



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27, 2015

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| Title   | Agenda Item Type  |
| Criminal and Traffic Procedure: Appearance in Court for Infractions Without Deposit of Bail | Action Required   |
| Rules, Forms, Standards, or Statutes Affected   | Effective Date  |
| Amend rule 4.105 of the California Rules of Court   | December 1, 2015  |
| Recommended by  | Contact   |
| Criminal Law Advisory Committee<br>Hon. Tricia Ann Bigelow, Chair                           | Arturo Castro, Supervising Attorney,<br>Criminal Justice Services, 415-865-7702<br><a href="mailto:arturo.castro@jud.ca.gov">arturo.castro@jud.ca.gov</a> |
| Traffic Advisory Committee<br>Hon. Mark S. Borrell, Chair                                   |   |

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### **Executive Summary**

The Criminal Law and Traffic Advisory Committees recommend amendments to rule 4.105 of the California Rules of Court to apply the rule to nontraffic infractions and to require courts to consider the totality of the circumstances when setting bail amounts before trial. The committees also recommend adding advisory committee comments to clarify the scope of the rule and explain that the totality of the circumstances may include whether the bail amount would impose an undue hardship on the defendant. The amendments were developed in response to recent Judicial Council directives to expand the application of the rule and promote access to justice in all infraction cases.

### **Recommendation**

The Criminal Law and Traffic Advisory Committees recommend that the Judicial Council, effective December 1, 2015, amend rule 4.105 to:

1. Apply the rule to nontraffic infractions by deleting various references to “traffic” and the “Vehicle Code”;
2. Add subdivision (c)(4) to require courts to consider the totality of the circumstances in determining the amount of any bail set before trial under subdivisions (c)(2) and (c)(3);
3. Add the following advisory committee comment to clarify the application of the rule under subdivision (a): “The rule does not apply to postconviction matters or cases in which the defendant seeks an appearance in court after a failure to appear or pay”;
4. Add to the advisory committee comment an explanation of the distinct statutory purposes and functions that bail and related considerations serve in infraction cases as distinguished from felony and misdemeanor cases;
5. Add the following citation to the advisory committee comment to provide examples of statutory alternatives to appearing for arraignment: “(See, e.g., Pen. Code, §§ 853.5, 853.6; Veh. Code, §§ 40510, 40512, and 40512.5 [authorizing defendants to post and forfeit bail in lieu of appearing for arraignment].)”;
6. Add to the advisory committee comment a statement that in considering the “totality of the circumstances” under new subdivision (c)(4), courts may consider “whether the bail amount would impose an undue hardship on the defendant”; and
7. Delete unnecessary references to the totality of the circumstances in light of the addition of those considerations under new subdivision (c)(4).

The text of the amended rule and advisory committee comment are attached at pages 6–7.

### **Previous Council Action**

Rule 4.105 was adopted by the Judicial Council effective June 8, 2015.

### **Rationale for Recommendation**

#### **Current rule**

Rule 4.105 was originally adopted in response to recent criticisms aimed at state traffic laws and trial court procedures for deposit of bail in traffic infraction cases. The purpose of the rule is to improve access to justice for defendants who appear in court as promised to challenge their traffic infraction citations. In short, the rule requires courts to allow traffic infraction defendants to appear as promised for arraignment and trial without prior deposit of bail, unless certain specified exceptions apply, and to require courts to notify defendants of the option to appear in court without deposit of bail in any instructions or other materials regarding bail provided by courts to the public.

When adopting the rule, the Judicial Council also directed the appropriate advisory committees to develop recommendations to expand the application of the rule to nontraffic infractions and to promote access to justice in all infraction cases. The recommended amendments were developed by the committees in response to the council's directives.

### **Proposed amendments**

The recommended amendments would expand application of the rule to nontraffic infractions and require courts to consider the totality of the circumstances when setting bail amounts before trial. To promote court consideration of financial hardships on defendants, the amendments would also add an advisory committee comment to explain that the totality of the circumstances may include "whether the amount of bail would cause an undue hardship on the defendant."

To clarify the scope of the rule, the amendments also add advisory committee comments to (1) explain that the rule "does not apply to postconviction matters or cases in which the defendant seeks an appearance in court after a failure to appear or pay," (2) provide more examples of statutory alternatives to appearances in court for arraignment, and (3) clarify that the rule takes into account the distinct statutory purposes and functions that bail and related considerations serve in infraction cases, as distinguished from felony and most misdemeanor cases.

Collectively, the amendments are designed to promote procedural fairness across all categories of infraction cases, reduce confusion about the application of the rule, and promote court consideration of the totality of the circumstances when determining bail amounts before trial, including any undue hardships on defendants.

### **Comments, Alternatives Considered, and Policy Implications**

Because of the significant concerns about defendants' access to courts in infraction cases and the related directives from the Judicial Council, the committees developed the proposed amendments on an expedited basis.

