

# **Tab A**

**TCPJAC/Criminal Law Advisory Committee (CLAC) Legislative  
Proposal to Amend Penal Code 808 to Add Court Commissioners to  
the Definition of Magistrate**

**PUBLIC SESSION**



## Judicial Council of California

ADMINISTRATIVE OFFICE OF THE COURTS

JUDICIAL AND COURT OPERATIONS SERVICES DIVISION

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# MEMORANDUM

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Date	Action Requested
July 26, 2016	Approval of final recommendations to the Judicial Council
To	Deadline
Trial Court Presiding Judges Advisory Committee	N/A
From	Contact
Marlene Smith, Supervising Analyst Judicial Council and Trial Court Leadership	Marlene Smith (415) 865-7617 <a href="mailto:Marlene.Smith@jud.ca.gov">Marlene.Smith@jud.ca.gov</a>
Subject	
Subordinate Judicial Officers: Court Commissioners as Magistrates	

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### Background

The Trial Court Presiding Judges Advisory Committee (TCPJAC) and Criminal Law Advisory Committee (CLAC) have proposed amending Penal Code section 808 to include “court commissioner” within the definition of those who may serve as a “magistrate.” In criminal cases, court commissioners have authority to perform a number of duties, including conducting arraignments and issuing bench warrants if directed by the presiding judge, but currently lack authority to issue a search warrant or to take and enter a guilty plea at arraignment. Court commissioners may act as temporary judges when qualified to do so and appointed for that purpose, but only on stipulation of the parties.

The proposal was developed at the request of presiding judges to expand the pool of judicial officers who are authorized to perform magistrate duties, provide courts with greater flexibility to equitably address judicial workloads, and increase access to justice in response to the need for a more system-wide approach to balancing judicial workload. The committees circulated the proposal from April 15 to June 14, 2016.

The Invitation to Comment proposal and comment chart are attached to this report. CLAC reviewed the comments received in response to the Invitation to Comment at their July 21, 2016 meeting, approved suggested responses to those comments, and approved the proposal as circulated for recommendation to the Judicial Council.

## Comments

A total of 9 comments were received; 7 agreed with the proposed changes, 1 did not agree, and 1 did not indicate a position. Both the Superior Court of Riverside County and the Superior Court of San Diego County agreed with the proposal, as did the California Court Commissioners Association and the California Judges Association (noting that their comments “are intended to assist with the proposal at this stage and are not representative of a final position on the proposal.”) Two comments and their recommended responses would benefit from your consideration.

- 1. Comments from AB 1058 (Child Support) Commissioners:** Both AB 1058 Commissioner Scott Harman (Sacramento) and AB 1058 Commissioner Rebecca Wightman (San Francisco) commented on the statewide need for an AB 1058 assigned commissioner’s program. Commissioner Wightman suggested an expansion of the current proposal to include an amendment to Family Code §§4252 to specifically authorize the Judicial Council to create an Assigned Commissioner Program in the Title IV-D child support system.

**Recommended TCPJAC Response:** The suggestions to expand the proposal to create either a statewide AB 1058 Assigned Commissioner Program as well as amend Family Code §§4252 to authorize the Judicial Council to create an Assigned Commissioner Program in the Title IV-D child support system is beyond the scope and intent of the circulated LEG16-01 proposal. TCPJAC will refer the suggestions to the appropriate Judicial Council committee for consideration.

- 2. Comment from Commissioner Lee Witham, Superior Court of San Diego County:** The commentator, a commissioner for 22 years, opposes the proposal and noted, “I believe that some courts (maybe not all) would take advantage of their Commissioners by assigning them undesirable duties that the judges of those courts dislike, abhor, and detest.”

**Recommended TCPJAC Response:** TCPJAC acknowledges the opposition submitted and understands that there may be some concerns regarding duties assigned to commissioners if the proposal should eventually pass. However, TCPJAC believes that the proposal will provide for a more system-wide approach to balancing judicial workload.

## Action Requested

Staff recommends that the TCPJAC review and approve the draft responses to the comments submitted during the June 2016 comment period and approve the proposal as circulated for recommendation to the Judicial Council.

