



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 14–15, 2017

Title

Criminal Procedure: Use of Risk/Needs Assessments at Sentencing

Agenda Item Type

Action Required

Effective Date

January 1, 2018

Rules, Forms, Standards, or Statutes Affected

Approve standard 4.35 of the California Standards of Judicial Administration

Date of Report

July 26, 2017

Recommended by

Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Contact

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Executive Summary

The Criminal Law Advisory Committee recommends approval of a new standard of judicial administration. The new standard provides guidance to judges on the appropriate uses of the results of risk/needs assessments at criminal sentencing.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council approve new standard 4.35 of the California Standards of Judicial Administration, effective January 1, 2018, to:

1. State the purposes for using the results of risk/needs assessments at sentencing;
2. Identify proper and improper uses of the results of risk/needs assessments at sentencing;
3. Recommend the validation of risk/needs assessment instruments;

4. Provide guidance on the use of the results of a risk/needs assessment in evaluating a defendant's amenability to or suitability for supervision; and
5. Recommend education on risk/needs assessments.

The text of the proposed new standard is attached at pages 9–13.

Previous Council Action

Effective January 1, 2015, the Judicial Council added several provisions related to risk/needs assessments to the criminal sentencing rules of court. It adopted rule 4.415, which provided, *inter alia*, that courts may consider “[t]he defendant’s specific needs and risk factors identified by a validated risk/needs assessment, if available,” in selecting the appropriate period and conditions of mandatory supervision. (Cal. Rules of Court, rule 4.415(c)(8).) The council also amended rule 4.411.5(a)(8) to require that presentence investigation reports include “[a]ny available, reliable risk/needs assessment information.”

The Criminal Law Advisory Committee is concurrently proposing amendments related to risk/needs assessments in rules 4.405, 4.411.5, 4.413, and 4.415.

Rationale for Recommendation

Background

As part of the realignment of California’s criminal sentencing procedures, the Legislature declared that correctional practices should use “a data-driven approach” to reduce corrections and related criminal justice spending through evidence-based strategies “that increase public safety while holding offenders accountable.” (Pen. Code, § 17.5(a)(7).) Many probation departments in California now employ a variety of risk/needs assessment instruments to conduct such assessments. They use the results of these assessments to establish an appropriate program of supervision and services for an offender and to prioritize limited probation resources.

The results of risk/needs assessments may also provide valuable information that can enhance the quality of judges’ sentencing decisions for those offenders eligible for community supervision. A core component of evidence-based sentencing is an actuarial assessment of the individual’s “risk” of recidivism and treatment “needs.” Evidence-based sentencing involves identifying offender risk factors, matching risk factors to supervision level, and providing proven treatment services and programs that are tailored to an individual defendant’s specific characteristics.

A substantial body of scientific research demonstrates that the actuarial assessment of recidivism risk is more accurate and reliable than unstructured clinical judgment. (See, e.g., J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessment Among Federal Probation Officers* (Sept. 2011) 75 Fed. Prob. 52–56.) Actuarial risk/needs assessments generally use a combination of “static risk factors”—offender characteristics positively associated with recidivism that cannot be changed through corrections programming—

and “dynamic risk factors”—offender characteristics positively associated with recidivism that can be changed through appropriate intervention. Actuarial risk assessment involves the comparison of the subject individual offender to a database of other offenders who had similar risk factors and known subsequent criminal histories.

Proposed New Standard

The committee recommends a new standard of judicial administration to provide guidance to courts in using risk/needs assessments at sentencing in criminal cases. This use of risk/needs assessments is intended to (1) prevent bias in sentencing; (2) reduce the risk of recidivism by focusing services and resources on medium- and high-risk offenders, who are most likely to reoffend; (3) reduce the risk of future recidivism by targeting a defendant’s needs in a supervision plan; and (4) advance the legislative directive to improve public safety outcomes by routing offenders into community-based supervision informed by evidence-based practices.

The proposed standard recommends the validation of risk/needs assessment instruments and education on risk/needs assessments. As discussed in more detail below, it also provides courts with guidance on the proper and improper uses of the results of risk/needs assessments at sentencing, including how these assessments relate to a defendant’s amenability to or suitability for supervision. An advisory committee comment to the standard provides further guidance on the use of the results of risk/needs assessments at sentencing, the limitations of risk/needs assessments, the validation of risk/needs assessment instruments, and the need for training and ongoing education on risk/needs assessments.

Proper use of the results of risk/needs assessments at sentencing

This proposed new standard provides the following guidance on the proper use of the results of risk/needs assessments at sentencing:

- The results of a risk/needs assessment should be considered only in context with all other information considered by the court at the time of sentencing, including the probation report, statements in mitigation and aggravation, evidence presented at a sentencing proceeding conducted under Penal Code section 1204, and comments by counsel and any victim.
- The results of a risk/needs assessment should be one of many factors that may be considered and weighed at a sentencing hearing. Information generated by the risk/needs assessment should be used along with all other information presented in connection with the sentencing hearing to inform and facilitate the decision of the court. Risk/needs assessment information should not be used as a substitute for the sound independent judgment of the court.
- Although they may not be determinative, the results of a risk/needs assessment may be considered by the court as a relevant factor in assessing:
 - Whether a defendant who is presumptively ineligible for probation has overcome the statutory limitation on probation;

- Whether an offender can be supervised safely and effectively in the community; and
 - The appropriate terms and conditions of supervision and responses to violations of supervision.
- If a court uses the results of a risk/needs assessment, it should consider any limitations of the instrument that have been raised in the probation report or by counsel, including:
 - That the instrument’s risk scores are based on group data, such that the instrument is able to identify only groups of high-risk offenders, not a particular high-risk individual;
 - Whether the instrument’s proprietary nature has been invoked to prevent the disclosure of information relating to how it weighs static and dynamic risk factors and how it determines risk scores;
 - Whether any scientific research has raised questions that the instrument unfairly classifies offenders by gender, race, or ethnicity; and
 - Whether the instrument has been validated on a relevant population.

