page where it first appears;

(2) The reporter's transcript must contain alphabetical and chronological indexes listing the volume, where applicable, and page where each witness's direct, cross, and any other examination, begins; and

(3) The reporter's transcript must contain an index listing the volume, where applicable, and page where any exhibit is marked for identification and where it is admitted or refused.

(c) Binding and cover

(1) If filed in paper form, clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets, except that transcripts may be bound at the top if required by a local rule of the appellate division.

(2)–(3) * * *

Rule 8.840. Completion and filing of the record

(a) * * * *

(b) Filing the record

When the record is complete, the trial court clerk must promptly send the original to the appellate division and send to the appellant and respondent copies of any certified statement on appeal and any copies of transcripts or official electronic recordings that they have purchased. The appellate division clerk must promptly file the original and ~~mail~~ send notice of the filing date to the parties.

Rule 8.842. Failure to procure the record

(a) Notice of default

Except as otherwise provided by these rules, if a party fails to do any act required to procure the record, the trial court clerk must promptly notify that party ~~by mail~~ in writing that it must do the act specified in the notice within 15 days after the notice is ~~mailed~~ sent and that, if it fails to comply, the reviewing court may impose the following sanctions:

(1)–(2) * * *

(b) * * *

Rule 8.843. Transmitting exhibits

(a)–(c) * * *

(d) Transmittal

Unless the appellate division orders otherwise, within 20 days after notice under (a) is filed or after the appellate division directs that an exhibit be sent:

(1) The trial court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits sent~~. The trial court clerk must also send a list of the

exhibits sent. If the exhibits are not transmitted electronically, the trial court clerk must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the trial court clerk.

(2) Any party in possession of designated exhibits returned by the trial court must put them into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits sent.~~ The party must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the party must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the party.

(e) Return by appellate division

On request, the appellate division may return an exhibit to the trial court or to the party that sent it. When the remittitur issues, the appellate division must return all exhibits not transmitted electronically to the trial court or to the party that sent them.

Rule 8.852. Notice of appeal

(a) * * *

(b) Notification of the appeal

(1) When a notice of appeal is filed, the trial court clerk must promptly ~~mail~~ send a notification of the filing to the attorney of record for each party and to any unrepresented defendant. The clerk must also ~~mail~~ send or deliver this notification to the appellate division clerk.

(2) The notification must show the date it was ~~mailed~~ sent or delivered, the number and title of the case, the date the notice of appeal was filed, and whether the defendant was represented by appointed counsel.

(3)–(4) * * *

(5) The ~~mailing~~ sending of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) * * *

Advisory Committee Comment

Notice of Appeal (Misdemeanor) (form CR-132) may be used to file the notice of appeal required under this rule. This form is available at any courthouse or county law library or online at ~~*www.courtinfo.ca.gov/forms*~~ *www.courts.ca.gov/forms*.

Subdivision (a). The only orders that a defendant can appeal in a misdemeanor case are (1) orders granting or denying a motion to suppress evidence (Penal Code section 1538.5(j)); and (2) orders made after the final judgment that affects the substantial rights of the defendant (Penal Code section 1466)

Rule 8.853. Time to appeal

(a) * * *

(b) Cross-appeal

If the defendant or the People timely appeal from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is either the time specified in (a) or 15 days after the trial court clerk ~~mails~~ sends notification of the first appeal, whichever is later.

(c)–(d) * * *

Rule 8.862. Preparation of clerk's transcript

(a)–(b) * * *

(c) Probation officer's reports

A probation officer's report included in the clerk's transcript under rule 8.861(12)(D) must appear in only the copies of the appellate record that are sent to the reviewing court, to appellate counsel for the People, and to appellate counsel for the defendant who was the subject of the report or to the defendant if he or she is self-represented. If the report is in paper form, it must placed in a sealed envelope. The reviewing court's copy of the report, and if applicable, the envelope, must be ~~placed in a sealed envelope~~ marked "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER—PROBATION OFFICER REPORT."

(d)–(e) * * *

Rule 8.864. Record of oral proceedings

(a) Appellant's election

The appellant must notify the trial court whether he or she elects to proceed with or without a record of the oral proceedings in the trial court. If the appellant elects to proceed with a record of the oral proceedings in the trial court, the notice must specify which form of the record of the oral proceedings in the trial court the appellant elects to use:

(1) A reporter's transcript under rules 8.865–8.867 or a transcript prepared from an official electronic recording of the proceedings under rule 8.868(b). If the appellant elects to use a reporter's transcript, the clerk must promptly ~~mail~~ send a copy of

appellant's notice making this election and the notice of appeal to each court reporter;

(2)–(3) * * *

(b)–(c) * * *

Rule 8.866. Preparation of reporter's transcript

(a) When preparation begins

(1) * * *

(2) If the notice sent to the reporter by the clerk under rule 8.864(a)(1) indicates that the appellant is the defendant and that the defendant was not represented by appointed counsel at trial:

(A) Within 10 days after the date the clerk ~~mailed~~ sent the notice under rule 8.864(a)(1), the reporter must file with the clerk the estimated cost of preparing the reporter's transcript.

(B) The clerk must promptly notify the appellant and his or her counsel of the estimated cost of preparing the reporter's transcript. The notification must show the date it was ~~mailed~~ sent.

(C) Within 10 days after the date the clerk ~~mailed~~ sent the notice under (B), the appellant must do one of the following:

(i)–(vii) * * *

(D) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk ~~mails~~ sends notice of this determination to the appellant, the appellant must do one of the following:

(i)–(vi) * * *

(E) * * *

(b)–(e) * * *

(f) Notice when proceedings were not reported or cannot be transcribed

(1) If any portion of the oral proceedings to be included in the reporter's transcript was not reported or cannot be transcribed, the trial court clerk must so notify the parties ~~by mail~~ in writing. The notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 15 days after this notice is ~~mailed~~ sent by the clerk, the appellant must serve and file a notice with the court stating whether the appellant elects to proceed with or without a record of the identified proceedings. When the party elects to proceed with a record of these oral proceedings:

(A)–(B) * * *

Rule 8.868. Record when trial proceedings were officially electronically recorded

(a)–(d) * * *

(e) When preparation begins

(1) * * *

(2) If the appellant is the defendant and the defendant was not represented by appointed counsel at trial:

(A) Within 10 days after the date the defendant files the election under rule 8.864(a)(1), the clerk must notify the appellant and his or her counsel of the estimated cost of preparing the transcript or the copy of the recording. The notification must show the date it was ~~mailed~~ sent.

(B) Within 10 days after the date the clerk ~~mailed~~ sent the notice under (A), the appellant must do one of the following:

(i)–(v) * * *

(C) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk ~~mails~~ sends notice of this determination to the appellant, the appellant must do one of the following:

(i)–(iv) * * *

(D) * * *

(f) Notice when proceedings were not officially electronically recorded or cannot be transcribed

(1) If any portion of the oral proceedings to be included in the transcript was not officially electronically recorded under Government Code section 69957 or cannot be transcribed, the trial court clerk must so notify the parties ~~by mail~~ in writing. The notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 15 days after this notice is ~~mailed~~ sent by the clerk, the appellant must serve and file a notice with the court stating whether the appellant elects to proceed with or without a record of the identified oral proceedings. When the party elects to proceed with a record of these oral proceedings:

(A)–(B) * * *

Rule 8.870. Exhibits

(a)–(c) * * *

(d) Transmittal

Unless the appellate division orders otherwise, within 20 days after the first notice under (b) is filed or after the appellate division directs that an exhibit be sent:

(1) The trial court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits~~. The trial court clerk must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the trial court clerk must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the trial court clerk.

(2) Any party in possession of designated exhibits returned by the trial court must put them into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits sent.~~ The party must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the party must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the party.

(e) Return by appellate division

On request, the appellate division may return an exhibit to the trial court or to the party that sent it. When the remittitur issues, the appellate division must return all exhibits not transmitted electronically to the trial court or to the party that sent them.

Rule 8.872. Sending and filing the record in the appellate division

(a)–(b) * * *

(c) Filing the record

On receipt, the appellate division clerk must promptly file the original record and ~~mail~~ send notice of the filing date to the parties.

Rule 8.874. Failure to procure the record

(a) Notice of default

If a party fails to do any act required to procure the record, the trial court clerk must promptly notify that party ~~by mail~~ in writing that it must do the act specified in the notice within 15 days after the notice is ~~mailed~~ sent and that, if it fails to comply, the appellate division may impose the following sanctions:

(1)–(2) * * *

(b) * * *

Rule 8.881. Notice of briefing schedule

When the record is filed, the clerk of the appellate division must promptly ~~mail~~ send a notice to each appellate counsel or unrepresented party giving the dates the briefs are due.

Rule 8.882. Briefs by parties and amici curiae

(a) * * *

(b) Extensions of time

(1) Except as otherwise provided by statute, in a civil case, the parties may extend each period under (a) by up to 30 days by filing one or more stipulations in the appellate division before the brief is due. Stipulations must be signed by and served on all parties. If the stipulation is filed in paper form, the original signature of at least one party must appear on the stipulation filed in the appellate division; the signatures of the other parties may be in the form of fax copies of the signed signature page of the stipulation. If the stipulation is electronically filed, the signatures must comply with the requirements of rule 8.77.

(2)–(4) * * *

(c) Failure to file a brief

(1) If a party in a civil appeal fails to timely file an appellant's opening brief or a respondent's brief, the appellate division clerk must promptly notify the party ~~by mail~~ in writing that the brief must be filed within 15 days after the notice is ~~mailed~~

sent and that if the party fails to comply, the court may impose one of the following sanctions:

(A)–(B) * * *

(2) If the appellant in a misdemeanor appeal fails to timely file an opening brief, the appellate division clerk must promptly notify the appellant ~~by mail~~ in writing that the brief must be filed within 30 days after the notice is ~~mailed~~ sent and that if the appellant fails to comply, the court may impose one of the following sanctions:

(A)–(B) * * *

(3) If the respondent in a misdemeanor appeal fails to timely file a brief, the appellate division clerk must promptly notify the respondent ~~by mail~~ in writing that the brief must be filed within 30 days after the notice is ~~mailed~~ sent and that if the respondent fails to comply, the court may impose one of the following sanctions:

(A)–(B) * * *

(4) * * *

**(d)–(e) * * *

Rule 8.883. Contents and form of briefs

**(a)–(b) * * *

(c) Form

(1) A brief may be reproduced by any process that produces a clear, black image of letter quality. All documents filed must have a page size of 8 1/2 by 11 inches. If filed in paper form, the paper must be white or unbleached~~, 81/2 by 11 inches,~~ and of at least 20-pound weight. Both sides of the paper may be used if the brief is not bound at the top.

(2) Any conventional ~~typeface~~ font may be used. The ~~typeface~~ font may be either proportionally spaced or monospaced.

(3) The ~~type~~ font style must be roman; but for emphasis, italics or boldface may be used or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters.

(4) Except as provided in (11), the ~~type~~ font size, including footnotes, must not be smaller than 13-point.

(5)–(8) * * *

(9) If filed in paper form, the brief must be bound on the left margin, except that briefs may be bound at the top if required by a local rule of the appellate division. If the brief is stapled, the bound edge and staples must be covered with tape.

(10)–(11)

(d) * * *

Rule 8.888. Finality and modification of decision

(a)–(b) * * *

(c) Consent to increase or decrease in amount of judgment

If an appellate division decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless, before the decision is final under (a), the party serves and files ~~two copies~~ a copy of a consent in the appellate division. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one filed ~~stamped~~endorsed copy of the consent to the trial court with the remittitur.

Rule 8.890. Remittitur

(a) * * *

(b) Clerk's duties

(1) If an appellate division case is not transferred to the Court of Appeal under rule 8.1000 et seq., the appellate division clerk must:

(A) * * *

(B) Send the remittitur to the trial court with a filed ~~stamped~~endorsed copy of the opinion or order; and

(C) Return to the trial court with the remittitur all original records, exhibits, and documents sent non-electronically to the appellate division in connection with the appeal, except any certification for transfer under rule 8.1005, the transcripts or statement on appeal, briefs, and the notice of appeal.

(2) * * *

(c)–(d) * * *

Rule 8.891. Costs and sanctions in civil appeals

(a)–(e) * * *

Advisory Committee Comment

Subdivision (d). "Net interest expenses" in subdivisions (d)(1)(F) and (G) means the interest expenses incurred to borrow the funds that are deposited minus any interest earned by the borrower on those funds while they are on deposit.

Subdivision (d)(1)(D), allowing recovery of the "costs to notarize, serve, mail, and file the record, briefs, and other papers," is intended to include fees charged by electronic filing service providers for electronic filing and service of documents.

Rule 8.901. Notice of appeal

(a) * * *

(b) Notification of the appeal

(1) When a notice of appeal is filed, the trial court clerk must promptly ~~mail~~ send a notification of the filing to the attorney of record for each party and to any unrepresented defendant. The clerk must also ~~mail~~ send or deliver this notification to the appellate division clerk.

(2) The notification must show the date it was ~~mailed~~ sent or delivered, the number and title of the case, and the date the notice of appeal was filed.

(3)–(4) * * *

(5) The ~~mailing~~ sending of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) * * *

Rule 8.902. Time to appeal

(a) * * *

(b) Cross-appeal

If the defendant or the People timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is either the time specified

in (a) or 30 days after the trial court clerk ~~mails~~ sends notification of the first appeal, whichever is later.

(c)–(d) * * *

Rule 8.911. Prosecuting attorney's notice regarding the record

If the prosecuting attorney does not want to receive a copy of the record on appeal, within 10 days after the notification of the appeal under rule 8.901(b) is ~~mailed~~ sent to the prosecuting attorney, the prosecuting attorney must serve and file a notice indicating that he or she does not want to receive the record.

Rule 8.915. Record of oral proceedings

(a) Appellant's election

The appellant must notify the trial court whether he or she elects to proceed with or without a record of the oral proceedings in the trial court. If the appellant elects to proceed with a record of the oral proceedings in the trial court, the notice must specify which form of the record of the oral proceedings in the trial court the appellant elects to use:

(1)–(2) * * *

(3) A reporter's transcript under rules 8.918–8.920 or a transcript prepared from an official electronic recording of the proceedings under rule 8.917(b). If the appellant elects to use a reporter's transcript, the clerk must promptly ~~mail~~ send a copy of appellant's notice making this election and the notice of appeal to each court reporter.

(b)–(c) * * *

Rule 8.917. Record when trial proceedings were officially electronically recorded

(a)–(d) * * *

(e) When preparation begins

(1) * * *

(2) If the appellant is the defendant:

(A) Within 10 days after the date the appellant files the election under rule 8.915(a), the clerk must notify the appellant and his or her counsel of the estimated cost of preparing the transcript or the copy of the recording. The notification must show the date it was ~~mailed~~ sent.

(B) Within 10 days after the date the clerk ~~mailed~~ sent the notice under (A), the appellant must do one of the following:

(i)–(v) * * *

(C) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk ~~mails~~ sends notice of this determination to the appellant, the appellant must do one of the following:

(i)–(iv) * * *

(D) * * *

(f) Notice when proceedings were not officially electronically recorded or cannot be transcribed

(1) If any portion of the oral proceedings to be included in the transcript were not officially electronically recorded under Government Code section 69957 or cannot be transcribed, the trial court clerk must so notify the parties ~~by mail~~ in writing. The notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 15 days after this notice is ~~mailed~~ sent by the clerk, the appellant must serve and file a notice with the court stating whether the appellant elects to proceed with or without a record of the identified proceedings. When the party elects to proceed with a record of these oral proceedings:

(A)–(B) * * *

Rule 8.919. Preparation of reporter's transcript

(a) When preparation begins

(1) * * *

(2) If the notice sent to the reporter by the clerk under rule 8.915(a)(3) indicates that the appellant is the defendant:

(A) Within 10 days after the date the clerk ~~mailed~~ sent the notice under rule 8.915(a)(3), the reporter must file with the clerk the estimated cost of preparing the reporter's transcript; and

(B) The clerk must promptly notify the appellant and his or her counsel of the estimated cost of preparing the reporter's transcript. The notification must show the date it was ~~mailed~~ sent.

(C) Within 10 days after the date the clerk ~~mailed~~ sent the notice under (B), the appellant must do one of the following:

(i)–(vii) * * *

(D) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk ~~mails~~ sends notice of this determination to the appellant, the appellant must do one of the following:

(i)–(vi) * * *

(E) * * *

**(b)–(e) * * *

(f) Notice when proceedings cannot be transcribed

(1) If any portion of the oral proceedings to be included in the reporter's transcript was not reported or cannot be transcribed, the trial court clerk must so notify the parties ~~by mail~~ in writing. The notice must:

(A) * * *

(B) Show the date it was ~~mailed~~ sent.

(2) Within 15 days after this notice is ~~mailed~~ sent by the clerk, the appellant must serve and file a notice with the court stating whether the appellant elects to proceed with or without a record of the identified proceedings. When the party elects to proceed with a record of these oral proceedings:

(A)–(B) * * *

Rule 8.921. Exhibits

**(a)–(c) * * *

(d) Transmittal

Unless the appellate division orders otherwise, within 20 days after notice under (b) is filed or after the appellate division directs that an exhibit be sent:

(1) The trial court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits sent~~. The trial court clerk must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the trial court clerk must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the trial court clerk.

(2) Any party in possession of designated exhibits returned by the trial court must put them into numerical or alphabetical order and send them to the appellate division ~~with two copies of a list of the exhibits sent.~~ The party must also send a list of the exhibits sent. If the exhibits are not transmitted electronically, the party must send two copies of the list. If the appellate division clerk finds the list correct, the clerk must sign and return ~~one~~ a copy to the party.

(e) Return by appellate division

On request, the appellate division may return an exhibit to the trial court or to the party that sent it. When the remittitur issues, the appellate division must return all exhibits not transmitted electronically to the trial court or to the party that sent them.

Rule 8.922. Sending and filing the record in the appellate division

(a)–(b) * * *

(c) Filing the record

On receipt, the appellate division clerk must promptly file the original record and ~~mail~~ send notice of the filing date to the parties.

Rule 8.924. Failure to procure the record

(a) Notice of default

If a party fails to do any act required to procure the record, the trial court clerk must promptly notify that party ~~by mail~~ in writing that it must do the act specified in the notice within 15 days after the notice is ~~mailed~~ sent and that, if it fails to comply, the reviewing court may impose the following sanctions:

(1)–(2) * * *

(b) * * *

Rule 8.926. Notice of briefing schedule

When the record is filed, the clerk of the appellate division must promptly ~~mail~~ send, to each appellate counsel or unrepresented party, a notice giving the dates the briefs are due.

Rule 8.927. Briefs

(a) * * *

(b) Failure to file a brief

(1) If the appellant fails to timely file an opening brief, the appellate division clerk must promptly notify the appellant ~~by mail~~ in writing that the brief must be filed within 20 days after the notice is ~~mailed~~ sent and that if the appellant fails to comply, the court may dismiss the appeal.

(2) If the respondent fails to timely file a brief, the appellate division clerk must promptly notify the respondent ~~by mail~~ in writing that the brief must be filed within 20 days after the notice is ~~mailed~~ sent and that if the respondent fails to comply, the court will decide the appeal on the record, the appellant's opening brief, and any oral argument by the appellant.

(3) * * *

(c) * * *

Rule 8.928. Contents and form of briefs

(a)–(b) * * *

(c) Form

(1) A brief may be reproduced by any process that produces a clear, black image of letter quality. All documents filed must have a page size of 8 1/2 by 11 inches. If filed in paper form, the paper must be white or unbleached~~, 81/2 by 11 inches,~~ and of at least 20-pound weight. Both sides of the paper may be used if the brief is not bound at the top.

(2) Any conventional ~~typeface~~ font may be used. The ~~typeface~~ font may be either proportionally spaced or monospaced.

(3) The ~~type~~ font style must be roman; but for emphasis, italics or boldface may be used or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters.

(4) Except as provided in (11), the ~~type~~ font size, including footnotes, must not be smaller than 13-point.

(5)–(8) * * *

(9) If filed in paper form, the brief must be bound on the left margin, except that briefs may be bound at the top if required by a local rule of the appellate division. If the brief is stapled, the bound edge and staples must be covered with tape.

