



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 21, 2018

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Title	Agenda Item Type
Criminal Procedure: Determination of Probable Cause Under Penal Code Section 1368.1(a)(2)	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 4.131	January 1, 2019
Recommended by	Date of Report
Criminal Law Advisory Committee Hon. Tricia Ann Bigelow, Chair	August 10, 2018
	Contact
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### **Executive Summary**

The Criminal Law Advisory Committee recommends that the Judicial Council adopt rule 4.131 of the California Rules of Court to implement recent legislation which allows a prosecuting attorney to request a probable cause determination for a defendant who is incompetent to stand trial in order to meet criteria needed to establish a conservatorship over a defendant. The new rule would establish procedures for these determinations of probable cause.

### **Recommendation**

The Criminal Law Advisory Committee recommends that the Judicial Council adopt California Rules of Court, rule 4.131, effective January 1, 2019, to establish procedures for determinations of probable cause under Penal Code section 1368.1(a)(2).

The text of the proposed rule is attached at page 4.

### **Relevant Previous Council Action**

The Judicial Council has taken no previous action to implement this legislation.

## **Analysis/Rationale**

Senate Bill 684 (Bates; Stats. 2017, ch. 246), effective January 1, 2018, amended Penal Code section 1368.1(a)(2) to allow a prosecuting attorney to request a probable cause determination for a defendant who is incompetent to stand trial, if the complaint charges specified offenses and the probable cause determination is sought “solely for the purpose of establishing the defendant is gravely disabled” under Welfare and Institutions Code section 5008(h)(1)(B), commonly referred to as a Murphy conservatorship.

This proposal would add a rule of court addressing procedures for probable cause determinations under Penal Code section 1368.1(a)(2). The statute states that the probable cause determinations are to be conducted “pursuant to procedures approved by the court” and that, “[i]n making this determination, the court shall consider using procedures consistent with the manner in which a preliminary examination is conducted.”

The proposed rule includes the following procedural requirements:

- The prosecuting attorney must serve and file notice of a request for a determination of probable cause at least 10 court days before the hearing;
- A judge must hear the determination of probable cause unless there is a stipulation by both parties to having the matter heard by a subordinate judicial officer;
- A defendant need not be present;
- The one-session requirement of Penal Code section 861 does not apply; and
- Transcripts must be provided in the same manner as they are for preliminary examinations.

## **Policy implications**

The committee considered how best to implement the new legislation and provide appropriate guidance to courts with respect to notice and transcript preparation requirements.

## **Comments**

This proposal circulated for public comment during the spring 2018 cycle. A total of two comments were received. The Superior Court of San Diego County and the Orange County Bar Association both agreed with the proposal. A chart with all comments received and the committee’s responses is attached at page 5.

## **Alternatives considered**

The committee alternatively considered additional provisions for the proposed rule, but determined that the current, limited proposal would provide appropriate guidance to the courts and justice system partners.

## **Fiscal and Operational Impacts**

No implementation requirements, costs, or operational impacts are expected. The proposal is intended to mitigate the court's workload by providing guidance and parameters for procedures for determinations of probable cause.

## **Attachments and Links**

1. Cal. Rules of Court, rule 4.131, at page 4
2. Chart of comments, at page 5
3. Link A: Senate Bill 684 (Stats. 2017, ch. 246),  
[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB684](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB684)

Rule 4.131 of the California Rules of Court is adopted, effective January 1, 2019, to read:

1 **Rule 4.131. Probable cause determinations under section 1368.1(a)(2)**

2  
3 **(a) Notice of a request for a determination of probable cause**

4  
5 The prosecuting attorney must serve and file notice of a request for a determination  
6 of probable cause on the defense at least 10 court days before the time appointed  
7 for the proceeding.

8  
9 **(b) Judge requirement**

10  
11 A judge must hear the determination of probable cause unless there is a stipulation  
12 by both parties to having the matter heard by a subordinate judicial officer.

13  
14 **(c) Defendant need not be present**

15  
16 A defendant need not be present for a determination of probable cause to proceed.

17  
18 **(d) Application of section 861**

19  
20 The one-session requirement of section 861 does not apply.

21  
22 **(e) Transcript**

23  
24 A transcript of the determination of probable cause must be provided to the  
25 prosecuting attorney and counsel for the defendant consistent with the manner in  
26 which a transcript is provided in a preliminary examination.

**SPR18-17****Criminal Procedure: Determination of Probable Cause Under Penal Code section 1368.1(a)(2)**

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association By: Nikki P. Miliband President	A		No response required.
2.	Superior Court of San Diego County By: Mike Roddy Executive Officer	A		No response required.