Improper use of the results of risk/needs assessments at sentencing

This proposed new standard provides the following guidance on the improper use of the results of risk/needs assessments at sentencing:

- The results of a risk/needs assessment should not be used to determine (1) whether to incarcerate a defendant, or (2) the severity of the sentence.
- The results of a risk/needs assessment should not be considered by the court for defendants statutorily ineligible for supervision.

Amenability to or suitability for supervision

This proposed new standard provides the following guidance on the use of the results of a risk/needs assessment in evaluating a defendant’s amenability or suitability to supervision:

- A court should not interpret the risk score as necessarily indicating that a defendant is not amenable to or suitable for community-based supervision. Community-based supervision may be most effective for defendants with “high” and “medium” risk scores. A “low” risk score often indicates that a defendant is amenable or suitable for community-based supervision, but should not be interpreted as necessarily indicating that a defendant is amenable or suitable for community-based supervision. Risk scores must be interpreted in the context of all relevant sentencing information received by the court.
- Ordinarily a defendant’s level of supervision should correspond to his or her level of risk of recidivism. In most cases, a court should order that a low-risk defendant receive less supervision and a high-risk defendant more.

- A court should order services that address the defendant’s needs.

Comments, Alternatives Considered, and Policy Implications

External Comments

This proposal circulated for public comment from March 14 until April 28, 2017. Six comments were submitted in response to the invitation to comment; three agreed with the proposal, one agreed with the proposal if modified, and two did not indicate their position. The committee revised the proposed standard in response to the comments. Its specific responses to each comment are available in the attached comment chart at pages 14–27.

Validation of risk/needs assessment instruments

One commenter expressed concern that unvalidated risk/needs assessment instruments may produce unreliable and inaccurate results and that the proposal appeared to allow for the use of such instruments. The commenter strongly discouraged the use of unvalidated risk/needs assessment instruments. Another commenter similarly affirmed that “[a]doption of risk needs assessments should be undertaken in tandem with commencing local validation studies of the accuracy of the risk assessment provided by the instruments.”

The committee recognizes the importance of validating risk/needs assessment instruments. As circulated, the standard contemplated, but did not expressly state, that courts should use validated risk/needs assessment instruments at sentencing. The committee has added a new subdivision (c) to make clear that risk/needs assessment instruments should be validated.

The committee also recognizes the importance of validating the instrument on a relevant population. The committee has re-lettered but otherwise retained subdivision (d)(4)(D) as circulated. Subdivision (d)(4)(D) provides that a court should consider any identified limitations of the instrument, including “[w]hether the instrument has been validated on a relevant population.” The advisory committee comment to this subdivision provides courts with additional guidance on validation.

Transparency

One commenter expressed concern about using the results of risk/needs assessment instruments if the algorithm used to generate the score has not been disclosed because of its proprietary nature. It explained that without transparency, the legitimacy of these instruments may be called into question and their use may be challenged as contributing to racial and gender bias.

The committee decided against revising the proposed standard to discourage using risk/needs assessment instruments if their underlying algorithms have not been disclosed. It re-lettered but otherwise retained subdivision (d)(4)(A) as circulated, which recognizes that judges should consider any identified limitations of risk/needs assessments, including “[w]hether the instrument’s proprietary nature has been invoked to prevent the disclosure of information relating to how it weighs static and dynamic risk factors and how it determines risk scores.” The committee determined that this provision was sufficient to address the transparency concerns

raised by the commenter, especially to the extent that risk/needs assessment instruments are validated and the factors used to generate risk scores are disclosed.

Use to incarcerate

One commenter recommended revising the proposal to encourage courts to use the results of risk/needs assessments to incarcerate defendants. The commenter noted their benefit in determining whether defendants can be safely served in the community. He also explained that this determination necessarily results in either incarcerating or releasing a defendant under supervision.

Conversely, another commenter expressed support for the committee's proposal to discourage courts from using the results of risk/needs assessments to incarcerate a defendant that they would otherwise place on probation.

The committee has decided against revising the proposal to endorse using the results of risk/needs assessments to incarcerate defendants. It prefers taking a cautious approach because the use of these results at sentencing is relatively new in science and the law. California courts have yet to approve the use of these results for incarceration, and the Wisconsin Supreme Court expressly prohibits such use. (*State v. Loomis* (2016) 371 Wis.2d 235, 256.) The standard should be reevaluated as more courts address the issue. Accordingly, at this time the committee recommends that risk/needs assessments not be used to determine whether to incarcerate defendants.

Application to low-risk offenders

One commenter questioned how the circulated proposal addressed low-risk offenders. As circulated, the proposal stated that “[a] ‘low’ risk score should not be interpreted as necessarily indicating that a defendant is amenable or suitable for community-based supervision.” While recognizing there are exceptions, the commenter explained that low-risk offenders are, by definition, the best candidates for community supervision. He recommended revising the proposal to provide: “A ‘low’ risk score often indicates that a defendant is amenable or suitable for community-based supervision, but should not be interpreted as necessarily indicating that a defendant is amenable or suitable for community-based supervision.” The committee agreed and revised the standard to recognize that a low-risk score often, but not necessarily, indicates that a defendant is amenable or suitable for community-based supervision.