The proposed amendments circulated for public comment from August 20, 2015, to September 7, 2015. A total of 11 comments were received; of those, 1 agreed with the proposal, 2 agreed if modified, 2 disagreed, and 5 did not indicate a position. One comment did not specifically relate to the proposal and therefore the text of the comment is not included on the comment chart. A chart with the comments and committees' responses is attached at pages 8–24.

### **Internal reevaluation of undue hardship considerations**

Current subdivision (c)(3) authorizes courts to require deposit of bail before trial if the court determines that the defendant is unlikely to appear for trial as ordered without prior deposit of bail. To promote court consideration of financial hardships on defendants, the committees originally proposed amending subdivision (c)(3) to require courts to consider the "totality of the circumstances" when determining whether the defendant is unlikely to appear, and adding an

advisory committee comment to explain that the totality of the circumstances includes “whether compliance with the order setting bail would impose an undue hardship on the defendant.”

Upon internal reevaluation, however, the committees decided that the two considerations—the likelihood of appearing and undue hardships caused by bail—are inherently distinct and necessarily apply to *separate* determinations. Accordingly, the committees decided to shift court consideration of the totality of the circumstances, including undue hardships, from the determination about the likelihood of appearing to the determination of the appropriate *amount* of bail.

Specifically, the committees deleted the proposed references to “totality” and other “circumstances” in subdivision (c)(3) and the related advisory committee comment, and instead added the following as new subdivision (c)(4): “In determining the amount of bail set under (2) and (3), courts must consider the totality of the circumstances.” The committees also added the following corresponding advisory committee comment: “In considering the ‘totality of the circumstances’ under this subdivision, courts may consider whether the bail amount would impose an undue hardship on the defendant.”

### **Notable comments**

Notable comments and the committees’ response include:

- ***Atypical bail considerations.*** One commentator suggested that the rule’s proposed bail considerations are improper because they are not applicable in felony and misdemeanor cases and would create a “slippery slope” into those case types. The rule’s bail considerations, however, were developed in light of the unique nature and purposes of bail in infraction cases, as distinguished from felony and misdemeanor cases. To emphasize that the rule’s bail considerations, including considerations of undue hardships, reflect the distinct statutory functions of bail applicable *only* to infraction cases, the committees added the following advisory committee comment: “**Subdivision (c).** This subdivision takes into account the distinct statutory purposes and functions that bail and related considerations serve in infraction cases, including, for example, the posting and forfeiting of bail in uncontested cases and the use of bail to satisfy later judgments, as distinguished from felony and misdemeanor cases.”
- ***Delayed effective date.*** The committees originally proposed a November 1, 2015, effective date for the amended rule. The committees, however, agreed to delay the proposed effective date to December 1, 2015, as requested by the Trial Court Presiding Judges and Court Executives Advisory Committees’ Joint Rules Subcommittee to ensure sufficient time for courts to implement the changes.

### **Alternatives**

As explained in the advisory committee comments, the rule only applies to pretrial proceedings for infraction defendants who have appeared by the appearance date or an approved extension of

that date. Several commentators suggested that the scope of the rule should be extended to various other proceedings, including postconviction proceedings, administrative matters, and proceedings after the defendant has failed to appear or pay. Those proceedings, however, involve procedural requirements and other implications that are considerably distinct. The committees, therefore, declined the suggestions as exceeding the scope of the proposal, but will consider separate rule recommendations to address other proceedings.

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

No significant costs or operational impacts are anticipated. The rule is designed to ensure that infraction defendants have access to courts without prior deposit of bail unless limited exceptions apply; it is not intended to interfere with the various statutory alternatives to arraignments and formal appearances in court.

In addition, although the proposal sets forth additional considerations for courts, the committees believe that those considerations can be accomplished without significant interference with calendar management and any increased burdens are outweighed by the resulting procedural fairness.

### **Attachments**

1. Cal. Rules of Court, rule 4.105, at pages 6–7
2. Chart of comments, at pages 8–24

California Rules of Court, rule 4.105, would be amended, effective December 1, 2015, to read:

1 **Rule 4.105. Appearance without deposit of bail in ~~traffic~~ infraction cases**

2  
3 **(a) Application**

4  
5 This rule applies to any ~~traffic infraction violation of the Vehicle Code~~ for which  
6 the defendant has received a written notice to appear.

7  
8 **(b) Appearance without deposit of bail**

9  
10 Except as provided in (c), courts must allow a defendant to appear for arraignment  
11 and trial without deposit of bail.

12  
13 **(c) Deposit of bail**

14  
15 (1) Courts must require the deposit of bail when the defendant elects a statutory  
16 procedure that requires the deposit of bail; ~~and~~

17  
18 (2) Courts may require the deposit of bail when the defendant does not sign a  
19 written promise to appear as required by the court; ~~and~~

20  
21 (3) Courts may require a deposit of bail before trial if the court finds, ~~based on~~  
22 ~~the circumstances of a particular case~~, that the defendant is unlikely to appear  
23 as ordered without a deposit of bail and the court expressly states the reasons  
24 for the finding.

