



## JUDICIAL COUNCIL OF CALIFORNIA

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May 28, 2015

Hon. Ben Hueso  
Member of the Senate  
State Capitol, Room 4035  
Sacramento, California 95814

Subject: SB 603 (Hueso), as amended May 4, 2015 – Oppose

Dear Senator Hueso:

The Judicial Council regrettably opposes SB 603, which, among other things, provides that if a defendant is acting as his or her own attorney, the court, upon a motion by the prosecutor, at the request of a victim, or upon the court's own motion, shall conduct a hearing to determine whether intermediary standby counsel shall be appointed, at county expense, for the limited purpose of presenting the defendant's examination of the victim. SB 603 further provides that if intermediary standby counsel is not available, the court may appoint any individual the court deems fit to conduct the examination, or the court may conduct the examination. In addition SB 603 provides that if the court orders intermediary standby counsel or another person to present the examination of the victim, or if the court presents the examination of the victim, the court must instruct the jury that although intermediary standby counsel, other person, or court, is presenting the defendant's questions of that witness, the defendant is continuing to represent himself or herself, and that the jury is to draw no negative inferences against the defendant from the use of intermediary standby counsel to facilitate the examination of that particular witness or to speculate as to the reasons for intermediary's participation.

The Judicial Council opposes SB 603, as amended May 4, 2015, because it: (1) It authorizes a burdensome and cumbersome procedural element to certain felony trials involving in pro per defendants and as a result interferes with the administration of justice; (2) it is unnecessary because courts already have the responsibility to manage court proceedings, including proceedings involving witnesses who are particularly vulnerable victims; (3) by permitting judges to ask questions on behalf of in pro per defendants in certain felony matters, the bill

interferes with the responsibility of judges to both be impartial in both fact and appearance and therefore conflicts with the ethical responsibility of judges; and (4) the proposed jury instruction interferes with the discretion of judges to interpret the law when rendering jury instructions that are appropriate to the individual facts and circumstances of a case.

*Burdens on the Courts:* The council opposes SB 603 because it authorizes a burdensome and cumbersome procedural element to certain felony trials involving in pro per defendants and as a result interferes with the administration of justice. Unfortunately, the council believes that the proposed procedure will result in burdensome delays in at least two circumstances.

First, delay will result from the initial request for stand-by counsel to be appointed to exam a witness on behalf of an in pro per defendant, or if standby counsel is not available, to appoint another individual deemed fit to conduct the examination, or the court may conduct the examination. To consider the motion, the trial must be stopped while the issue is taken up outside of the jury's presence. The legislation contemplates that a hearing must be conducted and evidence taken to establish the need for the appointment of stand-by counsel. To the extent these hearings involve the emotional state of the victim, it may be necessary to arrange for mental health professionals to clear their schedules to be available to testify—rarely can this be done on short notice. Delay also may be caused when the court must locate an attorney willing to act in this capacity—that may not be easy both in terms of numbers of available attorneys and, if willing to serve, their availability.

Second, delays also will inevitably occur during trial. SB 603 provides that the defendant shall “have the right to contemporaneously direct intermediary standby counsel ... to ensure the defendant maintains control of his or her defense.” While conceivably it is possible to list questions in advance, follow up questions are an integral component of the examination of witnesses. SB 603 contemplates that the defendant will continue to be in control of the questions asked—so if the attorney asks a question and an answer is given, with every question the standby counsel, other individual, or the court will need to confer with the defendant about the need for any follow-up questions. Even if this process only takes a few minutes for each question while the standby counsel, other individual, or court confers with the defendant, a cross-examination that might normally take only an hour could easily take three hours. The process will create a long and awkward cross-examination of the victim and is likely to interfere with the administration of justice. Moreover, the council is concerned that courts will have a difficult time applying SB 603 in a manner that is consistent with the holding in *Faretta v. California* (1975) 422 U.S. 806, at pp. 818-819;. In *Faretta*, the United States Supreme Court held that “[i]n forcing Faretta, . . . , to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense” (Faretta, at p. 836.)

