



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on January 19–20, 2017

Title	Agenda Item Type
Civil Practice and Procedure: Denial of Request to Remove Name From Shared Gang Database	Action required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 3.2300; approve form MC-1000	January 20, 2017
Recommended by	Date of Report
Civil and Small Claims Advisory Committee Hon. Raymond M. Cadei, Chair	January 4, 2017
	Contact
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Executive Summary

The Civil and Small Claims Advisory Committee recommends adoption of rule 3.2300 and approval of form MC-1000 to implement recently enacted legislation that authorizes superior court review of a law enforcement agency's denial of a request to remove an individual's name from a shared criminal gang database. The proposal is intended to give guidance to individuals and courts in making and processing requests for review under this legislation.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 20, 2017:

1. Adopt rule 3.2300, Review under Penal Code section 186.35 of law enforcement agency denial of request to remove name from shared gang database; and
2. Approve form MC-1000: Request for Review of Denial of Request to Remove Name From Gang Database.

To ensure that courts and individuals seeking review under this procedure have necessary guidance as soon as possible after the legislation takes effect on January 1, 2017, the committee seeks adoption of the rule and approval of the form effective the next business day after the Judicial Council meeting, without a prior period of public comment. If adopted, the proposal would then be circulated for public comment and any necessary amendments and revisions based on comments would be recommended to be effective no later than September 1, 2017.

The proposed rule and form are attached at pages 6–13.

Previous Council Action

There is no previous council action relevant to this report.

Rationale for Recommendation

Background

Assembly Bill 2298, adopted effective January 1, 2017, establishes a new procedure for superior court review of a law enforcement agency’s denial of a request to remove an individual’s name from a shared criminal gang database.¹ According to the August 22, 2016, Senate Floor Analysis of AB 2298, as amended Aug. 16, 2016, the state of California currently maintains a “CalGang” system of databases, which contains information about approximately 150,000 individuals designated by law enforcement as suspected gang members, associates, or affiliates.² According to this Senate analysis, the CalGang system contains data “including name, address, description, social security number, and race or ethnicity” of individuals in the database.³ The database is widely accessed by law enforcement officers, for reasons including “to determine who should be served with civil gang injunctions, given gang sentences, and targeted for saturation policing.”⁴

In response to concerns about the accuracy and secrecy of the shared gang database system, effective January 1, 2014, the Legislature enacted Penal Code section 186.34, requiring that before a law enforcement agency designates a person who is under 18 years of age as a suspected gang member, associate, or affiliate or otherwise identifies the person in a shared gang database, the agency must provide written notice of the proposed designation and the basis for the designation to the person and his or her parent or guardian, unless providing this notice would compromise an active criminal investigation or compromise the health or safety of the minor. (Pen. Code, § 186.34(b).) If the law enforcement agency sends such a notice, the minor or his or

¹ The enacted version of this bill is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2298.

² Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 2298 (2015–2016 Reg. Sess). This analysis is available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2298.

³ *Id.* at p. 5

⁴ *Id.* at p. 6.

her parent or guardian may contest the designation with the law enforcement agency. (*Id.*, § 186.34(c).)

AB 2298 amends Penal Code section 186.34 and enacts new Penal Code section 186.35, extending the provisions permitting notification and review of local law enforcement agency decisions to designate an individual as a suspected gang member, associate, or affiliate in a shared gang database. Specifically, the bill extends to adults the right to notification and to contest designation with the local law enforcement agency, and it creates a procedure for persons who have contested their designation with the local law enforcement agency to seek superior court review if the agency denies their request.

Penal Code section 186.35 states that a person may seek this judicial review by “filing an appeal” in the superior court.⁵ It also states that the procedure for judicial review of a law enforcement agency’s denial is a “limited civil case.”⁶ The statute explicitly limits the “evidentiary record for the appeal” to (1) the material submitted to and by the law enforcement agency when the person contested the inclusion in the database with the law enforcement agency under Penal Code section 186.34, and (2) “any arguments presented to the [superior] court.”⁷ In addition, it provides that, if on de novo review of this limited record and arguments, the superior court finds that the law enforcement agency has failed to establish the petitioner’s active gang membership, associate status, or affiliate status by clear and convincing evidence, the court shall order the law enforcement agency to remove the name of the person from the shared gang database.⁸

