

FAIRNESS AND ACCESS

Bench Handbook

[REVISED 2019]



JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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INTRODUCTION

This Handbook covers two important aspects of the judicial system: (1) fairness and its attendant requirements, the appearance of fairness and the avoidance of bias, and (2) access to the courts. Fairness and access are closely tied together, since an important way to ensure fairness in the courts is to make sure everyone has access.

In the first three chapters, the Handbook discusses the various legal requirements that apply to judges and the court system and the successful judicial practices that support the goals of increased fairness. It also covers your obligations to ensure fairness and avoid the appearance of bias, and discusses practices that can increase fairness and reduce the impact of biased behavior on the court system. It is not intended to be a substitute for participation in judicial education that addresses fairness issues, but rather a supplement to education programs and a handy reference if questions arise.

In Chapter 4, the Handbook discusses access to the courts. It explains the various meanings of access. It details the requirements for providing accommodation to court participants with disabilities and language assistance to court participants whose native language is not English. And it suggests methods for improving access for the economically disadvantaged.

Finally, the Handbook lists additional resources regarding access and fairness that have been prepared by the Judicial Council's Access and Fairness Advisory Committee and by the Center for Judicial Education and Research.

Chapter 1

FAIRNESS

I. [§1.1] FAIRNESS DEFINED

II. THE LEGAL REQUIREMENTS FOR FAIRNESS

- A. [§1.2] Code of Judicial Ethics
- B. [§1.3] Judicial Administration Standards
- C. [§1.4] Case Law

III. [§1.5] HOW TO CHECK YOURSELF FOR FAIRNESS

IV. [§1.6] WHEN TO RECUSE YOURSELF IN A CASE ON ACCOUNT OF BIAS

I. [§1.1] FAIRNESS DEFINED

Fair is defined in the dictionary as “free of favoritism or bias; impartial: a fair judge” and “just to all parties; equitable: a fair compromise.” Bias is defined as “preference or inclination that inhibits impartial judgment: prejudice.” Under these definitions, fairness and the lack of bias, which are key components of public trust, are closely associated with the judiciary and the court system in general.

Everyone agrees that judges should be fair and free of bias, and in the vast majority of cases judges intend to be fair and believe that they *are* being fair. But many academic and practical studies over the years have discovered unconscious biases that can affect the integrity of your decisions. What is equally important, these unconscious biases could affect the appearance of fairness. The appearance of fairness is, for a judge, just as important as actual fairness. Similarly, it’s not enough to be unbiased—a judge must also *appear* unbiased.

II. THE LEGAL REQUIREMENTS FOR FAIRNESS

A. [§1.2] CODE OF JUDICIAL ETHICS

The first legal requirement for judges to be fair and avoid actual or perceived bias and prejudice is found in the California Code of Judicial Ethics. The code, which is legally binding, specifically requires you to ensure fairness and prevent bias. It is available online at https://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf. You should consult it regularly because it provides an excellent guide to your day-to-day activities. In addition, the Code of Judicial Ethics governs the conduct of judges and judicial candidates for judicial office.

With respect to fairness and preventing bias, under the code you must:

- Dispose of all judicial matters fairly, promptly, and efficiently. Code of Judicial Ethics, Canon 3(B)(8). (But see the advisory committee commentary, which cautions that the obligation to dispose of matters promptly and efficiently must not take precedence over the obligation to dispose of matters fairly and with patience.)
- Manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law. Code of Judicial Ethics, Canon 3(B)(8).
- Perform your judicial duties without actual or perceived bias or prejudice. “A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.” Code of Judicial Ethics, Canon 3(B)(5).
- Require lawyers in proceedings before you to refrain from “(a) manifesting by words or conduct, bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others, or (b) sexual harassment against parties, witnesses, counsel, or others.” This canon, however, does not preclude legitimate advocacy when one of these factors is an issue in the proceedings. Code of Judicial Ethics, Canon 3(B)(6).
- Require staff and court personnel under your direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based on race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment, in the performance of their official duties. Code of Judicial Ethics, Canon 3(C)(3).