# JUDICIAL COUNCIL OF CALIFORNIA

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[www.courts.ca.gov/policyadmin-invitationstocomment.htm](http://www.courts.ca.gov/policyadmin-invitationstocomment.htm)

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## INVITATION TO COMMENT

### LEG16-01

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Title	Action Requested
Subordinate Judicial Officers: Court Commissioners as Magistrates	Review and submit comments by June 14, 2016
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Penal Code section 808	January 1, 2018
Proposed by	Contact
Trial Court Presiding Judges Advisory Committee	Eve Hershcopf, 415-865-7961 eve.hershcopf@jud.ca.gov
Hon. Brian L. McCabe, Chair	Deirdre Benedict, 415-865-8915
Criminal Law Advisory Committee	deirdre.benedict@jud.ca.gov
Hon. Tricia Ann Bigelow, Chair	

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### Executive Summary and Origin

The Criminal Law and Trial Court Presiding Judges Advisory Committees propose amending Penal Code section 808 to include “court commissioners” within the definition of those who may serve as a “magistrate.” Magistrate duties are constitutionally and statutorily defined functions in the criminal justice system; the authority of magistrates is limited in comparison to judicial powers. This proposal was developed at the request of presiding judges to expand the pool of judicial officers who are authorized to perform magistrate duties, provide courts with greater flexibility to equitably address judicial workloads, and increase access to justice in response to the need for a more systemwide approach to balancing judicial workload.

### Background

#### Magistrates

The role of a magistrate is unique in the criminal justice system and differs from the role of a judge. Magistrates derive their jurisdiction and limited powers from the state constitution (Cal. Const., art. I, § 14), together with the acts of the Legislature; the powers and duties of a magistrate are solely those given by statute. Penal Code section 808 defines “magistrates” as the judges of the Supreme Court, Courts of Appeal, and superior courts. Court commissioners, a type of subordinate judicial officer (SJO), are not currently included in the statutory definition. When acting as a magistrate, judges of the Supreme Court, Courts of Appeal, and superior courts have only the jurisdiction and powers conferred by law on magistrates—not those powers that pertain to their judicial offices.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

Magistrates perform certain constitutionally and statutorily defined functions in the criminal justice system. The principal functions of magistrates include issuing search warrants, bench warrants, arrest warrants, and warrants of commitment (Pen. Code, §§ 1523, 881(a), 807, and 1488); fixing and granting bail (Pen. Code, § 815a); conducting preliminary examinations of persons charged with a felony and binding defendants over for trial or release (Pen. Code, § 858); and acting as the designated on-call magistrate when court is not in session (Pen. Code, § 810). The authority of a magistrate is limited to those statutory functions. A magistrate presiding at a preliminary hearing does not sit as a judge of a court and cannot exercise any of the powers of a judge in court proceedings. Unlike a judge, a magistrate lacks authority to determine the guilt or innocence of a defendant.

### **Court commissioners**

Article VI, section 22 of the California Constitution empowers the Legislature to provide for the appointment of commissioners and other SJOs to perform subordinate judicial duties. Government Code section 72190 authorizes commissioners, under the direction of judges, to exercise the powers and perform the duties prescribed by law. The purpose of SJOs is “to assist an overburdened judiciary with the performance of ‘subordinate judicial duties.’” (*Branson v. Martin* (1997) 56 Cal.App.4th 300, 305.)

In criminal cases, court commissioners generally have authority to conduct arraignments and issue bench warrants, if directed to perform those duties by the presiding judge (Gov. Code, §§ 72190.1 and 72190.2); hear ex parte motions for orders and alternative writs and writs of habeas corpus (Code Civ. Proc., § 259); make an initial determination on whether a deviation from the bail schedule is appropriate (Pen. Code, § 1269c); and fix bail in misdemeanor Vehicle Code violation cases (Gov. Code, § 72304). In infraction cases, court commissioners are expressly authorized to exercise the same powers and duties as judges, including making probable cause determinations. (Gov. Code, § 72190; *Branson, supra*, 56 Cal.App.4th at p. 305.)

