



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 22-001*

For business meeting on: March 11, 2022

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**Title**

Judicial Council–Sponsored Legislation:  
Authorization for Remote Appearances and  
Expansion of Defendant Personal Presence  
Provisions in Criminal Proceedings

**Rules, Forms, Standards, or Statutes Affected**

Amend Pen. Code, §§ 977, 1043, 1043.5,  
1148, and 1193; enact Pen. Code, § 977.3

**Recommended by**

Legislation Committee  
Hon. Marla O. Anderson, Chair

Criminal Law Advisory Committee

Hon. Brian M. Hoffstadt, Chair

**Agenda Item Type**

Action Required

**Effective Date**

January 1, 2023

**Date of Report**

February 25, 2022

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### Executive Summary

The Legislation Committee and the Criminal Law Advisory Committee (CLAC) recommend that the Judicial Council sponsor legislation to amend Penal Code sections 977, 1043, 1043.5, 1148, and 1193, and to enact Penal Code section 977.3. The proposed legislation would provide statutory authority for remote criminal proceedings, provide statutory authority for courts to order the physical presence of a misdemeanor defendant, and expand a defendant's right to waive their physical and remote presence in a felony case.

### Recommendation

The Legislation Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code sections 977, 1043, 1043.5, 1148, and 1193, and to enact Penal Code section 977.3. The new statute would provide authority for remote criminal proceedings; the amendments would authorize courts to order the physical presence of a

misdemeanor defendant, and would expand a defendant’s right to waive their physical and remote presence in a felony case.

## **Relevant Previous Council Action**

In 2014, the Commission on the Future of California’s Court System (Futures Commission) was formed. Its primary purpose was to study and recommend to the Chief Justice initiatives to serve the public effectively and efficiently by enhancing access to justice. The Futures Commission released its final report in 2017 and noted that, “the option to attend court proceedings remotely should ultimately be available for all noncriminal case types and appearances, and for all witnesses, parties, and attorneys in courts across the state.”<sup>1</sup>

In 2018, in response to the Futures Commission recommendation on remote proceedings in noncriminal cases, the Information Technology Advisory Committee (ITAC) formed the Remote Video Appearances Workstream (the workstream), which analyzed the state of video and digital appearances in California courts, and made recommendations to “broaden the adoption of this emerging model for court appearances.”<sup>2</sup> The workstream made several recommendations to develop legislative and rule proposals that would facilitate the use of video appearances in most civil proceedings. Following the workstream’s report, the Civil and Small Claims Advisory Committee, Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, and ITAC formed a joint ad hoc subcommittee to move forward with development of legislative and rule proposals. In the spring of 2020, these advisory committees circulated for public comment a proposal to sponsor legislation for courts to permit remote video appearances in any civil action or proceeding, including trials and evidentiary hearings.<sup>3</sup>

Also, in the Spring of 2020, in response to the COVID-19 pandemic, the Judicial Council adopted emergency rule 3, Use of technology for remote appearances, and emergency rule 5, Personal appearance waivers of defendants during health emergency. These emergency rules permit a defendant in a criminal proceeding to waive their personal appearance and appear remotely or to permit counsel to appear on the defendant’s behalf. In light of the emergency rules, the Judicial Council adopted as one of its key legislative priorities for 2021 the continued sponsorship and support of legislation to improve judicial branch operational efficiencies. These efficiencies included cost-savings and cost-recovery measures as well as the ability to conduct proceedings remotely in order to expand safe and reliable access to justice.

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<sup>1</sup> Judicial Council of Cal., *Report to the Chief Justice: Commission on the Future of California’s Court System (2017)*, pp. 221–222, (Recommendation 5.1), available online at [www.courts.ca.gov/documents/futures-commission-final-report.pdf](http://www.courts.ca.gov/documents/futures-commission-final-report.pdf).

<sup>2</sup> Remote Video Appearances Workstream, *Remote Video Appearances for Most Noncriminal Hearings 2018–2019: Workstream Phase 1 Report, Final (Nov. 20, 2019)*, p. 3 (Workstream Report), available online at [www.courts.ca.gov/documents/jctc-20191125-materials.pdf](http://www.courts.ca.gov/documents/jctc-20191125-materials.pdf).