The commenter also expressed concern that the circulated proposal contemplated ordering services to address the needs of low-risk defendants. As circulated, the proposal provided that (1) a defendant's level of supervision should correspond to his or her level of risk, and (2) a court should order that a low-risk defendant receive less supervision. The commenter explained that the needs of low-risk offenders typically do not result in further criminal behavior and that mixing low-risk offenders with higher-risk offenders in treatment programs tends to increase the risk of recidivism for low-risk offenders. He recommended revising the proposal to provide that a court should order services to address the needs of only medium- and high-risk offenders.

The committee agrees that services may not be appropriate for most low-risk offenders. However, it decided against incorporating the recommended language to the extent that it implies that services should never be ordered for low-risk offenders. Instead, the committee re-lettered and revised subdivision (f)(3) to provide simply that “[a] court should order services that address the defendant’s needs.” Most often, low-risk offenders will not need services.

Other comments received

One commenter recommended revising subdivision (a) to include, among the standard’s purposes: “Reduce the risk of recidivism by focusing services and resources on those offenders who [are] most likely to re-offend.” The committee agreed and has revised the proposal to incorporate this recommendation.

The commenter also expressed concern with the circulated proposal’s statement that judges should consider any identified limitations of risk/needs assessments, including “[w]hether any studies have raised questions about whether the instrument disproportionately classifies minority offenders as having a higher risk of recidivism.” The commenter questioned what the committee intended in using the term “disproportionately” and urged replacing the term “studies” with “scientific research” because scientific research is governed by rigorous standards, including peer review. To address these concerns, the committee has revised the standard: it has re-lettered and revised subdivision (d)(4) to provide that courts should consider any of the instrument’s identified limitations, including, in subparagraph (C), “[w]hether any scientific research has raised questions that the instrument unfairly classifies offenders by gender, race, or ethnicity.”

The commenter also recommended several technical, nonsubstantive changes that the committee incorporated into the proposal.

Alternatives

In addition to the alternatives considered in response to the public comments, the committee initially considered recommending a proposal to add a new rule to the California Rules of Court on the use of risk/needs assessments at sentencing. It instead decided to propose a standard of judicial administration for several reasons, including (1) that the use of risk/needs assessments at sentencing is still relatively new, and (2) that published decisions from California appellate courts are absent on this issue. Future proposals may look at converting the standard to a rule of court.

Implementation Requirements, Costs, and Operational Impacts

The proposed standard is nonbinding and does not require that courts use the results of risk/needs assessments at sentencing. It is intended merely to provide guidance to courts that opt to use the assessments at sentencing.

For those courts that elect to use the results of risk/needs assessments at sentencing, county probation departments would incur the costs of validating the risk/needs assessment instruments,

conducting the assessments on the individual defendants, and adding a description of the results of the assessments in presentence reports. These costs would likely be minimal for probation departments that already use risk/needs assessments. Courts would incur the costs of judicial training and continuing education.

Attachments and Links

1. Cal. Standards of Judicial Administration, standard 4.35, at pages 9–13
2. Comment chart, at pages 14–27

Standard 4.35 of the California Standards of Judicial Administration is adopted, effective January 1, 2018, to read:

1 **Standard 4.35. Court use of risk/needs assessments at sentencing**

2
3 **(a) Application and purpose**

4
5 (1) This standard applies only to the use of the results of risk/needs assessments
6 at sentencing.

7
8 (2) The use of the results of risk/needs assessments at sentencing is intended to:

9
10 (A) Prevent biases in sentencing;

11
12 (B) Reduce the risk of recidivism by focusing services and resources on
13 medium- and high-risk offenders, who are most likely to reoffend;

14
15 (C) Reduce a defendant’s risk of future recidivism by targeting that
16 defendant’s needs with appropriate intervention services through
17 community supervision programs demonstrated to reduce recidivism;
18 and

19
20 (D) Advance the legislative directive to improve public safety outcomes by
21 routing offenders into community-based supervision informed by
22 evidence-based practices.

23
24 **(b) Definitions**

25
26 (1) “Risk” refers to the likelihood that a person will reoffend, without regard,
27 unless otherwise specified, to the nature of the original offense or the nature
28 of the reoffense.

29
30 (2) “Risk factors” refers to the “static” and “dynamic” factors that contribute to
31 the risk score.

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33 (3) “Static risk factors” refers to those risk factors that cannot be changed
34 through treatment or intervention, such as age or prior criminal history.

35
36 (4) “Dynamic risk factors,” also known as “needs,” are factors that can be
37 changed through treatment or intervention.

38
39 (5) “Results of a risk/needs assessment” refers to both a risk score and an
40 assessment of a person’s needs.

- 1 (6) A “risk score” refers to a descriptive evaluation of a person’s risk level as a
2 result of conducting an actuarial assessment with a validated risk/needs
3 assessment instrument and may include such terms as “high,” “medium,” or
4 “low” risk.
5
6 (7) “Amenability” or “suitability” refers to the likelihood that the person can be
7 safely and effectively supervised in the community and benefit from
8 supervision services that are informed by evidence-based practices that have
9 been demonstrated to reduce recidivism.
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11 (8) A “validated risk/needs assessment instrument” refers to a risk/needs
12 assessment instrument demonstrated by scientific research to be accurate and
13 reliable in assessing the risks and needs of the specific population on which it
14 was validated.
15
16 (9) “Supervision” includes all forms of supervision referenced in Penal Code
17 section 1203.2(a).
18

