



Judicial Council of California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-068

For business meeting on March 24, 2023

Title

Jury Instructions: Public Access and
Publication

Agenda Item Type

Action Required

Effective Date

April 1, 2023

Rules, Forms, Standards, or Statutes Affected

Revise Cal. Rules of Court, rule 2.1050

Date of Report

February 1, 2023

Recommended by

Rules Committee

Hon. Carin T. Fujisaki, Chair

Contact

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Executive Summary

The Rules Committee recommends revising California Rules of Court, rule 2.1050, to remove any implicit references to copyright and to express the council's continued interest in both free public access to its civil and criminal jury instructions and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them. This proposal originated with a suggestion from a nonprofit organization after a change in copyright law that impacts government bodies.

Recommendation

The Rules Committee recommends that the council, effective April 1, 2023, amend rule 2.1050 to remove references to "permission to publish" and "royalties," which may imply copyright in the *Judicial Council of California Civil Jury Instructions* and *Judicial Council of California Criminal Jury Instructions*, and to express the council's continued interest in both free public access to its civil and criminal jury instructions and having publishers accurately publish the instructions, properly attribute the council as the source of the instructions, and not claim copyright in them.

The proposed amended rule is attached at pages 5–6.

Relevant Previous Council Action

Rule 2.1050, Judicial Council jury instructions, was adopted in 2003 as rule 855 in conjunction with the Judicial Council's approval of the civil jury instructions that comprised the first edition of *Judicial Council of California Civil Jury Instructions (CACI)*. The council amended former rule 855, effective August 26, 2005, on the recommendation of the Task Force on Jury Instructions, adding a provision to subdivision (c), to ensure that publication of the instructions by commercial publishers does not occur without permission, including ensuring that commercial publishers publish the instructions accurately, credit the council as the source of the instructions, and do not claim copyright of the instructions.¹ From that point on, the council asserted copyright over the jury instructions.

After former rule 855 was renumbered, the only amendments were minor amendments in 2016 to effectuate an organizational name change.

Analysis/Rationale

Background

Beginning with jury instructions that became effective in January 2006, the council expressly asserted copyright over and regularly registered with the United States Copyright Office the amended editions and annual supplements of *CACI* and *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. That action was consistent with copyright law at the time. The publications, including the versions published on the court's website, contained copyright registration notices—for example, "© 2006." Similarly, public-facing draft instructions in reports to the council and in invitations to comment contained a footer that read, "Copyright Judicial Council of California" or some variation of that statement.

Following the United States Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* (*Georgia*),² Public.Resource.Org, Inc. (Public.Resource) asked the council to amend rule 2.1050, and to make corresponding changes to its jury instructions publications and associated California Courts web pages to clarify that the jury instructions are in the public domain and that the council does not assert copyright in those materials. Public.Resource requested these changes because it concluded that the jury instructions are not eligible for copyright protection under

¹ Judicial Council of Cal., Staff Rep., *Judicial Council Jury Instructions (amend Cal. Rules of Court, rules 229 and 855, repeal Cal. Stds. Jud. Admin., § 5* (Aug. 26, 2005), pp. 1–5, www.courts.ca.gov/documents/min082605.pdf. The council at the same time reaffirmed that it intended its jury instructions be freely available for use and reproduction by parties, attorneys, and the public, except as otherwise limited by the rules, and expanded subdivision (e) to include criminal jury instructions.

² (2020) __ U.S. __ [140 S.Ct. 1498, 206 L.Ed.2d 732].

Georgia.³ In June 2021, relying on the *Georgia* decision, the Copyright Office declined to register the May 2019 Supplement to *CACI*.

During the period the council expressly had claimed copyright in the jury instructions, the council simultaneously made the instructions freely available for use and reproduction by parties, attorneys, and the public by providing a broad public license for such use and reproduction. Under the rule, commercial publishers were treated differently from parties, attorneys, the public, and non-commercial publishers. Because the council has ceased registering a copyright in *CACI* and *CALCRIM*, the committee recommends that the rule now treat all publishers similarly. The committee believes it is appropriate to expand the provision in the rule that allows the council to contract with an official publisher to include contracting with other publishers, and to state a policy declaring the council's interest in maintaining the integrity of the jury instructions.

In subdivision (c), Public access, the proposal removes the entirety of the language concerning commercial publishers, and any implicit references to copyright, including “permission to publish” and “royalties.” The rule maintains the commitment to free public access for the jury instructions, including the council's continued provision of copies and updates of the approved jury instructions on the court's public website. The substance concerning publication of the instructions would be relocated to a new subdivision.

In new subdivision (d), Publication, the proposal expresses the council's intent to enter into agreements to publish with an official publisher and other publishers. Subdivision (d) maintains much of the substance of the current rule as it relates to protecting the integrity of the council's jury instructions. The council has an ongoing interest in publishers accurately publishing the instructions, accurately crediting the Judicial Council as the source of the instructions, and publishers not falsely claiming copyright in *CACI* and *CALCRIM*.