<sup>3</sup> Invitation to Comment, LEG20-02, *Proposal for Judicial Council–Sponsored Legislation: Remote Video Appearances in All Civil Actions and Proceedings*, available online at <http://www.courts.ca.gov/documents/leg20-02.pdf>.

In line with these priorities, the council sought trailer bill language in the 2021–2022 budget to allow continued use of remote technology in civil proceedings. Negotiations ultimately resulted in the passage of Senate Bill 241 (Umberg; Stats. 2021, ch. 214) and accompanying budget trailer bill language contained in Assembly Bill 177 (Ting; Stats. 2021, ch. 257).

SB 241 enacted the “2021 California Court Efficiency Act,” which, among other things, authorizes the use of remote technology in civil proceedings until July 1, 2023. The remote technology provision of the bill authorizes, in civil cases where a party has provided notice they intend to appear remotely, a party to appear remotely and the court to conduct conferences, hearings, and proceedings, in whole or in part, through the use of remote technology.

AB 177 requires the Judicial Council, by January 1, 2023, to submit a report to the Legislature and the Governor on the use of remote technology in civil actions by the trial courts, and requires the Judicial Council to convene a working group for the purpose of recommending a statewide framework for remote civil court proceedings that addresses equal and fair access to justice.

### **Analysis/Rationale**

Guided by the Judicial Council’s legislative priorities and lessons learned from the COVID-19 pandemic, the Criminal Law Advisory Committee developed this proposal as a companion to the civil remote proceeding legislative proposal. The proposal provides statutory authority for remote criminal proceedings, for courts to order the physical presence of a misdemeanor defendant, and for defendants to waive the right to be physically or remotely present in a felony case.

After SB 241 and AB 177 were chaptered in September 2021, the Legislation Committee revised this proposal to be consistent with the framework and terminology in those bills. This included replacing references to “personal presence” or being “personally present” with references to a defendant’s physical or remote presence, referring to proceedings through the use of remote technology rather than remote appearances through the use of technology, and ensuring that the judge’s ability to order the physical presence of the defendant was consistent throughout the different provisions. These technical changes did not circulate for public comment. The statutory revisions recommended by CLAC are underlined or struck through in black, and the revisions incorporating the framework and terminology of SB 241 and AB 177 are highlighted on pages 6–12.

### **Policy implications**

This proposal supports the Judicial Council’s current legislative priority to continue to sponsor and support legislation to improve judicial branch operational efficiencies, including the ability to conduct proceedings remotely in order to expand safe and reliable access to justice. In

addition, the proposal supports the branch’s longstanding priority to increase public access to the courts.<sup>4</sup>

### **Comments**

This proposal circulated for comment from April 9, 2021, to May 21, 2021, and received six comments, which were submitted by the director of operations of a superior court, a county bar association, a public defender’s office, an individual public defender, an interpreter, and a member of the public. Two commenters agreed with the proposal, one agreed if modified, two did not agree, and one did not declare a position but appeared to agree with the proposal.

The commenter who agreed with the proposal if modified read the proposal as amending Penal Code section 977(b)(2) to permit a victim of crime to require a defendant to be physically present in court, noting that there is no such requirement in case law, statute, or a constitutional provision, including Marsy’s Law. The committee clarified that the proposed language does not require the court to order the defendant to be physically present upon request of a victim, but states that the court may do so upon request of the victim, to the extent required by section 28 of article I of the California Constitution.

A commenter who disagreed with the proposal stated that remote appearances did not further the interests of the accused, and did not think that requiring the defendant’s consent for a remote appearance was sufficient to override this concern. The committee disagreed, noting that in addition to requiring the defendant’s consent, most defendants are represented by counsel who can help determine whether a remote or physical appearance in a particular proceeding is in the best interests of the defendant. The commenter also stated that an effective cross-examination could not be achieved during a remote proceeding. The committee responded that section 977.3 would protect a defendant’s right to cross-examination by requiring the consent of the parties for any witness in a criminal proceeding to testify remotely, as well as require the defendant to make an informed waiver, on the record, of the right to have the witness testify in person. Finally, the commenter stated that allowing defense counsel to appear remotely could pit the client’s interests against defense counsel’s interests in arranging for multiple appearances in various courts in order to earn more income.