19 **(c) Validation**

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21 The risk/needs assessment instrument should be validated.
22

23 **(d) Proper uses of the results of a risk/needs assessment at sentencing**

- 24
25 (1) The results of a risk/needs assessment should be considered only in context
26 with all other information considered by the court at the time of sentencing,
27 including the probation report, statements in mitigation and aggravation,
28 evidence presented at a sentencing proceeding conducted under section 1204,
29 and comments by counsel and any victim.
30
31 (2) The results of a risk/needs assessment should be one of many factors that
32 may be considered and weighed at a sentencing hearing. Information
33 generated by the risk/needs assessment should be used along with all other
34 information presented in connection with the sentencing hearing to inform
35 and facilitate the decision of the court. Risk/needs assessment information
36 should not be used as a substitute for the sound independent judgment of the
37 court.
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39 (3) Although they may not be determinative, the results of a risk/needs
40 assessment may be considered by the court as a relevant factor in assessing:
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42 (A) Whether a defendant who is presumptively ineligible for probation has
43 overcome the statutory limitation on probation;

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(B) Whether an offender can be supervised safely and effectively in the community; and

(C) The appropriate terms and conditions of supervision and responses to violations of supervision.

(4) If a court uses the results of a risk/needs assessment, it should consider any limitations of the instrument that have been raised in the probation report or by counsel, including:

(A) That the instrument’s risk scores are based on group data, such that the instrument is able to identify only groups of high-risk offenders, for example, not a particular high-risk individual;

(B) Whether the instrument’s proprietary nature has been invoked to prevent the disclosure of information relating to how it weighs static and dynamic risk factors and how it determines risk scores;

(C) Whether any scientific research has raised questions that the instrument unfairly classifies offenders by gender, race, or ethnicity; and

(D) Whether the instrument has been validated on a relevant population.

(e) Improper uses of the results of a risk/needs assessment at sentencing

(1) The results of a risk/needs assessment should not be used to determine:

(A) Whether to incarcerate a defendant; or

(B) The severity of the sentence.

(2) The results of a risk/needs assessment should not be considered by the court for defendants statutorily ineligible for supervision.

(f) Amenability to or suitability for supervision

(1) A court should not interpret a “high” or “medium” risk score as necessarily indicating that a defendant is not amenable to or suitable for community-based supervision. Community-based supervision may be most effective for defendants with “high” and “medium” risk scores. A “low” risk score often, but not necessarily, indicates that a defendant is amenable to or suitable for

1 community-based supervision. Risk scores must be interpreted in the context
2 of all relevant sentencing information received by the court.

3
4 (2) Ordinarily a defendant’s level of supervision should correspond to his or her
5 level of risk of recidivism. In most cases, a court should order that a low-risk
6 defendant receive less supervision and a high-risk defendant more.

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8 (3) A court should order services that address the defendant’s needs.

9
10 (g) Education regarding the nature, purpose, and limits of risk/needs assessment
11 information is critical to the proper use of such information. Education should
12 include all justice partners.

13
14 **Advisory Committee Comment**

15
16 **Subdivision (d)(1)–(2).** Although the results of risk/needs assessments provide important
17 information for use by the court at sentencing, they are not designed as a substitute for the
18 exercise of judicial discretion and judgment. The information should not be used as the sole basis
19 of the court’s decision, but should be considered in the context of all of the information received
20 in a sentencing proceeding. If justified by the circumstances of the case, it is appropriate for the
21 court to impose a disposition not supported by the results of a risk/needs assessment. (See *State v.*
22 *Loomis* (2016) 371 Wis.2d 235, 266 [“Just as corrections staff should disregard risk scores that
23 are inconsistent with other factors, we expect that . . . courts will exercise discretion when
24 assessing a . . . risk score with respect to each individual defendant”].)

25
26 **Subdivision (d)(4).** Court and justice partners should understand any limitations of the particular
27 instrument used to generate the results of a risk/needs assessment. (See *State v. Loomis, supra,*
28 371 Wis.2d at p. 264 [requiring presentence investigation reports to state the limitations of the
29 instrument used, including the proprietary nature of that instrument, any absence of a cross-
30 validation study for relevant populations, and any questions raised in studies about whether the
31 instrument disproportionately classifies minority offenders as having a higher risk of recidivism].)
32 The Wisconsin court also required that all presentence investigation reports caution that
33 risk/needs assessment tools must be constantly monitored and renormed for accuracy because of
34 changing populations and subpopulations. (*Ibid.*) California courts should similarly consider any
35 such limitations in the accuracy of the particular instrument employed in the case under review.
36 (See *ibid.* [“Providing information to sentencing courts on the limitations and cautions attendant
37 with the use of . . . risk assessments will enable courts to better assess the accuracy of the
38 assessment and the appropriate weight to be given to the risk score”].)

39
40 **Subdivision (d)(4)(D).** Validating a risk/needs assessment instrument will increase its accuracy
41 and reliability. Validation on a relevant population or subpopulation is recommended to account
42 for differences in local policies, implementation practices, and offender populations. Ongoing
43 monitoring and renorming of the instrument may be necessary to reflect changes in a population

1 or subpopulation. Revalidation of the instrument is also necessary if any of its dynamic or static
2 risk factors are modified.