25  
26 (4) In determining the amount of bail set under (2) and (3), courts must  
27 consider the totality of the circumstances.

28  
29 **(d) Notice**

30  
31 Courts must inform defendants of the option to appear in court without the deposit  
32 of bail in any instructions or other materials courts provide for the public that relate  
33 to bail for ~~traffic~~ infractions, including any website information, written  
34 instructions, courtesy notices, and forms. ~~Courts must implement this subdivision~~  
35 ~~as soon as reasonably possible but no later than September 15, 2015.~~

36  
37 *Rule 4.105 amended effective December 1, 2015; adopted effective June 8, 2015.*

38  
39  
40 **Advisory Committee Comment**

1 **Subdivision (a).** The rule is intended to apply only to an ~~traffic~~ infraction violation of the ~~Vehicle~~  
2 ~~Code~~ for which the defendant has received a written notice to appear and has appeared by the  
3 appearance date or an approved extension of that date. The rule does not apply to postconviction  
4 matters or cases in which the defendant seeks an appearance in court after a failure to appear or  
5 pay.

6  
7 **Subdivision (c).** This subdivision takes into account the distinct statutory purposes and functions  
8 that bail and related considerations serve in infraction cases, including, for example, the posting  
9 and forfeiting of bail in uncontested cases and the use of bail to satisfy later judgments, as  
10 distinguished from felony and most misdemeanor cases.

11  
12 **Subdivision (c)(1).** Various statutory provisions authorize ~~traffic~~ infraction defendants who have  
13 received a written notice to appear to elect to deposit bail in lieu of appearing in court or in  
14 advance of the notice to appear date. (See, e.g., Veh. Code, §§ 40510 [authorizing defendants to  
15 deposit bail before the notice to appear date]; 40519(a) [authorizing defendants who have  
16 received a written notice to appear to declare the intention to plead not guilty and deposit bail  
17 before the notice to appear date for purposes of electing to schedule an arraignment and trial on  
18 the same date or on separate dates]; 40519(b) [authorizing defendants who have received a  
19 written notice to appear to deposit bail and plead not guilty in writing in lieu of appearing in  
20 person]; and 40902 [authorizing trial by written declaration].)

21  
22 This rule is not intended to modify or contravene any statutorily authorized alternatives to  
23 appearing in court. (See, e.g., Pen. Code, §§ 853.5, 853.6; Veh. Code, §§ 40510, 40512, and  
24 40512.5 [authorizing defendants to post and forfeit bail in lieu of appearing for arraignment].)  
25 The purpose of this rule is to clarify that if the defendant declines to use a statutorily authorized  
26 alternative, courts must allow the defendant to appear *without* prior deposit of bail as provided  
27 above.

28  
29 **Subdivision (c)(2).** As used in this subdivision, the phrase “written promise to appear as required  
30 by the court” refers to a signed promise, made by a defendant who has appeared in court, to return  
31 to court on a future date and time as ordered by the court.

32  
33 **Subdivision (c)(3).** In exercising discretion to require deposit of bail on a particular case, courts  
34 should consider ~~the totality of the circumstances, including,~~ among other factors, whether  
35 previous failures to pay or appear were willful or involved adequate notice.

36  
37 **Subdivision (c)(4).** In considering the “totality of the circumstances” under this subdivision,  
38 courts may consider whether the bail amount would impose an undue hardship on the defendant.

**SP15-06****Criminal and Traffic Procedure: Appearance in Court for Infractions (Cal. Rules of Court 4.105)**

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

|    | <b>Commentator</b>  | <b>Position</b> | <b>Comment</b>  | <b>Committees' Responses</b>  |
|----|---|-----------------|---|---|
| 1. | Marin County Office of the Public Defender<br>By Jose Varela, Public Defender | N               | <p>I object to this rule because it is too ambiguous and will [be] applied differently throughout the state. A “Totality of circumstances” standard will cause undue litigation when litigants challenge the finding. Also, if courts delegate this finding to clerks there will be an issue of whether the clerks have the legal right to make such a finding.</p> <p>I recommend that the rule be rejected and that instead the rule be: Bail will not be required for the setting of traffic trial. Upon completion of the trial, the court will assess trial costs not to exceed \$200 above the citation fine imposed. A litigant will be charged \$150 above the citation fine imposed if they set a case for trial and then plead guilty on the day of trial. If a client is exonerated at trial an administrative fee of \$50 will be charged to cover court costs. Indigent clients may be assessed community service equivalent hours to cover costs as the court determines.</p> <p>This rule is clear; it keeps people from trying to game the system and gives court discretion to allow indigent clients access to justice.</p> | The committees decline the suggestion to abolish—by rule of court—bail before trial in infraction cases as exceeding the scope of the proposal and the purview of the Judicial Council.   |
| 2. | Hon. Jay M. Bloom<br>Superior Court of San Diego County                       | N               | I oppose this change. All bail causes some financial hardship or other hardship to people. To consider that factor thus makes no sense. In addition, the Penal Code does not condone consideration of financial hardship or any form of hardship. See Penal Code section 1275. I question whether a rule change can occur   | Under subdivision (c)(3), courts are authorized to require deposit of bail before trial if the court determines that the defendant is unlikely to appear for trial as ordered without prior deposit of bail. To promote court consideration of financial hardships on defendants, the committees originally proposed amending that subdivision to |