(10)–(11) * * *

**(d) * * *

Rule 8.931. Petitions filed by persons not represented by an attorney

(a)–(b) * * *

(c) Form of supporting documents

(1) Documents submitted under (b) must comply with the following requirements:

(A) If submitted in paper form, they must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered.

(B) If submitted in paper form, they must be index-tabbed by number or letter.

(C) They must begin with a table of contents listing each document by its title and its index~~-tab~~ number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(2) * * *

(3) Unless the court provides otherwise by local rule or order, only one set of ~~any separately bound~~ the supporting documents needs to be filed in support of a petition, an answer, an opposition, or a reply.

(d) * * *

Rule 8.1018. Finality and remittitur

(a)–(b) * * *

(c) When the Court of Appeal issues a decision

If the Court of Appeal issues a decision on a case it has ordered transferred from the appellate division of the superior court, filing, finality, and modification of that decision are governed by rule 8.264 and remittitur is governed by rule 8.272, except that the clerk must address the remittitur to the appellate division and send that court ~~two copies~~ a copy of the remittitur and ~~two file-stamped copies~~ a filed-endorsed copy of the Court of Appeal

opinion or order. If the remittitur and opinion are sent in paper format, two copies must be sent. On receipt of the Court of Appeal remittitur, the appellate division clerk must promptly issue a remittitur if there will be no further proceedings in that court.

(d) Documents to be returned

When the Court of Appeal denies or vacates transfer or issues a remittitur under (c), the Court of Appeal clerk must return to the appellate division any part of the record sent non-electronically to the Court of Appeal under rule 8.1007 and any exhibits that were sent non-electronically.

Item number: 35

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/16/15

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Branch Administration: Changes to Replace the Names "Administrative Office of the Courts" and "AOC"

Committee or other entity submitting the proposal:
Chairs of Judicial Council internal committees

Staff contact (name, phone and e-mail): Susan McMullan, 415-865-7990, susan.mcmullan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: n/a
Project description from annual agenda: n/a

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This proposal will complete the Judicial Council's July 2014 directive to "the [internal committee] chairs to undertake a systematic review of the California Rules of Court and to propose additional rules amendments in the future to eliminate the references to 'Administrative Office of the Courts' and 'AOC,' replacing them with references to 'Judicial Council,' 'Judicial Council staff,' or 'Administrative Director,' as appropriate."

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Judicial Branch Administration: Changes to Replace the Names "Administrative Office of the Courts" and "AOC"

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, titles 2, 3, 4, 5, 7, 8, and 10 and Appendixes D and F; and Cal. Stds. Jud. Admin., stds. 5.4, 5.45, 10.10, 10.11, 10.15, 10.16, and 10.80, and revise forms MC-700 and MC-704

Proposed by
Hon. Douglas P. Miller, Chair
Executive and Planning Committee
Hon. Harry E. Hull, Jr., Chair
Rules and Projects Committee
Hon. David M. Rubin, Chair
Litigation Management Committee
Hon. Kenneth K. So, Chair
Policy Coordination and Liaison Committee
Hon. James E. Herman, Chair
Technology Committee

Action Requested
Review and submit comments by June 17, 2105

Proposed Effective Date
January 1, 2016

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary and Origin

The internal chairs of the Judicial Council's five internal committees, recommend that the California Rules of Court and Standards of Judicial Administration be amended and Judicial Council forms be revised to replace the name "Administrative Office of the Courts" and "AOC" with "Judicial Council," or "Judicial Council staff," as appropriate, to further effectuate the name change that began in July 2014.

Background

On July 22, 2014, the Judicial Council accepted the recommendation of the five internal chairs, acting at the direction of the Chief Justice, to amend the rules of court to retire the use of the

names "Administrative Office of the Courts" and "AOC" for the Judicial Council staff.[1] At that time, the council amended rules 10.1, 10.80, and 10.81 and accepted other recommendations concerning the name change, including: "Direct the [internal committee] chairs to undertake a systematic review of the California Rules of Court and to propose additional rules amendments in the future to eliminate the references to 'Administrative Office of the Courts' and 'AOC,' replacing them with references to 'Judicial Council,' 'Judicial Council staff,' or 'Administrative Director,' as appropriate."

The July 2014 report to the council explained the rationale for these changes. The council concluded that, as a matter of sound policy, it was desirable and beneficial to unite the Judicial Council and its staff under the single name "Judicial Council of California" by retiring the separate name "Administrative Office of the Courts" or "AOC." For years, the Chief Justice and Judicial Council members had encountered confusion among those unfamiliar with the judicial branch about the role and relationship of the AOC to the council. It was a common misperception that the AOC was an entity that was separate from, and in some way independent of, the council, with its own policymaking authority. In reality, the AOC was not a separate entity. It was a name that many years ago had been conferred on staff to the Judicial Council by the council itself. Unfortunately, while unintended, that act of naming the staff had confused many members of the public and other branches of government about the true roles and responsibilities of the council. This confusion was impeding the council in advancing the interests of the judicial branch with both the legislative and executive branches.

Accordingly, the council determined that a change in nomenclature was desirable to bring the council into conformity with other state government entities and offices that do not give separate names to their staff. For example, the Public Utilities Commission (PUC) has had an extensive and organized staff for many years. But the staff uses the name of the commission itself, the PUC, which leads to no misunderstandings among the public it serves. Similarly, referring to the staff to the Judicial Council simply as the "Judicial Council" or "Judicial Council staff"—rather than as the "Administrative Office of the Courts" or "AOC"—would avoid confusion and misunderstandings.

The Proposal

The California Rules of Court would be amended throughout to replace "Administrative Office of the Courts" and "AOC," with "Judicial Council," "Judicial Council staff," or another appropriate reference. In addition, references to "Administrative Director of the Courts" would be shortened to "Administrative Director." These rule amendments would implement the changes initiated in July 2014 and will carry out the directive of the council.

Rule amendments

The words "Administrative Office of the Courts" and "AOC" in the existing rules and standards are used to describe both (1) individual and groups of staff with specific responsibilities and (2)

[1] Judicial Council of Cal., *Judicial Branch Administration: Retirement of the Names "Administrative Office of the Courts" and "AOC"* (July 22, 2014), available at: http://www.courts.ca.gov/documents/jc-20140729-itemB.pdf.

the entire staff of the Judicial Council. The direct replacement of "Administrative Office of the Courts" with "Judicial Council staff" did not make sense in every reference within the rules and standards. Most references were changed in that way, but for references that mean the entire staff of the Judicial Council, "the" was inserted before "Judicial Council staff." For example, rule 10.101 addresses budget responsibilities of the Judicial Council and the former Administrative Office of the Courts. Because the rule provides that the responsibilities of the latter are carried out by the Administrative Director and the director of Finance (only two individuals) the rule's title would be amended to read, "Role of the Judicial Council and Judicial Council staff." The current rule also provides, in subdivision (c), that the Chief Justice and the Administrative Director, on behalf of the council, may allocate funding and must report on expenditures for specified entities, including the former Administrative Office of the Courts. In this circumstance, the reference to "Administrative Office of the Courts" clearly means the entire entity and thus subdivision (c) of the rule would be amended to substitute "*the* Judicial Council staff" for "Administrative Office of the Courts."

Most of the proposed amendments make the change using "Judicial Council staff," as it is more common for rules to refer to individual or groups of staff than the entire organization. For example, rule 3.501, which provides definitions for rules on coordination of complex civil cases, would be amended to substitute "with Judicial Council staff" in place of "in the Administrative Office of the Courts" in the following provision: "'Coordination attorney' means an attorney in the Administrative Office of the Courts appointed by the Chair of the Judicial Council to perform such administrative functions as may be appropriate under the rules in this chapter, including but not limited to the functions described in rules 3.524 and 3.550."

In a few rules and standards, it seems most appropriate to substitute "Judicial Council" without "staff" in place of "Administrative Office of the Courts." Thus for example, rule 2.1050(c), on public access to Judicial Council jury instructions, would be amended to provide that the Judicial Council, rather than the Administrative Office of the Courts, must provide copies and updates of approved jury instructions to the public on the California Courts website. Standard 10.16 currently provides that a model code of ethical behavior for court staff is published by the Administrative Office of the Courts. Because there is no need to specify that this is published by staff, it would be amended to replace "Administrative Office of the Courts" with "Judicial Council."

Other amendments would be made to reflect the current name of smaller units within the Judicial Council staff. For example, in rule 10.50(d), "the Office of the General Counsel" would be amended to read "Judicial Council Legal Services."

Other proposals with name change amendments

One of the rules in this Invitation to Comment is also circulating for comment in a separate Invitation to Comment. It is SPR15-32, which proposes to amend rule 10.620 by removing certain requirements that are inconsistent with statute. On adoption by the council, rule 10.620 would be amended to make both the changes to eliminate inconsistency with statute in SPR15-32

and the changes to replace the names "Administrative Office of the Courts" and "AOC" in this proposal.

Form Revisions

Two forms, *Prefiling Order-Vexatious Litigant* (MC-700) and *Order on Application to Vacate Prefiling Order and Remove Plaintiff/Petitioner From Judicial Council Vexatious Litigant List* (MC-704), would be revised to replace "Administrative Office of the Courts" with "Judicial Council" in the address box at the bottom of the page.

Alternatives Considered

The internal committee chairs did not consider alternatives because the council directed these changes and they complete the amendment of rules that reflect the name change from "Administrative Office of the Courts" to "Judicial Council" and "Judicial Council staff."

Implementation Requirements, Costs, and Operational Impacts

Costs will be minimal. Following council adoption, publishers will publish the amended rules and standards and revised forms and they will be posted on the California Courts website.

Request for Specific Comments

In addition to comments on the proposal as a whole, the internal committee chairs are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Is the distinction between "Judicial Council staff" and "the Judicial Council staff" clear and applied correctly to the amendments?

Attachments and Links

Cal. Rules of Court, titles 2, 3, 4, 5, 7, 8, and 10 at page 5-79

Rules 2.503, 2.892, 2.894, 2.952, 2.954, 2.1050, 3.221, 3.500, 3.501, 3.550, 3.869, 4.102, 4.152, 4.153, 5.210, 5.225, 5.230, 5.505, 5.518, 5.655, 7.1101, 8.300, 8.405, 8.825, 8.831, 8.851, 8.852, 8.901, 8.904, and 8.930 of the California Rules of Court, would be amended, effective January 1, 2016, to read:

Rule 2.503. Public access

(a)–(i) * * *

Advisory Committee Comment

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

Subdivision (c). ***

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

Courts must send a copy of the order permitting remote electronic access in extraordinary criminal cases to: ~~Secretariat, Executive Office Programs Division, Administrative Office of the Courts~~Criminal Justice Court Services, Judicial Council of California, 455 Golden Gate Avenue, San Francisco, CA 94102-3688~~ or secretariat@jud.ca.gov~~.

Rule 2.892. Guidelines for approval of certification programs for interpreters for deaf and hard-of-hearing persons

Each organization, agency, or educational institution that administers tests for certification of court interpreters for deaf and hard-of-hearing persons under Evidence Code section 754 must comply with the guidelines adopted by the Judicial Council effective February 21, 1992, and any subsequent revisions, and must hold a valid, current approval by the Judicial Council to administer the tests as a certifying organization. The guidelines are stated in the *Judicial Council Guidelines for Approval of Certification Programs for Interpreters for Deaf and Hard-of-Hearing Persons,* published by the ~~Administrative Office of the Courts~~Judicial Council.

Rule 2.894. Reports on appointments of certified and registered interpreters and noncertified and nonregistered interpreters

Each superior court must report to the Judicial Council on:

(1) The appointment of certified and registered interpreters under Government Code section 71802, as required by ~~the Administrative Office of the Court~~s Judicial Council; and

(2) * * *

Rule 2.952. Electronic recording as official record of proceedings

(a)–(i) * * *

(j) Record on appeal

(1)–(2) * * *

(3) *Preparation of transcript*

On receiving directions to have a transcript prepared, the clerk may have the material transcribed by a court employee, but should ordinarily send the reels in question to a professional recording service that has been certified by the federal court system or the ~~Administrative Office of the Courts~~ Judicial Council or verified by the clerk to be skilled in producing transcripts.

Rule 2.954. Specifications for electronic recording equipment

(a)–(d) * * *

(e) Previous equipment

The Administrative Director ~~of the Courts~~ is authorized to approve any electronic recording devices and equipment acquired before the adoption or amendment of this rule that has been found by the court to produce satisfactory recordings of proceedings.

Rule 2.1050. Judicial Council jury instructions

(a)–(b) * * *

(c) Public access

The ~~Administrative Office of the Courts~~ Judicial Council must provide copies and updates of the approved jury instructions to the public on the California Courts web site. The ~~Administrative Office of the Courts~~ Judicial Council may contract with an official publisher to publish the instructions in both paper and electronic formats.

The Judicial Council intends that the instructions be freely available for use and reproduction by parties, attorneys, and the public, except as limited by this subdivision. The ~~Administrative Office of the Courts~~ Judicial Council may take steps necessary to ensure that publication of the instructions by commercial publishers does not occur without its permission, including, without limitation, ensuring that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The ~~Administrative Office of the Courts~~ Judicial Council may require commercial publishers to pay fees or royalties in exchange for permission to publish the instructions. As used in this rule, "commercial publishers" means entities that publish works for sale, whether for profit or otherwise.

(d) Updating and amendments

The Judicial Council instructions will be regularly updated and maintained through its advisory committees on jury instructions. Amendments to these instructions will be circulated for public comment before publication. Trial judges and attorneys may submit for the advisory committees' consideration suggestions for improving or modifying these instructions or creating new instructions, with an explanation of why the change is proposed. Suggestions should be sent to the ~~Administrative Office of the Courts, Office of the General Counsel~~ Judicial Council of California, Legal Services.

(e) * * *.

Rule 3.221. Information about alternative dispute resolution

(a) Court to provide information package

Each court must make available to the plaintiff, at the time the complaint is filed in all general civil cases, an alternative dispute resolution (ADR) information package that includes, at a minimum, all of the following:

(1) General information about the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes. ~~The Administrative Office of the Courts~~ Judicial Council staff has prepared model language that the courts may use to provide this information.

(2)–(4) * * *

(b)–(c) * * *

Rule 3.500. Transfer and consolidation of noncomplex common-issue actions filed in different courts

(a)–(f) * * *

(g) Conflicting orders

The Judicial Council's coordination staff ~~in the Administrative Office of the Courts~~ must review all transfer orders submitted under (e) and must promptly confer with the presiding judges of any courts that have issued conflicting orders under Code of Civil Procedure section 403. The presiding judges of those courts must confer with each other and with the judges who have issued the orders to the extent necessary to resolve the conflict. If it is determined that any party to a case has failed to disclose information concerning pending motions, the court may, after a duly noticed hearing, find that the party's failure to disclose is an unlawful interference with the processes of the court.

(h) * * *

Rule 3.501. Definitions

As used in this chapter, unless the context or subject matter otherwise requires:

(1)–(5) * * *

(6) "Coordination attorney" means an attorney ~~in the Administrative Office of the Courts~~ with the Judicial Council staff appointed by the Chair of the Judicial Council to perform such administrative functions as may be appropriate under the rules in this chapter, including but not limited to the functions described in rules 3.524 and 3.550.

(7)–(19) * * *

Rule 3.550. General administration by ~~the Administrative Office of the Courts~~Judicial Council staff

(a) Coordination attorney

Except as otherwise provided in the rules in this chapter, all necessary administrative functions under this chapter will be performed at the direction of the Chair of the Judicial Council by a coordination attorney ~~in the Administrative Office of the Courts~~ with the Judicial Council staff.

(a)–(c) * * *

Rule 3.869. General requirements for complaint procedures and complaint proceedings

(a)–(g) * * *

Advisory Committee Comment

~~The Administrative Office of the Courts~~ Judicial Council staff has developed model local rules that satisfy the requirements of this rule. These model local rules were developed with input from judicial officers, court administrators, alternative dispute resolution (ADR) program administrators, court-program mediators, and public commentators and are designed so that they can be readily adapted to the circumstances of individual courts and specific complaints. Courts are encouraged to adopt rules that follow the model rules, to the extent feasible. Courts can obtain copies of these model rules from the Judicial Council's civil ADR program staff ~~at the Administrative Office of the Courts~~.

Subdivision (a). * * *

Subdivision (c). * * *

Subdivision (d). * * *.

Rule 4.102. Uniform bail and penalty schedules—traffic, boating, fish and game, forestry, public utilities, parks and recreation, business licensing

The Judicial Council of California has established the policy of promulgating uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses.

In general, bail is used to ensure the presence of the defendant before the court. Under Vehicle Code sections 40512 and 13103, bail may also be forfeited and forfeiture may be ordered without the necessity of any further court proceedings and be treated as a conviction for specified Vehicle Code offenses. A penalty in the form of a monetary sum is a fine imposed as all or a portion of a sentence imposed.

To achieve substantial uniformity of bail and penalties throughout the state in traffic, boating, fish and game, forestry, public utilities, parks and recreation, and business licensing cases, the trial court judges, in performing their duty under Penal Code section 1269b to annually revise and adopt a schedule of bail and penalties for all misdemeanor and infraction offenses except Vehicle Code infractions, must give consideration to the

Uniform Bail and Penalty Schedules approved by the Judicial Council. The Uniform Bail and Penalty Schedule for infraction violations of the Vehicle Code will be established by the Judicial Council in accordance with Vehicle Code section 40310. Judges must give consideration to requiring additional bail for aggravating or enhancing factors.

After a court adopts a countywide bail and penalty schedule, under Penal Code section 1269b, the court must, as soon as practicable, mail a copy of the schedule to the Judicial Council with a report stating how the revised schedule differs from the council's uniform traffic bail and penalty schedule, uniform boating bail and penalty schedule, uniform fish and game bail and penalty schedule, uniform forestry bail and penalty schedule, uniform public utilities bail and penalty schedule, uniform parks and recreation bail and penalty schedule, or uniform business licensing bail and penalty schedule.

The purpose of this uniform bail and penalty schedule is to:

(1) Show the standard amount for bail, which for Vehicle Code offenses may also be the amount used for a bail forfeiture instead of further proceedings; and

(2) Serve as a guideline for the imposition of a fine as all or a portion of the penalty for a first conviction of a listed offense where a fine is used as all or a portion of the penalty for such offense. The amounts shown for the misdemeanors on the boating, fish and game, forestry, public utilities, parks and recreation, and business licensing bail and penalty schedules have been set with this dual purpose in mind.

Unless otherwise shown, the maximum penalties for the listed offenses are six months in the county jail or a fine of $1,000, or both. The penalty amounts are intended to be used to provide standard fine amounts for a first offense conviction of a violation shown where a fine is used as all or a portion of the sentence imposed.

Note:
Courts may obtain copies of the Uniform Bail and Penalty Schedules by contacting:
~~Office of the General Counsel~~
~~Administrative Office of the Courts~~
Criminal Justice Court Services
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688
(415) 865-7611 or
www.courts.ca.gov/reference

Rule 4.152. Selection of court and trial judge

When a judge grants a motion for change of venue, he or she must inform the presiding judge of the transferring court. The presiding judge, or his or her designee, must:

(1) Notify the Administrative Director ~~of the Courts~~ of the change of venue. After receiving the transferring court's notification, the Administrative Director, in order to expedite judicial business and equalize the work of the judges, must advise the transferring court which courts would not be unduly burdened by the trial of the case.

(2) * * *

Rule 4.153. Order on change of venue

After receiving the list of courts from the Administrative Director ~~of the Courts~~, the presiding judge, or his or her designee, must:

(1)–(3) * * *

Rule 5.210. Court-connected child custody mediation

(a)–(f) * * *

(g) Education and training providers

Only education and training acquired from eligible providers meet the requirements of this rule. "Eligible providers" includes the ~~Administrative Office of the Courts~~ Judicial Council and may include educational institutions, professional associations, professional continuing education groups, public or private for-profit or not-for-profit groups, and court-connected groups.

(1) * * *

(2) Effective July 1, 2005, all education and training programs must be approved by the ~~Administrative Office of the Courts~~ Judicial Council staff in consultation with the Family and Juvenile Law Advisory Committee.