3
4 **Subdivision (e).** When the court is considering whether to place a person on supervision at an
5 original sentencing proceeding or after a violation of supervision, the results of a risk/needs
6 assessment may assist the court in assessing the person’s amenability to supervision and services
7 in the community. But when the person is ineligible for supervision, or the court has otherwise
8 decided not to grant or reinstate probation, the results of a risk/needs assessment should not be
9 used in determining the period of incarceration to be imposed. (See *State v. Loomis, supra*, 371
10 Wis.2d at p. 256 [holding that risk/needs assessments should not be used to determine the severity
11 of a sentence or whether a defendant is incarcerated]; *Malenchik v. State* (2010) 928 N.E.2d 564,
12 573 [“It is clear that [risk/needs assessment instruments are neither intended] nor recommended
13 to substitute for the judicial function of determining the length of sentence appropriate for each
14 offender”].)

15
16 **Subdivision (f).** Risk/needs assessment instruments generally produce a numerical or descriptive
17 “risk score” such as “high,” “moderate,” or “low” risk. It is critical that courts and justice partners
18 understand the meaning and limitations of such designations. First, because risk assessments are
19 based on group data, they are able to identify groups of high-risk offenders, not a particular high-
20 risk individual. Second, in some assessment instruments, “risk” refers only to a generalized risk
21 of committing a new offense, not to the seriousness of the subsequent offense (e.g., violent, sex,
22 drug, or theft). Nor does “high risk” necessarily mean “highly dangerous.” A high-risk drug
23 offender, for example, may present a high risk that he or she will use drugs again, but does not
24 necessarily present a high risk to commit a violent felony. Third, scientific research indicates that
25 medium- and high-risk offenders may most benefit from evidence-based supervision and
26 programs that address critical risk factors. Courts and probation departments should also consider
27 how presentence investigation reports present risk assessment information. A report that merely
28 refers to the defendant as “high risk” may incorrectly imply that the defendant presents a great
29 danger to public safety and must therefore be incarcerated. Conversely, “low risk” does not
30 necessarily mean “no risk.”

31
32 **Subdivision (g).** An instrument’s accuracy and reliability depend on its proper administration.
33 Training and continuing education should be required for anyone who administers the instrument.
34 Judges with sentencing assignments should receive appropriate training on the purpose, use, and
35 limits of risk/needs assessments. (See Guiding Principle 4, Stakeholder Training, in Pamela M.
36 Casey et al., *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for*
37 *Courts from a National Working Group* (National Center for State Courts, 2011) pp. 21–22.)

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Criminal Procedure: Use of Risk/Needs Assessments at Sentencing

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

	Commentator	Position	Comment	Committee Response
1.	California Public Defenders Association By: Charles Denton President	N/I	<p>The California Public Defenders Association (CPDA), a statewide organization of public defenders, private defense counsel, and investigators supports the Judicial Council’s proposal to provide guidance to judges on the appropriate use of risk and needs assessments in criminal sentencings. CPDA offers the following suggestions on how the proposed standard may be strengthened and best utilized to ensure fairness and legitimacy.</p> <p>CPDA agrees that a risk/needs assessments may provide additional information to judges in deciding (1) whether to place someone on probation who may be presumptively ineligible, (2) determining how an individual may be safely supervised in the community and (3) in determining the appropriate conditions of probation for someone who will be supervised in the community. However, a risk assessment should never be used as a substitute for consideration of individualized information about the person being considered for a probationary sentence.</p> <p>CPDA also strongly agrees a risk assessment should never be used in the first instance to decide whether or not to incarcerate an individual and should not be used to determine the severity of a sentence if a person is to be incarcerated.</p> <p>In other words, CPDA agrees overall with how this proposal addresses many of the issues that arise regarding the appropriate use of risk assessments. However, CPDA believes this proposal could be improved. In particular, this proposal appears to</p>	<p>The committee appreciates the input of the California Public Defenders Association.</p> <p>No response required.</p> <p>No response required.</p> <p>The committee agrees and has revised the standard to incorporate the CPDA’s recommendation. The circulated standard contemplated, but did not expressly state, that courts should use validated risk/needs</p>

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Criminal Procedure: Use of Risk/Needs Assessments at Sentencing

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	Commentator	Position	Comment	Committee Response
			<p>permit the use risk assessment scores from instruments that are not validated. This is problematic because an unvalidated test instrument may produce unreliable results and inaccurate results. Peer review and validation are two of the hallmarks of good science. Neither the criminal justice system nor the public will have confidence in the results of a risk assessment that was produced by an unvalidated test instrument. Accordingly the courts should strongly discourage the use of results risk/needs assessment from instruments that have not been validated.</p> <p>In addition, results obtained from risk assessments where the proprietary nature of the software program has been invoked to prevent an evaluation of how the instrument determines the score should never be used. Transparency is important to the acceptance of risk assessment tools as a legitimate source of information in determining how to best supervise an individual in the community. The legitimacy of the sentencing proceeding is called into question when the risk assessment tool employed is a “black box.”¹ The failure to identify what factors are used and how they are used raises issues of bias. This in turn leads to challenges by lawyers regarding issues of gender and racial bias. Indeed, there are risk assessments tools in use that have been criticized for disproportionately classifying minority offenders as being a higher risk of re-offense than Caucasians.² CPDA strongly objects to the use of any risk-assessment tool that has been legitimately criticized for being racially biased or for assessing minority offenders as a</p>	<p>assessment instruments at sentencing. The committee has added a new subdivision (c) to expressly recognize that risk/assessment instruments should be validated.</p> <p>The committee has decided against pursuing this recommendation. It has re-lettered but otherwise retained subdivision (d)(4)(iv) as circulated. Subdivision (d)(4)(iv) recognizes that judges should consider any identified limitations of risk/needs assessments, including “[w]hether the instrument’s proprietary nature has been invoked to prevent the disclosure of information relating to how it weighs static and dynamic risk factors and how it determines risk scores.” The committee determined that this provision was sufficient to address the transparency concerns raised by the CPDA, especially to the extent that risk/assessment instruments are validated and the factors used to generate risk scores are disclosed.</p>