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|--|-------------|----------|--|---|
|  |             |          | <p>without some legislative change.</p> <p>While this proposal only deals with low level matters, it starts courts down the slippery slope to misdemeanors and then felonies. Should a serious felon get reduced bail because he can't afford to make bail or it will cause a hardship. It also opens the door for every bail decision down the road to involve hearings concerning hardship whether financial, social, or otherwise. This is a road I do not believe we should go down.</p> | <p>require courts to consider the "totality of the circumstances" and adding an advisory committee comment to explain that the totality of the circumstances includes "whether compliance with the order setting bail would impose an undue hardship on the defendant."</p> <p>Upon reflection, however, the committees decided to shift court consideration of the totality of the circumstances, including undue hardship, from the determination about whether bail is necessary to ensure the defendant's appearance, to the determination of the appropriate <i>amount</i> of bail.</p> <p>Accordingly, the committees deleted the proposed references to "totality" and other circumstances in subdivision (c)(3) and the related advisory committee comment, and instead added the following as subdivision (c)(4): "<u>In determining the amount of bail set under (2) and (3), courts must consider the totality of the circumstances.</u>"</p> <p>The committees also added the following corresponding advisory committee comment: "<b>Subdivision (c)(4).</b> In considering the 'totality of the circumstances' under this subdivision, courts may consider whether the bail amount would impose an undue hardship on the defendant."</p> <p>In addition, given the unique nature and purposes of bail in infraction cases, as opposed to felony and misdemeanor cases, the committees added the following advisory committee comment to emphasize that the rule's bail considerations, including considerations of undue hardships,</p> |

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|----|---|-----------|---|--|
|    |   |           |   | <p>reflect the distinct statutory functions of bail applicable <i>only</i> to infraction cases: “<b>Subdivision (c)</b>. This subdivision takes into account the distinct statutory purposes and functions that bail and related considerations serve in infraction cases, including, for example, the posting and forfeiting of bail in uncontested cases and the use of bail to satisfy later judgments, as distinguished from felony and most misdemeanor cases.”</p> |
| 3. | <p>Hon. Mark A. Borenstein<br/>Superior Court of Los Angeles County</p> | <p>AM</p> | <p>The proposed rule expands the rule that generally would not require the posting of bail (usually the amount of the fine or penalty) to non traffic infractions. That is a good thing. However, many non traffic infractions are handled administratively under Govt Code 53060.4, Veh. Code 40230, Food &amp; Agr. Code 31622 and Pub. Utilities Code 99582 (there are a few other administrative substitutes for low level misdemeanors and infractions). Generally, the penalty for the administrative citation must be paid before any review of the citation is initiated. The statutes require the citing cities or agencies to evaluate claims that the citee lacks the ability to pay, but these systems are haphazard, different cities require different information and often the citee does not realize he or she can apply, in effect for a penalty waiver, pending appeal.</p> <p>In my view, the rule that applies to non traffic infractions should also apply to administrative citations that are the very same offenses many cities and agencies charge as infractions. I urge</p> | <p>The committees appreciate but decline the suggestion to expand the application of the rule to administrative proceedings as exceeding the scope of the proposal. The committees, however, will study the issue for possible future recommendations.</p>   |

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|----|---|-----------------|--|--|
|    |   |                 | the committees to consider expanding the rule that the penalty does not have to be paid in advance in order to for the contestant to seek review of the administrative citation.<br>Thank you.   |  |
| 4. | Hon. Curtis E.A. Karnow<br>Superior Court of San Francisco<br>County  | NI              | The Committee may find useful a quick look at my article, located at e.g.<br><a href="http://scholarship.law.berkeley.edu/bjcl/vol13/iss1/1/">http://scholarship.law.berkeley.edu/bjcl/vol13/iss1/1/</a><br><br>The article, although now somewhat dated (2008), supports the efforts of the Committee in having courts consider among other things hardship and generally the economic situation of the defendant, if the point is to ensure the future appearance of the defendant.      | No response required.  |
| 5. | Superior Court of San Diego County<br>By Michael Roddy, Court Executive<br>Officer  | A               | No additional comments.  | No response required.  |
| 6. | Trial Court Presiding Judges/Court<br>Executives Advisory Committees<br>Joint Rules Subcommittee<br>By Claudia Ortega, Senior Court<br>Services Analyst | AM              | On behalf of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC), the TCPJAC/CEAC Joint Rules Subcommittee (JRS) respectfully submits the following comment and conveys a position of “agree with proposed changes if modified.”<br><br>The JRS requests that the proposed period of one week for implementation be changed to thirty (30) days to provide the trial courts with sufficient time to provide training for court | To ensure that courts have sufficient time to implement the recommended rule amendments, the committees agreed to delay the recommended effective date from November 1, 2015, to December 1, 2015, as requested. |