Subdivision (e), Updating and revisions, would also be clarified to reflect existing practice relating to consideration of suggestions for changes to the jury instructions. Law students, self-represented litigants, appellate justices, business entities, and nonprofits—to name just a few—submit proposals on jury instructions, and any proposal submitted is considered by the appropriate advisory committee on jury instructions. The current provision provides that trial judges and attorneys may submit proposals to the Legal Services office of the Judicial Council. The advisory committees, however, consider submissions on jury instruction content from anyone with a comment relevant to the jury instructions, not just trial judges and attorneys.

Policy implications

Any policy implications are the result of an expansion of the government edicts doctrine under federal copyright law. This proposal does not alter the council's commitment to creating accurate

³ The Court in *Georgia* held that, under the government edicts doctrine, annotations beneath the statutory provisions in the *Official Code of Georgia Annotated* are ineligible for copyright protection. (*Georgia, supra*, 140 S.Ct. at pp. 1503–1504.) Under the government edicts doctrine, “copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.” (*Id.* at p. 1508.)

and clear jury instructions stated in plain English in an attempt to clarify the legal principles jurors must consider in reaching their decisions.

Comments

The proposal was circulated for public comment in the winter 2023 invitation-to-comment period—from December 14, 2022, to January 20, 2023. One commenter, Public.Resource, responded. Public.Resource agreed with the proposal and suggested no modifications.

A chart setting forth the comment and committee’s response is included at pages 7–9.

Alternatives considered

The Rules Committee considered the changes to rule 2.1050 suggested by the nonprofit organization Public.Resource to declare the jury instructions “in the public domain” and that the council does not claim copyright in them. The committee decided it was not necessary to make those declarations. Rule 2.1050(c) already states that the Judicial Council intends that the instructions be freely available for use and reproduction. In addition, the committee concluded that it is preferable to retain the language relating to accuracy and attribution. Even without copyright protections, the council has a significant interest in protecting the integrity of its jury instructions.

Fiscal and Operational Impacts

Operational impacts to the council from this rule amendment are expected to be minimal. Any fiscal impacts would not be from the proposed amendment but from no longer asserting copyright in the instructions, and even those effects are uncertain. Publishers who contract with the Judicial Council to publish jury instructions pay fees to the council. By statute, monies received from jury instruction publishers must be used “for the improvement of the jury system.”⁴ The committee believes the council’s jury instructions have significant value, even without copyright protections. It is possible, however, that revenues will decrease over time as more copies of the jury instructions become available.

Attachments and Links

1. Cal. Rules of Court, rule 2.1050, at pages 5–6
2. Chart of comments, at pages 7–9

⁴ Gov. Code, § 77209(h).

Rule 2.1050 of the California Rules of Court is amended, effective April 1, 2023, to read:

Rule 2.1050. Judicial Council jury instructions

~~(a)–(b)~~ * * *

(c) Public access

The Judicial Council must provide copies and updates of the approved jury instructions to the public on the California Courts website. ~~The 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 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 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) Publication

The Judicial Council may contract with an official publisher and other publishers to publish the instructions in both paper and electronic formats. The Judicial Council may take appropriate actions to maintain the integrity of the jury instructions, including, without limitation, ensuring that publishers accurately publish the Judicial Council’s instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright in the instructions.

(d)(e) Updating and ~~amendments~~ revisions

The Judicial Council instructions will be regularly updated and maintained through its advisory committees on jury instructions. ~~Amendments~~ Revisions 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,~~ Suggestions for revising an instruction or creating new instructions may be submitted in writing, with an explanation of why the change is proposed. ~~Suggestions should be sent to the Judicial Council of California, Legal Services.~~

1 **(e)(f) Use of instructions**

2
3 Use of the Judicial Council instructions is strongly encouraged. If the latest edition
4 of the jury instructions approved by the Judicial Council contains an instruction
5 applicable to a case and the trial judge determines that the jury should be instructed
6 on the subject, it is recommended that the judge use the Judicial Council instruction
7 unless ~~he or she~~ the judge finds that a different instruction would more accurately
8 state the law and be understood by jurors. Whenever the latest edition of the
9 Judicial Council jury instructions does not contain an instruction on a subject on
10 which the trial judge determines that the jury should be instructed, or when a
11 Judicial Council instruction cannot be modified to submit the issue properly, the
12 instruction given on that subject should be accurate, brief, understandable,
13 impartial, and free from argument.