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Criminal Procedure: Use of Risk/Needs Assessments at Sentencing

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	Commentator	Position	Comment	Committee Response
			<p>higher risk than other similarly situated non-minorities.</p> <p>¹ For a discussion of the issues of “black box algorithms used in risk assessment instruments and bias see “Risk-assessment algorithms challenged in bail, sentencing and parole decisions” ABA Journal, March 1, 2017 (http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email last viewed 3/30/17)</p> <p>² See Machine Bias” Propublica, May 26, 2016 (https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing last viewed 3/30/17)</p> <p>In 2014, then United States Attorney raised concerns over the use of risk assessments by the criminal justice system. “Although these measures (referring to risk assessments) were crafted with the best of intentions, I am concerned that they inadvertently undermine our efforts to ensure individualized and equal justice,” and “they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”</p> <p>In conclusion, it is CPDA’s position that validated, open-source risk assessments that are gender and</p>	<p>See response above.</p> <p>See responses above.</p>

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Criminal Procedure: Use of Risk/Needs Assessments at Sentencing

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	Commentator	Position	Comment	Committee Response
			racially neutral have a place in the criminal justice system. However, measures should never replace individualized judicial sentencing decisions.	
2.	<p>Hon. John T. Lu Chair, Massachusetts Sentencing Commission Associate Justice, Massachusetts Superior Court [In personal capacity, affiliations for identification only]</p>	NI	<p>1. I recommend the adoption of the changes as appropriately fostering the increased use of risk needs assessments in sentencing.</p> <p>2. I recommend that the changes also highlight that, as the proposed changes state, risk needs assessments may appropriately be used to determine that an individual is eligible for probation, and that the proposed rule does not endorse the court using risk needs assessments to determine that it should incarcerate an individual it would otherwise place on probation.</p> <p>3. Judges that use risk needs assessments should be mindful that risk needs assessments have been criticized as racially and socio-economically discriminatory. For example, critics allege that individuals that live in poor minority communities with high police patrol penetration attain higher risk scores than individuals from white low police patrol areas with inadequate justification in the individual's increased risk.</p> <p>4. Adoption of risk needs assessments should be undertaken in tandem with commencing local validation studies of the accuracy of the risk assessment provided by the instruments.</p>	<p>The committee appreciates Justice Lu’s input.</p> <p>The committee agrees with this comment. It has re-lettered but otherwise retained subdivision (e)(1)(i) as circulated. Subdivision (e)(1)(i) identifies using a risk/needs assessment “[t]o determine whether to incarcerate a defendant” as an improper use.</p> <p>The committee agrees with this comment. It has re-lettered but otherwise retained subdivision (d)(4)(iii) as circulated. Subdivision (d)(4)(iii) provides that the court should consider any identified limitations of the instrument, including “[w]hether any scientific research has raised questions that the instrument unfairly classifies offenders by gender, race, or ethnicity.”</p> <p>The committee recognizes the importance of validating the risk/needs assessment instrument on a relevant population. In response to this comment, it has added subdivision (c) to provide that the instruments should be validated. The committee has also re-lettered but otherwise retained subdivision</p>

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			<p>5. Risk assessment is an evolving field and judges that utilize them should monitor the developing literature for developments that will inform their responsible use.</p> <p>These are my personal opinions and not that of any entity I am affiliated with. Affiliations are included for identification only.</p>	<p>(d)(4)(iv) as circulated. Subdivision (d)(4)(iv) further provides that a court should consider any identified limitations of the instrument, including “[w]hether the instrument has been validated on a relevant population.” The advisory committee comment to this subdivision provides courts with additional guidance on validation.</p> <p>The committee agrees with this comment. It has re-lettered but otherwise retained subdivision (g) and its advisory committee comment as circulated to recognize the importance of education and continuing education for judges.</p>
3.	Orange County Bar Association By: Michael L. Baroni President	A	<p>The Legislature has declared that correctional practices should utilize “a data-driven approach” to reduce corrections and related criminal justice spending through evidence-based strategies “that increase public safety while holding offenders accountable.” (Pen. Code, § 17.5(a)(7).) In furtherance, previously enacted Cal. Rules of Court, rule 4.415 and 4.411.5 directed the criminal sentencing court to take into account risk/needs assessments. Proposed adoption of new Cal. Standards of Judicial Administration, standard 4.35 would give guidance to judges on the appropriate uses of the results of risk/needs assessments in criminal sentencing. The standard includes needed definitions, the requirement that such risk/needs assessments must be scientifically validated prior to</p>	<p>The committee appreciates Orange County Bar Association’s input.</p>

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			<p>use, mandatory training in the use of such tools and the limitations on the use of such tools. In particular, courts are urged to retain the exercise of their discretion and are admonished not to use such assessments solely to determine whether to incarcerate a defendant or to determine the severity of the sentence.</p> <p>This standard is much needed as it carefully sets forth the many limitations and possible abuses of such assessment tools. While capable of providing guidance under certain circumstances, over reliance on such tools has been more the norm than the exception. This standard goes a long way in attempting to prevent such mistakes. Anyone who has studied the development of the sexually violent predator law in California will recognize the validity of this assertion.</p>	<p>No response required.</p>
4.	<p>Superior Court of California, County of Los Angeles By: Sandra Pigati-Pizano Management Analyst</p>	A	<p>This proposal merely adds an additional tool for the judge to use in a sentencing proceeding. The risk scores must be interpreted in light of all available information. They are not, however, designed as a substitute for the exercise of experienced judicial discretion and judgment.</p>	<p>The committee appreciates the court’s input. It agrees that the results of risk/needs assessments should not be determinative. The committee has re-lettered, but otherwise retained subdivision (d)(2) as circulated. Subdivision (d)(2) provides that “[t]he results of a risk/needs assessment should be one of many factors that may be considered and weighed at a sentencing hearing. Information generated by the risk/needs assessment should be used along with all other information presented in connection with the sentencing hearing to inform and facilitate the decision of the court. Risk/needs assessment information should be used as a substitute for the sound</p>