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**Criminal and Traffic Procedure: Appearance in Court for Infractions (Cal. Rules of Court 4.105)**

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|    | Commentator   | Position | Comment  | Committees' Responses |
|----|---|----------|--|-----------------------|
|    |   |          | <p>staff, and modify notices and internal processes. For those courts that would be especially impacted by these proposed rule changes, the JRS members anticipate that one week would not allow for a smooth transition and full implementation. Staff shortages and other fiscal constraints balanced with the courts' ongoing regular business make immediate implementation difficult if not impossible for some courts.</p> <p>Trial courts may not submit comments expressing the need for an extended implementation period, but this may be because the proposal is only out for comment for a limited time. On behalf of those trial courts that could not provide comment because of the condensed comment period, the JRS requests that the committees provide the courts with 30 days for implementation so that they can implement the new changes to the rule in a comprehensive manner.</p> |                       |
| 7. | <p>Western Center on Law and Poverty<br/>The Coalition<br/>By Antionette Dozier, Senior Attorney</p> <p>Elisa Della-Piana<br/>Director of Programs<br/>East Bay Community Law Center</p> <p>Michael Herald<br/>Legislative Advocate</p> | NI       | <p>Thank you for the opportunity to comment on proposed amendments to Rule 4.105 ("the Proposal"). The organizations signatory to this letter ("the Coalition") represent low-income clients, many of whom have been adversely affected – sometimes for years – by traffic court policies and procedures. The Coalition collectively authored the report <i>Not Just a Ferguson Problem: How Traffic Court Drives Inequality in California</i>, released earlier this year and is currently preparing to monitor the</p>   |                       |

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|  | <b>Commentator</b>   | <b>Position</b> | <b>Comment</b>  | <b>Committees' Responses</b>  |
|--|--|-----------------|---|---|
|  | <p>Antionette Dozier<br/>Senior Attorney<br/>Western Center on Law and Poverty</p> <p>Dana Isaac<br/>Thurgood Marshall Fellow<br/>Lawyers' Committee for Civil Rights of the San Francisco Bay Area</p> <p>Claire Johnson Raba<br/>Staff Attorney<br/>Bay Area Legal Aid</p> <p>Brittany Stonesifer<br/>Staff Attorney<br/>Legal Services for Prisoners with Children</p> <p>Theresa Zhen<br/>Skadden Fellow<br/>A New Way of Life Reentry Project</p> <p>Stephen Bingham Retired Legal Aid Attorney</p> |                 | <p>implementation of Rule 4.105 statewide.</p> <p>We are pleased that the Committees are promptly proposing an expansion of Rule 4.105 to enable greater court access to low-income litigants. We outline below our specific comments to the Proposal.</p> <p><b>1. Non-traffic infractions:</b> We fully support the Proposal's language to remove all references to "traffic" and the "Vehicle Code." As described in the Proposal, Rule 4.105 must promote procedural fairness for all categories of infraction cases. Though Vehicle Code violations make up a substantial number of infractions for which prepaid bail is currently required for a court appearance, there are also municipal, county, transit and Penal Code violations that are heard as infractions in traffic court and require the posting of bail before trial. The same need for equal access applies to all infractions, regardless of the code section under which they are issued.</p> <p><b>2. Totality of the circumstances:</b> We support the Proposal's language to specify "totality of the circumstances" in (c)(3). We also recommend that the Judicial Council adopt the definition of "totality of the circumstances" to include "...whether compliance with the order setting bail would impose an undue hardship on the defendant."</p> <p><b>3. Application of the Rule:</b> We strongly object</p> | <p>1. No response required.</p> <p>2. Please see the related response to comment #2 above regarding considerations of undue hardship.</p> <p>3. The committees decline the suggestion to delete</p> |