Commissioners, however, currently lack authority to issue a search warrant (see 61 Ops.Cal.Atty.Gen. 487 (1978)) or to take and enter a guilty plea at arraignment (see 67 Ops.Cal.Atty.Gen. 162 (1984)). Court commissioners may act as temporary judges when qualified to do so and appointed for that purpose, but only on stipulation of the parties. (Code Civ. Proc., § 259; see, also, Cal. Rules of Court, rule 2.831.)

### **The Proposal**

The Criminal Law and Trial Court Presiding Judges Advisory Committees propose amending Penal Code section 808 to include “court commissioners” within the definition of “magistrate.” The proposal would expand the pool of judicial officers who are authorized to exercise magistrate powers and perform magistrate duties. By expanding the authorized duties of commissioners, the proposal is designed to promote court efficiencies, enhance access to justice, and provide court leadership with more flexibility to address judicial workloads.

Over the years, judicial workload demands have exceeded the number of available judicial officers.<sup>1</sup> As of June 30, 2014, there were 291 authorized commissioner FTE positions in the judicial branch.<sup>2</sup> The number of SJOs assigned to each court varies widely across the state. Several reasons favor broadening the scope of commissioner authority, including:

The assignment flexibility that commissioners allow the courts;  
The expertise commissioners bring to many case types; and  
The ability of commissioners “to assist judges with routine preliminary matters, thereby freeing the judges for more complex matters.”<sup>3</sup>

In addition, recent rulings and legislation have enhanced the need for greater flexibility in fulfilling the duties of magistrates. The Supreme Court in *Missouri v. McNeely* (2013) 569 U.S. \_\_ [133 S.Ct. 1552, 185 L.Ed.2d 696], for example, ruled that search warrants are required for nonconsensual blood testing during driving under the influence investigations, and that exceptions to the warrant requirement must be determined case by case based on the totality of the circumstances (see also Penal Code § 1524(a)(13) and (15) (A)(i) authorizing courts to issue search warrants under these circumstances). The ruling has amplified the number of search warrant requests, particularly off-hours requests, resulting in increased workload demands for judges who serve as on-call magistrates on nights and weekends.

Similarly, recently enacted legislation has expanded the courts’ workload by providing courts with authority to issue temporary emergency gun violence restraining orders (Pen. Code, §§ 18125–18145). Penal Code section 18145(a)(2) authorizes the issuance of temporary emergency gun violence restraining orders in accordance with the procedures for obtaining an oral search warrant, if time and circumstances do not permit the submission of a written petition. Those procedures specifically authorize magistrates to issue oral search warrants when the court is in session. Under Penal Code section 18145(b), the presiding judge designates at least one judge, commissioner, or referee to be reasonably available to issue temporary emergency gun violence restraining orders, but only when the court is not in session. Because the statutory authority for this type of restraining order is new, the workload impact is not yet known but is anticipated to be significant for some courts.

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<sup>1</sup> Judicial Council of Cal., *Need for New Judgeships in the Superior Courts: 2014 Update of the Judicial Needs Assessment* (November 2014), [www.courts.ca.gov/12922.htm](http://www.courts.ca.gov/12922.htm). This mandatory report to the Legislature describes the filings-based need for judicial officers in the trial courts and shows that an additional 270 full-time equivalent judicial officers are needed in 35 courts. Judicial need is calculated based on a complex workload formula. The statewide need for new judgeships is calculated by adding the judicial need among only the courts that have fewer judgeships than their workload demands.

<sup>2</sup> Judicial Council of Cal., *2015 Court Statistics Report: Statewide Caseload Trends, 2004–2005 Through 2013–2014* (2015), [www.courts.ca.gov/12941.htm#id7495](http://www.courts.ca.gov/12941.htm#id7495).

<sup>3</sup> See Judicial Council of Cal., *Subordinate Judicial Officers: Duties and Titles* (July 2002), p. 13, [www.courts.ca.gov/documents/sjowgfinal.pdf](http://www.courts.ca.gov/documents/sjowgfinal.pdf). The report found that SJOs spent at least 75 percent of their time on criminal cases performing the duties of temporary judges.

Since the duties of magistrates are easily distinguishable from the duties of judges, commissioner responsibilities could be expanded to include magistrate duties without causing undue confusion. In this manner, the proposal provides greater flexibility in the use of existing judicial and commissioner resources to increase access to justice while equitably addressing judicial workload concerns.