The committee disagreed that facilitating such conditional remote appearances by counsel in criminal matters would undermine the duty of loyalty. The committee noted that while it is conceivable that the provision might increase an individual attorney’s ability to make appearances in various geographic locations without having to take into account travel time and expenses (thus reducing the cost to the clients), it is not inconsistent with any rule of professional

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<sup>4</sup> In 2013, Chief Justice Tani G. Cantil-Sakauye proposed a framework to increase public access to the courts. Her vision, entitled Access 3D, combines strategies from the courts—actions that will ensure greater public access—with a reasonable reliance on funds reinvested into the judicial branch. The goals of Access 3D ensure that Californians have access to the justice system they expect and deserve. The three dimensions of Access 3D are: (1) improved physical access, by keeping courts open and operating during hours that benefit the public; (2) increased remote access, by increasing the ability of court users to conduct branch business online; and (3) enhanced equal access, by serving people of all languages, abilities, and needs, reflecting California’s diversity.

conduct. Additionally, because such appearances may be made only with the consent of the client and subject to court approval, the committee did not share the commenter's concern that authorized remote appearances by counsel will result in prejudice to a defendant.

The other commenter who disagreed with the proposal was concerned that inadequate equipment, poor internet connections, and lack of technical knowledge, among other things, would make the work of court interpreters and stenographers difficult or impossible to do if they could not clearly hear the proceedings. Similar to SB 241, the proposal includes a provision for the Judicial Council to adopt rules of court to implement the policies and provisions of this section, and CLAC plans to consider rules addressing technology standards, training, and guidance to courts on conducting proceedings with remote appearances, including defendants with limited English proficiency.

### **Alternatives considered**

CLAC discussed whether to revise section 977 to allow the court to exercise its discretion to order a remote appearance rather than rely on a defendant's consent. Though there was a measure of support for those changes, there was an overriding concern about opposition to remote appearances without the defendant's consent, and the committee ultimately decided to develop a proposal aimed at removing statutory barriers to the optional use of remote technology, with a defendant's consent, for a remote proceeding.

The committee discussed concerns that allowing prosecutors and defense attorneys to appear remotely could result in delayed resolution of cases, but ultimately decided that providing statutory authority for remote appearances by counsel when appropriate was a valuable procedural option.

### **Fiscal and Operational Impacts**

The proposal would provide courts with statutory authority to permit, but not require, remote proceedings through the use of technology. Courts that choose to allow remote proceedings through the use of technology would need to devote fiscal resources and modify existing operations to support such appearances. Specifically, implementing remote criminal proceedings would result in staff, training, equipment, and software costs. However, the transition to remote proceedings during the COVID-19 pandemic has already resulted in all 58 local superior courts being able to hold proceedings remotely in at least one case type, and 39 courts in most or all case types. Further, the option to conduct remote proceedings may help courts reduce case backlogs associated with the pandemic, resulting in fiscal and operational benefits.

### **Attachments and Links**

1. Pen. Code, §§ 977, 977.3, 1043, 1043.5, 1148, and 1193, at pages 6–12
2. Chart of comments, at pages 13–21

Sections 977, 1043, 1043.5, 1148, and 1193 of the Penal Code would be amended, and section 977.3 would be enacted, effective January 1, 2023, to read:

1 § 977.

2  
3 (a)

4  
5 (1) In all cases in which the accused is charged with a misdemeanor only, they  
6 may appear by counsel only, except as provided in paragraphs (2) and (3). If  
7 the accused agrees, the initial court appearance, arraignment, ~~and plea, and all~~  
8 other proceedings may be by video conducted remotely through the use of  
9 technology, as provided by subdivision (c). However, the court may  
10 specifically direct the defendant, either personally or through counsel, to be  
11 personally physically present at any particular proceeding or portion thereof.  
12

13 (2) If the accused is charged with a misdemeanor offense involving domestic  
14 violence, as defined in Section 6211 of the Family Code, or a misdemeanor  
15 violation of Section 273.6, the accused shall be present for arraignment and  
16 sentencing, and at any time during the proceedings when ordered by the court  
17 for the purpose of being informed of the conditions of a protective order  
18 issued pursuant to Section 136.2.

19  
20 (3) If the accused is charged with a misdemeanor offense involving driving under  
21 the influence, in an appropriate case, the court may order a defendant to be  
22 present for arraignment, at the time of plea, or at sentencing. For purposes of  
23 this paragraph, a misdemeanor offense involving driving under the influence  
24 shall include a misdemeanor violation of any of the following:

25  
26 (A) Subdivision (b) of Section 191.5.