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|--|-------------|----------|--|--|
|  |             |          | <p>to the Proposal’s recommendation to add the following advisory committee comment: “The rule does not apply to post conviction matters or cases in which the defendant seeks an appearance in court after a failure to appear or pay.” We recommend that the Judicial Council explicitly reject this language.</p> <p>First, in our experience, it is inaccurate to classify a proceeding as a “post-conviction matter” if a defendant previously failed to appear in court. Under Vehicle Code section 40508(a), a conviction for failure to appear requires a finding of willfulness.<sup>1</sup> Without such a judicial determination of willfulness or an opportunity by the defendant to be heard on the reasons for non-appearance, the failure to appear is not a “conviction.” Because individuals may have good cause for the failure to appear, courts cannot simply presume that all failures to appear are willful. Procedurally, a failure to appear is best characterized as an allegation, not a conviction.</p> <p>Second, there are serious due process concerns with the proposed amendment. If adopted in its current form, individuals will be required to post bail before the court considers any exculpatory evidence. There is often good cause for failure to appear, such as medical emergencies, incarceration, lack of notice (particularly for homeless defendants), or good faith attempts to come to court that were stymied (e.g., long wait to enter the courthouse, resulting in late arrival</p> | <p>the advisory committee comment to clarify the scope of the rule. As explained in the current advisory committee comment, the current rule only applies to pretrial proceedings for infraction defendants who have appeared by the appearance date or an approved extension of that date. The recommended advisory committee comment, therefore, accurately clarifies the scope of the rule. The committees will, however, consider separate rule recommendations to address postconviction matters and proceedings after failures to appear or pay.</p> |

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|  | <b>Commentator</b> | <b>Position</b> | <b>Comment</b>  | <b>Committees' Responses</b> |
|--|--------------------|-----------------|---|------------------------------|
|  |                    |                 | <p>in courtroom.) By requiring the deposit of bail to access court to present evidence of good cause for a failure to appear or pay, a court deprives a defendant of the opportunity to be heard simply because he or she does not have the funds to post bail.</p> <p>Third, limiting the scope of the rule to initial hearings subverts access to justice in traffic court. Across the state 4.2 million licenses were suspended from 2006-2013 for failure to appear and failure to pay.<sup>2</sup> In Los Angeles alone, thousands of failures to appear are processed weekly.<sup>3</sup> If the rule as drafted is adopted, the right to proceed to arraignment and trial without the deposit of bail will be foreclosed to potentially millions of Californians. Rule 4.105 will not substantially change the status quo, and the goal of promoting procedural fairness for all categories of infraction cases will be thwarted.</p> <p>Finally, adopting the Proposal while excluding consideration of the effect of administrative fines on failures to appear and failures to pay will negatively impact the most vulnerable and financially distressed Californians. Bail is defined as the total amount owed in base fines, civil assessment fees, surcharges, and penalty assessments. Each failure to appear adds a \$300 civil assessment fee to the total amount of bail. This is cost-prohibitive for those who are experiencing financial hardship. It will effectively prevent low-income persons from resolving their traffic court obligations.</p> |                              |

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|  | Commentator | Position | Comment   | Committees' Responses |
|--|-------------|----------|---|-----------------------|
|  |             |          | <p>In conclusion, we recommend that the Committees explicitly reject any provisions limiting requests for hearing after the defendant has failed to appear or pay.</p> <p>Thank you for considering our views on these very important amendments to Rule 4.105. Please do not hesitate to contact any member of the Coalition should have additional questions.</p> <p><sup>1</sup> Penal Code section 40508(a) provides that “A person willfully violating his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested.” Similarly, section 40508(b) states that “A person willfully failing to pay bail in installments as agreed to under Section 40510.5 or a lawfully imposed fine for a violation of a provision of this code or a local ordinance adopted pursuant to this code within the time authorized by the court and without lawful excuse having been presented to the court on or before the date the bail or fine is due is guilty of a misdemeanor regardless of the full payment of the bail or fine after that time.”</p> <p><sup>2</sup> ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 13 (2015).</p> <p><sup>3</sup> <i>Steen v. Appellate Division, Superior Court of Los Angeles County</i>, 59 Cal 4th 1045 (Cal. 2014), Second Declaration of Greg Blair.</p> |                       |