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				independent judgment of the court.”
5.	Superior Court of California, County of San Diego By: Mike Roddy Executive Officer	A		The committee appreciates the court’s support.
6.	Hon. Roger K. Warren President Emeritus National Center for State Courts	AM	<p>My colleagues and I at the National Center for State Courts (NCSC) have published and conducted numerous judicial education events across the country on this topic since the Conference of Chief Justices in 2011 adopted the following resolution supporting the use of risk needs assessment (RNA) information in state sentencing proceedings as recommended by a National Working Group of experts convened earlier by NCSC:</p> <p>Support the National Working Group’s recommendation that offender risk and needs assessment information be available to inform judicial decisions regarding effective management and reduction of the risk of offender recidivism; and</p> <p>Endorse the Guiding Principles described in the National Working Group’s report as a valuable tool for state courts in crafting policies and practices to incorporate offender risk and needs assessment information in the sentencing process; and</p> <p>Encourage state and local courts to review the Guiding Principles and work with their justice system partners to incorporate risk and needs assessment information into the sentencing process.” (The National Working Group’s “Guiding</p>	<p>The committee appreciates Judge Warren’s input.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

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			<p>Principles” report, referred to in the Resolution, is also referenced in the Criminal Law Advisory Committee’s Comment to the proposed Standard.)</p> <p>Risk Needs Assessment (RNA) information is now included in felony pre-sentence reports in some or all jurisdictions in over 20 states. I compliment the Criminal Law Advisory Committee (CLAC) for its work on this Proposed Standard. It accurately reflects best practices for the use of RNA at sentencing in state courts across the country. I offer below a few proposed changes (and explanatory comments) intended only to further strengthen the Proposed Standard. Except for my final comment below, my comments address only the language of the Proposed Standard itself, not the related language of the CLAC’s commentary which would need to be modified accordingly to the extent the proposed changes are adopted. The views expressed here are my own, and do not necessarily represent the views of the NCSC.</p> <ol style="list-style-type: none"> 1. Section (a) (2): The Proposed Standard describes three purposes for the use of RNA at sentencing. There is a fourth well-recognized purpose, i.e. The Risk Principle: that in order to reduce recidivism interventions should focus on medium and high-risk offenders and avoid interventions, unless for compelling reasons, with low-risk offenders. The Proposed Standard does not capture that purpose. I propose, therefore, that a new sub-paragraph ii. be added (and the current sub-paragraphs ii & iii be moved 	<p>No response required.</p> <p>The committee agrees. In response to this comment, it has added subdivision (a)(2)(ii), which provides that risk/needs assessments are intended to “[r]educe the risk of recidivism by focusing services and resources on medium-and high-risk offenders, who are most likely to offend.”</p>

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			<p>down) providing: “Reduce the risk of recidivism by focusing services and resources on those offenders most likely to re-offend, i.e. medium and high risk offenders.”</p> <p>2. Section (b) (8): I think it would be more accurate and potentially less confusing to say that a validated RNA instrument is one demonstrated to be accurate in “assessing the risks and needs of the specific population on which it was validated.” I don’t believe the change would require any other changes in the Proposed Standard.</p> <p>3. Section (c) (4) (ii): I propose that the first word be changed to “That.” All actuarial risk assessments are based on group data. That’s the nature of an actuarial assessment. It’s perfectly appropriate to point out that this is group data, not individual data, but it’s not a question of “whether” its group data. I also propose that the provision be modified to read: “... only groups of high-risk offenders, for example, not a particular high-risk individual;” The point being made is equally applicable to low-risk and medium-risk offenders.</p> <p>4. Section (c) (4) (iii): I have three concerns with this language. The first is that the primary burden to demonstrate the tool’s accuracy and fairness should be on the developer or researcher who conducts the</p>	<p>The committee agrees and has incorporated this recommendation into the standard.</p> <p>The committee agrees and has incorporated this recommendation into the standard.</p> <p>To address the concerns raised by Judge Warren, the committee has revised the standard. It has re-lettered and revised subdivision (d)(4)(iii) to provide that courts should consider any identified limitations of</p>

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			<p>tool’s validation, not on some third party to demonstrate that the tool is not valid. Second, the word “disproportionately” is ambiguous. Disproportionate to what? African American offenders, for example, tend to have modestly higher average risk scores on properly validated instruments (those having predictive and differential validity) than whites, not because the tools are inaccurate or unfair but primarily because most tools heavily weight prior criminal history and, as a direct and indirect result of historical racial discrimination, African-American defendants tend to have more serious criminal histories. African-American defendants will therefore tend to have “disproportionately” high risk scores compared to whites, but on properly validated tools high-risk black defendants will have scores similar to the scores of high-risk white defendants, that is scores not “disproportionate” to the scores of high-risk white defendants. Third, I propose that the word “studies” be changed to “scientific research.” As correctly stated in section (b) (8) of the Proposed Standard a “validated” instrument is one demonstrated by “scientific research” to be accurate. Scientific research is governed by rigorous standards, including peer review. There is no logical reason to allow a purported “study” that does not meet the standards of scientific research to challenge the accuracy of an instrument that is supported by</p>	<p>the instrument, including “[w]hether any scientific research has raised questions that the instrument unfairly classifies offenders by gender, race, or ethnicity.”</p>