27  
28 (B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

29  
30 (C) Section 23152 of the Vehicle Code.

31  
32 (D) Section 23153 of the Vehicle Code.

33  
34 (b)

35  
36 (1) Except as provided in subdivision (c), in all cases in which a felony is  
37 charged, the accused shall be personally physically present at the  
38 arraignment, at the time of plea, during the preliminary hearing, during those  
39 portions of the trial when evidence is taken before the trier of fact, and at the  
40 time of the imposition of sentence. The accused shall be personally  
41 physically or remotely present at all other proceedings unless they shall, with  
42 leave of court and with approval by defendant's counsel, execute in open

1 court, a written waiver of their right to be personally physically or remotely  
2 present, as provided by paragraph (2). If the accused agrees, the initial court  
3 appearance, arraignment, and plea appearances may be by video conducted  
4 remotely through the use of technology, as provided by subdivision (c).

- 5  
6 (2) The accused may execute a written waiver of his or her right to be personally  
7 present, approved by his or her counsel, and † The waiver of a defendant’s  
8 right to be personally physically or remotely present shall be may be in  
9 writing and filed with the court or, with the court’s consent, may be entered  
10 orally, either by the defendant or by the defendant’s counsel of record. A  
11 defendant’s oral waiver of the right to be personally physically or remotely  
12 present shall be on the record and state that the defendant has been advised of  
13 the right to be personally physically or remotely present for the hearing at  
14 issue and agrees that notice to the attorney that the defendant’s physical or  
15 remote presence in court at a future date and time is required is notice to the  
16 defendant of that requirement. A waiver of the defendant’s physical or  
17 remote presence may be entered by counsel, after counsel has stated on the  
18 record that the defendant has been advised of the right to be personally  
19 physically or remotely present for the hearing at issue, has voluntarily waived  
20 that right, and agrees that notice to the attorney that the defendant’s physical  
21 or remote presence in court at a future date and time is required is notice to  
22 the defendant of that requirement. However, the court may specifically direct  
23 the defendant, either personally or through counsel, to be personally  
24 physically or remotely present at any particular proceeding or portion thereof,  
25 including upon request of a victim, to the extent required by Section 28 of  
26 Article I of the California Constitution. The A written waiver of the  
27 defendant’s personal physical or remote presence shall be substantially in the  
28 following form:

29  
30 “Waiver of Defendant’s Personal Physical or Remote Presence”

31  
32 “The undersigned defendant, having been advised of their right to be present  
33 at all stages of the proceedings, including, but not limited to, presentation of  
34 and arguments on questions of fact and law, and to be confronted by and  
35 cross-examine all witnesses, hereby waives the right to be physically or  
36 remotely present at the hearing of any motion or other proceeding in this  
37 cause. The undersigned defendant hereby requests the court to proceed during  
38 every absence of the defendant that the court may permit pursuant to this  
39 waiver, and hereby agrees that their interest is represented at all times by the  
40 presence of their attorney the same as if the defendant were personally  
41 physically or remotely present in court, and further agrees that notice to his or  
42 her attorney that his or her physical or remote presence in court on a

1 particular day at a particular time is required is notice to the defendant of the  
2 requirement of their physical or remote appearance at that time and place.”

3  
4 (c)

5  
6 (1) 977(c)(1): If the accused agrees, ~~The court may~~ conduct ~~permit~~ the initial  
7 court appearance, and arraignment of defendants held in any state, county, or  
8 local facility within the county on felony or misdemeanor charges, except for  
9 those defendants who were indicted by a grand jury, remote appearances  
10 proceedings to be conducted by two-way electronic audiovideo  
11 communication through the use of remote technology between the defendant  
12 and the courtroom in lieu of the physical presence of the defendant in the  
13 courtroom. If the defendant is represented by counsel, the attorney shall be  
14 present with the defendant at the initial court appearance and arraignment,  
15 and may enter a plea during the arraignment. However, if the defendant is  
16 represented by counsel at an arraignment on an information in a felony case,  
17 and if the defendant does not plead guilty or nolo contendere to any charge,  
18 the attorney shall be present with the defendant or if the attorney is not  
19 present with the defendant, the attorney shall be present in court during the  
20 hearing. The court may specifically direct the defendant, either personally or  
21 through counsel, to be physically present at any particular proceeding or  
22 portion thereof. If the defendant is represented by counsel, the attorney shall  
23 not be required to be personally-physically present with the defendant if the  
24 remote technology allows for private communication between the defendant  
25 and the attorney, unless, upon request of defense counsel, the court allows the  
26 appearance without private communication. The defendant shall have the  
27 right to make their plea while physically present in the courtroom if they  
28 request to do so. If the defendant decides not to exercise the right to be  
29 physically present in the courtroom they shall ~~execute a written~~ waiver of that  
30 right. A judge may order a defendant’s personal appearance in court for the  
31 initial court appearance and arraignment. In a misdemeanor case, a judge  
32 may, pursuant to this subdivision, accept a plea of guilty or no contest from a  
33 defendant who is not physically in the courtroom. In a felony case, a judge  
34 may, pursuant to this subdivision, accept a plea of guilty or no contest from a  
35 defendant who is not physically in the courtroom if the parties stipulate  
36 thereto.