W23-11

Jury Instructions: Public Access and Publication (Revise Cal. Rules of Court, rule 2.1050)

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

	Commenter	Position	Comment	Committee Response
1.	Public.Resource.Org, Inc. by Jennifer M. Urban Clinical Professor Samuelson Law, Technology & Public Policy Clinic University of California, Berkeley School of Law	A	Public.Resource.Org (“Public Resource”) writes to convey its strong support of the Rules Committee’s proposed revisions to California Rules of Court, rule 2.1050, set forth in Invitation to Comment W23-11 (“Invitation to Comment”). In November of 2020, Public Resource respectfully requested that the Judicial Council of California (“JCC”) revise rule 2.1050, consistent with federal copyright law, to clarify that the California Civil Jury Instructions (“CACI”) and the California Criminal Jury Instructions (“CALCRIM”) (collectively, the “Jury Instructions”) are in the public domain. Public Resource also respectfully requested that the JCC make the corresponding change of removing all copyright claims and notices from CACI, from CALCRIM, and from related web pages on the Judicial Branch web site. Public Resource submitted its proposal together with letters and statements of support from: • 11 public interest organizations that seek to improve public access to the law: Electronic Frontier Foundation, Fix the Court, Public Citizen, First Amendment Coalition, Public Knowledge, Free Law Project, Creative Commons, American Civil Liberties Union Found. of Northern California, American Civil Liberties Union Found. of San Diego & Imperial Counties, American Civil Liberties Union Found. of Southern California, and the Wikimedia Foundation; • The Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project; • 338 law professors, law librarians, and legal practitioners, the East Bay Community Law Center, and the San Francisco Public Defender’s Office; • 120 law students, and 12 California law student organizations: Berkeley Law Wage Justice Clinic, Berkeley Journal of Gender, Law & Justice, Berkeley Technology Law Journal, Hastings Law Journal, Intellectual Property and Technology Law Journal, King Hall Intellectual Property Law Association, Law and Political	The committee thanks the commenter for its input.

Jury Instructions: Public Access and Publication (Revise Cal. Rules of Court, rule 2.1050)

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	Commenter	Position	Comment	Committee Response
			Economy Society, Law Students of African Descent, Middle Eastern & North African Law Students Association, Post-Conviction Advocacy Project, Pilipinx American Law Society, Public Interest Law & Technology; and • Edward H. Schulman, a former Chief Assistant State Public Defender and member of the CALJIC Committee in Los Angeles from 1985-89. Public Resource applauds the Rules Committee’s proposed changes to rule 2.1050 and its continued commitment to making the Jury Instructions freely [available] to the public. As noted in the Invitation to Comment, the proposed changes eliminate portions of rule 2.1050, subdivision (c) that implicitly referred to copyright protection, and “recommit[] to free public access for the jury instructions, including the council’s continued provision of copies and updates of the approved jury instructions on the court’s public website.” The proposed changes to rule 2.1050 would more fully realize California’s longstanding and ongoing efforts to increase Californians’ access to the law. California has set an impressive and important precedent by rendering its Jury Instructions in “plain English.” (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix.) The JCC took this approach explicitly to increase access to the law for jurors. (See Judicial Council of Cal., Civil Jury Instructions (2020) p. xxiii.) The JCC additionally worked to increase public access to the law by posting the Jury Instructions on the Judicial Branch web site. (Cal. Rules of Court, rule 2.1050, subd. (c).) The proposed changes to rule 2.1050 would further these efforts by bringing California’s Jury Instructions in line with federal copyright law, and specifically with the United States Supreme Court’s decision in <i>Georgia v. Public.Resource.Org, Inc.</i> that, under the government edicts doctrine, government officials cannot author, and therefore cannot copyright, works they create in carrying out their official duties. ((2020) 140 S.Ct. 1498, 1504.)	

W23-11

Jury Instructions: Public Access and Publication (Revise Cal. Rules of Court, rule 2.1050)

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	Commenter	Position	Comment	Committee Response
			Public Resource thanks the Rules Committee and the JCC for its careful work to correct this oversight. The government edicts doctrine, at heart, ensures access to the law. And access to the law is fundamental to California’s administration of justice. “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.” (Cal. Const. art. I, § 7, subd. (a).) Accordingly, “ ‘All are entitled to be informed as to what the State commands or forbids.’ ” (<i>People ex rel. Gallo v. Acuna</i> (1997) 14 Cal.4th 1090, 1115, quoting <i>Lanzetta v. New Jersey</i> (1939) 306 U.S. 451, 453.) Because “ ‘[e]very citizen is presumed to know the law,’ ” “ ‘it needs no argument to show . . . that all should have free access’ ” to its contents. (<i>Georgia, supra</i>, 140 S.Ct. at p. 1507, quoting <i>Nash v. Lathrop</i> (1886) 142 Mass. 29, 35.) Jury instructions in particular “are important because together they state the law that [jurors] will use.” (CACI No. 5000.) Providing the law and legal materials for viewing alone is inadequate. (See <i>Building Officials & Code Adm. v. Code Technology, Inc.</i> (1st Cir. 1980) 628 F.2d 730, 736 [stating that the right to freely access the law includes “a necessary right freely to copy and circulate all or part of a given law for various purposes”].) The proposed changes are thus essential to complying with federal copyright law, to serving the goals of the JCC, and to protecting public access to the law. Public Resource supports them fully.	