Recommended rule and form

Although AB 2298 does not direct the Judicial Council to adopt implementing rules or forms, the committee is concerned that, without a rule and form, it may be difficult both for individuals to figure out how to seek this newly authorized judicial review and for courts to determine how to handle these requests. This is in part because the judicial review procedure described in Penal Code section 186.35 does not fit squarely into existing appellate, civil, or criminal procedure. Although the legislation amends the Penal Code and relates to law enforcement decisions and actions that may implicate criminal matters, a request to review a law enforcement decision to deny removal from the database is not tied to any specific underlying criminal case. Individuals not currently involved in any criminal court matter may seek judicial relief. Although the statute refers to the procedure as an “appeal” triggered by filing a “notice of appeal” in the superior court (Pen. Code, § 186.35(a)), there is no lower court decision or any adjudicatory decision by an administrative agency for the superior court to review. And although the statute states that the procedure under section 186.35 is a “limited civil case,” both the nature of the dispute and the

⁵ Pen. Code, § 186.35(a).

⁶ *Ibid.*

⁷ *Id.*, § 186.35(b).

⁸ *Ibid.*

procedures established under the statute are inconsistent with statutes regarding limited civil cases, which delineate what constitutes a limited civil case based on the dollar amount in controversy; limit the permissible pleadings in these cases to complaints, answers, and demurrers; provide for discovery; and provide for a jury or court trial.⁹

Given these statutory provisions, the chairs of the Appellate, Criminal Law, Civil and Small Claims, and Family and Juvenile Law Advisory Committees designated members of each of their committees to participate in an informal working group to review the legislation and propose a rule of court and a form. Based on the recommendation of that working group, the proposed new rule 3.2300 has been placed in a new “Miscellaneous” division within Title 3, the Civil Rules, and the proposed form has been designated as a miscellaneous form.

Proposed rule 3.2300 combines elements from Penal Code section 186.35 with provisions modeled on the rule relating to habeas corpus petitions (rule 4.551) and formatting requirements from the rules relating to appeals to the superior court appellate division (rules 8.838 and 8.883). Among other things, this rule would:

- Require the presiding judge to designate one or more judges to handle these requests for review of law enforcement agency decisions. This recommendation is to ensure that any such request for review is handled by a judge who is familiar with these proceedings;
- Generally require self-represented individuals to use proposed *Request for Review of Denial of Request to Remove Name From Gang Database* (form MC-1000) when seeking review of a law enforcement agency decision. This recommendation is to assist self-represented individuals and courts by ensuring that necessary information is conveyed to the court;
- Require the law enforcement agency to prepare, serve, and file the record established by Penal Code section 186.35, and provide that if the law enforcement agency does not timely file the required record, the court may order the law enforcement agency to remove the name of the person from the shared gang database;
- Allow the person filing the request for review to include written argument in their initial filing or in a separate filing, and also allow the law enforcement agency to file written argument; and
- Provide for request or waiver of oral argument.

Proposed *Request for Review of Denial of Request to Remove Name From Gang Database* (form MC-1000) is designed to be a simple, straightforward request for review of the law enforcement agency decision. It is in plain-language format, with instructions on the second page. The person filing the request is asked to attach a copy of the law enforcement agency decision.

⁹ Code Civ. Proc., §§ 86 et seq. and 630.20 et seq.

Comments, Alternatives Considered, and Policy Implications

As noted above, because of the urgent need to have the rule and form available as soon as possible after the effective date of the statutory changes, this proposal has not been circulated for public comment. Therefore, no public comments are available at this time. However, input was received on this proposal from the representatives of the Appellate, Criminal Law, Civil and Small Claims, and Family and Juvenile Law Advisory Committees who participated in the informal working group.

That working group declined to recommend that the proposed rule be placed in either the appellate or criminal titles of the California Rules of Court. Because the recommendation was to place the rule in Civil Rules, the Civil and Small Claims Advisory Committee agreed to sponsor this proposal.

The working group and committee also considered not including any references to the content of the record in the rule. Ultimately, however, they determined that incorporating the relevant statutory requirements in the rule and including advisory committee comments with additional statutory references would be helpful.

The committee also considered not developing any proposal at this time. As noted above, the legislation does not specifically require the Judicial Council to adopt implementing rules or forms. The working group and committee concluded, however, that without a rule providing direction for implementing this unique judicial procedure, individuals seeking review in the court and courts may have difficulty implementing these new legislative requirements.