37  
38 (2)

39  
40 (A) A defendant who does not wish to be personally physically or remotely  
41 present for noncritical portions of the trial when no testimonial  
42 evidence is taken may make an oral waiver in open court prior to the  
43 proceeding, or may submit a written request to the court, which the



1 court may grant in its discretion. The court may, when a defendant has  
2 waived the right to be personally physically or remotely present,  
3 require a defendant ~~held in any state, county, or local facility within the~~  
4 ~~county or~~ with pending felony or misdemeanor charges to be present  
5 for noncritical portions of the trial when no testimonial evidence is  
6 taken, including, but not limited to, confirmation of the preliminary  
7 hearing, status conferences, trial readiness conferences, discovery  
8 motions, receipt of records, the setting of the trial date, a motion to  
9 vacate the trial date, and motions in limine, ~~by two-way electronic~~  
10 ~~audiovideo communication~~ remote appearance through the use of  
11 remote technology between the defendant and the courtroom in lieu of  
12 requiring the physical presence of the defendant and counsel for the  
13 parties in the courtroom. If the defendant is represented by counsel, the  
14 attorney shall not be required to be personally physically present with  
15 the defendant for noncritical portions of the trial, if the ~~audiovideo~~  
16 ~~conferencing system or other~~ remote technology allows for private  
17 communication between the defendant and the attorney prior to and  
18 during the noncritical portion of trial. Any private communication shall  
19 be confidential and privileged pursuant to Section 952 of the Evidence  
20 Code.

21  
22 (B) This paragraph does not expand or limit the right of a defendant to be  
23 personally present with their counsel at a particular proceeding as  
24 required by Section 15 of Article 1 of the California Constitution.

25  
26 (d) \* \* \*

27  
28  
29 (e)

30  
31 A court may, as appropriate and practicable, allow a prosecuting attorney or  
32 defense counsel to participate in a criminal proceeding through the use of remote  
33 technology, without being physically present in the courtroom.

34  
35 (f)

36  
37 Consistent with its constitutional rule making authority, the Judicial Council may  
38 adopt rules of court to implement the policies and provisions of this section.

39  
40 § 977.3.

41  
42 (a)

43

1 A witness in a criminal proceeding may testify in a hearing or trial remotely  
2 through the use of remote technology with the written or oral consent of the parties,  
3 on the record, and the agreement of the court. The defendant must make an  
4 informed waiver, on the record, of the right to have the witness testify in person.

5  
6 **(b)**

7  
8 Consistent with its constitutional rule making authority, the Judicial Council may  
9 adopt rules of court to implement the policies and provisions of this section.

10  
11 **§ 1043.**

12  
13 **(a)–(d)** \* \* \*

14  
15 **(e)**

16  
17 If the defendant in a misdemeanor case fails to appear in person or to appear  
18 remotely through the use of remote technology in accordance with Section 977 at  
19 the time set for trial or during the course of trial, the court shall proceed with the  
20 trial, unless good cause for a continuance exists, if the defendant has authorized  
21 their counsel to proceed in their absence pursuant to subdivision (a) of Section 977.

22  
23 If there is no authorization pursuant to subdivision (a) of Section 977 and if the  
24 defendant fails to appear in person at the time set for trial or during the course of  
25 trial, the court, in its discretion, may do one or more of the following, as it deems  
26 appropriate:

- 27  
28 (1) Continue the matter.  
29 (2) Order bail forfeited or revoke release on the defendant's own recognizance.  
30 (3) Issue a bench warrant.  
31 (4) Proceed with the trial in the defendant's absence as authorized in subdivision  
32 (f).