**SP15-06**

**Criminal and Traffic Procedure: Appearance in Court for Infractions (Cal. Rules of Court 4.105)**

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

|    | Commentator   | Position | Comment   | Committees' Responses  |
|----|---|----------|---|--|
| 8. | Nora Sanchez<br>Operations Director<br>Criminal, Traffic & Collaborative<br>Courts<br>Superior Court of Orange County | NI       | <p>The biggest challenge with this rule is that it does not clearly outline to the public that without the deposit of bail, the clerk’s office is not authorized to set a case for arraignment and court trial. Only by appearing for arraignment, can a plea be entered in court of not guilty along with the request to waive the posting of bail. When the public reads ... 4.105(b), “Except as provided in (c), courts must allow a defendant to appear for arraignment and trial without the deposit of bail”, they truly believe that this rule allows them to set the case for trial without the need for bail in the clerk’s office.</p> <p>To clarify this Rule for the public, the rule should be changed as shown in <b>red</b>:</p> <p><b>Rule 4.105: Appearance for Arraignment without deposit of bail in traffic infraction cases</b></p> <p><b>(a) Application</b><br/>This rule applies to any traffic infraction <del>violation of the Vehicle Code</del> for which the defendant has received a written notice to appear.</p> <p><b>(b) Appearance without deposit of bail</b><br/>Except as provided in (c), <b>the clerk’s office is not authorized to schedule a matter for arraignment and</b> trial without deposit of bail.</p> | <p>The committees decline the suggestion as unnecessary and exceeding the scope of the proposal. As explained in the advisory committee comment, the rule only applies to cases in which the defendant has appeared by the appearance date or an approved extension of that date. The rule is not intended to modify or contravene any statutorily authorized alternatives to appearing in court. In addition, many courts have developed unique local practices for processing infraction cases and the rule is not intended to obstruct or interfere with those practices.</p> |

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|    |  |          | <p><b>(c) Deposit of bail</b></p> <p>(1) Courts must require the deposit of bail when the defendant elects a statutory procedure that requires the deposit of bail;</p> <p>(2) <b>A judicial officer</b> may require the deposit of bail when the defendant does not sign a written promise to appear as required by the court; <del>and</del>.</p> <p>(3) <b>A judicial officer</b> may require a deposit of bail before trial if the court finds, based on the <u>totality of the circumstances</u> of a particular case, that the defendant is unlikely to appear as ordered without a deposit of bail and the court expressly states the reasons for the finding.</p>                                       |                       |
| 9. | <p>ACLU of Northern California<br/>By Christine P. Sun<br/>Associate Director   Director of Legal-Policy Department</p> <p>Marley Degner, Esq.<br/>Counsel<br/>Pillsbury Winthrop Shaw Pittman LLP</p> | NI       | <p>We are attorneys with the American Civil Liberties Union of Northern California and the law firm of Pillsbury Winthrop Shaw Pittman LLP, respectively. We are writing to provide comments regarding the proposed amendment to Rule 4.105, pursuant to the Invitation to Comment, SP15-06. Prior to its adoption, we submitted comments to Rule 4.105 (see May 29, 2015 letter and June 5, 2015 letter) and hereby renew those comments to the extent that they were not incorporated into the Rule.</p> <p>Below are our comments to the proposed amendments.</p> <p><u>Non-Traffic Infractions</u></p> <p>We support the expansion of the Rule to apply to non-traffic infractions. As previously noted</p> | No response required. |

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|  |             |          | <p>by others, traffic courts hear numerous types of infractions other than traffic infractions, including “quality of life” infractions that disproportionately affect low-income and homeless people. As with traffic infractions, withholding the right to contest a non-traffic citation until the fines, penalty assessments, and other surcharges for the citation are paid in full is a clear violation of due process, equal protection, and other constitutional rights and guarantees. We urge the Judicial Council to adopt this amendment.</p> <p><u>Totality of the Circumstances</u></p> <p>As we previously commented, Rule 4.105 should be modified to state clearly that in no circumstance will a defendant be denied a trial because of an inability to post “bail.” Although requiring courts to consider whether the imposition of bail would pose an “undue hardship” is a step in the right direction, it does not entirely resolve the constitutional concerns that we raised in our previous comments. (See, e.g., <i>Southern Union Co. v. U.S.</i> (2012) 132 S.Ct. 2344, 2350-2351; <i>People v. Hanson</i> (2000) 23 Cal.4th 355, 360-363 [criminal fine is a type of criminal punishment]; <i>Bell v. Wolfish</i> (1979) 441 U.S. 520, 535; <i>Kennedy v. Mendoza-Martinez</i> (1963) 372 U.S. 144, 165-166; <i>Wong Wing v. U.S.</i> (1896) 163 U.S. 228, 237 [due process prohibits government from imposing</p> | <p>The committees decline the suggestion as exceeding the scope of the proposal. Because California’s current statutory scheme contemplates application of bail laws to infractions (see, e.g., Pen. Code, § 1458), any significant reconfiguration of the scheme would require legislation.</p> |

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|  |             |          | <p>criminal punishment prior to an adjudication of guilt]; <i>United States v. James Daniel Good Real Property</i> (1993) 510 U.S. 43, 48, 53 [due process generally requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property]; <i>Jersey v. John Muir Medical Center</i> (2002) 97 Cal.App.4th 814, 821 [fundamental right of access to the courts]; see <i>Payne v. Superior Court</i> (1976) 17 Cal.3d 908, 922-923[creating two classes of people: those who can pay to access the courts in infraction cases and those who cannot violates equal protection].)</p> <p>We further urge the Judicial Council to provide guidance to the courts that would ensure that the proper procedural safeguards are followed with respect to the “totality of the circumstances” and “undue hardship” assessments, including but not limited to providing to defendants notice and the opportunity to be heard.</p> <p><u>Application of the Rule to Post-Conviction Matters</u></p> <p>We join in the comments by the Western Center on Law &amp; Poverty and other organizations concerning the prepayment of “bail” for those defendants who have failed to pay or to appear. Moreover, as noted above and in our previous comments, there are serious constitutional problems with restricting the ability of defendants to petition the Court for relief from a</p> | <p>Because the rule applies to cases in which the defendants have appeared as required, the defendants have the opportunity to be heard.</p> <p>Please see the related response to comment #7 above regarding post-conviction matters.</p> |