(h) * * *

Rule 5.225. Appointment requirements for child custody evaluators

(a)–(m) * * *

(n) Education and training providers

"Eligible providers" includes the ~~Administrative Office of the Courts~~ Judicial Council and may include educational institutions, professional associations, professional continuing education groups, public or private for-profit or not-for-profit groups, and court-connected groups. Eligible providers must:

(1)–(6) * * *

(o) Program approval required

All education and training programs must be approved by the ~~Administrative Office of the Courts~~ Judicial Council staff in consultation with the Family and Juvenile Law Advisory Committee. Education and training courses that were taken between January 1, 2000, and July 1, 2003, may be applied toward the requirements of this rule if they addressed the subjects listed in (d) and either were certified or approved for continuing education credit by a professional provider group or were offered as part of a related postgraduate degree or licensing program.

Rule 5.230. Domestic violence training standards for court-appointed child custody investigators and evaluators

(a)–(c) * * *

(d) Mandatory training

Persons appointed as child custody investigators under Family Code section 3110 or Evidence Code section 730, and persons who are professional staff or trainees in a child custody or visitation evaluation or investigation, must complete basic training in domestic violence issues as described in Family Code section 1816 and, in addition:

(1) *Advanced training*

Sixteen hours of advanced training must be completed within a 12-month period. The training must include the following:

(A) Twelve hours of instruction, as approved by the~~Administrative Office of the Courts~~ Judicial Council, in:

(i)–(v) * * *

(B) * * *

(2) * * *

(e) Education and training providers

Only education and training acquired from eligible providers meets the requirements of this rule. "Eligible providers" includes the ~~Administrative Office of the Courts~~ Judicial Council and may include educational institutions, professional associations, professional continuing education groups, public or private for-profit or not-for-profit groups, and court-connected groups.

(1) * * *

(2) Effective July 1, 2005, all education and training programs must be approved by the ~~Administrative Office of the Courts~~ Judicial Council staff in consultation with the Family and Juvenile Law Advisory Committee.

(f)–(g) * * *

Rule 5.505. Juvenile dependency court performance measures

(a)–(b) * * *

(c) Data collection

(1) * * *

(2) Before implementation of the CCMS family and juvenile law module, each local court must collect and submit to the ~~AOC~~ Judicial Council the subset of juvenile dependency data described in (b) and further delineated in the *Implementation Guide to Juvenile Dependency Court Performance Measures* that it is reasonably capable of collecting and submitting with its existing court case management system and resources.

(3) On implementation of the CCMS family and juvenile law module in a local court, and as the necessary data elements become electronically available, the local court must collect and submit to the ~~AOC~~ Judicial Council the juvenile dependency data described in (b) and further delineated in the *Implementation Guide to Juvenile Dependency Court Performance Measures*. For the purposes of this subdivision, "implementation of the CCMS family and juvenile law module" in a local court means that the CCMS family and juvenile law module has been deployed in that court, is

functioning, and has the ability to capture the required data elements and that local court staff has been trained to use the system.

(d) Use of data and development of measures before CCMS implementation

Before CCMS implementation, the ~~AOC~~ Judicial Council must:

(1) * * *

(2) Establish a procedure to assist the local courts in submitting the required data to the ~~AOC~~ Judicial Council;

(3)– * * *

(e) Use of data after CCMS implementation

On implementation of CCMS, the ~~AOC~~ Judicial Council must:

(1)–(4) * * *

Rule 5.518. Court-connected child protection/dependency mediation

(a)–(h) * * *

(i) Education and training providers

Only education and training acquired from eligible providers meet the requirements of this rule. "Eligible providers" includes the ~~Administrative Office of the Courts~~ Judicial Council and may include educational institutions, professional associations, professional continuing education groups, public or private for-profit or not-for-profit groups, and court-connected groups.

(1) * * *

(2) Effective July 1, 2005, all education and training programs must be approved by the ~~Administrative Office of the Courts~~ Judicial Council staff in consultation with the Family and Juvenile Law Advisory Committee.

(j) * * *

Rule 5.655. Program requirements for Court Appointed Special Advocate programs

(a) * * *

(b) Definitions

(1) * * *

(2) ~~The~~ Judicial Council~~'s Administrative Office of the Courts (AOC)~~ staff may create a *CASA Program Policies and Procedures Manual* containing recommended program policies and procedures. If ~~the AOC~~ Judicial Council staff creates a manual, it will be developed in collaboration with the California CASA Association and California CASA program directors. The protocols will address program and fiscal management, and the recruitment, screening, selection, training, and supervision of lay volunteers.

(3)–(5) * * *

(c)–(j) * * *

(k) CASA program administration and management

A CASA program must adopt and adhere to a written plan for program governance and evaluation that includes the following as applicable:

(1) Articles of incorporation, bylaws, and a board of directors. Any CASA program that functions under the auspices of a public agency or private entity must specify in its plan a clear administrative relationship with the parent organization and clearly delineated delegations of authority and accountability. No CASA program may function under the auspices of a probation department or department of social services. CASA programs may receive funds from probation departments, local child welfare agencies, and the California Department of Social Services if:

(A)–(B) * * *

(C) Any MOU or contract between a CASA program and the contributing agency is submitted to and approved by ~~AOC~~ Judicial Council staff.

(2)–(5) * * *

(*l*) Finance, facility, and risk management

(1) A CASA program must adopt a written plan for fiscal control. The fiscal plan must include an annual audit, conducted by a qualified professional, that is

consistent with generally accepted accounting principles and the audit protocols in the program's contract with the ~~Administrative Office of the Courts~~ Judicial Council.

(2)–(7) * * *

**(m) * * *

Rule 7.1101. Qualifications and continuing education required of counsel appointed by the court in guardianships and conservatorships

(a) Definitions

As used in this rule, the following terms have the meanings stated below:

(1)–(5) * * *

~~(6) "AOC" is the Administrative Office of the Courts.~~

(~~7~~ 6) "Counsel in private practice" includes attorneys employed by or performing services under contracts with nonprofit organizations.

**(b)–(h) * * *

(i) Reporting

The ~~AOC~~ Judicial Council may require courts to report appointed counsel's qualifications and completion of continuing education required by this rule to ensure compliance with Probate Code section 1456.

Rule 8.300. Appointment of appellate counsel by the Court of Appeal

**(a)–(e) * * *

Advisory Committee Comment

Subdivision (b). The "designated oversight committee" referred to in subdivision (b)(2) is currently the Appellate Indigent Defense Oversight Advisory Committee. The criteria approved by this committee can be found on the judicial branch's public website at www.*courts~~info~~*.ca.gov.

Rule 8.405. Filing the appeal

(a)–(b) * * *

Advisory Committee Comment

Subdivision (a). *Notice of Appeal—Juvenile (California Rules of Court, Rule 8.400)* (form JV-800) may be used to file the notice of appeal required under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*.

Rule 8.825. Abandonment, voluntary dismissal, and compromise

(a)–(c) * * *

Advisory Committee Comment

Abandonment of Appeal (Limited Civil Case) (form APP-106) may be used to file an abandonment under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*.

Rule 8.831. Notice designating the record on appeal

(a)–(b) * * *

Advisory Committee Comment

Notice Designating Record on Appeal (Limited Civil Case) (form APP-103) may be used to file the designation required under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*. To assist parties in making appropriate choices, courts are encouraged to include information about whether the proceedings were recorded by a court reporter or officially electronically recorded in any information that the court provides to parties concerning their appellate rights.

If the appellant designates a clerk's transcript or reporter's transcript under this rule, the respondent will have an opportunity to designate additional documents to be included in the clerk's transcript under rule 8.832(b)(2) or additional proceedings to be included in the reporter's transcript under rule 8.834(a)(3).

Rule 8.851. Appointment of appellate counsel

(a)–(c) * * *

Advisory Committee Comment

Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133) may be used to request that appellate counsel be appointed in a misdemeanor case. If the appellant was not represented by the public defender or other appointed counsel in the trial court, the appellant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210) to show indigency. These forms are available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*.

Rule 8.852. Notice of appeal

(a)–(b) * * *

Advisory Committee Comment

Notice of Appeal (Misdemeanor) (form CR-132) may be used to file the notice of appeal required under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms.*

Subdivision (a). The only orders that a defendant can appeal in a misdemeanor case are (1) orders granting or denying a motion to suppress evidence (Penal Code section 1538.5(j)); and (2) orders made after the final judgment that affects the substantial rights of the defendant (Penal Code section 1466).

Rule 8.901. Notice of appeal

(a)–(b) * * *

Advisory Committee Comment

Notice of Appeal and Record of Oral Proceedings (Infraction) (form CR-142) may be used to file the notice of appeal required under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms.*

Rule 8.904. Abandoning the appeal

(a)–(c) * * *

Advisory Committee Comment

*Abandonment of Appeal (Infrac*tion) (form CR-145) may be used to file an abandonment under this rule. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*.

Rule 8.930. Application

(a)–(b) * * *

Advisory Committee Comment

Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (form APP-150-INFO) provides additional information about proceedings for writs in the appellate division of the superior court. This form is available at any courthouse or county law library or online at *www.courts~~info~~.ca.gov/forms*.

Subdivision (b). The superior courts, not the appellate divisions, have original jurisdiction in habeas corpus proceedings (see Cal. Const., art. VI, §10). Habeas corpus proceedings in the superior courts are governed by rules 4.550 et. seq.

Rules 10.2, 10.5, 10.6, 10.10, 10.11, 10.12, 10.13, 10.14, 10.16, 10.20, 10.22, 10.30, 10.34, 10.46, 10.48, 10.50, 10.51, 10.52, 10.56, 10.64, 10.80, 10.81, 10.102, 10.103, 10.104, 10.105, 10.106, 10.172, 10.180, 10.181, 10.182, 10.183, 10.184, 10.201, 10.202, 10.203, 10.350, 10.452, 10.455, 10.461, 10.462, 10.468, 10.469, 10.478, 10.481, 10.491, 10.500, 10.501, 10.502, 10.601, 10.620, 10.630, 10.660, 10.670, 10.742, 10.761, 10.762, 10.776, 10.777, 10.781, 10.782, 10.800, 10.801, 10.804, 10.805, 10.811, 10.815, 10.820, 10.830, 10.854, 10.870, and 10.960 of the California Rules of Court would be amended, effective January 1, 2016, to read:

TITLE 10. JUDICIAL ADMINISTRATION RULES

Rule 10.2. Judicial Council membership and terms

(a) * * *

(b) Council officers and duties

(1)–(2) * * *

(3) *Officers*

The Judicial Council has seven officers: the chair, vice-chair, secretary, and the chairs of the council's four internal committees.

(4) *Administrative Director ~~of the Courts~~*

The Administrative Director ~~of the Courts~~ is the secretary to the Judicial Council and performs administrative and policymaking functions as provided by the Constitution and the laws of the State of California and as delegated by the Judicial Council and the Chief Justice. The secretary is not a voting member of the council.

(c)–(e) * * *

Rule 10.5. Notice and agenda of council meetings

(a) * * *

(b) Meeting schedule

The ~~Administrative Office of the Courts~~ Judicial Council must publish a regular annual schedule that states the planned date, purpose, and location of each meeting. Additional meetings may be scheduled as necessary.

(c) Notice of business meetings

"Business meetings" are council meetings at which a majority of voting members are present to discuss and decide matters within the council's jurisdiction. The ~~Administrative Office of the Courts~~ Judicial Council must give public notice of the

date, location, and agenda of each business meeting at least seven days before the meeting. The notice must state whether the meeting is open or closed. If the meeting is partly closed, the notice must indicate which agenda items are closed. A meeting may be conducted without notice in case of an emergency requiring prompt action.

(d) Budget meetings

A "budget meeting" is that portion of any business meeting at which trial court budgets are to be discussed. The ~~Administrative Office of the Courts~~ Judicial Council must provide notice of a budget meeting in the same manner as any other business meeting. Budget meetings normally are scheduled as follows:

(1)–(4) * * *

(e) Form of notice

The notice and agenda for council meetings must be posted at the ~~Administrative Office of the Courts~~ Judicial Council of California and on the California Courts Web site (*www.courts~~info~~.ca.gov*). In addition, the notice and agenda for budget meetings must be provided to designated employee representatives who have submitted a written request to the ~~Administrative Office of the Courts~~ Judicial Council (attention ~~Secretariat~~ Judicial Council Support).

(f) * * *

(g) Meeting materials

(1) * * *

(2) *Budget materials*

(A) * * *

(B) *Distribution*

Materials must be made available by posting on the California Courts Web site and by distribution to designated employee representatives who have submitted a written request to the ~~Administrative Office of the Courts~~ Judicial Council of California (attention ~~Secretariat~~ Judicial Council Support).

(C) * * *

(h) * * *

Rule 10.6. Judicial Council meetings

(a)–(c) * * *

(d) Requests to speak—general

The Executive and Planning Committee, in its discretion, may allow a member of the public to speak at a business meeting. Unless the Chief Justice waives this requirement, any member of the public who wishes to speak at a business meeting must submit a request of no more than two pages to the chair of the Executive and Planning Committee by delivering it to the ~~Administrative Office of the Courts~~ Judicial Council (attention Judicial Council Support) at least four business days before the meeting.

(1)–(2) * * *

(e) Presentation of information on trial court budget matters

(1) * * *

(2) *Oral presentation*

Any designated employee representative who wishes to make an oral presentation to the Judicial Council must make a written request to the ~~Administrative Office of the Courts~~ Judicial Council of California (attention ~~Secretariat~~ Judicial Council Support) no later than 24 hours before the meeting unless the issue has arisen within the last five business days before the meeting, in which case the written request may be made on the day of the meeting.

(3) * * *

(f)–(g) * * *

Rule 10.10. Judicial Council internal committees

(a)–(c) * * *

(d) Meetings

Each internal committee meets as often as necessary to perform its responsibilities. The Administrative Director ~~of the Courts~~, as secretary of the Judicial Council, may attend and participate in the meetings of each internal committee. Internal committee meetings are closed to the public but may be opened at the committee chair's discretion.

(e)–(g) * * *

Rule 10.11. Executive and Planning Committee

(a)–(e) * * *

(f) Topics for making policy and receiving updates

The committee develops a schedule of topics that the council intends to consider for making policy and receives updates from the Administrative Director ~~of the Courts~~ or ~~Administrative Office of the Courts~~ Judicial Council staff.

(g)–(j) * * *

Rule 10.12. Policy Coordination and Liaison Committee

(a) Legislative activities

The Policy Coordination and Liaison Committee performs the following functions:

(1) Taking a position on behalf of the council on pending legislative bills, after evaluating input from the council advisory bodies and ~~the Administrative Office of the Courts~~ Judicial Council staff, and any other input received from the courts, provided that the position is consistent with the council's established policies and precedents;

(2) Making recommendations to the council on all proposals for council-sponsored legislation and on an annual legislative agenda after evaluating input from council advisory bodies and ~~the Administrative Office of the Courts~~ Judicial Council staff, and any other input received from the courts; and

(3) * * *

(b)–(d) * * *

Rule 10.13. Rules and Projects Committee

(a)–(e) * * *

(f) Responsibility of the Administrative Director ~~of the Courts~~

The Administrative Director is responsible for ensuring that items submitted to the committee for circulation for comment and the council's agenda comply with the committee's procedures and its guidelines on format and style.

Rule 10.14. Litigation Management Committee

(a) Litigation oversight

The Litigation Management Committee oversees litigation and claims against trial court judges, appellate court justices, the Judicial Council, ~~the Administrative Office of the Courts~~ its staff, the trial and appellate courts, and the employees of those bodies in which the likely monetary exposure is $100,000 or more or that raise issues of significance to the judicial branch by:

(1) * * *

(2) Consulting with the Administrative Director or ~~General~~ Chief Counsel, on request, regarding important strategy issues.

(b) * * *

(c) Strategic decisions

The committee resolves written objections described in rule 10.202(d) presented by ~~the Office of the General Counsel~~ Legal Services.

Rule 10.16. Technology Committee

(a) * * *

(b) Coordination

The committee coordinates the activities of the Administrative Director ~~of the Courts~~, council internal committees and advisory committees, the courts, justice partners, and stakeholders on matters relating to court information technology. The committee also, in collaboration or consultation with the Policy Coordination and Liaison Committee, coordinates with other branches of government on information technology issues.

(c)–(e) * * *

Rule 10.20. Proposals for new or amended rules, standards, or forms; rule-making process in general

(a) * * *

(b) Proposals

The council will consider proposals that are submitted to it by an internal committee, an advisory committee, a task force, or ~~the Administrative Office of the~~

~~Courts~~ Judicial Council staff, in accordance with rule 10.22 and any policies and procedures established by the Rules and Projects Committee.

(c) * * *

Rule 10.21. Proposals from members of the public for changes to rules, standards, or forms

(a) Application

This rule applies to proposals for changes to rules, standards, or forms by a member of the public (any person or organization other than a Judicial Council internal committee, advisory committee, or task force, or ~~the Administrative Office of the Courts~~ Judicial Council staff).

(b) Submission and content of proposals

Proposals must be submitted in writing to: Judicial Council of California, Attention: ~~General~~ Chief Counsel. Proposals should include:

(1)–(8) * * *

(c) Advisory committee's review of proposal

The ~~General~~ Chief Counsel must refer each proposal from a member of the public to an appropriate advisory committee for consideration and recommendation, or, if no appropriate advisory committee exists, to the Rules and Projects Committee. A~~n Administrative Office of the Courts~~ Judicial Council staff member may independently review the proposal and present an analysis and a recommendation to the committee. The committee may take one of the following actions:

(1)–(3) * * *

Rule 10.22. Rule-making procedures

(a) Who may make proposals

A Judicial Council internal committee, advisory committee, task force, or ~~the Administrative Office of the Courts~~ Judicial Council staff may recommend that the council adopt, amend, or repeal a rule or standard or adopt, approve, revise, or revoke a form.

(b) Legal and advisory committee review

The internal committee, advisory committee, task force, or ~~Administrative Office of the Courts~~ Judicial Council staff (the proponent) must first submit its proposal to

~~the Office of the General Counsel~~ Legal Services for legal and drafting review. If the proponent is not an advisory committee, and an appropriate advisory committee exists, the proponent must also submit the proposal to that advisory committee for review.

(c) Recommendation to Rules and Projects Committee

After the proposal has been reviewed by ~~the Office of the General Counsel~~ Legal Services and any appropriate advisory committee, the proponent must submit the proposal to the Rules and Projects Committee with a recommendation that it be (1) circulated for public comment or (2) submitted to the council for approval without public comment.

(d)–(g) * * *

Rule 10.30. Judicial Council advisory bodies

(a) * * *

(b) Functions

The advisory bodies:

(1)–(2) * * *

(3) Generally do not implement policy. The council may, however, assign policy-implementation and programmatic responsibilities to an advisory body and may request it make recommendations to ~~the Administrative Office of the Courts~~ Judicial Council staff on implementation of council policy or programs;

(4) * * *

(5) Are responsible, through ~~the Administrative Office of the Courts~~ Judicial Council staff, for gathering stakeholder perspectives on policy recommendations they plan to present to the council.

(c)–(e) * * *

(f) Role of the Administrative Director ~~of the Courts~~

The Administrative Director ~~of the Courts~~ sits as an ex officio member of each advisory body.

(g) * * *

Rule 10.34. Duties and responsibilities of advisory committees

(a) * * *

(b) Annual charges

(1) * * *

(2) Advisory committees have limited discretion to pursue matters in addition to those specified in each committee's annual charge, as long as the matters are consistent with a committee's general charge, within the limits of resources available to the committee, and within any other limits specified by the council, the designated internal committee, or the Administrative Director ~~of the Courts~~.

(c) * * *

(d) Role of the Administrative Director ~~of the Courts~~

(1)–(2) * * *

(e) Role of staff

(1) Advisory committees are assisted by ~~the~~ Judicial Council staff ~~of the Administrative Office of the Courts~~. The duties of staff members include drafting committee annual agendas, managing the committee's budget and resources, coordinating committee activities, providing legal and policy analysis to the committee, organizing and drafting reports, selecting and supervising consultants, providing technical assistance, and assisting committee chairs in presenting the committee's recommendations to the Judicial Council. Staff may provide independent legal or policy analysis of issues that is different from the committee's position, if authorized to do so by the Administrative Director ~~of the Courts~~.

(2) Staff report to the Administrative Director ~~of the Courts~~. The decisions or instructions of an advisory body or its chair are not binding on the staff except in instances when the council or the Administrative Director has specifically authorized such exercise of authority.