33  
34 **(f)–(g)** \* \* \*

35  
36 **§ 1043.5.**

37  
38 **(a)–(c)** \* \* \*

39  
40 **(d)**

1 Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to  
2 be physically present or to appear through the use of remote technology in  
3 accordance with Section 977.

4  
5 (e) \* \* \*

6  
7 **§ 1148.**

8  
9 If charged with a felony the defendant must, before the verdict is received, appear in  
10 person or appear remotely through the use of remote technology in accordance with  
11 Section 977, unless, after the exercise of reasonable diligence to procure the presence of  
12 the defendant, the court shall find that it will be in the interest of justice that the verdict  
13 be received in his absence. If for a misdemeanor, the verdict may be rendered in his  
14 absence.

15  
16 **§ 1193.**

17  
18 Judgment upon persons convicted of commission of crime shall be pronounced as  
19 follows:

20  
21 (a)

22  
23 If the conviction is for a felony, the defendant shall be personally physically  
24 present or appear remotely through the use of remote technology in accordance  
25 with Section 977 when judgment is pronounced against him or her, unless the  
26 defendant, in open court and on the record, or in a notarized writing, requests that  
27 judgment be pronounced against him or her in his or her absence, and that he or she  
28 be represented by an attorney when judgment is pronounced, and the court  
29 approves his or her absence during the pronouncement of judgment, or unless, after  
30 the exercise of reasonable diligence to procure the presence of the defendant, the  
31 court shall find that it will be in the interest of justice that judgment be pronounced  
32 in his or her absence; provided, that when any judgment imposing the death penalty  
33 has been affirmed by the appellate court, sentence may be reimposed upon the  
34 defendant in his or her absence by the court from which the appeal was taken, and  
35 in the following manner: upon receipt by the superior court from which the appeal  
36 is taken of the certificate of the appellate court affirming the judgment, the judge of  
37 the superior court shall forthwith make and cause to be entered an order  
38 pronouncing sentence against the defendant, and a warrant signed by the judge, and  
39 attested by the clerk under the seal of the court, shall be drawn, and it shall state the  
40 conviction and judgment and appoint a day upon which the judgment shall be  
41 executed, which shall not be less than 60 days nor more than 90 days from the time  
42 of making the order; and that, within five days thereafter, a certified copy of the  
43 order, attested by the clerk under the seal of the court, and attached to the warrant,

1 shall, for the purpose of execution, be transmitted by registered mail to the warden  
2 of the state prison having the custody of the defendant and certified copies thereof  
3 shall be transmitted by registered mail to the Governor; and provided further, that  
4 when any judgment imposing the death penalty has been affirmed and sentence has  
5 been reimposed as above provided there shall be no appeal from the order fixing  
6 the time for and directing the execution of the judgment as herein provided. If a pro  
7 se defendant requests that judgment in a noncapital case be pronounced against him  
8 or her in his or her absence, the court shall appoint an attorney to represent the  
9 defendant in the in absentia sentencing.

10  
11 **(b)**

12  
13 If the conviction be of a misdemeanor, judgment may be pronounced against the  
14 defendant in his absence.  
15

DRAFT

**LEG21-01**

**Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings** (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Craig Downing Director of Operations Superior Court of Fresno County	NI	I reviewed the sponsor legislation for remote appearances and it addresses criminal law; however, traffic infraction cases fall under Title 4: Criminal Rules. With the JC sponsoring legislation to embrace remote appearances in criminal proceedings, is the traffic advisory group going to amend the rule of court for remote appearances in traffic Rule 4.220(a) and 4.220(d)(3) to mirror the language in the attached proposal.	The Traffic Advisory Committee is currently examining how the rule should be changed in light of Penal Code section 1428.5, new legislation authorizing remote proceedings in infraction cases (Assembly Bill 143 (Stats. 2021, ch. 70)).
2.	Orange County Bar Association by Larisa Dinsmoor President	AM	<p>Leg 21-01 expands the law surrounding remote appearances through the use of technology. The changes are appropriate and permit expanded access through Penal Code 977 appearances via technology.</p> <p>The one issue appears in Section 977(b)(2), which permits a victim of a crime to require that a defendant be present in court. There is no such requirement in Marsy’s Law, and this portion does not appear to be based upon any case law, statute, or constitutional provision.</p> <p>However, the court may specifically direct the defendant, either personally</p>	The recommended language does not require the court to order the defendant to be physically present upon request of a victim. It states that the court may do so upon request of the victim.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