Under the Code of Judicial Ethics you are responsible in the courtroom not only for your own behavior, but also for the behavior of your staff and the lawyers appearing before you.

In addition, the code requires you to uphold these standards outside the courtroom; your behavior must ensure the appearance of fairness and impartiality. A “judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender identity,

gender expression, religion, national origin, ethnicity, or sexual orientation,” although an exception is made for religious organizations. Code of Judicial Ethics, Canon 2(C).

The rationale for barring a judge’s membership in organizations that practice discrimination is that such membership may give rise to a perception that the judge’s impartiality is impaired. Additionally, a judge’s membership in an organization that engages in *any* discriminatory membership practices prohibited by law also violates Code of Judicial Ethics, Canon 2, 2(A) and gives the appearance of impropriety. Advisory Committee Commentary to Code of Judicial Ethics, Canon 2(C).

Finally, a judge’s public manifestation of knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Code of Judicial Ethics, Canon 2, 2(A) and diminishes public confidence in the integrity and impartiality of the judiciary. Advisory Committee Commentary to Code of Judicial Ethics, Canon 2(C).

B. [§1.3] JUDICIAL ADMINISTRATION STANDARDS

The second source of authority that is intended to increase fairness, limit bias, and preserve the integrity and impartiality of the judicial system is the standards of judicial administration adopted by the Judicial Council. These standards provide guidance for judicial conduct, although they do not have the force of law.

The standards recommend that you should:

- Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all the participants. Cal Rules of Ct, Standards J Admin 10.20(a)(1). In conducting trials, judges should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other. Their conduct must be in accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality so that the trial is not only fair in fact, but also appears to be fair. *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 1002.
- Refrain, in all courtroom proceedings, from engaging in conduct and prohibit others from engaging in conduct that shows bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants. Cal Rules of Ct, Standards J Admin 10.20(a)(2).
- Ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests, and are not influenced by stereotypes or biases. Cal Rules of Ct, Standards J Admin 10.20(a)(3).

Each court must use gender-neutral language in all local rules, forms, and court documents, and must periodically review them to ensure the continued use of gender-neutral language. Cal Rules of Ct 10.612.

C. [§1.4] CASE LAW

A mere appearance of bias is not enough to disqualify a judge. For judicial disqualification under the Due Process clause, based on an objective assessment of the circumstances in the particular case, there must exist the probability of actual bias on the part of the judge or decision maker that is too high to be constitutionally tolerable. *People v Freeman* (2010) 47 C4th 993, 996.

In the past, perceived bias on the part of judicial officers has occasionally been the basis for reversal:

- In an employment discrimination case, the trial judge's actions in allowing and indeed helping to create a circus atmosphere and in giving defendants' lawyer free rein to deride and make snide remarks at will at the expense of plaintiffs and their lawyer, constituted judicial misconduct and required reversal. See *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 1003, 1008. When the appearance of judicial bias and unfairness colors the entire record, the appellant need not follow the general requirement of making an affirmative showing of prejudice. 151 CA4th at 1008. The test is not whether appellant has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause the appellate court to lack confidence in the fairness of the proceedings to such an extent as would require reversal. *Haluck v Ricoh Electronics, Inc., supra*.
- In a parole revocation case, the appellate court ordered a different judge to handle the retrial because the judge at the hearing expressed unabashed animosity toward Proposition 36 that requires probation for certain drug violations, and particularly toward those defendants—like the subject of the revocation hearing—who are unable to complete Proposition 36 probation without a violation. *People v Enriquez* (2008) 160 CA4th 230, 244.
- In an adoption proceeding, bias was found based on the judge's stated belief that persons who were deaf were not qualified to be adoptive parents. See *Adoption of Richardson* (1967) 251 CA2d 222, 236.
- The perceived bias cases may not be good law after *Freeman*. However, it is important for judges to look at them to see how easy it can be to do things that give rise to an appearance of bias (*i.e.*, even if not legally required under the Due Process clause, judges

should strive mightily to avoid the appearance of bias, not just bias itself).