Implementation Requirements, Costs, and Operational Impacts

The committee intends that the proposed rule and form will create an efficient, clear process for courts, thereby minimizing any additional burdens as individuals seek judicial relief under the Penal Code section 186.35 process.

Attachments and Links

1. Cal. Rules of Court, rule 3.2300, at pages 6–11
2. Form MC-1000, at pages 12–13

Rule 3.2300 of the California Rules of Court is adopted, effective January 20, 2017, to read:

Division 23. Miscellaneous

Rule 3.2300. Review under Penal Code section 186.35 of law enforcement agency denial of request to remove name from shared gang database

(a) Proceedings governed

This rule applies to proceedings under Penal Code section 186.35 to seek review of a local law enforcement agency's denial of a request under Penal Code section 186.34 to remove a person's name from a shared gang database.

(b) Definitions

For purposes of this rule:

- (1) "Request for review" or "petition" means a "notice of appeal" under Penal Code section 186.35 requesting review of a law enforcement agency's decision denying a person's request under Penal Code section 186.34 to remove a person's name from a shared gang database.
- (2) "Law enforcement agency" means the local law enforcement agency that denied the request under Penal Code section 186.34 to remove a person's name from a shared gang database.

(c) Designated judge

The presiding judge of each superior court must designate one or more judges to handle any petitions governed by this rule that are filed in the court.

(d) Petition

(1) Form

(A) Except as provided in (i) and (ii), *Request for Review of Denial of Request to Remove Name From Gang Database* (form MC-1000) must be used to seek review under Penal Code section 186.35 of a law enforcement agency's decision denying a request to remove a person's name from a shared gang database.

(i) A petition filed by an attorney need not be on form MC-1000. For good cause the court may also accept a petition from a nonattorney that is not on form MC-1000.

(ii) Any petition that is not on form MC-1000 must contain the information specified in form MC-1000.

(B) The person seeking review must attach to the petition under (A) the law enforcement agency's written verification of its decision denying the person's request under Penal Code section 186.34 to remove his or her name—or, if the request was filed by a parent or guardian on behalf of a child under 18, the name of the child—from the shared gang database.

(2) Time for filing

The petition must be filed within 90 calendar days of the date the law enforcement agency mails or personally serves the person filing the petition with written verification of the agency's decision denying that person's request under Penal Code section 186.34 to remove the name from the shared gang database.

(3) Where to file

The petition must be filed in either the superior court of the county in which the law enforcement agency is located or, if the person filing the petition resides in California, in the superior court of the county in which that person resides.

(4) Fee

The fee for filing the petition is \$25, as specified in Government Code section 70615.

(5) Service

A copy of the petition with the attachment required under (1)(B) must be served either personally or by mail on the law enforcement agency, as provided in Code of Civil Procedure sections 1011–1013a. Proof of this service must be filed in the superior court with the petition.

(e) Record

(1) Filing

(A) The law enforcement agency must serve the record on the person filing the petition and must file the record in the superior court in which the petition was filed.

(B) The record must be served and filed within 15 days after the date the petition is served on the law enforcement agency as required by subdivision (d)(5) of this rule.

(C) If the record contains any documents that are part of a juvenile case file or are sealed or confidential under Welfare and Institutions Code section 827, the

law enforcement agency must include a coversheet that states “Confidential Filing – Juvenile Case File Enclosed.”

(D) The procedures set out in rules 2.550 and 2.551 apply to any record sought to be filed under seal in a proceeding under this rule.

(2) Contents

The record is limited to the documents required by Penal Code section 186.35(b)

(3) Format

(A) The cover or first page of the record must:

(i) Clearly identify it as the record in the case;

(ii) Clearly indicate if the record includes any documents that are sealed or confidential under Welfare and Institutions Code section 827;

(iii) State the title and court number of the case; and

(iv) Include the name, mailing address, telephone number, fax number (if available), e-mail address (if available), and California State Bar number (if applicable) of the attorney or other person filing the record on behalf of the law enforcement agency. The court will use this as the name, mailing address, telephone number, fax number, and e-mail address of record for the agency unless the agency informs the court otherwise in writing.