**LEG21-01**

**Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings** (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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

	Commenter	Position	Comment	Committee Response
			<p>or through counsel, to be personally present at any particular proceeding or portion thereof, <del>including upon request of a victim, to the extent required by Section 28 of Article I of the California Constitution.</del></p>	
3.	San Diego County: Office of the Primary Public Defender by Jeremy Thornton Deputy Public Defender	N	<p>The California judiciary should protect the dignity of the accused and promote a robust attorney-client relationship – the LEG21-01 proposal does neither. Though well-intentioned, the proposed amendments to Penal Code sections, 977, 1043, 1043.5 and 1193, and the addition of Section 977.3 are ill-advised and should not be pursued.</p> <p>A. Remote appearances are dehumanizing and do not further the interests of the accused.</p> <p>The accused are routinely dehumanized in the criminal justice system. Prosecutors rarely refer to the accused by name, and instead identify them by the present charges and past convictions. One of the most important roles of a competent defense practitioner is to humanize the client. It is most difficult – and sometimes impossible – to do so when the client is reduced</p>	

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

**LEG21-01**

**Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings** (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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	Commenter	Position	Comment	Committee Response
			<p>to an image on a screen. Empathy and sympathy for the many struggles of the client is noticeably absent when the proceedings involve remote appearances.</p> <p>That the accused must consent to the remote appearance is of no consolation. If there is one common likeness between individuals within the criminal justice system, it is a history of trauma. A large majority of the individuals who are accused of criminal conduct have been subject to, either singularly or a combination of: abuse, neglect, violence, racism, or sexual assault and exploitation.</p> <p>This maltreatment leads these individuals to believe that they are of little to no value. They are told that they are a pariah, they view themselves as such, and they seek to minimize their perceived cost to others. The consequence of remote proceedings as a result of these mistaken – but internalized – beliefs: the individuals are content to watch court actors make weighty decisions about the individuals’ futures rather than participate in the decision-making process. In essence, court becomes a reality tv show, the ending of which is often a prison sentence for the viewer. By requiring</p>	<p>The proposal requires a defendant’s consent to appear remotely through the use of technology in a criminal proceeding and does not permit a remote appearance over a defendant’s objection. Further, most defendants are represented by counsel who can help determine whether a remote or physical personal appearance in a particular proceeding is in the best interests of the defendant.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

## LEG21-01

### Sponsored Legislation: Authorization for Remote Appearances and Expansion of Defendant Personal Presence Provisions in Criminal Proceedings (Amend Pen. Code, §§ 977, 1043, 1043.5, 1148, and 1193; enact Pen. Code, § 977.3)

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			<p>individuals to personally attend court, the courts convey a fundamental truth about the adjudication process: that the accused is a stake holder, has worth, and whose dignity must be respected.</p> <p>B. Effective advocacy cannot be achieved during a remote proceeding.</p> <p>An exacting cross-examination is necessary for effective advocacy; it is vital to the determination of credibility and reliability. This much was recognized by the United States Supreme Court: “Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”</p>	<p>The committee acknowledges the commenter’s concerns. However, section 977.3 would require the consent of the parties for any witness in a criminal proceeding to testify remotely, as well as require the defendant to make an informed waiver, on the record, of the right to have the witness testify physically in the courtroom. These requirements would protect the defendant’s right to cross-examination.</p>

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			<p>Confronting a witness with prior statements is a basic and fundamental component of cross-examination. More often than not, this is most effective with the visual component of defense counsel actually walking up to the witness and asking the witness to confront a prior inconsistent statement made by that witness. This is impossible when the witness is testifying by video. In this way, embracing a rule that permits witnesses to testify remotely will correspond to less-effective advocacy, which is antithetical to truth determination.</p> <p>C. Permitting defense counsel to appear remotely has the potential to undermine the duty of loyalty.</p> <p>Defense counsel cannot represent an individual if the representation will be materially limited because of the attorney’s own interest. The proposal implicates this particular rule section in two ways. First, it allows an attorney to appear for court without having to be personally present with the client. Second, it permits an attorney to appear remotely without being personally present in the courtroom.</p>	<p>The committee does not agree that allowing attorneys to appear remotely (with the consent of the defendant and subject to judicial approval) poses a danger of undermining the right to effective assistance of counsel. While the committee recognizes and agrees with the assertion that competent counsel must have the capacity to engage in confidential communication with a client during a hearing at which the defendant’s presence is required in order for the</p>