(f) Review of annual agendas

(1)–(2) * * *

(3) To pursue matters in addition to those specified in its annual charge, an advisory committee must have the approval of the internal committee with oversight responsibility for the advisory committee. The matters must be

consistent with the advisory committee's general charge, as set forth in the rules of court, its approved annual agenda, and the council's long-range strategic plan. The additional matters must also be within the committee's authorized budget and available resources, as specified by the council or the Administrative Director ~~of the Courts~~.

Rule 10.46. Trial Court Presiding Judges Advisory Committee

(a) * * *

(b) Additional duties

In addition to the duties specified in rule 10.34, the committee may:

(1) * * *

(2) Respond and provide input to the Judicial Council, appropriate advisory committees, or ~~the Administrative Office of the Courts~~ Judicial Council staff on pending policy proposals and offer new recommendations on policy initiatives in the areas of legislation, rules, forms, standards, studies, and recommendations concerning court administration; and

(3) Provide for liaison between the trial courts and the Judicial Council, its advisory committees, task forces, and working groups, and ~~the Administrative Office of the Courts~~ Judicial Council staff.

(c)–(f) * * *

Rule 10.48. Court Executives Advisory Committee

(a) * * *

(b) Additional duties

In addition to the duties specified in rule 10.34, the committee must:

(1)–(4) * * *

(5) Meet periodically with the ~~Administrative Office of the Courts~~ Judicial Council's executive team to enhance branch communications.

(c)–(g) * * *

Rule 10.50. Governing Committee of the Center for Judicial Education and Research

(a) Establishment and purpose

In 1973, the Judicial Council of California and the California Judges Association created the Center for Judicial Education and Research (CJER), ~~which subsequently became the Education Division of the Administrative Office of the Courts~~ is now known as the Center for Judiciary Education and Research (CJER). The Governing Committee of CJER was made an advisory committee to the council in 1993 through the adoption of former rule 1029. In 2001, the rule that specifies the CJER Governing Committee's duties was made consistent with the rules pertaining to other Judicial Council advisory committees, but it continues to acknowledge the historic participation of the California Judges Association.

(b)–(f) * * *

Rule 10.51. Court Interpreters Advisory Panel

(a) * * *

(b) Additional duty

The advisory panel is charged with reviewing and making recommendations to the council on the findings of the study of language and interpreter use and need for interpreters in court proceedings that is conducted by ~~the Administrative Office of the Courts~~ Judicial Council staff every five years under Government Code section 68563.

(c)–(d) * * *

Rule 10.52. Administrative Presiding Justices Advisory Committee

(a) * * *

(b) Additional duties

In addition to the duties described in rule 10.34, the committee must:

(1)–(3) * * *

(4) Comment on and make recommendations to the council about appellate court operations, including:

(A) Initiatives to be pursued by the council or ~~the Administrative Office of the Courts~~ Judicial Council staff; and

(B) * * *

(c) * * *

(d) Funding

Each year, the committee must recommend budget change proposals to be submitted to the Chief Justice for legislative funding to operate the appellate courts. These proposals must be consistent with the budget management guidelines of the Judicial Council's Finance ~~Division~~ office ~~of the Administrative Office of the Courts~~.

(e) * * *

(f) Administrative Director ~~of the Courts~~

* * *

Rule 10.56. Collaborative Justice Courts Advisory Committee

(a) * * *

(b) Additional duties

In addition to the duties described in rule 10.34, the committee must:

(1)–(4) * * *

(5) Make recommendations regarding grant funding programs that are administered by ~~the Administrative Office of the Courts~~ Judicial Council staff for drug courts and other treatment courts; and

(6) * * *

(c) * * *

Rule 10.102. Acceptance of gifts

(a) Administrative Director ~~of the Courts~~' authority to accept gifts

The Administrative Director ~~of the Courts~~ may accept on behalf of any entity listed in (b) any gift of real or personal property if the gift and any terms and conditions are found to be in the best interest of the state. Any applicable standards used by the Director of Finance under Government Code section 11005.1 may be considered in accepting gifts.

(b) Delegation of authority

The Administrative Director may delegate the authority to accept gifts to the following, under any guidelines established by ~~the Administrative Office of the Courts~~ Judicial Council staff:

(1)–(3) * * *

(4) The Judicial Council's director of ~~the~~ Finance ~~Division of the Administrative Office of the Courts~~, for gifts to the Judicial Council and ~~the Administrative Office of the Courts~~ Judicial Council staff.

Rule 10.103. Limitation on intrabranch contracting

(a) Definitions

For purposes of this rule, "judicial branch entity" includes a trial court, a Court of Appeal, the Supreme Court, and the ~~Administrative Office of the Courts~~ Judicial Council.

(b)–(d) * * *

Rule 10.104. Limitation on contracting with former employees

(a) Trial and appellate court contracts with former employees

A trial or appellate court may not enter into a contract for goods or services for which compensation is paid with a person previously employed by that court or by the ~~Administrative Office of the Courts~~ Judicial Council:

(1) * * *

(2) For a period of 24 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by the court or the ~~Administrative Office of the Courts~~ Judicial Council.

(b) ~~Administrative Office of the Courts~~ Judicial Council contracts with former employees

The ~~Administrative Office of the Courts~~ Judicial Council may not enter into a contract for goods or services for which compensation is paid with a person previously employed by it:

(1) For a period of 12 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she was employed

in a policymaking position at the ~~Administrative Office of the Courts~~ Judicial Council in the same general subject area as the proposed contract within the 12-month period before his or her retirement, dismissal, or separation; or

(2) For a period of 24 months following the date of the former employee's retirement, dismissal, or separation from service, if he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by the ~~Administrative Office of the Courts~~ Judicial Council.

(c) Policymaking position

"Policymaking position" includes:

(1)–(2) * * *

(3) In the ~~Administrative Office of the Courts~~ Judicial Council, the Administrative Director ~~of the Courts~~, the Chief Deputy Director, any director, and any other position designated by the Administrative Director as a policymaking position.

(d) Scope

This rule does not prohibit any court or the ~~Administrative Office of the Courts~~ Judicial Council from (1) employing any person or (2) contracting with any former judge or justice.

Rule 10.105. Allocation of new fee, fine, and forfeiture revenue

(a) * * *

(b) Methodology

~~The Administrative Office of the Courts~~ Judicial Council staff must recommend a methodology for the allocation and must recommend an allocation based on this methodology. On approval of a methodology by the Judicial Council, ~~the~~ ~~Administrative Office of the Courts~~ Judicial Council staff must issue a Finance Memo stating the methodology adopted by the Judicial Council.

Rule 10.106. Judicial branch travel expense reimbursement policy

(a) * * *

(b) Applicability

The judicial branch travel expense reimbursement policy applies to official state business travel by:

(1) * * *

(2) Officers, employees, retired annuitants, and members of the Supreme Court, the Courts of Appeal, superior courts, the Judicial Council, ~~the Administrative Office of the Courts~~ Judicial Council staff, the Habeas Corpus Resource Center, and the Commission on Judicial Performance; and

(3) Members of task forces, working groups, commissions, or similar bodies appointed by the Chief Justice, the Judicial Council, or the Administrative Director~~ of the Courts~~.

(c) Amendments

The Judicial Council delegates to the Administrative Director~~ of the Courts~~, under article VI, section 6(c) of the California Constitution and other applicable law, the authority to make technical changes and clarifications to the judicial branch travel expense reimbursement policy. The changes and clarifications must be fiscally responsible, provide for appropriate accountability, and be in general compliance with the policy initially adopted by the Judicial Council.

Rule 10.172. Court security plans

(a)–(c) * * *

(d) Submission of court security plan to the ~~Administrative Office of the Courts~~ Judicial Council

On or before November 1, 2009, each superior court must submit a court security plan to the ~~Administrative Office of the Courts (AOC)~~ Judicial Council. On or before February 1, 2011, and each succeeding February 1, each superior court must report to the ~~AOC~~ council whether it has made any changes to the court security plan and, if so, identify each change made and provide copies of the current court security plan and current assessment report. In preparing any submission, a court may request technical assistance from ~~the AOC~~ Judicial Council staff.

(e) Plan review process

~~The AOC~~ Judicial Council staff will evaluate for completeness submissions identified in (d). Annually, the submissions and evaluations will be provided to the Working Group on Court Security. Any submissions determined by the working group to be incomplete or deficient must be returned to the submitting court for correction and completion. No later than July 1 of each year, the working group

must submit to the Judicial Council a summary of the submissions for the Judicial Council's report to the Legislature.

(f) * * *

Advisory Committee Comment

This rule is adopted to comply with the mandate in Government Code section 69925, which requires the Judicial Council to provide for the areas to be addressed in a court security plan and to establish a process for the review of such plans. The Working Group on Court Security is authorized by Government Code section 69927 and established by rule 10.170 for the purpose of studying and making recommendation to the Judicial Council regarding court security matters. For the assistance of the courts and sheriffs in preparing and submitting their court security plans, the Working Group on Court Security has prepared *Court Security Plan Guidelines* with respect to each of the subject areas identified in subsections (b)(1) and (b)(2). The courts and sheriffs may obtain copies of the *Court Security Plan Guidelines* from the ~~Administrative Office of the Courts'~~ Judicial Council's ~~Emergency Response and~~ Office of Security ~~unit~~.

Rule 10.180. Court facilities standards

(a) Development of standards

~~The Administrative Office of the Courts~~ Judicial Council staff is responsible for developing and maintaining standards for the alteration, remodeling, renovation, and expansion of existing court facilities and for the construction of new court facilities.

(b) Adoption by the Judicial Council

The standards developed by ~~the Administrative Office of the Courts~~ Judicial Council staff must be submitted to the Judicial Council for review and adoption as the standards to be used for court facilities in the state. Nonsubstantive changes to the standards may be made by the ~~Administrative Office of the Courts~~ Judicial Council staff; substantive changes must be submitted to the Judicial Council for review and adoption.

(c) Use of standards

The Judicial Council, ~~the~~ ~~Administrative Office of the Courts~~ Judicial Council staff, affected courts, and advisory groups on court facilities issues created under these rules must use the standards adopted under (b) in reviewing or recommending proposed alteration, remodeling, renovation, or expansion of an existing court facility or new construction. Courts and advisory groups must report deviations from the standards to ~~the~~ ~~Administrative Office of the Courts~~ Judicial Council staff through a process established for that purpose.

Rule 10.181. Court facilities policies, procedures, and standards

(a) Responsibilities of ~~the Administrative Office of the Courts~~ Judicial Council staff

~~The Administrative Office of the Courts~~ Judicial Council staff, after consultation with the Court Facilities Transitional Task Force, must prepare and present to the Judicial Council recommendations for policies, procedures, and standards concerning the operation, maintenance, alteration, remodeling, renovation, expansion, acquisition, space programming, design, and construction of appellate and trial court facilities under Government Code sections 69204(c) and 70391(e).

(b) * * *

Rule 10.182. Operation and maintenance of court facilities

(a) Intent

The intent of this rule is to allocate responsibility and decision making for the operation and maintenance of court facilities among the courts and ~~the Administrative Office of the Courts~~ Judicial Council staff.

(b) Responsibilities of ~~the Administrative Office of the Courts~~ Judicial Council staff

(1) In addition to those matters expressly authorized by statute, ~~the Administrative Office of the Courts~~ Judicial Council staff is responsible for:

(A) Taking action on the operation of court facilities, including the day-to-day operation of a building and maintenance of a facility. ~~The Administrative Office of the Courts~~ Judicial Council staff must, in cooperation with the court, perform its responsibilities concerning operation of the court facility to effectively and efficiently support the day-to-day operation of the court system and services of the court. These actions include maintaining proper heating, ventilation, and air conditioning levels; providing functional electrical, fire safety, vertical transportation, mechanical, and plumbing systems through preventive maintenance and responsive repairs; and maintaining structural, nonstructural, security, and telecommunications infrastructures.

(B)–(C) * * *

(2) ~~The Administrative Office of the Courts~~ Judicial Council staff must consult with affected courts concerning the annual operations and maintenance needs assessment, development of annual priorities, and fiscal planning for the operational and maintenance needs of court facilities.

(3) ~~The Administrative Office of the Courts~~ Judicial Council staff may, when appropriate, delegate its responsibilities for ongoing operation and management to the court for some or all of the existing court facilities used by that court. Any delegation of responsibility must ensure that:

(A)–(D) * * *

(4) ~~The Administrative Office of the Courts~~ Judicial Council staff, whenever feasible, seek review and recommendations from the Court Facilities Transitional Task Force before recommending action on appellate and trial court facilities issues to the Judicial Council.

(c) Responsibilities of the courts

(1) The affected courts must consult with ~~the Administrative Office of the Courts~~ Judicial Council staff concerning the annual operations and maintenance needs assessment, development of annual priorities, and fiscal planning for the operational and maintenance needs of court facilities, including contingency planning for unforeseen facility maintenance needs.

(2) Each court to which responsibility is delegated under (b)(3) must report to ~~the Administrative Office of the Courts~~ Judicial Council staff quarterly or more often, as provided in the delegation. The report must include the activities and expenditures related to the delegation that are specified for reporting in the delegation. Each court must also account to ~~The Administrative Office of the Courts~~ Judicial Council staff for all expenditures related to the delegation. ~~The Administrative Office of the Courts~~ Judicial Council staff may conduct an internal audit of any receipts and expenditures.

Rule 10.183. Decision making on transfer of responsibility for trial court facilities

(a) Intent

The intent of this rule is to allocate among the Judicial Council, the trial courts, and ~~the Administrative Office of the Courts~~ Judicial Council staff, responsibility and decision making for the transfer of responsibility for trial court facilities from the counties to the Judicial Council.

(b)–(c) * * *

(d) Responsibilities of ~~the Administrative Office of the Courts~~ Judicial Council staff

~~The Administrative Office of the Courts~~ Judicial Council staff is responsible for the following matters related to transfer of responsibility for court facilities, in addition to matters expressly authorized by statute:

(1)–(4) * * *

(e) Appeal of county facilities payment amount

The Administrative Director ~~of the Courts~~ must obtain the approval of the Executive and Planning Committee before pursuing correction of a county facilities payment amount under Government Code section 70367. This provision does not preclude the Administrative Director ~~of the Courts~~ from submitting a declaration as required by Government Code section 70367(a). The Administrative Director ~~of the Courts~~ must report to the Executive and Planning Committee any decision not to appeal a county facilities payment amount.

Rule 10.184. Acquisition, space programming, construction, and design of court facilities

(a) Intent

The intent of this rule is to allocate responsibility and decision making for acquisition, space programming, construction, and design of court facilities among the courts and ~~the Administrative Office of the Courts~~ Judicial Council staff.

(b) Responsibilities of ~~the Administrative Office of the Courts~~ Judicial Council staff

(1) In addition to those matters expressly provided by statute, ~~the Administrative Office of the Courts~~ Judicial Council staff is responsible for the acquisition, space programming, construction, and design of a court facility, consistent with the facilities policies and procedures adopted by the Judicial Council and the California Rules of Court.

(2) ~~The Administrative Office of the Courts~~ Judicial Council staff must prepare and submit to the Judicial Council separate annual capital outlay proposals for the appellate courts and the trial courts, as part of the yearly judicial branch budget development cycle, specifying the amounts to be spent for these purposes. The capital outlay proposal for the trial courts must specify the money that is proposed to be spent from the State Court Facilities Construction Fund and from other sources. The annual capital outlay proposals must be consistent with the Five-Year Capital Infrastructure Plan or must recommend appropriate changes in the Five-Year Capital Infrastructure Plan. ~~The Administrative Office of the Courts~~ Judicial Council staff must, whenever feasible, seek review and recommendations from the

Court Facilities Transitional Task Force before recommending action to the Judicial Council on these issues.

(3) ~~The Administrative Office of the Courts~~ Judicial Council staff must consult with the affected courts concerning the annual capital needs of the courts.

(c) Responsibilities of the courts

(1) Affected courts must consult with ~~the Administrative Office of the Courts~~ Judicial Council staff concerning the courts' annual capital needs.

(2) * * *

(d) Advisory group for construction projects

~~The Administrative Office of the Courts~~ Judicial Council staff, in consultation with the leadership of the affected court, must establish and work with an advisory group for each court construction or major renovation project. The advisory group consists of court judicial officers, other court personnel, and others affected by the court facility. The advisory group must work with ~~the Administrative Office of the Courts~~ Judicial Council staff on issues involved in the construction or renovation, from the selection of a space programmer and architect through occupancy of the facility.

Rule 10.201. Claim and litigation procedure

(a) Definitions

As used in this chapter:

(1)–(2) * * *

(3) "~~Office of the General Counsel~~ Legal Services" means the ~~Office of the General Counsel of the Administrative Office of the Courts~~ Judicial Council's Legal Services office; and

(4) * * *

(b) Procedure for action on claims

To carry out the Judicial Council's responsibility under Government Code section 912.7 to act on a claim, claim amendment, or application for leave to present a late claim against a judicial branch entity or a judge, ~~the Office of the General Counsel~~ Legal Services, under the direction of the Administrative Director ~~of the Courts~~, must:

(1)–(2) * * *

(3) If determined by ~~the Office of the General Counsel~~ Legal Services to be appropriate, refer a claim or claim amendment for further investigation to a claims adjuster or other investigator under contract with the ~~Administrative Office of the Courts~~ Judicial Council;

(4) * * *

(5) Allow a claim in the amount justly due as determined by ~~the Office of the General Counsel~~ Legal Services if it is a proper charge against the judicial branch entity and the amount is less than $100,000; and

(6) * * *

(c) Allowance and payment of claims

The following may allow and authorize payment of any claim arising out of the activities of a judicial branch entity or judge:

(1) ~~The Office of the General Counsel~~ Legal Services, under the direction of the Administrative Director ~~of the Courts~~, if the payment is less than $100,000; or

(2) * * *

(d) Settlement of lawsuits and payment of judgments

The following may settle lawsuits, after consultation with the affected entity and any judge or employee being defended by the Judicial Council, and authorize payment of judgments arising out of the activities of a judicial branch entity or judge:

(1) ~~The Office of the General Counsel~~ Legal Services, under the direction of the Administrative Director ~~of the Courts~~, if the payment is less than $100,000 and the lawsuit does not raise issues of significance to the judicial branch; or

(2) * * *

Rule 10.202. Claims and litigation management

**(a) * * *

(b) Duties of ~~the Office of the General Counsel~~ Legal Services

To carry out the duty of the Judicial Council to provide for the representation, defense, and indemnification of justices of the Courts of Appeal or the Supreme Court, judges, subordinate judicial officers, court executive officers and administrators, and trial and appellate court employees under part 1 (commencing with section 810) to part 7 (commencing with section 995), inclusive, of the Government Code, ~~the Office of the General Counsel~~ Legal Services under the direction of the Administrative Director ~~of the Courts~~ and the ~~General~~ Chief Counsel, must:

(1)–(8) * * *

(c) Duties of trial and appellate courts

The trial and appellate courts must:

(1) Notify ~~the Office of the General Counsel~~ Legal Services promptly on receipt of notice of a dispute that is likely to result in a claim or lawsuit, or of a claim or lawsuit filed, against the court, a justice, a judge or subordinate judicial officer, a court executive officer or administrator, or a court employee, and forward the claim and lawsuit to ~~the Office of the General Counsel~~ Legal Services for handling; and

(2) Consult with ~~the Office of the General Counsel~~ Legal Services regarding strategic and settlement decisions in claims and lawsuits.

(d) Disagreements about major strategic decisions

Following consultation with ~~the Office of the General Counsel~~ Legal Services, a presiding judge or administrative presiding justice may object to a proposed decision of ~~the Office of the General Counsel~~ Legal Services about major strategic decisions, such as retention of counsel and proposed settlements, by presenting to ~~the Office of the General Counsel~~ Legal Services a written statement of the objection. ~~The Office of the General Counsel~~ Legal Services must present the written objection to the Litigation Management Committee, which will resolve the objection.

Rule 10.203. Contractual indemnification

(a) Intent

The intent of this rule is to facilitate the use of contractual indemnities that allocate legal risk and liability to parties that contract with a superior court or Court of Appeal, the Supreme Court, or the Judicial Council~~, or the Administrative Office of the Courts~~ (a "judicial branch entity" as defined in Gov. Code, § 900.3).