### **Alternatives Considered**

The committees alternatively considered amending Penal Code section 808 to provide court commissioners with limited authority to exercise specifically defined magistrate powers and perform magistrate duties. (See Pen. Code, § 646.91(a), (l) [commissioners are included among the judicial officers authorized to issue ex parte emergency protective orders for persons in immediate danger of being stalked], and Pen. Code, § 809 [the Santa Clara County Superior Court night-time commissioner is “considered a magistrate for the purpose of conducting prompt probable cause hearings for persons arrested without an arrest warrant”].) The committees, however, determined that a proposal to include court commissioners as magistrates for all purposes would provide greater flexibility, enhance court efficiencies, and enable courts to more effectively and equitably address workload issues while increasing access to justice.

### **Implementation Requirements, Costs, and Operational Impacts**

Under the proposal, local court leadership would retain discretion to decide the extent of magistrate duties that could be performed by court commissioners. For those courts that choose to incorporate the magistrate role into commissioner duties, potential implementation costs may include commissioner training. Because implementation would be voluntary, however, each court could determine whether potential efficiencies would outweigh implementation 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 Penal Code section 808, at page 5



Section 808 of the Penal Code would be amended, effective January 1, 2018, to read:

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**§ 808**

The following persons are magistrates:

(a) The judges of the Supreme Court.

(b) The judges of the courts of appeal.

(c) The judges of the superior courts.

(d) Court commissioners.

**LEG16-01****Subordinate Judicial Officers: Court Commissioners as Magistrates**

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	California Court Commissioners Association by Jeri Hamlin President	A	<p>The California Court Commissioners Association supports and endorses the proposal to amend PC Section 808 to include court commissioners within the definition of those who may serve as a magistrate.</p> <p>Among other benefits, this legislative change will help courts of limited resources better utilize the many talents and extensive experience of their respective commissioners, and in so doing, benefit the public in a substantial way.</p>	No response required.
2.	California Judges Association by Lexi Purich Howard Legislative Director	A	<p>Thank you for the opportunity to provide comments on behalf of the California Judges Association (CJA).</p> <p>CJA supports the legislative proposal to amend Penal Code Section 808 to include court commissioners within the definition of those who may serve as magistrate.</p> <p>The proposed expansion of judicial officers who are authorized to perform magistrate duties, including reviewing and signing search warrants, is a timely and much needed response to increasing judicial workloads.</p> <p>Our comments here are intended to assist with the proposal at this stage and are not representative of a final position on the proposal. Thank you for the opportunity to provide these comments; we welcome any questions and further discussion.</p>	No response required.
3.	Hon. Jeffrey M. Harkavy	A	I wish to add my voice in strong support of the	No response required.

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## Subordinate Judicial Officers: Court Commissioners as Magistrates

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	Commentator	Position	Comment	Committee Response
	Commissioner Superior Court of California, County of Los Angeles		proposed amendment to Penal Code Section 808, including court commissioners in the definition of magistrates. In my opinion, there is no logical or public policy reason for court commissioners to not perform the duties of a magistrate. As Commissioners, we have the exact same qualifications to hold our position as that of judges. We are required to complete the same training classes, ongoing judicial education and we are equally bound to the Canons of Judicial Ethics. On a day to day basis, we perform the same duties as judge's and are held to the same high standards. By passing this proposed amendment, there will be more well trained judicial officers to perform the important tasks now performed by judges alone.  Thank you for your consideration.	
4.	Hon. Scott P. Harman Commissioner Superior Court of California, County of Sacramento	A	I am e-mailing to indicate my support for the proposal to allow SJOs to act as magistrates. I would also like to suggest that there is a great need statewide for an assigned commissioner's program, especially in the AB 1058 arena where the Federal Regulations require a commissioner to hear the child support cases.	<b>TCPJAC Recommended Response:</b> The suggestion to expand the proposal to create a statewide Assigned Commissioner Program in the AB 1058 arena is beyond the scope and intent of the circulated LEG16-01 proposal. TCPJAC will refer the suggestion to the appropriate Judicial Council committee for consideration.
5.	Orange County Bar Association by Todd G. Friedland President	A	This proposal appears to serve the stated purpose of balancing judicial workloads and increasing courtroom efficiency and access to justice. Many court commissioners have expertise similar to that of judges and would be reliable decision-makers in performing magistrate duties.	No response required.