(B) All documents in the record must have a page size of 8.5 by 11 inches;

(C) The text must be reproduced as legibly as printed matter;

(D) The contents must be arranged chronologically;

(E) The pages must be consecutively numbered; and

(F) The record must be bound on the left margin.

(4) Failure to file the record

If the law enforcement agency does not timely file the required record, the superior court clerk must serve the law enforcement agency with a notice indicating that the agency must file the record within five court days of service of the clerks notice or the court may order the law enforcement agency to remove the name of the person from the shared gang database.

(f) Written argument

(1) Contents

- (A) The person filing the petition may include in the petition or separately serve and file a written argument about why, based on the record specified in Penal Code section 186.35(b), the law enforcement agency has failed to establish by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person so designated or to be so designated by the law enforcement agency in the shared gang database.
- (B) The law enforcement agency may serve and file a written argument about why, based on the record specified in Penal Code section 186.35(b), it has established by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person.
- (C) If an argument refers to something in the record, it must provide the page number of the record where that thing appears or, if the record has not yet been filed, the page number of the relevant document.
- (D) Except for any required attachment to a petition when an argument is included in the petition, nothing may be attached to an argument and an argument must not refer to any evidence that is not in the record.

(2) Time to serve and file

Any written argument must be served and filed within 15 days after the date the record is served.

(3) Format and length of argument

- (A) The cover or first page of any argument must:

 - (i) Clearly identify it as the argument of the person filing the petition or of the law enforcement agency;
 - (ii) State the title and court number of the case; and
 - (iii) Include the name, mailing address, telephone number, fax number (if available), e-mail address (if available), and California State Bar number (if applicable) of the attorney or other person filing the argument.
- (B) An argument must not exceed 10 pages.
- (C) The pages must be consecutively numbered.

(g) Oral argument

(1) *Setting oral argument*

The court may set the case for oral argument at the request of either party or on its own motion.

(2) *Requesting or waiving oral argument*

The person filing the petition or the law enforcement agency may request oral argument or inform the court that they do not want to participate in oral argument. Any such request for or waiver of oral argument must be served and filed within 15 days after the date the record is served.

(3) *Sending notice of oral argument*

If oral argument is set, the clerk must send notice at least 20 days before the oral argument date. The court may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

(4) *Sealed or confidential records*

If the responding party indicates that the record contains information from a juvenile case file or documents that are sealed or confidential under Welfare and Institutions Code section 827, the argument must be closed to the public unless the crime charged allows for public access under Welfare and Institutions Code section 676.

(h) Decision

As provided in Penal Code section 186.35, if, on de novo review and any arguments presented to the court, the court finds that the law enforcement agency has failed to establish by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person so designated in the shared gang database, the court must order the law enforcement agency to remove the name of the person from the shared gang database.

(i) Service on the Attorney General

The court must serve on the Attorney General a copy of any order under (e)(4) or (h) to remove a name from a shared gang database.

Advisory Committee Comment

Subdivision (d)(1)(B). Penal Code section 186.34(f) provides that if a person to be designated as a suspected gang member, associate, or affiliate, or his or her parent or guardian, submits written documentation to the local law enforcement agency contesting the designation, the local law enforcement

agency “shall provide the person and his or her parent or guardian with written verification of the agency’s decision within 30 days of submission of the written documentation contesting the designation. If the law enforcement agency denies the request for removal, the notice of its determination shall state the reason for the denial.”

Subdivision (e)(2). Penal Code section 186.35(b) provides that the evidentiary record for this review proceeding “shall be limited to the agency’s statement of basis of its designation made pursuant to subdivision (e) of Section 186.34, and the documentation provided to the agency by the appellant pursuant to subdivision (f) of Section 186.34.”

Penal Code section 186.34(e)(1) provides that “[a] person, or, if the person is under 18 years of age, his or her parent or guardian, or an attorney working on behalf of the person may request information of any law enforcement agency as to whether the person is designated as a suspected gang member, associate, or affiliate in a shared gang database” and, if the person is so designated, “information as to the basis for the designation for the purpose of contesting the designation as described in subdivision (f).” Section 186.35(e)(2) provides that “[t]he law enforcement agency shall provide information requested under paragraph (1), unless doing so would compromise an active criminal investigation or compromise the health or safety of the person if the person is under 18 years of age.”