(b) Defense and indemnification provisions

Notwithstanding rule 10.14, 10.201, or 10.202, a judicial branch entity may enter into a contract that requires the contractor or the contractor's insurer to indemnify, defend, and hold harmless the entity and its officers, agents, and employees against claims, demands, liability, damages, attorney fees, costs, expenses, or losses arising from the performance of the contract. Upon receipt of notice of a claim or lawsuit that may be subject to contractual indemnities, the judicial branch entity must notify ~~the Office of the General Counsel~~ Legal Services, which will manage the claim or lawsuit to obtain the benefits of the contractual indemnities to the extent consistent with the interests of the public and the judicial branch.

Rule 10.350. Workers' compensation program

(a) Intent

The intent of this rule is to:

(1) Establish procedures for the ~~Administrative Office of the Courts~~ Judicial Council's workers' compensation program for the trial courts; and

(2) * * *

(b) Duties of ~~the Administrative Office of the Courts~~ Judicial Council staff

To carry out the duty of the Judicial Council to establish a workers' compensation program for the trial courts, ~~the Administrative Office of the Courts~~ Judicial Council staff, through its Human Resources ~~Division~~ office, must:

(1)–(4) * * *

(5) Make personnel available by telephone to consult with trial courts regarding the cost and benefits of the plan being offered by the ~~Administrative Office of the Courts~~ Judicial Council; and

(6) * * *

(c) Duties of the trial courts

(1) Each trial court that elects to participate in the program made available through the ~~the Administrative Office of the Courts~~ Judicial Council must:

(A) Timely notify the Human Resources ~~Division~~ office of its decision to participate in the workers' compensation program being offered through the ~~Administrative Office of the Courts~~ Judicial Council;

(B) Timely complete and return necessary paperwork to the Human Resources ~~Division~~ office; and

(C) * * *

(2) Each trial court that elects not to participate in the workers' compensation program available through the ~~Administrative Office of the Courts~~ Judicial Council must:

(A) * * *

(B) Timely submit to the Human Resources ~~Division~~ office for its approval the information necessary to evaluate the workers' compensation program identified by the trial court to provide benefits for its employees; and

(C) * * *

Rule 10.452. Minimum education requirements, expectations, and recommendations

(a)–(c) * * *

(d) Responsibilities of Chief Justice and administrative presiding justices

The Chief Justice and each administrative presiding justice:

(1)–(2) * * *

(3) In addition to the educational leave required under (d)(1)–(2), should grant leave to a justice, clerk/administrator, or managing attorney to serve on education committees and as a faculty member at education programs when the individual's services have been requested for these purposes by the ~~Administrative Office of the Courts~~ Judicial Council, the California Judges Association, or the court. If a court's calendar would not be adversely affected, the court should grant additional leave for a justice, the clerk/administrator, or the managing attorney to serve on an educational committee or as a faculty member for judicial branch education;

(4) * * *

(5) Must ensure that justices, the clerk/administrator, and the managing attorney are reimbursed by their court in accordance with the travel policies issued by ~~the Administrative Office of the Courts~~ Judicial Council staff for travel expenses incurred in attending in-state education programs as a participant, except to the extent that: (i) certain expenses are covered by the

~~Administrative Office of the Courts~~ Judicial Council; or (ii) the education provider or sponsor of the program pays the expenses. Provisions for these expenses must be part of every court's budget. The Chief Justice or the administrative presiding justice may approve reimbursement of travel expenses incurred by justices, the clerk/administrator, and the managing attorney in attending out-of-state education programs as a participant; and

(6) Must retain the records and cumulative histories of participation provided by justices. These records and cumulative histories are subject to periodic audit by ~~the Administrative Office of the Courts~~ Judicial Council staff. The Chief Justice and the administrative presiding justice must report the data from the records and cumulative histories on an aggregate basis to the Judicial Council, on a form provided by the Judicial Council, within six months after the end of each three-year period.

(e) Responsibilities of presiding judges

Each presiding judge:

(1)–(5) * * *

(6) Must ensure that judges, subordinate judicial officers, and the court executive officer are reimbursed by their court in accordance with the Trial Court Financial Policies and Procedures Manual for travel expenses incurred in attending in-state education programs as a participant, except to the extent that: (i) certain expenses are covered by the ~~Administrative Office of the Courts~~ Judicial Council; or (ii) the education provider or sponsor of the program pays the expenses. Provisions for these expenses must be part of every court's budget. The presiding judge may approve reimbursement of travel expenses incurred by judges, subordinate judicial officers, and the court executive officer in attending out-of-state education programs as a participant; and

(7) Must retain the records and cumulative histories of participation provided by judges. These records and cumulative histories are subject to periodic audit by the ~~Administrative Office of the Courts~~ Judicial Council. The presiding judge must report the data from the records and cumulative histories on an aggregate basis to the Judicial Council, on a form provided by the Judicial Council, within six months after the end of each three-year period.

(f) Responsibilities of Supreme Court and Court of Appeal justices, clerk/administrators, managing attorneys, and supervisors

Each court's justices, clerk/administrator, managing attorney, and supervisors:

(1)–(2) * * *

(3) Should allow and encourage court personnel, in addition to participating as students in educational activities, to serve on court personnel education committees and as faculty at court personnel education programs when an employee's services have been requested for these purposes by ~~the Administrative Office of the Courts~~ Judicial Council staff or the court;

(4) * * *

(5) Must ensure that supervisors and other court personnel are reimbursed by their court in accordance with the travel policies issued by ~~the Administrative Office of the Courts~~ Judicial Council staff for travel expenses incurred in attending in-state education programs as a participant, except to the extent that: (i) certain expenses are covered by the ~~Administrative Office of the Courts~~ Judicial Council; or (ii) the education provider or sponsor of the program pays the expenses. Provisions for these expenses must be part of every court's budget. The clerk/administrator or the managing attorney may approve reimbursement of travel expenses incurred by supervisors and other court personnel in attending out-of-state education programs as a participant.

(g) Responsibilities of trial court executive officers, managers, and supervisors

Each trial court's executive officer, managers, and supervisors:

(1)–(4) * * *

(5) Must ensure that managers, supervisors, and other court personnel are reimbursed by their court in accordance with the Trial Court Financial Policies and Procedures Manual for travel expenses incurred in attending in-state education programs as a participant, except to the extent that: (i) certain expenses are covered by the ~~Administrative Office of the Courts~~ Judicial Council; or (ii) the education provider or sponsor of the program pays the expenses. Provisions for these expenses must be part of every court's budget. The court executive officer may approve reimbursement of travel expenses incurred by managers, supervisors, and other court personnel in attending out-of-state education programs as a participant.

Rule 10.455. Ethics orientation for Judicial Council members and for judicial branch employees required to file a statement of economic interests

(a) * * *

(b) Definitions

For purposes of this rule, "judicial branch employee" includes an employee of a trial or appellate court or the ~~Administrative Office of the Courts~~ Judicial Council, but does not include court commissioners or referees.

(c) Judicial Council members and judicial branch employees

(1) ~~The Administrative Office of the Courts~~ Judicial Council staff must provide an ethics orientation course for Judicial Council members and for judicial branch employees who are required to file a statement of economic interests.

(2)–(3) * * *

Rule 10.461. Minimum education requirements for Supreme Court and Court of Appeal justices

**(a) * * *

(b) Content-based requirement

Each new Court of Appeal justice, within two years of confirmation of appointment, must attend a new appellate justice orientation program sponsored by a national provider of appellate orientation programs or by the ~~Administrative Office of the Courts'~~ Judicial Council's ~~Education Division/~~Center for ~~Judicial~~ Judiciary Education and Research.

(c)–(e) * * *

Advisory Committee Comment

The requirements formerly contained in subdivision (e)(2) of rule 970, which has been repealed, are carried forward without change in rule 10.461(b).

~~The Administrative Office of the Courts (AOC)~~ Judicial Council staff has developed both a manual format and an automated format of the individual justice's recording and reporting form referenced in rule 10.461(e) that gathers all the information needed by the Chief Justice or the administrative presiding justice to complete the aggregate report to the Judicial Council required under rule 10.452(d)(6). The Chief Justice or the administrative presiding justice may determine which form should be used in his or her court and may provide the manual or automated format of the ~~AOC~~ council-developed form (available from the ~~AOC's~~ council's ~~Education Division/~~Center for ~~Judicial~~ Judiciary Education and Research) or may provide another appropriate form that has been developed by his or her court or by another court that gathers all the information needed by the Chief Justice or the administrative presiding justice to complete the aggregate report to the Judicial Council.

Rule 10.462. Minimum education requirements and expectations for trial court judges and subordinate judicial officers

(a)–(b) * * *

(c) Content-based requirements

(1) Each new trial court judge and subordinate judicial officer must complete the "new judge education" provided by the ~~Administrative Office of the Courts'~~ Judicial Council's ~~Education Division/~~Center for ~~Judicial~~ Judiciary Education and Research (CJER) as follows:

(A)–(C) * * *

(2)–(4) * * *

(d)–(g) * * *

Advisory Committee Comment

The minimum judicial education requirements in rule 10.462 do not apply to retired judges seeking to sit on regular court assignment in the Assigned Judges Program. Retired judges who seek to serve in the Assigned Judges Program must comply with the Chief Justice's Standards and Guidelines for Judges Who Serve on Assignment, which includes education requirements.

~~The Administrative Office of the Courts (AOC)~~ Judicial Council staff has developed both a manual format and an automated format of the individual judge's recording and reporting form referenced in rule 10.462(f) that gathers all the information needed by the presiding judge to complete the aggregate report to the Judicial Council required under rule 10.452(e)(7). The presiding judge may determine which form should be used in his or her court and may provide the manual or automated format of the ~~AOC~~council-developed form (available from the ~~AOC's Education Division/~~ Judicial Council's Center for ~~Judicial~~ Judiciary Education and Research) or may provide another appropriate form that has been developed by his or her court or by another court that gathers all the information needed by the presiding judge to complete the aggregate report to the Judicial Council.

Rule 10.468. Content-based and hours-based education for superior court judges and subordinate judicial officers regularly assigned to hear probate proceedings

(a) Definitions

As used in this rule, the following terms have the meanings stated below:

(1)–(5) * * *

~~(6) "AOC" is the Administrative Office of the Courts.~~

(~~7~~ 6) "CJER" is the ~~AOC Education Division/~~Judicial Council's Center for ~~Judicial~~ Judiciary Education and Research.

(~~8~~ 7) "CJA" is the California Judges Association.

(b)* * *

(c) Hours-based continuing education

(1)–(5) * * *

(6) A judicial officer may fulfill the education requirement in (1) or (2) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a)), or education approved by the judicial officer's presiding judge as meeting the education criteria specified in rule 10.481(b).

(7) * * *

(d) * * *

(e) Record keeping and reporting

(1) * * *

(2) Presiding judges' records of judicial officer participation in the education required by this rule are subject to audit by ~~the AOC~~ Judicial Council staff under rule 10.462. T~~he AOC~~ Judicial Council staff may require courts to report participation by judicial officers in the education required by this rule to ensure compliance with Probate Code section 1456.

Rule 10.469. Judicial education recommendations for justices, judges, and subordinate judicial officers

(a) * * *

(b) Jury trial assignment

Each judge or subordinate judicial officer assigned to jury trials should regularly use the ~~Administrative Office of the Courts' Education Division/~~Judicial Council CJER educational materials or other appropriate materials and should regularly complete CJER or other appropriate educational programs devoted to the conduct of jury voir dire and the treatment of jurors.

(c)–(e) * * *

Rule 10.478. Content-based and hours-based education for court investigators, probate attorneys, and probate examiners

(a) Definitions

As used in this rule, the following terms have the meanings specified below, unless the context or subject matter otherwise require:

(1)–(4) * * *

~~(5) "AOC" is the Administrative Office of the Courts;~~

(~~6~~ 5) "CJER" is the ~~AOC Education Division/~~Judicial Council's Center for ~~Judicial~~ Judiciary Education and Research.

(b) Content-based requirements for court investigators

(1) * * *

(2) A court investigator may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the court investigator's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(c) Content-based education for probate attorneys

(1) * * *

(2) A probate attorney may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the probate attorney's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(d) Content-based education for probate examiners

(1) * * *

(2) A probate examiner may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the probate examiner's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(e) Hours-based education for court investigators

(1) * * *

(2) A court investigator may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the court investigator's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(f) Hours-based education for probate attorneys

(1) * * *

(2) A probate attorney may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the probate attorney's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(g) Hours-based education for probate examiners

(1) * * *

(2) A probate examiner may fulfill the education requirement in (1) through ~~AOC~~ council-sponsored education, an approved provider (see rule 10.481(a), or education approved by the court executive officer or the probate examiner's supervisor as meeting the education criteria specified in rule 10.481(b).

(3)–(4) * * *

(h) * * *

(i) Record keeping and reporting

(1) * * *

(2) The ~~AOC~~ Judicial Council may require courts to report participation by court investigators, probate attorneys, and probate examiners in the education required by this rule as necessary to ensure compliance with Probate Code section 1456.

Rule 10.481. Approved providers; approved course criteria

(a) Approved providers

The ~~Administrative Office of the Courts'~~ Judicial Council's ~~Education Division/~~Center for Judiciary Education and Research (CJER) is responsible for maintaining a current list of approved providers. The list of approved providers must include the ~~Administrative Office of the Courts~~ Judicial Council, the California Judges Association, and all California state courts and should include other reputable national and state organizations that regularly offer education directed to justices, judges, and court personnel. The director of ~~the Education Division/~~CJER may add or remove organizations from the list of approved providers as appropriate according to these criteria. Any education program offered by any of the approved providers that is relevant to the work of the courts or enhances the individual participant's ability to perform his or her job may be applied toward the education requirements and expectations stated in rules 10.461–10.479, except for the requirements stated in rules 10.461(b), 10.462(c), and 10.473(b), for which specific providers are required.

(b) * * *

Advisory Committee Comment

Subdivision (b). The director of ~~the Education Division/~~CJER is available to assist those authorized to approve a request to apply education offered by a non-approved provider in determining whether the education meets the listed criteria.

Rule 10.491. Minimum education requirements for ~~Administrative Office of the Courts~~ Judicial Council executives, managers, supervisors, and other employees

(a) Applicability

All ~~Administrative Office of the Courts (AOC)~~ Judicial Council executives, managers, supervisors, and other employees must complete these minimum education requirements.

(b) Content-based requirements

(1) Each new manager or supervisor must complete the ~~AOC's~~ New Manager/Supervisor Orientation within six months of being hired or assigned as a manager or supervisor.

(2) Each new employee, including each new manager or supervisor, must complete the ~~AOC's~~ New Employee Orientation within six months of being hired and should complete it as soon as possible after being hired.

(3) The Administrative Director ~~of the Courts~~ may require new managers, supervisors, and other employees to complete specific ~~AOC~~ compliance courses in addition to the required orientation courses.

(c) Hours-based requirements

(1)–(5) * * *

(6) Each hour of participation in traditional (live, face-to-face) education; distance education such as broadcasts, videoconference courses, and online coursework; and faculty service counts toward the requirement on an hour-for-hour basis. The Administrative Director ~~of the Courts~~ or an executive, manager, or supervisor, if delegated by the Administrative Director, has discretion to determine the number of hours, if any, of traditional (live, face-to-face) education required to meet the continuing education requirement.

(7) * * *

(8) The Administrative Director ~~of the Courts~~ may require executives, managers, supervisors, and other employees to complete specific ~~AOC~~ compliance courses as part of the continuing education requirements.

(d) Extension of time

(1) For good cause, the Administrative Director ~~of the Courts~~ or an executive, manager, or supervisor, if delegated by the Administrative Director, may grant a one-year extension of time to complete the education requirements in this rule. If an extension is granted, the subsequent two-year compliance period begins immediately after the extended compliance period ends, unless otherwise determined by the Administrative Director.

(2) * * *

**(e) * * *

(f) Responsibilities of Administrative Director ~~of the Courts~~ and of ~~AOC~~ Judicial Council executives, managers, and supervisors

The Administrative Director ~~of the Courts~~ and each ~~AOC~~ Judicial Council executive, manager, and supervisor:

(1)–(3) * * *

(4) Must ensure that executives, managers, supervisors, and other employees are reimbursed ~~by the AOC~~ in accordance with the travel policies issued by ~~the~~

~~Administrative Office of the Courts~~ Judicial Council staff for travel expenses incurred in attending in-state education programs as a participant in order to complete the minimum education requirements in (b)–(c). Provisions for these expenses must be part of the ~~AOC's~~ Judicial Council's budget. The Administrative Director of the Courts may approve reimbursement of travel expenses incurred by executives, managers, supervisors, and other employees in attending out-of-state education programs as participants.

Rule 10.500. Public access to judicial administrative records

(a)–(b) * * *

(c) Definitions

As used in this rule:

(1)–(2) * * *

(3) "Judicial branch entity" means the Supreme Court, each Court of Appeal, each superior court, and the Judicial Council~~, and the Administrative Office of the Courts~~.

(4)–(6) * * *

(d) * * *

(e) Public access

(1) * * *

(2) *Examples*

Judicial administrative records subject to inspection and copying unless exempt from disclosure under subdivision (f) include, but are not limited to, the following:

(A) Budget information submitted to the ~~Administrative Office of the Courts~~ Judicial Council after enactment of the annual Budget Act;

(B)–(F) * * *

(3)–(12) * * *

(f)–(i) * * *

(j) Public access disputes

(1) Unless the petitioner elects to proceed under (2) below, disputes and appeals of decisions with respect to disputes with the Judicial Council~~,~~ ~~Administrative Office of the Courts,~~ or a superior court regarding access to budget and management information required to be maintained under rule 10.501 are subject to the process described in rule 10.803.

(2)–(6) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivisions (b)(1) and (b)(2). * * *

Subdivision (c)(2). * * *

Subdivision (e)(4). * * *

Subdivision (f)(3).* * *

Subdivision (f)(10). * * *

Subdivision (f)(11). * * *

Subdivision (j)(1). Under current rule 10.803 a petitioner may file a writ in a superior court regarding a dispute with a superior court or the ~~Administrative Office of the Courts~~ Judicial Council with respect to disclosure of records and information required to be maintained under current rule 10.802. The writ petition must be heard on an expedited basis and includes a right to an appeal. The statutory authority for the hearing process set forth in current rule 10.803, Government Code section 71675(b), does not extend this procedure to other disputes with respect to public access. The rule provides that petitioners with a dispute with any other judicial branch entity, or with respect to records that are not required to be maintained under rule 10.802, may follow the procedure set forth in (j)(2) through (j)(6), which is equivalent to the dispute resolution procedure of the California Public Records Act. A petitioner eligible for the dispute resolution process set out in current rule 10.803 may also elect to proceed with his or her dispute under the procedure set forth in (j)(2) through (j)(6).

Rule 10.501. Maintenance of budget and management information

(a) Maintenance of information by the superior court

Each superior court must maintain for a period of three years from the close of the fiscal year to which the following relate:

(1) Official documents of the superior court pertaining to the approved superior court budget allocation adopted by the Judicial Council and actual final year-

end superior court revenue and expenditure reports as required in budget procedures issued by ~~the Administrative Office of the Courts~~ Judicial Council staff to be maintained or reported to the council, including budget allocation, revenue, and expenditure reports;

(2)–(3) * * *

(b) Maintenance of information by ~~the Administrative Office of the Courts~~ Judicial Council staff

~~The Administrative Office of the Courts~~ Judicial Council staff must maintain for a period of three years from the close of the fiscal year to which the following relate:

(1) * * *

(2) Actual final year-end superior court revenue and expenditure reports required by budget procedures issued by ~~the Administrative Office of the Courts~~ Judicial Council staff to be maintained or reported to the council that are received from the courts, including budget revenues and expenditures for each superior court;

(3)–(4) * * *

Rule 10.502. Judicial sabbatical pilot program

(a)–(b) * * *

(c) Application

(1) An eligible judge may apply for a sabbatical by submitting a sabbatical proposal to the Administrative Director ~~of the Courts~~ with a copy to the presiding judge or justice.

(2) * * *

(d) Judicial Sabbatical Review Committee

A Judicial Sabbatical Review Committee will be appointed to make recommendations to the Judicial Council regarding sabbatical requests.

(1) * * *

(2) *Staffing*

The committee will be staffed by the Judicial Council's Human Resources

~~Division~~ office ~~of the Administrative Office of the Courts~~ and may elect its chair and vice-chair.