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			<p>scientific research. To redress these three concerns I propose substitute language along these lines: “Whether the instrument has been demonstrated to have “differential validity”, i.e. to be accurate across offender sub-groups, e.g., by gender, race, and ethnicity, or any scientific research has raised questions about whether the instrument accurately and fairly classifies minority offenders.”</p> <p>5. Section (d) (1) (i): It is accurate, and important to point out, that RNA tools were not developed and should not be used to determine what the proper punishment or penalty should be, or to determine the severity of a sentence. But it is also widely acknowledged that RNA can be very helpful in making the corrections determination whether the defendant can be best served in the community, i.e. to determine amenability for probation supervision. Using RNA information to determine amenability sometimes leads to confusion because the result of the determination is that the defendant is either incarcerated in prison or placed on probation, but the determination is based on corrections considerations not punitive considerations. Punitive considerations also influence the sentencing decision whether to incarcerate, of course, but those punitive considerations are distinct from amenability considerations. To address this issue, I</p>	<p>The committee has decided against pursuing this recommendation. The committee prefers taking a cautious approach because the use of risk/needs assessments at sentencing is relatively new in science and the law. The use of risk/needs assessments for the decision to incarcerate has not been validated by the courts. The <i>Loomis</i> decision, for example, expressly prohibits such use. The standard should be reevaluated as more courts address the issue. Accordingly, at this time the committee recommends that risk/needs assessments not be used to determine whether to incarcerate defendants.</p>

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			<p>propose that section (d) (1) be amended to read: “The results of a risk/needs assessment should not be used: (i) to determine the appropriate penalty or punishment; (ii) to determine the severity of the sentence; or (iii) to determine whether to incarcerate a defendant, except where the determination whether to incarcerate results from a corrections assessment whether the offender can be supervised safely and effectively in the community under section (c) (3) (ii) above.”</p> <p>6. Section (e) (1): The statements about “high” and “medium” risk offenders are accurate. But the statement about a “low” risk score is incomplete and misleading. The risk principle of EBP posits that generally speaking the less intervention with “low risk” offenders the better. By definition, “low risk” offenders are the best candidates for community supervision; they are more likely to be compliant and less likely to fail or reoffend. But, of course, it’s true that there are exceptions. I propose that the third sentence be modified to read: “A “low” risk score often indicates that a defendant is amenable or suitable for community-based supervision, but should not be interpreted as necessarily indicating that a defendant is amenable or suitable for community-based supervision.”</p> <p>7. Section (e) (2): The statements here are</p>	<p>The committee agreed and revised the standard to recognize that a low-risk score often, but not necessarily, indicates that a defendant is amenable or suitable for community-based supervision.</p> <p>The committee agrees and has incorporated</p>

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			<p>generally correct, but not always. In many jurisdictions, for example, sex offenders on community supervision are at least initially supervised as a higher risk offender despite being assessed as low risk. I propose amending the two sentences to add the word “ordinarily” or phrase “in most cases” or otherwise convey that there are exceptions to this guidance.</p> <p>8. Section (e) (3): I think this statement is misleading with respect to most low risk offenders placed on community supervision. With most such low risk offenders the objective is to impose the appropriate sanction, and address restitution, victim, and other issues, but not to order services that address needs. The needs of a low risk offender are not typically such that they are likely to result in further criminal activity; if the defendant has needs that are likely to result in further criminal behavior the defendant is not likely to be assessed as low risk. Further, mixing low-risk offenders with higher-risk offenders in treatment programs tends to increase the risk of recidivism among low-risk offenders. The goal with the low-risk offender is generally to get the offender out of the criminal justice system once other sentencing objectives are satisfied, not taking up a treatment slot that could be filled by a higher risk offender, or further embroiled in it, e.g., for failing to participate in a court-</p>	<p>this recommendation into the standard.</p> <p>The committee agrees that services may not be appropriate for most low-risk offenders. It decided against incorporating the recommended language to the extent that it implies that services should never be ordered for low-risk offenders. Instead, the committee re-lettered and revised subdivision (f)(3) to provide simply that “[a] court should order services that address the defendant’s needs.” Most often, low-risk offenders will not need services.</p>

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			<p>ordered program. One way to address this issue would be to limit this provision to medium and high risk offenders, e.g. “A court should order services that address the needs of “medium” and “high” risk offenders.”</p> <p>9. My final comment is with respect to the final paragraph of the Invitation to Comment’s introductory language on “Implementation Requirements, Costs, and Operational Impacts.” I think the paragraph overstates the costs of implementation. RNA information can only be presented to courts in counties where the probation departments already has a validated risk assessment tool and is using it to assess probationers. So those costs are sunk already. Indeed, unless the probation department is already skilled in proper administration of a validated RNA instrument, and is using that assessment information properly in the supervision of its probationers, it probably makes no sense for the courts to obtain RNA information in the first place because the court’s use of RNA information will be ineffective if probation staff are not properly trained and skilled in the use of RNA information in properly supervising offenders and steering them to appropriate services.</p>	<p>The report to the Judicial Council accompanying the final recommended proposal reflects that the implementation requirements, costs, and impacts may be relatively minimal for probation departments that are already using validated risk assessment instruments to assess probationers.</p>