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|  |             |          | <p>civil assessment or other penalty, or to contest the underlying infraction, based on their financial capacity to prepay “bail.”</p> <p><u>Bail forfeiture</u></p> <p>We urge the Judicial Council to develop alternatives to appearing in court that would not involve the prepayment of “bail.” For example, we have been contacted by several people who have encountered significant difficulties and long wait times in obtaining a trial date in person, including in Alameda County. It is antithetical to our system of justice to allow some persons, but not others, convenient access to our courts solely because they have the financial capacity to pay “bail” upfront.</p> <p><u>Notice</u></p> <p>We urge that the Judicial Council amend the Notice requirement of Rule 4.105 to include language that makes clear that in the circumstances where the court may decide to impose fines and fees for a Vehicle Code infraction, that the defendant has the right to an ability to pay determination. Vehicle Code 42003(c) states in relevant part that, “In any case when a person appears before a traffic referee or judge of the superior court for adjudication of a violation of this code, the court, <i>upon request of the defendant</i>, shall consider the defendant's ability to pay.” (emphasis added). This subsection also</p> | <p>The committees decline the suggestion to develop alternative procedures for appearances as exceeding the scope of the proposal. The committees, however, will study the issue for possible future recommendations.</p> <p>The committees decline the suggestion to require notice of the opportunity to request ability-to-pay determinations for fines after judgment as exceeding the scope of the proposal. The committees, however, will consider the suggestion for possible future recommendations.</p> |

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|     |  |          | <p>describes certain procedural due process protections that defendants are entitled to as part of the court's assessment, including the right to present witnesses and other documentary evidence, the right to cross-examination, and a written statement of the findings by the court or county officer. It is likely that many indigent or low-income defendants do not avail themselves of these protections simply because they are unaware of this provision of the Vehicle Code. Requiring that courts notify all persons of their statutory rights to an ability to pay assessment would be a small but important step in helping to equalize the playing field.</p> <p>Thank you for your time and attention to this matter.</p>  |  |
| 10. | <p>Law Offices of the Los Angeles County Public Defender<br/>By Ronald L. Brown, Public Defender</p> | NI       | <p>As the Public Defender of Los Angeles County, I and the attorneys in my office represent indigent defendants charged with felony and misdemeanor violations of various California Codes including, but not limited to, the Penal Code and Vehicle Code. Although we do not represent defendants whose cases originally are filed as infractions, eventually many of our clients have their cases reduced to infractions either by a court under Penal Code section 17(b) or by a prosecutor as a result of a negotiated disposition. Thus, in addition to our concern as attorneys with equal access to the justice system for all persons, we have a particular interest in such access on behalf of our clients. It is in this spirit that I offer the following comments for your</p> | <p>Please see the related response to comment #2 above regarding considerations of undue hardship.</p> |

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|  |             |          | <p>consideration:</p> <p>I believe that the Proposal appropriately addresses the stated purpose of the judicial council, "to promote procedural fairness across all categories of infractions cases, reduce confusion about the application of the rule, enhance the information in the advisory committee comments by adding examples, and ensure that courts consider the totality of the circumstances of a particular case when making bail decisions, including any hardships on the defendant." The Proposal is comprehensive, the language is clear and precise as well.</p> <p>I would, however, suggest a small but important change. In order to ensure that courts consider whether the deposit of bail before trial would create undue hardships on defendants, I propose moving the following language, set forth in the Proposed Amendments, from the advisory committee to the actual rule.</p> <p>Language proposed to be added to advisory committee notes: <i>"totality of the circumstances includes whether compliance with the order setting bail would impose an undue hardship on the defendant."</i></p> <p>The new rule 4.105(c)(3) would read:</p> <p>Courts may require a deposit of bail before trial if the court finds, based on the totality of</p> |                       |

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|     |                    |                 | <p>circumstances of a particular case, that the defendant is unlikely to appear as ordered without a deposit of bail and the court expressly states the reasons for the finding. <i>The totality of the circumstances when determining whether bail is appropriate includes whether compliance with the order setting bail would impose an undue hardship on the defendant.</i>"</p> <p>Respectfully submitted,</p> <p>Ronald L. Brown<br/>Public Defender of Los Angeles County</p> |                              |
| 11. | Nathan             |                 | [Comment not specifically related to the proposal]   | No response required.        |