(e) Evaluation

(1) The Administrative Director ~~of the Courts~~ must forward all sabbatical requests that comply with (c) to the Judicial Sabbatical Review Committee.

(2)–(3) * * *

(f)–(j) * * *

Rule 10.601. Superior court management

(a) * * *

(b) Goals

The rules in this division are intended to ensure the authority and responsibility of the superior courts to do the following, consistent with statutes, rules of court, and standards of judicial administration:

(1)–(4) * * *

(5) Provide input to the Judicial Council, the Trial Court Budget Working Group, and ~~the Administrative Office of the Courts~~ Judicial Council staff on the trial court budget process; and

(6) * * *

(c) * * *

Rule 10.620. Public access to administrative decisions of trial courts

(a) * * *

(b) Budget priorities

~~The Administrative Office of the Courts~~ Judicial Council staff may request, on 30 court days' notice, recommendations from the trial courts concerning judicial branch budget priorities. The notice must state that if a trial court is to make recommendations, the trial court must also give notice, as provided in (g), that interested members of the public may send input to ~~the Administrative Office of the Courts~~Judicial Council staff.

(c) * * *

(d) Other decisions requiring public input

Each trial court must seek input from the public, as provided in (e), before making the following decisions:

(1) A request for permission from ~~the Administrative Office of the Courts~~ Judicial Council staff to reallocate budget funds from one program component to another in an amount greater than $400,000 or 10 percent of the total trial court budget, whichever is greater.

(2)–(4) * * *

(e)–(k) * * *

Rule 10.630. Reporting of reciprocal assignment orders

A "reciprocal assignment order" is an order issued by the Chief Justice that permits judges in courts of different counties to serve in each other's courts. A court must report to ~~the Administrative Office of the Courts~~ Judicial Council staff, on a monthly basis, each assignment of a judge from another county to its court under a reciprocal assignment order.

Rule 10.660. Enforcement of agreements—petitions (Gov. Code, §§ 71639.5, 71825.2)

(a) * * *

(b) Assignment of Court of Appeal justice to hear the petition

(1) * * *

(2) When the petition is filed, the clerk of the court must immediately request of the Judicial Council's ~~Judicial Assignments Unit~~ Assigned Judges Program ~~of the Administrative Office of the Courts~~ the assignment of a hearing judge from the panel established under (e).

(3) * * *

(c)–(e) * * *

Rule 10.670. Trial court personnel plans

(a)–(d) * * *

(e) Submission of personnel plans

The superior court of each county must submit to the Judicial Council a personnel plan in compliance with these provisions by March 1, 1999. The superior court of each county must submit to the Judicial Council any changes to this plan by March 1 of every following year. If requested by a superior court, ~~the Administrative Office of the Courts~~ Judicial Council staff must review the court's personnel plan and provide the court with technical assistance in preparing the plan.

Rule 10.742. Use of attorneys as court-appointed temporary judges

(a)–(b) * * *

(c) Record and report of uses

Each trial court that uses attorneys as temporary judges must record and report to ~~the Administrative Office of the Courts~~ Judicial Council staff on a quarterly basis information concerning its use of them. The report must state:

(1)–(3) * * *

Rule 10.761. Regional Court Interpreter Employment Relations Committees

(a) * * *

(b) Membership

(1)–(3) * * *

(4) Each Regional Court Interpreter Employment Relations Committee may appoint a chief negotiator to bargain with recognized employee organizations. The chief negotiator may be Judicial Council staff ~~of the Administrative Office of the Courts~~.

(5) * * *

(c)–(d) * * *

(e) ~~Administrative Office of the Courts~~ Judicial Council staff

~~The~~ Judicial Council staff ~~of the Administrative Office of the Courts~~ will assist each Regional Court Interpreter Employment Relations Committee in performing its functions.

Rule 10.762. Cross-assignments for court interpreter employees

(a) * * *

(b) Definitions

As used in this rule:

(1)–(3) * * *

(4) "Regional court interpreter coordinator" means a~~n~~ Judicial Council employee ~~of the Administrative Office of the Courts~~ whose duty it is to locate, assign, and schedule available court interpreter employees for courts within and across regions, which are described under Government Code section 71807(a).

(5) * * *

(c) * * *

(d) Payment for cross-assignments

The home court must issue payment to the court interpreter for all cross-assignments, including per diem compensation and mileage reimbursement. ~~The Administrative Office of the Courts~~ Judicial Council staff will administer funding to the home court for payments associated with cross-assignments.

(e)–(f) * * *

Rule 10.776. Definitions

As used in the rules in this chapter, the following terms have the meanings stated below:

(1)–(4) * * *

(5) An "accredited educational institution" is a college or university, including a community or junior college, accredited by a regional accrediting organization recognized by the Council for Higher Education Accreditation~~; and~~.

~~(6) "AOC" is the Administrative Office of the Courts.~~

Rule 10.777. Qualifications of court investigators, probate attorneys, and probate examiners

(a)–(e) * * *

(f) Record keeping and reporting

The ~~AOC~~ Judicial Council may require courts to report on the qualifications of the court investigators, probate attorneys, or probate examiners hired or under contract under this rule, and on waivers made under (e), as necessary to ensure compliance with Probate Code section 1456.

Rule 10.781. Court-related ADR neutrals

(a) Qualifications of mediators for general civil cases

Each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates mediators to mediate any general civil case pending in the court must establish minimum qualifications for the mediators eligible to be included on the court's list or to be recommended, selected, appointed, or compensated by the court. A court that approves the parties' agreement to use a mediator who is selected by the parties and who is not on the court's list of mediators or that memorializes the parties' agreement in a court order has not thereby recommended, selected, or appointed that mediator within the meaning of this rule. In establishing these qualifications, courts are encouraged to consider the Model Qualification Standards for Mediators in Court-Connected Mediation Programs for General Civil Cases issued by the ~~Administrative Office of the Courts~~ Judicial Council staff.

(b)–(d) * * *

Rule 10.782. ADR program information

(a) Report to Judicial Council

Each court must report information on its ADR programs to the Judicial Council, as requested by ~~the Administrative Office of the Courts~~ Judicial Council staff.

(b) * * *

Rule 10.800. Superior court budgeting

(a) * * *

(b) Development of budget requests

Each superior court must prepare and submit to the ~~Administrative Office of the Courts~~ Judicial Council a budget according to the schedule and procedures established by the Judicial Council.

(c) * * *

Rule 10.801. Superior court budget procedures

(a) Adoption of budget procedures by ~~the Administrative Office of the Courts~~ Judicial Council staff

~~The Administrative Office of the Courts~~ Judicial Council staff must adopt superior court budget procedures to be included in the *Trial Court Financial Policies and Procedures Manual*, the annual Baseline Budget Development Package, and the annual *Budget Change Request Package*. These procedures include the following:

(1)–(9) * * *

(b) Technical assistance

~~The Administrative Office of the Courts~~ Judicial Council staff, on request, provides technical assistance and ongoing training in budget development and implementation to the superior courts.

Rule 10.805. Notice of change in court-county relationship

If, under Government Code section 77212, the county gives notice to the superior court that the county will no longer provide a specific county service or the court gives notice to the county that the court will no longer use a specific county service, the court must, within 10 days of receiving or giving such notice, provide a copy of this notice to the Judicial Council's Finance ~~Division~~ Services office ~~of the Administrative Office of the Courts~~.

Rule 10.811. Reimbursement of costs associated with homicide trials

(a)–(b) * * *

(c) Submission

A request for reimbursement must be submitted by the court's presiding judge or executive officer to ~~the Administrative Office of the Courts~~ Judicial Council staff. All requests for reimbursement must comply with guidelines approved by the Judicial Council and include a completed *Request for Reimbursement of Extraordinary Homicide Trial Costs* form.

Rule 10.815. Fees to be set by the court

(a)–(d) * * *

(e) Reporting requirement

Each court that charges a fee under this rule must provide the ~~Administrative Office of the Courts~~ Judicial Council staff with a description of the fee, how the amount of the fee was determined, and how the fee is applied.

(f)–(g) * * *

Rule 10.820. Acceptance of credit cards by the superior courts

(a) Delegation of authority to Administrative Director ~~of the Courts~~

The Administrative Director ~~of the Courts~~ is authorized, under rule 10.80, to approve on behalf of the Judicial Council requests from the superior courts to accept credit cards for the payment of court fees or to impose a charge for the use of credit cards. The authority is given to the Judicial Council by Government Code section 6159.

(b) Standards for use of credit cards

The Administrative Director ~~of the Courts~~ is authorized to approve requests under (a) for acceptance of credit cards if all of the following are true:

(1)–(3) * * *

(c) Standards for charge for the use of credit cards

The Administrative Director ~~of the Courts~~ is authorized to approve requests under (a) for the imposition of a charge for the use of credit cards if both of the following are true:

(1)–(2) * * *

(d) Referral to Judicial Council

The Administrative Director ~~of the Courts~~ may refer any request under (a) to the Judicial Council for its action.

(e) * * *

Rule 10.830. Disposal of surplus court personal property

(a) * * *

(b) Exception for disposal of technology equipment acquired on or after July 1, 2000

A superior court that wishes to dispose of surplus technology equipment to which the court acquired title on or after July 1, 2000 must provide a written description of such technology equipment to the Administrative Director ~~of the Courts~~. If, within 60 days of receipt of the description, the Administrative Director determines that another court of record of the State of California is in need of the surplus technology equipment, the court holding title to the equipment must donate it to the court determined to be in need. If the Administrative Director determines that no other court needs the equipment or makes no determination within 60 days of receiving the written description of it, the court holding title to the equipment may dispose of it as provided in (a), (c), and (d). The Administrative Director must provide to the courts a definition of the term "technology equipment" as used in this rule and must provide 30 days' notice of any amendment to the definition.

(c)–(d) * * *

Rule 10.854. Standards and guidelines for trial court records

(a) The standards and guidelines

~~The Administrative Office of the Courts~~ Judicial Council staff, in collaboration with trial court presiding judges and court executives, must prepare, maintain, and distribute a manual providing standards and guidelines for the creation, maintenance, and retention of trial court records (the *Trial Court Records Manual*), consistent with the Government Code and the rules of court and policies adopted by the Judicial Council. The manual should assist the courts and the public to have complete, accurate, efficient, and accessible court records. Before the manual is issued, it must be made available for comment from the trial courts.

(b) * * *

(c) Updating the manual

~~The Administrative Office of the Courts~~ Judicial Council staff, in collaboration with trial court presiding judges and court executives, must periodically update the *Trial Court Records Manual* to reflect changes in technology that affect the creation, maintenance, and retention of court records. Except for technical changes, corrections, or minor substantive changes not likely to create controversy, proposed changes in the manual must be made available for comment from the courts before the manual is updated or changed. Courts must be notified of any changes in the standards or guidelines, including all those relating to the permanent retention of records.

(d) * * *

Rule 10.870. Trial court automation standards

Each superior court that acquires, develops, enhances, or maintains automated accounting or case management systems through funding provided under Government Code section 68090.8 must comply with the standards approved by the Judicial Council. The approved standards are stated in *Judicial Council Trial Court Automation Standards* ~~published by the Administrative Office of the Courts~~.

Rule 10.960. Court self-help centers

(a)–(e) * * *

(f) Budget and funding

A court must include in its annual budget funding necessary for operation of its self-help center. In analyzing and making recommendations on the allocation of funding for a court self-help center, ~~the Administrative Office of the Courts~~ Judicial Council staff will consider the degree to which individual courts have been successful in meeting the guidelines and procedures for the operation of the self-help center.

Standards 5.40, 5.45, 10.10, 10.11, 10.15, 10.16, and 10.80 of the Standards of Judicial Administration would be amended, effective January 1, 2016, to read:

Standard 5.40. Juvenile court matters

* * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b)(2). * * *

Subdivision (c)(4). * * *

Subdivision (d)(4). Juvenile court law is a specialized area of the law that requires dedication and study. The juvenile court judge has a responsibility to maintain high quality in the practice of law in the juvenile court. The quality of representation in the juvenile court depends in good part on the education of the lawyers who appear there. In order to make certain that all parties receive adequate representation, it is important that attorneys have adequate training before they begin practice in juvenile court and on a continuing basis thereafter. The presiding judge of the juvenile court should mandate such training for all court-appointed attorneys and urge leaders of public law offices to provide at least comparable training for attorneys assigned to juvenile court.

A minimum of six hours of continuing legal education is suggested; more hours are recommended. Education methods can include lectures and tapes that meet the legal education requirements.

In addition to basic legal training in juvenile dependency and delinquency law, evidentiary issues, and effective trial practice techniques, training should also include important related issues, including child development, alternative resources for families, effects and treatment of substance abuse, domestic violence, abuse, neglect, modification and enforcement of all court orders, dependency, delinquency, guardianships, conservatorships, interviewing children, and emancipation. Education may also include observational experience such as site visits to institutions and operations critical to the juvenile court.

A significant barrier to the establishment and maintenance of well-trained attorneys is a lack of educational materials relating to juvenile court practice. Law libraries, law offices, and court systems traditionally do not devote adequate resources to the purchase of such educational materials.

Effective January 1, 1993, guidelines and training material will be available from ~~the Administrative Office of the Courts~~ Judicial Council staff.

Subdivision (e)(11). * * *

Standard 5.45. Resource guidelines for child abuse and neglect cases

(a) * * *

(b) Distribution of guidelines

~~The Administrative Office of the Courts~~ Judicial Council staff will distribute a copy of the resource guidelines to each juvenile court and will provide individual copies to judicial officers and court administrators on written request.

Advisory Committee Comment

Child abuse and neglect cases impose a special obligation on juvenile court judges to oversee case progress. Case oversight includes monitoring the agency's fulfillment of its responsibilities and parental cooperation with the case plan. Court involvement in child welfare cases occurs simultaneously with agency efforts to assist the family. Federal and state legal mandates assign to the juvenile court a series of interrelated and complex decisions that shape the course of state intervention and determine the future of the child and family.

Unlike almost all other types of cases in the court system, child abuse and neglect cases deal with an ongoing and changing situation. In a child welfare case, the court must focus on agency casework and parental behavior over an extended period of time. In making a decision, the court must take into account the agency's plan to help the family and anticipated changes in parental behavior. At the same time, the court must consider the evolving circumstances and needs of each child.

The purpose of these resource guidelines is to specify the essential elements of properly conducted court hearings. The guidelines describe the requirements of juvenile courts in fulfilling their oversight role under federal and state laws, and they specify the necessary elements of a fair, thorough, and speedy court process in child abuse and neglect cases. The guidelines cover all stages of the court process, from the initial removal hearing to the end of juvenile court involvement. These guidelines assume that the court will remain involved until after the child has been safely returned home, has been placed in another permanent home, or has reached adulthood.

Currently, juvenile courts in California operate under the same juvenile court law and rules, and yet the rules are implemented with considerable variation throughout the state. In part, this is due to the lack of resource guidelines. The adoption of the proposed resource guidelines will help encourage more consistent juvenile court procedures in the state.

The guidelines are meant to be goals, and, as such, some of them may appear out of reach because of fiscal constraints or lack of judicial and staff resources. The Judicial Council Family

and Juvenile Law Advisory Committee and Judicial Council staff ~~of the Administrative Office of the Courts~~ are committed to providing technical assistance to each juvenile court to aid in implementing these goals.

Standard 10.10. Judicial branch education

(a) Purpose

Judicial branch education for all trial and appellate judicial officers and court employees is essential to improving the fair, effective, and efficient administration of justice. Judicial branch education is acknowledged as a vital component in achieving the goals of the Judicial Council's Long-Range Strategic Plan, including access and fairness, branch independence, modernization, and quality of justice. The Judicial Council has charged the Governing Committee of the Center for ~~Judicial~~ Judiciary Education and Research (CJER), an advisory committee to the council, with developing and maintaining a comprehensive and quality education program on behalf of the Judicial Council for the California judicial branch.

(b)–(c) * * *

(d) Elements of comprehensive education program

The Governing Committee of CJER is responsible for developing and maintaining a comprehensive and quality education program for the judicial branch. This program is to be implemented by CJER as the Education Division of the ~~Administrative Office of the Courts~~ Judicial Council. The program should be designed to meet the educational needs and requirements of judicial officers and court employees as stated in standards 10.11 and 10.15 and should include the following elements:

(1)–(10) * * *

Standard 10.11. General judicial education standards

(a)–(i) * * *

Advisory Committee Comment

Subdivision (a). This provision recognizes that judicial officers must develop, maintain, and improve their professional competence by participating in judicial orientation and training programs when they first assume their judicial positions, and thereafter in continuing education programs throughout their judicial careers.

The judiciary will assess its own educational needs and establish appropriate programs and tools for meeting those needs. Various judicial organizations in this state, such as the ~~Administrative Office of the Courts~~ Judicial Council staff, the California Judges Association, and the Center for ~~Judicial~~ Judiciary Education and Research, provide judicial officers with comprehensive educational opportunities in all areas of their judicial responsibilities. These organizations typically use experienced judicial officers to plan, conduct, oversee, and evaluate the effectiveness of their programs. Judicial officers determine all aspects of the programs offered by the California Judges Association. The Center for ~~Judicial~~ Judiciary Education and Research is governed by an 11-member governing committee appointed by the Chief Justice of California as Chair of the Judicial Council. Four of the judicial members are nominated by the California Judges Association and four are appointed on behalf of the Judicial Council; three court administrator members are appointed on behalf of the Judicial Council. Subject to the Judicial Council's authority, the committee is responsible for determining matters relating to the center's judicial branch education policies and for making recommendations to the Judicial Council for action. The center's educational activities are planned, conducted, and overseen by a broad base of judicial officers and administrators serving on planning committees under the governing committee's supervision.

Subdivision (b). * * *

Subdivision (d). * * *

Subdivision (g). * * *.

Standard 10.15. General court employee education standards

(a) * * *

(b) Responsibilities of executive and administrative officers

Executive and administrative officers should develop, as a part of the annual budget process for their courts, annual education plans that facilitate employees' participation as both students and faculty in judicial branch education programs, as prescribed by this standard. The plans may designate, either locally or regionally, a training specialist to coordinate the implementation of the plans. The plans should include methods of measuring the effectiveness of education programs. A copy of the locally developed education plans should be forwarded to the Center for ~~Judicial~~ Judiciary Education and Research (CJER), which will serve as a depository.

(c) * * *

(d) Executive and administrative officer education

(1)–(4) * * *

(5) Executive and administrative officers should make training available to their employees on a local or regional level. This training should include an orientation program for all new employees on the background, history, and structure of the judicial branch, including the Judicial Council and ~~the Administrative Office of the Courts~~ its staff.

(6) * * *

(e)–(j) * * *

Standard 10.16. Model code of ethics for court employees

Each trial and appellate court should adopt a code of ethical behavior for its support staff, and in doing so should consider rule 10.670(c)(12) of the California Rules of Court, and the model Code of Ethics for the Court Employees of California approved by the Judicial Council on May 17, 1994, and any subsequent revisions. The approved model code is published by ~~the Administrative Office of the Courts~~ Judicial Council staff.

Standard 10.80. Court records management standards

Each court should develop records management practices consistent with the standards approved by the Judicial Council. The approved standards are specified in Judicial Council Court Records Management Standards, published by ~~the Administrative Office of the Courts~~ Judicial Council staff.

Implementation of these standards, which cover creation, use, maintenance, and destruction of records, should lead to more efficient court administration, better protection and preservation of records, and improved public access to records.

Judicial Council Governance Policies

~~JUNE 2008~~ JANUARY 2016

JUDICIAL COUNCIL OF CALIFORNIA

Judicial Council Governance Policies

I. Governance Process

A. The Judicial Council

1–5 * * *

6. Council Officers and Duties
The Judicial Council has seven officers: the Chair, Vice-Chair, Secretary, and the chairs of the council's four internal committees: Executive and Planning, Litigation Management, Policy Coordination and Liaison, and Rules and Projects.

The Chief Justice serves as Chair of the council and performs those functions prescribed by the Constitution and the laws of the State of California. The Chair is a voting member of the council.

The Chief Justice appoints a Vice-Chair from among the judicial members of the council. When the Chair is absent, unable to serve, or so directs, the Vice-Chair performs all of the duties of the Chair.