III. [§1.5] HOW TO CHECK YOURSELF FOR FAIRNESS

“How can I check myself for fairness?” Asking the question is an important first step to increasing your own fairness and reducing bias. The second step is to participate regularly in judicial education that addresses fairness issues.

Numerous studies have shown that everyone has unconscious biases. A fairness education goal is to help participants become aware of those biases and learn not to act on them to the detriment of the judicial process. Awareness alone may be enough to help prevent you from displaying an unconscious bias in a proceeding, which could impair the fairness of the proceeding and bring the judiciary into disrepute. Although again not a substitute for participation in education sessions, there are various common-sense techniques that you can use to recognize and identify your unconscious biases.

First, simply consider the possibility that unconscious biases are affecting your decision making. Unconscious biases may arise when your beliefs, feelings, attitudes, speech, or actions are influenced not only by your perception of another person’s words and actions but also by that person’s race, national origin, religion, gender, sexual orientation, gender identity, age, or disability.

Second, review your own conduct for evidence of bias. Possible indicators include your tone of voice, posture, and gestures, and the forms of address that you tend to use with persons whom you perceive as belonging to certain categories or groups, *e.g.*, persons of a certain gender, race, national origin, religion, sexual orientation, or gender identity. Techniques for self-examination include:

- Asking the jurors at the end of the trial to complete an anonymous exit questionnaire on various aspects of the proceedings, including how fair you and the court staff were.
- Reviewing a sampling of your past orders and rulings to look for a pattern that may indicate that it could have been based on a bias.
- Reviewing a sampling of transcripts or tape recordings of your past trials, to spot such indicators of bias as the use of ethnic expressions, or the use of particular forms of address when speaking to members of certain groups.
- Putting yourself in a losing party’s or attorney’s shoes. Is there anything you did as a judge that you, as a party or attorney, might perceive as showing bias?

Finally, be careful that you do not show disapproval or impatience that may be misconstrued as bias. Remember that body language can have as much of an impact as words in expressing disapproval or impatience. Facial expression, body language, and oral communication can create the appearance of judicial bias to the litigants or the lawyers in the proceeding, to the jurors, to the media, and to other court observers.

If you are aware of your own behavior and mannerisms, you can more easily avoid behavior that could be perceived as prejudicial. Research has shown that jurors often take their cues for their attitudes toward litigants, attorneys, and witnesses from the judge's conduct and demeanor, including nonverbal behavior. In addition, conduct that one believes is not biased or does not convey stereotyping, can nevertheless give the impression of favoring or disfavoring one litigant, attorney, or witness over another, and thereby affect an individual's credibility. This conduct may include anger, impatience, sarcasm, and the inappropriate use of humor.

In addition you should, from time to time, review California Civil Jury Instruction (CACI) 113 on bias, as it will remind you about the importance of acknowledging, and then combating, biases. CACI 113 states:

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

IV. [§1.6] WHEN TO RECUSE YOURSELF IN A CASE ON ACCOUNT OF BIAS

You must recuse yourself if:

- You believe your recusal would further the interests of justice (CCP §170.1(a)(6)(A)(i)),
- You have substantial doubt about being able to be impartial (CCP §170.1(a)(6)(A)(ii)), or
- A person who is aware of the facts might reasonably entertain a doubt about your impartiality (CCP §170.1(a)(6)(A)(iii); Code of Judicial Ethics, Canon 3(E)(2), (3)).

Note: This Bench Handbook is not intended to give comprehensive guidance on recusal. For that, please review Rothman, California Judicial Conduct Handbook (Thomson Reuters 4th ed 2017) or California Judges Benchguide 2: *Disqualification of Judge* (Cal CJER 2010).