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			<p>The right to counsel includes the ability to confer with counsel during the proceedings. Competent defense counsel often speak with clients during proceedings and answer any questions that clients may have. An attorney cannot effectively do that while not standing or sitting immediately next to the client.</p> <p>Though the proposal has obvious implications to the right to counsel, it can be argued that this defect is cured if the attorney first gets permission from the client – and this is why the proposal implicates the duty of loyalty. An attorney may prefer the comfort of the attorney’s office to the courtroom. In fact, for retained attorneys, remote appearances may even permit multiple appearances in various courts across counties; this means more income. A situation where the attorney considers the attorney’s own comfort or income, i.e., the attorney’s own interest, compromises the attorney’s sober judgment and can materially limit the representation.</p> <p>The COVID-19 public health crisis introduced an immediate need to conduct court proceedings in a manner where individuals were distanced from each other. There was a cost to this, but</p>	<p>right to counsel to be effectuated, the proposed provision does not foreclose the use of technology to allow for such communication, as needed. Additionally, the committee does not share the view that facilitating such conditional remote appearances by counsel in criminal matters undermines the duty of loyalty. While it is conceivable that the rule might increase an individual attorney’s ability to make appearances in various geographic locations without having to take into account travel time and expenses (thus reducing the cost to the clients), it is not inconsistent with any rule of professional conduct. And, because such appearances may be made only with the consent of the client and subject to court approval, the committee does not share the commenter’s concern that occasional authorized remote appearances by counsel will result in prejudice to a defendant.</p>

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			the cost was outweighed by the dangers of the novel virus. The emergency measures that were put in place should not become the new normal. Instead, as the danger subsides there should be a corresponding restoration of the rights of the accused. For the aforementioned reasons, we oppose the LEG21-01 proposal.	
4.	Jason Gundel Assistant Public Defender Imperial County Public Defender's Office El Centro, California	A		The committee appreciates the comment.
5.	Azucena Puerta-Diaz	N	My name is Azucena Puerta-Diaz, and I am a Spanish Interpreter with over 25 years of experience working in state and federal courts, attorneys' offices, hospitals, education, and local, state, national, and international conferences. I have an MA in Linguistics from the University of Southern California, and I am certified by the Judicial Council of California, the US District Courts, and the American Translators Association.  I object to the use of video remote in court proceedings when interpreter services are	

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			<p>required. My experience is that video remote has had many problems that interfere with the ability of LEP persons to fully participate in hearings. I request the Legislature to NOT adopt the trailer bill on remote hearings, but instead take time to speak with those of us working in the courts, so that we can share the many problems we have experienced during the Covid-19 Pandemic.</p> <p>Technology is not up to par with the court needs of anyone participating in the judicial process. Bad equipment, poor internet connections, lack of knowledge and/or improper use of technology, among other things, difficult and sometimes make impossible the work of court interpreters and stenographers, who cannot hear part of the proceedings. Add to that issues related to acoustic shock, mental fatigue, remote audiovisual processing, discourse practices, and forensic linguistics, and the services cannot be adequately provided.</p> <p>Special times call for special circumstances, and the unexpected court shutdowns imposed by the unprecedented pandemic forced us to adapt to make the best with what we had. However, we should not make permanent the bad practices</p>	<p>The proposal includes a provision for the Judicial Council to adopt rules of court to implement the policies and provisions of this section. The committee recommends these rules address technology standards, training, and guidance to courts on conducting proceedings with remote appearances, including defendants with limited English proficiency. The rulemaking process includes a public comment period.</p>

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## LEG21-01

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			that had to be implemented in an emergency. PLEASE DO NOT IMPLEMENT REMOTE INTERPRETING AS A STANDARD PRACTICE. IT DOES NOT WORK.	
6.	Kailin Wong Spanish Fork, UT	A	This will benefit all, should be implemented permanently.	The committee appreciates the comment.

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