The Chief Justice appoints a Judicial Council member to serve as chair of the council in the event that both the Chief Justice and the council's Vice-Chair are absent or unable to serve. The Chief Justice determines the individuals to serve as chair from among the internal committee chairs and vice-chairs.

The Chief Justice appoints the chairs and vice-chairs of the council's four internal committees from among the members of the council. Internal committee chairs are appointed for a one-year term. Committee chairs call meetings, as necessary, and provide reports to the council on the activities of the internal committees. Meetings of the internal committees are closed to the public but may be opened at the chair's discretion.

The Administrative Director ~~of the Courts~~ serves as Secretary to the council and performs administrative and policymaking functions as provided by the Constitution and the laws of the State of California and as delegated by the council and the Chief Justice (see II.B, *infra,* for duties of the Administrative Director). The Secretary is not a voting member of the council.

Together, the Chief Justice and the Administrative Director, on behalf of the Judicial Council and with regard to the budgets of the Supreme Court, the Courts of Appeal, the trial courts, the Judicial Council, the Habeas Corpus Resource Center, and the ~~Administrative Office of the Courts~~ Judicial Council staff, may: (1) make technical changes to the proposed budget, and (2) participate in budget negotiations with the legislative and executive branches consistent with the goals and priorities of the council.

The Chief Justice and the Administrative Director, on behalf of the Judicial Council, also may allocate funding appropriated in the State Budget to the Supreme Court, the Courts of Appeal, the Judicial Council, the Habeas Corpus Resource Center, and the ~~Administrative Office of the Courts~~ Judicial Council staff.

After the end of each fiscal year, the Administrative Director reports to the Judicial Council on actual expenditures in the budgets of the Supreme Court, the Courts of Appeal, the trial courts, the Judicial Council, the Habeas Corpus Resource Center, and the ~~Administrative Office of the Courts~~ Judicial Council staff.

7. * * *

B. Council Internal Committees

The internal committees of the Judicial Council assist the full membership of the council in its responsibilities by providing recommendations in their assigned areas including rules for court administration, practice, and procedure, and by performing duties delegated by the council. Internal committees generally work at the same policy level as the council, focusing on the establishment of policies that emphasize long-term strategic leadership and that align with judicial branch goals.

1. Executive and Planning Committee

The Executive and Planning Committee has the following functions and makes regular reports to the full council on its actions:

a.–e. * * *

f. Developing a schedule of topics about which the council wishes to consider making policy or to receive updates from the Administrative Director or ~~Administrative Office of the Courts~~ Judicial Council staff.

g.–j. * * *

**2.–3. * * *

4. Litigation Management Committee

The Litigation Management Committee has the following functions and takes the following actions:

a. Overseeing litigation and claims against trial court judges, appellate court justices, the Judicial Council, ~~the Administrative Office of the Courts,~~ the trial and appellate courts, and the employees of those bodies that seek recovery of $100,000 or more, or raise important policy or court operations issues, by: (1) reviewing and approving any proposed settlement, stipulated judgment, or offer of judgment; and (2) consulting with the Administrative Director or ~~General~~ Chief Counsel on important strategy issues. Important policy or court operations issues may include whether to initiate litigation on behalf of a court,

when to defend a challenged court practice, or how to resolve disputes where the outcome might have statewide implications.

b. * * *

c. When necessary, resolving written objections to major strategic decisions, such as retention of counsel and proposed settlements, presented by the ~~General~~ Chief Counsel.

C. Council Advisory Bodies

Council advisory bodies are typically advisory committees and task forces. They use the individual and collective experience, opinions, and wisdom of their members to provide policy recommendations and advice to the council on topics the Chief Justice or the council specifies. The council and its internal committees provide direction to the advisory bodies.

Council advisory bodies work at the same policy level as the council, developing recommendations that focus on strategic goals and long-term impacts that align with judicial branch goals.

Council advisory bodies generally do not implement policy. The council may, however, assign policy-implementation and programmatic responsibilities to an advisory body and may request it make recommendations to staff on implementation of council policy or programs.

Council advisory bodies do not speak or act for the council except when formally given such authority for specific and time-limited purposes.

Council advisory bodies, through staff, are responsible for gathering stakeholder perspectives on policy recommendations they plan to present to the council.

The Chief Justice assigns oversight of each council advisory body to an internal committee. The council gives a general charge to each advisory body specifying the body's subject matter jurisdiction.

1. Council Advisory Committees

a.–b. * * *

c. Advisory committees have limited discretion to pursue matters in addition to those specified by the council in each committee's annual charge, as long as the matters are consistent with a committee's general charge, within the limits of resources available to the committee, and within any other limits specified by the council, the designated internal committee, or the Administrative Director ~~of the Courts~~.

d.–e. * * *

f. Staff report to the Administrative Director ~~of the Courts~~. Decisions or instructions of an advisory body or its leader are not binding on the staff except in instances when the council or the Administrative Director has specifically authorized such exercise of authority.

2. Council Task Forces and Other Advisory Bodies

The Chief Justice, Judicial Council, or the Administrative Director ~~of the Courts~~ may establish task forces and other advisory bodies to work on specific projects that cannot be addressed by the council's standing advisory committees. These task forces and other advisory bodies may be required to report to one of the council's internal committees or the Administrative Director, as designated in the charge.

II. Council-Staff Relationship

A. Unity of Control

1. The Judicial Council appoints an Administrative Director ~~of the Courts~~ who serves at the pleasure of the council and performs functions prescribed by the California Constitution and delegated by the council and the Chief Justice. Adopting rules of court administration, practice, and procedure is not delegated to the Administrative Director.

2. * * *

3. The Administrative Director, under the supervision of the Chief Justice, employs, organizes, and directs a staff agency~~, known as the Administrative Office of the Courts~~. The ~~Administrative Office of the Courts~~ Judicial Council staff assists the council and its Chair in carrying out their duties under the Constitution and laws of the State of California.

4. The Administrative Director is responsible for staff performance and has sole authority to assign, supervise, and direct staff. The Administrative Director is responsible for ensuring the completeness and quality of reports and other work product presented to the council. Council members may from time to time request information or assistance from staff, unless in the Director's opinion such requests require an unreasonable amount of staff time or become disruptive. Council members and advisory body members may individually provide information to the Administrative Director on the performance of the Judicial Council staff ~~and the Administrative Office of the Courts~~.

The Administrative Director is responsible for allocating financial and other resources of the ~~Administrative Office of the Courts~~ Judicial Council staff to achieve the goals of the Judicial Council and to implement the council's policies.

B. Relationship of the Administrative Director to the Council's Internal Committees and Advisory Bodies

* * *.

C. Accountability of the Administrative Director

The Administrative Director is accountable to the council and the Chair for the performance of the ~~Administrative Office of the Courts~~ Judicial Council staff. The Administrative Director's charge is to accomplish the council's goals and priorities, while avoiding the use of illegal, imprudent, or unethical means.

The Administrative Director reports to the Judicial Council at least once annually on the progress made toward achieving the council's goals. When the council sets the direction on projects or programs that require more than one year to complete, the Administrative Director will report back to the council at regular intervals on status and significant developments.

D. Delegation to the Administrative Director

The Administrative Director may use any reasonable interpretation of Judicial Council policies to achieve the council's goals, consistent with the limitations from the council and the Chief Justice.

In carrying out these duties, the Administrative Director is responsible for allocating the financial and other resources of the ~~Administrative Office of the Courts~~ Judicial Council staff (including, for example, funding the operation of advisory bodies and other activities) to achieve the branch goals and policies adopted by the Judicial Council of California.

Appendix F of the California Rules of Court would be amended, effective January 1, 2016, to read:

Appendix F

Guidelines for the Juvenile Dependency Counsel Collections Program

1–9 * * *

10. Collection Services

(a) * * *

(b) Outside Collection Services Providers

When appropriate and consistent with policy FIN 10.01, a court may use an outside collection services provider.

(1) *Collection Services Provided by County*

If collection services are provided by the county, the agreement should be formalized by a memorandum of understanding (MOU) between the court and county. ~~AOC~~ Judicial Council staff will provide a sample MOU on request. An electronic copy of the MOU, including a scanned copy of the completed signature page, must be sent to jdccp@jud.ca.gov.

(2) *Collection Services Provided by Private Vendor*

A court that uses a private collection service should use a vendor has entered into a master agreement with the ~~AOC~~ Judicial Council to provide comprehensive collection services. A court that uses such a vendor should complete a participation agreement and send it to ~~the AOC~~ Judicial Council staff via e-mail to jdccp@jud.ca.gov.

(3) *Court Option for ~~AOC~~ Judicial Council Agreement with Collection Services Provider*

At a court's request, the ~~AOC~~ Judicial Council may directly enter into an MOU with the county or an agreement with a private collection services vendor for dependency counsel reimbursement collection services.

11. * * *

12. Remittance and Reporting of Collected Revenue

Courts will remit collected revenue to the ~~AOC~~ Judicial Council, less costs recoverable under section 903.47(a)(1)(B), in the same manner as required under Government Code section 68085.1 and will report this revenue on row 130 of *Court Remittance Advice* (form TC-145). The ~~AOC~~ Judicial Council will deposit the revenue received under these guidelines into the Trial Court Trust Fund.

(a) ~~AOC~~ Judicial Council Collections Agreement Option

Where the ~~AOC~~ Judicial Council has entered into an MOU or agreement with a county or a private collection services vendor under section 10(b)(3) of these guidelines, funds will be remitted directly to the ~~AOC~~ Judicial Council under the terms of the MOU or the agreement.

13. Program Data Reporting

Each court should report collections program data to ~~the AOC~~ Judicial Council staff to ensure implementation of the Legislature's intent by determining the cost-effectiveness of the program and confirming that efforts to collect reimbursement do not negatively impact reunification; to provide a basis for projecting the amount of future reimbursements; and to evaluate the effectiveness of the reimbursement program at both statewide and local levels.

(a) * * *

14. Technical Assistance

~~AOC staff to the~~ Judicial Council staff will provide technical assistance on request to courts that do not yet have a dependency counsel reimbursement program in place or that wish to coordinate with other courts in establishing a regional reimbursement program. Courts may send requests by e-mail to jdccp@jud.ca.gov to receive technical assistance, which can include (but is not limited to) services such as:

(a) ~~–~~(c) * * *

(d) Working with current collection services providers who have entered into master agreements with the ~~AOC~~ Judicial Council to ensure compliance with the JDCCP reporting requirements.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: *(To be completed only if a party is making the motion)* NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	***FOR COURT USE ONLY***
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:

PREFILING ORDER—VEXATIOUS LITIGANT

1. Name and address of each plaintiff or cross-complainant or other party subject to this prefiling order:

2. This prefiling order is entered pursuant to a motion made by ☐ the court ☐ party

3. The person or persons identified in item 1, unless represented by an attorney, are prohibited from filing any new litigation in the courts of California without approval of the presiding justice or presiding judge of the court in which the action is to be filed.

4. The clerk is ordered to provide a copy of this order to the California Judicial Council by fax at 415-865-4329 or by mail at the address below.

Vexatious Litigant Prefiling Orders
Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102

Date: _____

_____
JUDICIAL OFFICER

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*
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER:	
ORDER ON APPLICATION TO VACATE PREFILING ORDER AND REMOVE PLAINTIFF/PETITIONER FROM JUDICIAL COUNCIL VEXATIOUS LITIGANT LIST	CASE NUMBER:

Plaintiff/Petitioner requests that this court vacate the prefiling order and remove the vexatious litigant's name from the statewide list in the following case or cases *(if more than one, list each separately)*:

Court:

Case Name:

Case Number:

Date prefiling order entered:

Court:

Case Name:

Case Number:

Date prefiling order entered:

☐ Continued on *Attachment* (form MC-025)

☐ Granted

☐ Denied

Date: _____

_____
PRESIDING JUSTICE OR JUDGE

The clerk is ordered to provide this order to the Judicial Council of California by fax at 415-865-4329 or by mail at the address below.

Vexatious Litigant Prefiling Orders
Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102

Form Approved for Optional Use
Judicial Council of California
MC-704 [Rev. January 1, 2016]

ORDER ON APPLICATION TO VACATE PREFILING ORDER AND REMOVE PLAINTIFF/PETITIONER FROM JUDICIAL COUNCIL VEXATIOUS LITIGANT LIST

Code of Civil Procedure, § 391,8
www.courts.ca.gov

Item number: 36

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Time for Notice and Notice Form (Amend Cal. Rules of Court, rule 3.670; revise form CIV-020)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee
Hon. Patricial Lucas, Chair

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 2014
Project description from annual agenda:
Telephonic Appearances.

- Correct inconsistency in newly amended rule 3.670(h)(4) regarding notice of telephonic appearance. Rule currently requires notice to be made by 2:00 p.m. the day before hearing, but then permits written notice to be served by close of business that same day. [Rule is being re-circulated due to comment from original circulation pointing out additional change needed to assure consistency and request from court to amend rule because not all courts open up to 2:00 p.m.]
- Revise form for Notice of Telephonic Appearances (form CIV-020) to eliminate reference to out-dated requirements regarding notice.

If requesting July 1 or out of cycle, explain:

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

Judicial Council of California • Administrative Office of the Courts

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

INVITATION TO COMMENT

SPR15-___

Title
Telephone Appearances: Time for Notice and Notice Form

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 3.670; revise form CIV-020

Proposed by
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair

Action Requested
Review and submit comments by June 17, 2015

Proposed Effective Date
January 1, 2016

Contact
Anne Ronan, Attorney
415-865-8933
anne.ronan@jud.ca.gov

Executive Summary and Origin

Recently, the Civil and Small Claims Advisory Committee recommended and the Judicial Council adopted amendments to the telephonic appearances rule, California Rules of Court, rule 3.670. The primary impact of the rule changes was to include ex parte applications under the rubric of civil matters at which parties could, as a general rule, appear by telephone if appropriate notice was provided, and to shorten notice for all telephonic appearances from three days to two. This new proposal amends the rule to clarify certain of the service of notice provisions in light of the new two-day timeline and revises the *Notice of Intent to Appear by Telephone* (form CIV-020) to correct the rule references and the time frame for notice.

Prior Circulation

A portion of this proposal was circulated in spring 2014, addressing only the service of notice for telephonic appearances on ex parte applications. In light of comments received, the committee has expanded the proposed amendments to the rules regarding service of notice for regularly noticed appearances as well, and has further revised the notice form.

The Proposal

This proposal, with an effective date of January 1, 2016, addresses some issues that need correction in light of the recent amendments to California Rules of Court, rule 3.670. The proposed changes are as follows:

1. Amend California Rules of Court, rule 3.670(h)(1) to require that if written notice of intent to appear telephonically is provided in a matter other than an ex parte application,

the notice must be served in a manner reasonably calculated to ensure delivery by 5:00 p.m. that same day.

2. Amend California Rules of Court, rule 3.670(h)(4), to clarify that written, like oral, notice of intent to appear telephonically to oppose an ex parte application must be provided to the court and the parties no later than 2 p.m. or the close of business (whichever is earlier) on the court day before the appearance; and

3. Revise the *Notice of Intent to Appear by Telephone* (form CIV-020) to correct the rule references in the form and to correctly reflect the new times for notice.

Rule 3.670(h)(1)

Two years ago, the council changed this rule to provide that on regularly noticed hearings (i.e., those other than ex parte applications), notice of intent to appear telephonically need only be provided two days (rather than three days) in advance of the hearing. Rule 3.670(h)(1)(B).[1] At that time, no change was made to another provisions in the rule that specifically addresses when *written* notice of the intent to appear telephonically must be made—the rule continues to allow service of such notice by means calculated to ensure delivery to the parties by close of the next business day. Nor was any change made to the time when a party receiving the notice under (h)(1)(B) has to provide notice of that party's own intent to appear telephonically should he or she wish to do so in light of the other party appearing telephonically— the rule continues to allow service of such notice by noon the day before the hearing. Rule 3.670(h)(2).

As a result of therecent amendment to the time period for notice, these two periods specified in Rule 3.670(h)(1)(B) and 3.670(h)(2) now overlap. Party A can serve written notice of intent to appear telephonically on Party B by any means that ensures Party B gets the notice by close of business one dayafter sending the notice. Since the starting point for sending notice is now two days before the hearing, this language allows written notice of a Party A's intent to appear telephonically to be delivered to Party B by close of business the day before the hearing. But Party B must provide notice of his or her intent to appear telephonically by noon that same day. To correct this overlap, this proposal would change the time for service of written notice, requiring that service be by a means calculated to ensure delivery to the parties no later than 5:00 p.m. on the same day on which the notice is provided to the court.[2] This would require that if written notice is given on the last day permitted by the rule, the notice would have to be provided either orally on all other parties or, if in writing, by electronic means (fax or email) if so authorized or by hand delivery of a copy.

Rule 3.670(h)(4)

The current rule on providing notice of telephonic appearance on an ex parte matter is clear for instances when *an applicant* wants to appear telephonically. (See rule 3.670(h)(3).) However, the

[1] Note, the provisions under rule 3.670(h)(1)(B) only come into play if the party seeking to appear telephonically did not provide notice of that intent on the moving, opposition, or reply papers.

[2] By expressly including a specific timeframe for delivery in the rule, the rule comes within the exception to the various extensions of time provided for in the Code of Civil Procedure for different types of service. See Code Civ. Proc. §§ 1013 (a), (c), (e) and 1010.6(a)(4) (providing for extensions of time for notice by various types of service but only in the absence of a specific exception provided for by statute or rule of court.)

provisions in the rule regarding the time for giving written notice by *any other party* wanting to appear telephonically areunclear. The first sentence of rule 3.670(h)(4) provides that a party other than the applicant who seeks to appear by phone on an ex parte application must notify the court, the applicant, and any other parties of that intent *by 2 p.m.* the day before the appearance. However, the last sentence of this subparagraph currently states that service of a written notice is to be by any legal means calculated to ensure delivery *no later than the close of business* that same day.

Providing that service need not be effective until close of business the day before the hearing contradicts the first sentence in the subdivision that the party must notify all parties by 2 p.m. that day. The inclusion of a different time for service of notice in writing appears to have been an oversight. The proposed amendment would change the last sentence in the subdivision to make it consistent with the first sentence by providing that written notice is to be done in such a way that it is received by all parties no later than 2 p.m.

Form CIV-020

The information in the instructions box at the bottom of the *Notice of Intent to Appear by Telephone* (form CIV-020) is outdated in light of the recent changes in the rules. The attached proposed form has been amended so that the instructions reflect the current rules. The changes are as follows:

- In the second paragraph in the box, the reference to the rule regarding written notice has been updated to reflect the numbering of the current rule.

- In the third paragraph, the instruction regarding the time for notice of appearing telephonically has been amended to reflect the rule that notice of two, rather than three, court days is generally required. The instruction has also been amended to reflect that notice is more tightly proscribed on ex parte applications.

Alternatives Considered

The committee considered not recommending any changes. However, the committee concluded that if the rule is not amended, it will be internally inconsistent, which may result in unnecessary expenditures of court time in overseeing litigants' arguments as to whether notice was appropriately given. Similarly, if the instructions on the form are left as is, inconsistent with current rules, problems may arise with disputes between parties and confusion at the filing windows regarding whether the form is timely filed and served.

Implementation Requirements, Costs, and Operational Impacts

Correction of these issues should not adversely affect the courts or impose on them any expense. The form is one used by the parties: correcting and expanding the references to the rules will help avoid confusion and questions to the clerks' office. Similarly, clarification of the rule for when written service must be provided will avoid ambiguity and ensure appropriate notice to the courts.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The 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 two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Amended rule 3.670, at pages 5–6
2. Revised form CIV-020, at page 7

California Rules of Court, rule 3.670(h) would be revised, effective January 1, 2015, as follows:

Rule 3.670. Telephone appearance

(a)–(g) * * *

(h) Notice by party

(1) Except as provided in (6), a party choosing to appear by telephone at a hearing, conference, or proceeding, other than on an ex parte application, under this rule must either:

(A) Place the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers; or

(B) At least two court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least two court days before the appearance and by serving the notice ~~at the same time on all other parties by personal delivery, fax transmission, express mail, e-mail if such service is required by local rule or court order or agreed to by the parties, or other~~ by any means authorized by law and reasonably calculated to ensure delivery to the parties no later than t~~he close of the next business day~~ 5:00 p.m. that same day.