Chapter 2

BIAS IN THE COURTS

- I. [§2.1] THE EFFECT OF BIASED BEHAVIOR IN THE COURTS**
- II. [§2.2] HOW BIASED BEHAVIOR MANIFESTS IN THE COURTS**
- III. [§2.3] WHAT JUDGES CAN DO TO ELIMINATE BIAS IN THE COURTS**

I. [§2.1] THE EFFECT OF BIASED BEHAVIOR IN THE COURTS

Words, actions, and behaviors that indicate bias may diminish public trust and violate the following two fundamental principles of our justice system: (1) our courts must be free from bias, and (2) equal access to fair and dignified treatment in our courts is available to all who enter them. Public trust and confidence in our legal system is grounded in the practice and perception of fairness and equality in our courts. One strong indicator of that is how the people who work in the courts conduct themselves when interacting with the public.

Everyone entering the court must be given equal treatment regardless of gender, gender identity, gender expression, racial or ethnic background, disability, sexual orientation, age, socioeconomic status, or ability to speak English. Judicial officers and other court personnel should be careful not to make assumptions about people's roles in the courts based on these factors.

II. [§2.2] HOW BIASED BEHAVIOR MANIFESTS IN THE COURTS

Biased behavior is sometimes so ingrained that it is difficult to recognize. One type of biased behavior is conduct that overtly communicates that a person is stereotyping. This conduct, which on a conscious level all would find offensive, may sometimes exist on an unconscious level. This bias can be manifested by, for example:

- Assuming that a woman, or a person of Hispanic, Asian, or African descent, is not a judge, attorney, or officer of the court;
- Complimenting litigants or parties of color on their English skills, while not commenting on the English skills of others; or
- Speaking more slowly to a person who, based on appearance, you believe speaks a primary language other than English but who may have been born in this country.

Biases are also exhibited through mistaken conclusions drawn by judges, court employees, or users, because of ignorance of variation in behavioral norms across all cultures, for example, by:

- Assuming that a nod or a “yes” indicates thorough understanding;
- Assuming that a “yes” means the person agrees with you. In some cultures, *e.g.*, Japan, the word for “yes”—“hai”—can mean nothing more than “I’m listening” or “I understand you”; or
- Assuming that someone is lying if he or she does not make eye contact. In many cultures, making eye contact with someone in a position of authority is considered disrespectful.

Yet another way in which biased behavior may be shown is through habitual behavior that reflects conscious or unconscious bias, for example, by:

- Addressing white lawyers by formal title such as counsel, but minority lawyers by informal reference such as by their first name;
- Permitting white male lawyers or litigants to fully argue their point or tell their story, but continually interrupting lawyers or litigants of color and women; or
- Referring to women by terms such as “honey” or “dear” or commenting on their appearance.

III. [§2.3] WHAT JUDGES CAN DO TO ELIMINATE BIAS IN THE COURTS

You can be a role model. And you can help court staff eliminate bias. Both you and your staff should:

- Treat everyone with courtesy and respect. For example, individuals should be addressed by appropriate title, such as “Judge” or “Your Honor,” “Counselor” or “Attorney,” “Mr.” or “Ms.” (unless “Miss” or “Mrs.” is requested), “Dr.,” “Officer,” “Representative,” or “Senator.” Groups should be addressed with gender-neutral or gender-inclusive terms, such as “members of the jury,” “counselors,” or “ladies and gentlemen.”
- Act neither in an overly friendly nor unfriendly manner to individuals in the courtroom or in the clerk’s office.
- Permit all parties and attorneys an equal opportunity to present their cases, without exhibiting impatient or disinterest.
- Be polite on the telephone.

- Maintain decorum in the courtroom when court is not in session. Bailiffs and clerks should avoid having personal conversations and telling jokes with attorneys and witnesses.
- Attend fairness training, including ethics training.

Example: Judge Young hears a motion to change child custody. He knows and likes petitioner father’s counsel, Joseph Lee. He is unfamiliar with Maria Alvarez, counsel for the respondent mother. Ms. Alvarez is young, and her client appears upset, although she remains quiet at the table.

