



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-183

For business meeting on November 19, 2021

Title

Judicial Branch Administration: Emergency Rule on Use of Technology for Remote Appearances

Agenda Item Type

Action Required

Effective Date

January 1, 2022

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, emergency rule 3

Date of Report

October 28, 2021

Recommended by

Hon. Marsha G. Slough, Chair, Executive and Planning Committee
Hon. David M. Rubin, Chair, Judicial Branch Budget Committee and Litigation Management Committee
Hon. Kyle S. Brodie, Chair, Technology Committee
Hon. Marla O. Anderson, Chair, Legislation Committee
Hon. Carin Fujisaki, Chair, Rules Committee

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Executive Summary

The chairs of the Judicial Council's six internal committees recommend that the Judicial Council amend emergency rule 3 effective January 1, 2022, to remove civil proceedings from the scope of the rule and to affirm that the rule continues to apply to criminal proceedings. The amendment would make the rule consistent with new Code of Civil Procedure section 367.75, enacted in Senate Bill 241 (Stats. 2021, ch. 214), which will govern remote proceedings in civil cases beginning January 1, 2022. Courts may continue to rely on the authority in emergency rule 3, however, to conduct criminal proceedings remotely as they continue to address the impact of the COVID-19 pandemic and the backlog it created.

Recommendation

The chairs of the Judicial Council's six internal committees recommend that the Judicial Council, effective January 1, 2022, amend emergency rule 3 to remove civil proceedings from the scope of the rule and to confirm that the rule will continue to apply to criminal proceedings.

The proposed amended rule is attached at page 5.

Relevant Previous Council Action

The Judicial Council, on April 6, 2020, adopted 12 emergency rules to address the impact of the COVID-19 pandemic on California residents and the courts in an effort to help courts continue to carry out their constitutional mission while protecting the health and safety of court users, court employees, and judicial officers. Among these rules was emergency rule 3, which authorized courts to conduct judicial proceedings and court operations using remote technology. The council has not amended the rule since it was first adopted.

Analysis/Rationale

Currently, emergency rule 3 authorizes courts to use technology to conduct judicial proceedings remotely in both civil and criminal cases. Due to the success of remote proceedings during the pandemic and the improvement in access to justice, stakeholders and the Judicial Council urged the Legislature to enact a statute that authorizes courts to use remote technology to conduct civil proceedings. In response to these efforts, the Legislature enacted Code of Civil Procedure section 367.75¹ as part of Senate Bill 241 (Link A). Section 367.75 authorizes the use of remote proceedings in all civil cases beginning January 1, 2022, and requires the Judicial Council to adopt rules of court to implement the statute. A proposed new rule and rule amendments implementing section 367.75 will be circulated early in November so that they may be considered by the council and go into effect January 1, 2022, coinciding with the effective date of the new statute.

The Judicial Council adopted emergency rule 3 early in the COVID-19 pandemic when the Legislature was not in session and could not take the actions necessary to explicitly authorize the use of remote judicial proceedings. By enacting section 367.75, the Legislature has now addressed the circumstances under which courts can conduct remote proceedings in civil cases. Because the Legislature has now acted with respect to remote civil proceedings, the chairs of the internal committees are of the view that emergency rule 3 would no longer govern civil proceedings once section 367.75 takes effect on January 1, 2022. Accordingly, to avoid any confusion or ambiguity about which law applies, it is appropriate to amend the rule to exclude its application to civil proceedings.

In contrast, the Legislature has not taken any action to address the use of remote technology in criminal proceedings since the council's adoption of emergency rule 3. Courts and litigants still

¹ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

need the flexibility that emergency rule 3 affords to conduct criminal proceedings with the use of remote technology. This is particularly so while the COVID-19 pandemic continues and courts need to expeditiously address the backlog of criminal cases caused by the pandemic. For that reason, the internal committee chairs recommend that emergency rule 3 be amended to affirm that the use of remote technology continues to be authorized under the conditions provided in emergency rules 3 and 5.² The continued availability of emergency rule 3 in criminal proceedings is necessary to assure adequate access to justice and allow courts to fulfill their constitutional duties while protecting the health and safety of litigants, court personnel, and judicial officers.

Policy implications

Amending emergency rule 3 to remove its application to civil proceedings because of more recent legislative action and confirm that criminal proceedings may be conducted through the use of remote technology furthers the council's mission to improve the administration of justice and to increase access to justice.

Comments

The proposal to amend emergency rule 3 was not circulated for public comment. The primary reason is that it conforms the rule to changes in statute, specifically the enactment of section 367.75, which will now govern the use of remote technology for civil proceedings. In addition, there was a limited amount of time in which to amend the rule following the enactment of section 367.75 and give courts and litigants sufficient notice of the need to make any changes necessary to shift from practices and procedures under emergency rule 3 to those that will be implemented under the new section.

Alternatives considered

The internal committee chairs considered taking no action or repealing emergency rule 3 entirely. If there is no amendment to the rule, there would be ambiguity and confusion as to which law applies to civil proceedings, emergency rule 3 or section 367.75 and the rules that implement the new statute. If the rule were repealed entirely, litigants and courts could lose the ability to participate in criminal proceedings through the use of remote technology at a time when that flexibility is needed due to the ongoing pandemic and the backlog of criminal cases.

Fiscal and Operational Impacts

There may be some costs and operational impacts resulting from changes in practice and procedure resulting from the enactment and implementation of section 367.75, including costs for training court staff and judicial officers. These impacts would be the result of the statute, however, not of this proposed amendment conforming emergency 3 to the new statute. Amending emergency rule 3, in and of itself, is unlikely to have any additional fiscal and operational impacts.

² Emergency rule 5 addresses personal appearance waivers of defendants in criminal remote proceedings.

Attachments and Links

1. Proposed Cal. Rules of Court, emergency rule 3, at page 5
2. Link A: Sen. Bill 241 (Stats. 2021, ch. 214),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB241.

Emergency rule 3 of the California Rules of Court is amended, effective January 1, 2022, to read:

1 **Appendix I**

2 **Emergency Rules Related to COVID-19**

3
4
5 **Emergency rule 3. Use of technology for remote appearances**

6
7 **(a) Remote appearances**

8
9 Notwithstanding any other law, in order to protect the health and safety of the
10 public, including court users, both in custody and out of custody defendants,
11 witnesses, court personnel, judicial officers, and others, courts must conduct
12 ~~judicial~~ criminal proceedings and court operations as follows:

13
14 (1) Courts may require that ~~judicial~~ criminal proceedings and court operations be
15 conducted remotely.

16
17 (2) In criminal proceedings, courts must receive the consent of the defendant to
18 conduct the proceeding remotely and otherwise comply with emergency rule
19 5. Notwithstanding Penal Code sections 865 and 977 or any other law, the
20 court may conduct any criminal proceeding remotely. As used in this rule,
21 “consent of the defendant” means that the consent of the defendant is
22 required only for the waiver of the defendant’s appearance as provided in
23 emergency rule 5. For good cause shown, the court may require any witness
24 to personally appear in a particular proceeding.

25
26 (3) Conducting criminal proceedings remotely includes, but is not limited to, the
27 use of video, audio, and telephonic means for remote appearances; the
28 electronic exchange and authentication of documentary evidence; e-filing and
29 e-service; the use of remote interpreting; and the use of remote reporting and
30 electronic recording to make the official record of an action or proceeding.

31
32 **(b) Sunset of rule**

33
34 This rule will remain in effect until 90 days after the Governor declares that the
35 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
36 repealed by the Judicial Council.

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