*SB 603 is Unnecessary.* The council also believes that SB 603 is unnecessary because under existing law, the court already has the responsibility to manage court proceedings. It is generally accepted that the courts have (1) inherent equitable powers, derived from the historic power of the equity courts, and also (2) inherent supervisory and administrative powers, which enable them to carry out their duties and control litigation before them. These inherent powers of the

courts exist apart from any statutory authority. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967). Further, every court has the power to “amend and control its process and orders so as to make them conform to law and justice” (Cal. Civ. Proc. §128). This would include taking measures to minimize the potential trauma of an in pro per defendant examining a victim and regulating the conduct of the defendant’s examination, as appropriate and consistent with the defendant’s constitutional right to represent him or herself.

*Authorization for Court to Conduct Examination of Witness:*

The council is also opposed to SB 603, because by permitting judges to ask questions on behalf of in pro per defendants in certain felony matters, the bill interferes with the responsibility of judges to both be impartial in both fact and appearance and therefore conflicts with the ethical responsibility of judges.

Authorizing a judge to question the witness, with a disclosure by the judge that he or she is simply reading the defendant’s questions, may seem consistent with other instances in which a judge finds it necessary to ask questions of a witness. However, this authorization ignores the reality that examination of a witness is a fluid process, which, necessarily includes follow-up questions. Authorizing a judge to ask follow-up questions on behalf of a defendant raises ethical concerns, including the very real possibility that despite any admonishments by the judge to the contrary, a jury may perceive the judicial officer as acting on behalf of the defendant. Moreover, SB 603 gives the defendant “the right to contemporaneously direct” the court “during the examination to ensure the defendant maintains control of his or her defense.” (See proposed Pen. Code sec. 686.3, subd. (g).) The council believes that authorizing a judge to ask questions for the defendant in the manner contemplated by SB 603 will result in conflicts with the California Code of Judicial Ethics and in particular the following:

Canon 2, provides, “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities;”

Canon 2A, provides that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;” and

Canon 3B (5), provides that: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice....”

In addition, Rothman’s California Judicial Conduct Handbook, section 2.23 addresses judges questioning witnesses and provides “A trial judge may examine witnesses to elicit or clarify testimony . . . . Indeed, ‘it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence.’ . . . The trial judge, however, must not become an advocate for either party or under the [guise] of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness.

*Proposed Jury Instruction:* The council opposes the jury instruction set forth in SB 603 because: (1) it interferes with the discretion of judges to interpret the law when rendering jury instructions

that are appropriate to the individual facts and circumstances of a case and (2) is unnecessary because the Judicial Council already has a process to develop a balanced jury instruction.

The council firmly believes that, because the judicial branch has constitutional responsibility for interpreting laws enacted by the Legislature, identifying the need for and the drafting of jury instructions is something that must remain within the exclusive purview of the judicial branch. Jury instructions, by their very nature, require a judge to interpret the law and communicate in plain English to the jury about how they should apply the law to the particular facts and circumstances of a case. The council believes that creating a specific jury instruction, in statute, interferes with judicial discretion to deliver balanced jury instructions that are appropriate to the unique facts and circumstances of each trial. Rule 2.1050 of the California Rules of Court recognizes that a judge may need to modify an instruction if "he or she finds that a different instruction would more accurately state the law and be understood by jurors." Judges also need flexibility in responding to questions from jurors about what a jury instruction means.

The council also believes there are many practical reasons why the drafting of jury instructions should be left to the discretion of the judicial branch. As case law evolves impacting a jury instruction, judges and the Judicial Council are in the best position to quickly make revisions to the instructions based on that case law. However, if the language of a jury instruction is set forth in statute, courts may find that the statutory instruction is inconsistent with evolving case law. This could result in the need for legislation to amend a codified jury instruction any time case law develops—a time-consuming process—whereas a judge can readily modify jury instructions timely and appropriately as case law develops.

For these reasons, the Judicial Council regretfully opposes SB 603.

Sincerely,



Sharon Reilly  
Senior Attorney

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cc: Ms. Gail Stewart, Special Assistant, Legislative Director, Office of the San Diego District Attorney  
Members, Senate Public Safety Committee  
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor  
Mr. Martin Hoshino, Administrative Director, Judicial Council of California