Judge Young greets Mr. Lee warmly, but is perfunctory with Ms. Alvarez and warns her client that he will have no emotional outbursts in his courtroom. At one points during Ms. Alvarez’s direct examination of her client, he interrupts, addressing her as “young lady” and telling her to get to the point.

Ruling on the motion, he apologetically (to Mr. Lee and the father) denies it, explaining that he considered the motion and testimony, but that young girls are better off living with their mothers.

Judge Young’s behavior both showed bias for Mr. Lee and against Ms. Alvarez and her client. And although he ultimately denied the father’s motion, and may have had good cause to do so, Judge Young’s stated reasoning appears to be based on bias rather than on evidence.

Chapter 3

AVOIDING BIAS

- I. **[§3.1] AVOIDING BIAS TOWARD SPECIFIC COURT PARTICIPANTS**
- II. **[§3.2] AVOIDING GENDER BIAS**
- III. **[§3.3] AVOIDING SEXUAL ORIENTATION AND GENDER IDENTITY BIAS**

I. **[§3.1] AVOIDING BIAS TOWARD SPECIFIC COURT PARTICIPANTS**

There are three steps judges should take to help avoid bias:

- Do not rely on stereotypes;
- Look for evidence on relevant issues (as opposed to relying on stereotypes); and
- Be conscious of their decision-making process.

The suggestions below may seem obvious, but if you think of them simply as reminders, they may help you identify areas of potential improvement for you and your colleagues. It should be noted that the following suggestions are not a substitute for participation in fairness education.

- *Litigants*: The claims of litigants who are women or people of color or who have a limited ability to speak English are as legitimate as any other cases judges hear in court and must be treated accordingly. Some judicial officers have been dismissive of litigants who are women as being “emotional.” This attitude must be avoided. And just as you should be careful not to label litigants who are women as more emotional either because of an unwarranted assumption or because of the nature of the cases often brought by women, such as child-support enforcement, you must also avoid showing favoritism toward or bias against litigants in family law cases who are men. This includes assuming that women are better than men at raising children.
- *Victims*: Take special care to treat all victims of crime with respect and be sensitive to the trauma they have experienced. Victims of domestic violence and sexual assault must not be subjected to increased scrutiny or be stereotyped because the alleged crime is sexual in nature or occurred in a domestic context. Likewise, victims are no less credible because they are people of color or have

different cultural backgrounds or limited ability to speak English. The testimony of women and people of color must be judged by the same standards of relevance and credibility as the testimony of other victims.

- *Attorneys:* Good attorneys are zealous advocates. This, of course, includes attorneys who are women and/or people of color. It is a danger sign if you or colleagues expect them to be more passive or emotional in their advocacy or more tolerant of interruptions or reprimands. Another point is to recognize and respond to attorneys who are women and/or people of color to the same extent and in the same manner as you would recognize and respond to other members of the bar. For example, it is inappropriate to address an attorney as “young lady” or to identify an attorney as “that black attorney” or “that Hispanic attorney.”
- *Witnesses:* Judge the credibility of witnesses by the same standards that you would use for all individuals. Do not judge their veracity on the basis of race, gender, or language ability. You, the attorneys, and court personnel should make every effort to correctly and respectfully pronounce each party’s name. If an attorney has a client or a witness whose name you or others in the courtroom find difficult to pronounce, you should encourage the attorney to help the court by informing you and the staff at or before the calendar call of the correct pronunciation. You may ask the attorney to write out the name phonetically. In this way, the client or the witness will not be embarrassed. California Civil Jury Instruction 113 (Bias), 5003 (Witnesses) and California Criminal Jury Instruction (CalCRIM) 200 (Duties of Judge and Jury) support this idea.
- *Expert Witnesses:* Judge expert witnesses on the basis of their qualifications and the substance of their testimony and not on their gender, race, or language ability. The test for competence should be applied equally. See CACI 219 (Expert Witness Testimony) (consider expert’s training and experience, facts relied on, and reason for expert’s opinion); CalCRIM 332 (Expert Witness Testimony) (follow general witness instructions and focus on training, facts, and opinion).