(2) If after receiving notice from another party as provided under (1) a party that has not given notice also decides to appear by telephone, the party may do so by notifying the court and all other parties that have appeared in the action, no later than noon on the court day before the appearance, of its intent to appear by telephone.

(3) An applicant choosing to appear by telephone at an ex parte appearance under this rule must:

(A) Place the phrase "Telephone Appearance" below the title of the application papers;

(B) File and serve the papers in such a way that they will be received by the court and all parties by no later than 10:00 a.m. two court days before the ex parte appearance; and

(C) If provided by local rule, ensure that copies of the papers are received in the department in which the matter is to be considered.

(4) Any party other than an applicant choosing to appear by telephone at an ex parte appearance under this rule must notify the court and all other parties that have appeared in the action, no later than 2:00 p.m. or the close of business on the court day before the appearance, whichever is earlier, of its intent to appear by telephone.

If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court and by serving the notice ~~at the same time~~ on all other parties by any means authorized by law reasonably calculated to ensure delivery to the parties no later than 2:00 p.m. or the close of business, whichever is earlier, on the court day before the appearance.

(5) If a party that has given notice that it intends to appear by telephone under (1) subsequently chooses to appear in person, the party may appear in person.

(6) A party may ask the court for leave to appear by telephone without the notice provided for under (1)–(4). The court should permit the party to appear by telephone upon a showing of good cause or unforeseen circumstances.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. *(if available)*: E-MAIL ADDRESS *(if available)*: ATTORNEY FOR (*Name*):	DRAFT 07/16/14 Not approved by Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
NOTICE OF INTENT TO APPEAR BY TELEPHONE	CASE NUMBER:

1. Party intending to appear by telephone is
   - ☐ Plaintiff/Petitioner *(name):*
   - ☐ Defendant/Respondent *(name):*
   - ☐ Other *(name):*
2. The conference, hearing, or proceeding is for *(describe):*

set on *(date):* at *(time):* in *(department):*

before *(name of judicial officer, if known):*

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

See Code of Civil Procedure section 367.5 and California Rules of Court, rule 3.670 to determine if a conference, hearing, or proceeding is one generally considered appropriate for telephone appearance. Note that a court may determine on a hearing-by-hearing basis that a personal appearance is required. (Code Civ. Proc., § 367.5(c).)

This form is intended only to provide written notice to a court and parties as provided in rule 3.670(h) of the California Rules of Court. **Check with the court to determine how to make arrangements for telephone services for an appearance either directly with the court or through a court-appointed vendor.**

Read California Rule of Court, rule 3.670(h) to determine when you have to file and serve this notice. There are different deadlines depending upon the circumstances:

(1) On a regularly noticed hearing, notice must be given at least two court days before the appearance (Cal. Rules of Court, rule 3.670 (h)(1)(B)) or, after receiving notice that another party will be appearing telephonically, by noon on the court day before the appearance (Cal. Rules of Court, rule 3.670 (h)(2)).

(2) On an ex parte application, notice must be given by an applicant by 10:00 a.m. two court days before the hearing/ (Cal. Rules of Court, rule 3.670(h)(3)). Any party other than an applicant may give notice by 2:00 p.m. or the close of court (whichever is earlier) the court day before an ex parte appearance. (Cal. Rules of Court, rule 3.670 (h)(4).)

Item number: 37

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: 4/16/15

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Update Judicial Council Misdemeanor Domestic Violence Plea Form Citations

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Eve Hershcopf, 415-865-7961

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 3. Recommend Judicial Council approval of various rule and form proposals to promote timely, consistent, and effective criminal case processing, including revisions to dismissal and criminal protective order forms.
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
The updates are needed to bring the forms current but are so minimal that it would be useful to include in the July 1 cycle.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 17, 2015

Title
Criminal Procedure: Update Judicial Council Misdemeanor Domestic Violence Plea Form Citations

Rules, Forms, Standards, or Statutes Affected
Revise form CR-102

Recommended by
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2015

Date of Report
April 7, 2015

Contact
Eve Hershcopf, 415-865-7961
eve.hershcopf@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends revising an optional Judicial Council form used to facilitate the taking of guilty or no contest pleas in misdemeanor domestic violence cases to update two citations to statutes that address prohibitions on owning, using, or possessing firearms and ammunition within 10 years of a misdemeanor domestic violence conviction.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective July 1, 2015, revise the *Domestic Violence Plea Form with Waiver of Rights (Misdemeanor)* (form CR-102) to:

1. Replace the citation to Penal Code section 12021 in provision 7f with a citation to Penal Code section 29805, to reflect the current statute that addresses prohibitions on owning, using, or possessing firearms within 10 years of a misdemeanor domestic violence conviction; and
2. Replace the citation to Penal Code section 12316 in provision 7f with a citation to Penal Code section 30305, to reflect the current statute that addresses prohibitions on owning,

using, or possessing ammunition within 10 years of a misdemeanor domestic violence conviction.

The revised form is attached at pages 3–5.

Previous Council Action

The *Domestic Violence Plea Form with Waiver of Rights (Misdemeanor)* (form CR-102) was adopted on April 29, 2011, with a July 1, 2011, effective date.

Rationale for Recommendation

The form CR-102 is an optional form designed to promote standardized pleas in misdemeanor domestic violence cases statewide by including all necessary and common advisements, waivers, and consequences of the plea.

Penal Code section 29805, added by Senate Bill 1080 (Committee on Public Safety; Stats. 2010, ch. 711), § 6.76, operative January 1, 2012, continues former section 12021(c)(1) without substantive change.

Penal Code section 30305, added by SB 1080, § 6, operative January 1, 2012, continues former section 12316 without substantive change: Subdivision (a) of section 30305 continues former section 12316(b)(1) & (3) without substantive change; subdivision (b) continues former section 12316(b)(4)–(5) without substantive change; subdivision (c) continues former section 12316(d)(1) without substantive change; subdivision (d) continues former section 12316(d)(2)–(3) without substantive change.

To reduce confusion and enhance the information on the forms, the committee recommends revising the form to update these two citations to reflect the current statutes.

Comments, Alternatives Considered, and Policy Implications

The committee considered postponing or declining to recommend any form revisions in light of the severe economic circumstances faced by courts. The committee, however, decided to recommend the updated citations to current law. The revisions would not impose any significant change in court practices; rather, the recommended revisions are designed to improve procedures for misdemeanor domestic violence plea agreements by ensuring that provisions setting forth the consequences of the plea reflect current law.

Implementation Requirements, Costs, and Operational Impacts

Expected costs and implementation requirements are limited to the production of new forms. No other implementation requirements or operational impacts are expected.

Attachments and Links

1. Form CR-102, at pages 3–5

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
DOMESTIC VIOLENCE PLEA FORM WITH WAIVER OF RIGHTS (Misdemeanor)	CASE NUMBER:

Instructions:

- *Fill out this form only if you want to plead guilty or no contest*.
- *Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank*.
- *Sign and date the form under "DEFENDANT'S STATEMENT" on page 3.*
- *Keep in mind that the court cannot give legal advice. If you have an attorney and have questions about anything in this form, ask your attorney.*

INITIALS

1. **Charges and Maximum Penalties.** I want to plead guilty or no contest to the charges listed below. I understand that the maximum penalties for the charges to which I am pleading guilty or no contest are listed below. ☐

COUNT	CHARGES (SECTION & DESCRIPTION)		MAXIMUM PENALTY (FINE & JAIL)	

2. **Prior Convictions.** I understand that I am also charged with a prior conviction in case number(s): _____ ☐

3. **Probation Violations.** I understand that I am also charged with a violation of probation in case number(s): _____ ☐

4. **Right to an Attorney** *(Leave this box blank if you have an attorney)***.** I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. **I hereby give up my right to be represented by an attorney.** ☐

5. **Other Constitutional Rights.** I understand that I am entitled to each of the following rights concerning the charges and prior convictions (if any) listed in items 1 and 2 (above):

   a. **Right to a jury trial.** I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were convinced beyond a reasonable doubt that I am guilty. ☐

   b. **Right to confront and cross-examine witnesses.** I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court to testify under oath in my presence and I or my attorney may question them. ☐

   c. **Right to remain silent and not incriminate myself.** I understand that I have the right to remain silent and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself and I cannot be forced to testify. ☐

Form Approved for Optional Use
Judicial Council of California
CR-102 [Rev. July 1, 2015]

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PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

INITIALS

6. **Rights for Probation Violations** *(Leave this box blank if you are not charged with a probation violation).* I understand that I have all the constitutional rights listed above for all probation violations charged against me, except that I do not have a right to a jury trial, only a court hearing before a judge. ☐

7. **Consequences of My Plea**
   a. **No contest plea.** I understand that a no contest plea has the same effect as a guilty plea except that it cannot be used against me in a civil case that derives from an act on which this prosecution is based unless the offense is punishable as a felony. ☐
   b. **Effect of conviction on other cases.** I understand that a conviction in this case may be used to increase my punishment for future domestic violence convictions and may constitute a violation of any other current grant of parole or probation, which may result in additional punishment. ☐
   c. **Mandatory minimum conditions of probation.** I understand that if I am granted probation, the terms and conditions will include *at least* all of the following (see Pen. Code, § 1203.097): ☐
      (1) A minimum of either 36 months (3 years) or 48 months (4 years) of probation;
      (2) A criminal court protective order that may include residence exclusion or stay-away conditions;
      (3) Booking within one week of sentencing if I have not already been booked;
      (4) Several statutory fines, fees, and assessments, including a domestic violence fee, restitution fine, probation revocation fine (stayed), criminal conviction assessment, and court security fee;
      (5) Successful completion of an appropriate batterer's treatment program lasting at least 52 weeks;
      (6) Community service;
      (7) Restitution to the victim (if applicable);
      (8) An order to not own, possess, purchase, or receive any firearms;
      (9) An order to relinquish any firearms in my possession or control; and
      (10) Other: _____
      _____
      _____
      _____
   d. **Effect of future probation violation.** I understand that if I violate any of the terms or conditions of probation, I may be returned to court and sentenced up to the maximum punishment on each charge as indicated in item 1. ☐
   e. **Immigration consequences.** I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, **will** result in my deportation, exclusion from admission and reentry to the United States, and denial of naturalization and amnesty, and that the appropriate consulate may be informed of my conviction. ☐
   f. **Firearm prohibition.** I understand that a conviction in this case may prohibit me from owning, using, or possessing firearms and ammunition within 10 years under Penal Code sections 29805 and 30305. ☐
   g. **Child custody consequences.** I understand that a conviction in this case may result in a rebuttable presumption that an award of sole or joint physical or legal custody of a child is detrimental to the best interest of the child under Family Code section 3044. ☐
   h. **Other consequences** *(specify):* _____
      _____
      _____ ☐

8. **Before the Plea**
   a. **Discussion with my attorney** *(Leave this box blank if you are not represented by an attorney).* Before entering this plea, I have had a full opportunity to discuss with my attorney the facts of the case, the elements of the charged offenses and prior convictions (if any), any defenses that I may have, my constitutional and statutory rights and waiver of those rights, the consequences of this plea, and anything else I think is important to my case. ☐
   b. **Questions.** I have no further questions for the court or for my attorney with regard to my plea and admissions in this case or any of my rights or anything else on this form. ☐

9. **Waiver of Constitutional Rights.** For each of the charges, prior convictions (if any), and probation violations (if any) listed in items 1, 2, and 3, I give up my right to a jury trial, my right to a court hearing, my right to confront and cross-examine witnesses, and my right to remain silent and not to incriminate myself. I understand that I am, in fact, incriminating myself with my plea. ☐

10. **The Plea** *(check one).* I freely and voluntarily plead ☐ GUILTY ☐ NO CONTEST to the charges listed in item 1. I offer my plea with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. ☐

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

INITIALS

11. **Prior Convictions.** I freely and voluntarily admit the prior convictions (if any) listed in item 2, and I understand that this admission may increase the penalties that are imposed on me. ☐

12. **Probation Violations.** I freely and voluntarily admit the probation violations (if any) listed in item 3. ☐

13. **Sentencing.** I understand that I have a right to delay my sentencing at least 6 hours and as long as 5 days after my plea. I give up this right and agree to be sentenced at this time. ☐

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and the effects of any prior convictions and probation violations have been explained to me. I understand each of the rights outlined above and I give up each of them to enter my plea.

_____ _____
Defendant's Signature **Date**

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge, any possible defenses to the charges, the effect of any prior convictions and probation violations, and the consequences of the plea.

_____ _____
Attorney's Signature **Date**

INTERPRETER'S STATEMENT

I, _____ , having been duly sworn or having a written oath on file, certify that I truly interpreted this form to the defendant in the language noted below. The defendant stated that he or she understood the contents on the form and then initialed and signed the form.

Language: ☐ Spanish ☐ Other *(specify):* _____

_____ _____
Interpreter's Signature **Date**

COURT'S FINDINGS AND ORDER

The court, having reviewed this form and having orally examined the defendant, finds that (a) the defendant has read or been read and understands each of the initialed items on this form; (b) the defendant understands the nature of the crimes and allegations listed in items 1, 2, and 3 and the consequences of the plea and any admissions; (c) the defendant expressly, knowingly, understandingly, and intelligently waives his or her constitutional and statutory rights; and (d) the defendant's plea, admissions, and waiver of rights are made freely and voluntarily.

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

_____ _____
Signature of the Court **Date**

Item number: 38

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (July 1 cycle)**

RUPRO Meeting: April 16, 2015

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Administration: Rule for Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch (amend rule 10.63)

Committee or other entity submitting the proposal:
Executive and Planning Committee

Staff contact (name, phone and e-mail): Susan McMullan

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: NA
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Prompt adoption of the rule amendment is needed to implement the recommendations of the California State Auditor and to most effectively use the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch.

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

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Judicial Administration: Rule for Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 10.63

Proposed by
Executive and Planning Committee
Hon. Douglas P. Miller, Chair

Action Requested
Review and submit comments by May 15, 2015

Proposed Effective Date
July 1, 2015

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary and Origin

The Executive and Planning Committee (E&P) recommends that rule 10.63 of the California Rules of Court, which concerns the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch, be amended to modify the description of its duties, provide more specificity to the membership criteria, and make technical changes.

Background

Rule 10.63 was adopted by the Judicial Council, effective February 21, 2014, to establish by rule the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch (A&E).

The Proposal

Subdivision (b) of rule 10.63 sets out A&E's additional duties, beyond the committee's area of focus. Subdivision (b)(2) would be amended to add that every odd year, A&E will review and report to the council on council expenditures for local assistance (benefitting one or more trial courts) and state operations, consistent with the recommendation of the California State Auditor (CSA) (formerly, Bureau of State Audits) to give this responsibility to an advisory body.[1] Specifically, the CSA recommended, "The Judicial Council should create a separate advisory body, or amend a current committee's responsibilities and composition, to review the AOC's

[1] California State Auditor, *Judicial Branch of California, Report 2014-107* (Jan. 2015), p. 4, 54, *www.bsa.ca.gov/pdfs/reports/2014-107.pdf*

state operations and local assistance expenditures in detail to ensure that they are justified and prudent. This advisory body should be staffed with public and judicial branch finance experts."[2] E&P has determined that A&E has the appropriate expertise for this responsibility and will, through the rule amendment, charge that committee with reviewing expenditures from funds designated for state operations and local assistance. In addition, the council will adopt guidelines for A&E to use in its review of state operations and local assistance expenditures.

E&P also recommends that the membership provision in rule 10.63 be amended, consistent with the CSA recommendation, to specifically require that members have expertise in public and judicial branch finance. Thus, subdivision (c) would be amended to provide that members from all membership categories must have "experience in public or judicial branch finance." The amendment of this subdivision would also eliminate the provision that states, "The California Judges Association will recommend three nominees for a superior court judge position and submit its recommendations to the Executive and Planning Committee of the Judicial Council." The California Judges Association may continue to submit recommendations for membership, but to so specify in the rule is unnecessary.

Subdivision (b)(1) would be amended to limit the additional duty of making annual recommendations to the council concerning any budget change proposals for funding Judicial Council staff (formerly the Administrative Office of the Courts (AOC)). Other advisory bodies, such as the Trial Court Budget Advisory Committee, the Judicial Council Technology Committee (JCTC), and E&P, are responsible for recommending certain budget change proposals. For example, the JCTC recommends budget change proposals related to technology, such as trial court telecommunications for local area network/wide area network architecture. Thus, the rule would be amended to provide that A&E is responsible for recommendations for budget change proposals not within the purview of any other advisory body.

The rule would be amended to remove the additional duty of recommending any proposed changes to the annual compensation plan for council staff (formerly the AOC). The Judicial Council already is involved in review of Judicial Council staff compensation. In addition, salaries of council staff are subject to the approval of the Chair of the Judicial Council (Gov. Code, § 19825(b)). Maintaining this review as a responsibility of A&E would result in a duplication of efforts. Thus, E&P recommends removing it from the rule.

Subdivision (b)(3) would be amended to narrow the audit reports that A&E must review. The word "all" would be removed to reflect that A&E is not responsible for reviewing audit reports of the judicial branch conducted by outside entities such as the CSA. To expedite action relating to outside audits, the review and response will be done by either the council, council internal committees, or particular council members identified to assist with this duty. This will ensure timely action on audit reports from outside entities. A&E would retain responsibility for reviewing audits of the judicial branch performed by the council's Audit Services.

[2] *Ibid.*

Subdivision (b)(4) would be amended slightly to parallel new subdivision (b)(2) by adding "review and" before "report" and to provide that this duty occurs in even years. Other minor changes would be made to reflect the name change from "Administrative Office of the Courts" and "AOC" to "Judicial Council" and "Judicial Council staff," as appropriate.

Alternatives Considered

The rule could remain unchanged, but E&P believes that the proposed amendments are necessary to align A&E's additional duties and membership criteria to the needs of the council and to respond to the CSA recommendations that the council (1) charge a new or existing advisory committee with responsibility for reviewing state operations and local assistance expenditures in detail to ensure they are justified and prudent, and (2) provide that the advisory committee is composed of subject-matter experts with experience in public and judicial branch finance.

Implementation Requirements, Costs, and Operational Impacts

On amendment of the rule, E&P will solicit nominations for all positions on A&E under the new membership criteria. This effort will require a special solicitation apart from the general spring solicitation for advisory committee membership nominations. Current members of A&E will be asked to reapply for appointment to the committee.

Request for Specific Comments

In addition to comments on the proposal as a whole, E&P is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

Attachments and Links

1. Cal. Rules of Court, rule 10.63, at pages 4–5

Rule 10.63 of the California Rules of Court would be amended, effective July 1, 2015, to read:

Rule 10.63. Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch

(a) Area of focus

The committee makes recommendations to the council on practices that will promote financial accountability and efficiency in the judicial branch.

(b) Additional duties

In addition to the duties specified in rule 10.34, the committee must:

(1) Make recommendations annually to the council concerning ~~any~~ budget change proposals for funding of the ~~Administrative Office of the Courts (AOC)~~ Judicial Council that are not within the purview of any other advisory body ~~and any proposed changes to the annual compensation plan for the AOC~~;

(2) Every odd year, review and report to the council on council expenditures for local assistance (benefiting one or more trial courts) and state operations;

~~(2)~~(3) Review ~~all~~ audit reports of the judicial branch, recommend council acceptance of audit reports, and, where appropriate, make recommendations to the council on individual or systemic issues;

~~(3)~~(4) Every even year, review and report to the council on ~~AOC~~ council contracts that meet established criteria to ensure that the contracts are in support of judicial branch policy; and

~~(4)~~(5) Review proposed updates and revisions to the *Judicial Branch Contracting Manual.*

(c) Membership

The committee must include members ~~in~~ with experience in public or judicial branch finance from the following categories:

(1) Appellate court justices;

(2) Superior court judges; and

(3) Court executive officers.

~~The California Judges Association will recommend three nominees for a superior court judge position and submit its recommendations to the Executive and Planning Committee of the Judicial Council.~~

Advisory Committee Comment

Rule 10.63 of the California Rules of Court would be amended, effective July 1, 2015, to read:

The purpose of the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch is to promote transparency, accountability, efficiency, and understanding of the ~~AOC~~ Judicial Council and the judicial branch. The advisory committee fosters the best use of the work, information, and recommendations provided by ~~the AOC~~ Judicial Council staff, and it promotes increased understanding of the ~~AOC's~~ mission, responsibilities, accomplishments, and challenges of Judicial Council staff.