Penal Code section 186.34(f) provides that “the person to be designated as a suspected gang member, associate, or affiliate, or his or her parent or guardian, may submit written documentation to the local law enforcement agency contesting the designation.”

Penal Code section 186.34(g) also provides that “[n]othing in this section shall require a local law enforcement agency to disclose any information protected under Section 1040 or 1041 of the Evidence Code or Section 6254 of the Government Code.”

Request for Review of Denial of Request to Remove Name From Gang Database

Clerk stamps date here when form is filed.

Instructions: Please read the instructions on the back of this form before completing and filing this form.**Notice to the Clerk:** This request is filed under Penal Code section 186.35 and California Rules of Court, rule 3.2300. Rule 3.2300(c) requires the presiding judge of each superior court to designate one or more judges to hear such requests. This request must be submitted to a judge designated under rule 3.2300(c).

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 Making This Request:****I am:** The person whose name is in the gang database.
 The parent or guardian of the child under 18 whose name is in the gang database.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, give your information.*)

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-Mail: _____

2 Decision You Are Requesting Be ReviewedI am seeking review of the attached decision by the following law enforcement agency denying my request under Penal Code section 186.34 to remove my name or the name of my child or ward from a shared gang database. (*You must attach a copy of the written verification that the law enforcement agency served on you of its decision denying your request and fill in the name and address of the law enforcement agency.*)

Name of law enforcement agency: _____

Address: _____

City: _____ State: _____ Zip: _____

The attached decision was served on me/my client by the law enforcement agency:

 By personal delivery By mail on (*date:*) _____**3 Reason for This Request for Review**

I am seeking review of the attached decision on the basis that the law enforcement agency has not established by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person whose name I requested be removed from the shared gang database.

4 Written Argument I have attached my written argument about why, based on the record specified in Penal Code section 186.35(b), the law enforcement agency has failed to establish by clear and convincing evidence the gang membership, associate status, or affiliate status of the person whose name I requested be removed from the street gang database.**NOTE:** *You are not required to submit written argument. If you wish to submit written argument, you can either include that argument in this request or serve and file the argument separately within 15 days after the law enforcement agency serves and files the record in this proceeding. Please see rule 3.2300(f) for information about submitting written argument.*

5 Request for or Waiver of Oral Argument

I understand oral argument can be requested in this case. I am am not requesting oral argument.

Date: _____

Type or print your name

Signature

Instructions

This form is only for seeking review by a court of a local law enforcement agency's denial of a request under Penal Code section 186.34 to remove an individual's name from a shared gang database.

You must serve and file this form **no later than 90 calendar days** after the law enforcement agency serves you with written verification of its decision denying your request under Penal Code section 186.34 to remove your name from a shared gang database or, if you are the parent or guardian of a child under 18 whose name is in the gang database, the child's name. **If your request is late, your request will be dismissed.**

To serve and file this form, complete the following steps:

1. Fill out this form

In the second box on the right-hand side: Fill in the name of the county for the superior court where you plan to file the request and the street address for the court (see rule 3.2300(d)(3) for information about where to file this form).

In Item 1:

Fill in your name.

Check the box to indicate if you are the person whose name is in the gang database or that person's parent or guardian.

Fill in the name and firm name of your lawyer, if you have one.

Fill in your lawyer's contact information, or if you do not have a lawyer, your contact information.

In Item 2:

Fill in the name and address of the law enforcement agency whose decision you are requesting the court to review.

Attach a copy of the law enforcement agency's decision denying your request to remove your name or the name of your child or ward from the gang database.

In Item 4:

Check whether or not you are attaching written argument to this report.

In Item 5:

Indicate whether or not you want to have oral argument on your request or whether you want to give up (waive) oral argument, and have the court decide the case without oral argument.

At the end of the form:

Print and sign your name and fill in the date you signed the form.

2. Make copies of the form

Make a copy of the completed form for your records and for the law enforcement agency.

3. Serve the form

Serve a copy of the completed form and the required attachment on the law enforcement agency 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 at www.courts.ca.gov/selfhelp-serving.htm.

4. File the form

Take or mail the original completed form with a copy of the law enforcement agency decision attached and proof of service on the law enforcement agency to the clerk's office of the court where you are filing this form. 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.

Pay the \$25 filing fee and file this form, or if you are unable to pay this fee, file a request to waive court fees (form FW-001) in the court.