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## Subordinate Judicial Officers: Court Commissioners as Magistrates

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	Commentator	Position	Comment	Committee Response
			This proposal is short-sighted and in the end provides only temporary relief if any from caseload congestion. Many counties already use commissioners in many of the functions of the magistrate. Parties are already free to stipulate to a commissioner presiding at a preliminary hearing. This proposal merely masks the real problem which faces our court system; namely, the lack of adequate trial court funding and the unwillingness of the Governor to fill current judicial vacancies and the Legislature's failure to add needed judicial positions. Merely adding another body to nighttime warrant duty does little to solve California's long-term judicial needs.	
6.	Superior Court of California, County of Riverside by Marita Ford Senior Management Analyst	A		No specific comment.
7.	Superior Court of California, County of San Diego by Mike Roddy Executive Officer	A		No specific comment.
8.	Hon. Rebecca Wightman Commissioner, Dept. 416 Superior Court of California, County of San Francisco	N/I	I have been a Commissioner for almost two decades (in two different counties), and have had a variety of assignments. I wholeheartedly agree with the proposal, and urge that in fact, it be expanded as noted herein. The current proposal will indeed provide trial courts with greater flexibility in managing their respective judicial workloads. And it while it mentions potential implementation costs for commissioner training, I would point out that a number of courts may realize potential savings	<b>TCPJAC Recommended Response:</b> The suggestion to expand the proposal to amend Family Code §§4252 to authorize the Judicial Council to create an Assigned Commissioner Program in the Title IV-D child support system is beyond the scope and intent of the circulated LEG16-01 proposal. TCPJAC will refer the suggestion to the appropriate Judicial Council committee for consideration.

# LEG16-01

## Subordinate Judicial Officers: Court Commissioners as Magistrates

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	Commentator	Position	Comment	Committee Response
			<p>by not having to separately track and parcel out certain “duty judge” duties.</p> <p>I would also like to see the proposal go farther. Specifically, I would like to see the proposed legislation to also seed an amendment the Family Code §§4252, to either clarify or add a provision that would specifically authorize the Judicial Council under direction of the Chief Justice, to create an Assigned Commissioner Program in the Title IV-D child support system (also known as the AB1058 program). As trial court budgets become more and more strained, and with AB1058 funding having been stagnant for the past 8 years, the need for flexibility in the program has become critical. Such an amendment would provide the necessary flexibility to deploy experienced AB1058 Commissioners (similar to the Assigned Judges Program) to assist counties that may be experiencing coverage issues, backlogs, or are in need of other help to improve in certain areas identified and required as part of the federal funding. The CJA and CCCA have previously indicated support for such a proposal. Given the current creation by the Chief Justice of the 2016 AB1058 Funding Allocation Joint Subcommittee, this would be an ideal time to consider such a proposal that would assist trial courts in managing their workloads.</p> <p>Thank you for the opportunity to comment. I submit this comment as an individual, and not on behalf of any organization.</p>	

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### Subordinate Judicial Officers: Court Commissioners as Magistrates

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	Commentator	Position	Comment	Committee Response
9.	Hon. Lee C. Witham Commissioner San Diego County	N	<p>I have worked as a Court Commissioner for over 22 years. Prior to those years, I practiced law for about 19 years, 10 of those years as a Deputy District Attorney.</p> <p>I am opposed to the pending proposal to amend Penal Code 808 in order to include commissioners as magistrates.</p> <p>I believe that some courts (maybe not all) would take advantage of their Commissioners by assigning them undesirable duties that the judges of those courts dislike, abhor, and detest. Please register my position in opposition.</p>	<b>TCPJAC Recommended Response:</b> TCPJAC acknowledges the opposition submitted and understands that there may be some concerns regarding duties assigned to commissioners if the proposal should eventually pass. However, TCPJAC believes that the proposal will provide for a more system-wide approach to balancing judicial workload.