II. [§3.2] AVOIDING GENDER BIAS

Numerous studies have documented examples of gender bias in the courts, including the 1996 report of the Judicial Council’s Advisory Committee on Gender Bias in the Courts (“Advisory Committee”), entitled *Achieving Equal Justice for Women and Men in the Courts*. Current legal

news reports and summary reports of actions of the Commission on Judicial Performance suggest this continues to be an issue in the courts.

A first step to help you avoid gender bias is to participate regularly in judicial education programs that address fairness issues.

A second step is to avoid the biased behavior in the following list, based on the Advisory Committee's conclusions:

- Openly hostile behavior to female participants in the courtroom;
- Sexual innuendo or dirty jokes;
- Use of terms of endearment to refer to female participants in the courtroom;
- Failure to extend equally common courtesies to female and transgender participants, such as appropriate forms of address;
- Undue attention to the personal appearance of female and transgender court participants;
- Reliance on stereotypes about women rather than on judgments unique to each individual;
- Adoption of a tone by a male judicial officer toward female participants that is fatherly, courtly, and patronizing, or harsh and reprimanding;
- Imposition of unequal standards of advocacy;
- Hostility and impatience toward causes of action usually involving women, such as sexual discrimination or harassment;
- Imposition of such penalties as denying continuances of trials or depositions on female participants who are pregnant, when similar penalties would not have been imposed for other conditions of disability; and
- Failure to intervene appropriately when conduct constituting gender (including transgender) bias is exhibited by some other court participant under the judge's control, such as counsel, a bailiff, or a court clerk.

III. [§3.3] AVOIDING SEXUAL ORIENTATION AND GENDER IDENTITY BIAS

The legal landscape concerning same-sex couples and gender identity has changed substantially in the last 10 years. To reduce sexual orientation and gender identity bias, it is important to be aware of the following legal principles and developments:

- Marriage is legal in California for both opposite and same-sex couples. As a result of *Hollingsworth v Perry* (2013) 570 US 693,

133 S Ct 2652, 186 L Ed 2d 768, Proposition 8, an amendment to the California Constitution passed by voters in 2008 prohibiting marriages by same-sex couples, was permanently enjoined from enforcement. Additionally, same-sex spouses became recognized by federal law due to *U.S. v Windsor* (2013) 570 US 744, 133 S Ct 2675, 186 L Ed 2d 808.

- *Obergefell v Hodges* (2015) ___ US ___, 135 S Ct 2584, 192 L Ed 2d 609, ultimately made same-sex marriage legal in all states. It held that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. It also held that states must recognize lawful same-sex marriages performed in other states.
- State law acknowledges relationships formed by same-sex couples before same-sex marriage was legalized. See Fam C §143 (term “spouse” now includes registered domestic partners); Fam C §§297–298.5; Fam C §297.5 (registered domestic partners have same right and responsibilities as spouses); Prob C §37(b) (surviving domestic partner defined); and CC §1714.01 (right of domestic partner to recover damages for negligent infliction of emotional distress in the same way as a spouse).
- It is state policy that every person deserves full legal recognition and equal treatment under the law and to ensure that intersex, transgender, and nonbinary people have state-issued identification documents that provide full legal recognition of their accurate gender identity. The Gender Recognition Act (SB 179 (2017)), effective January 1, 2018, recognizes that gender identity is fundamentally personal and changes the requirements for obtaining a new birth certificate and name changes.
- The Gender Recognition Act provides a nonbinary option for gender. Gender change petitions no longer require any medical treatment, only a statement under oath that the petition is to conform the person’s legal gender to identity; the procedures for name change are modified (hearings are not always required); and the bill creates a separate procedure for change of gender for persons under 18. The added and amended statutes were operative September 1, 2018. See CCP §§1277–1278.
- SB 310 (amending, repealing and adding CCP §1279.5), which allows name changes for people in prisons and jails, and SB 396 (amending Gov C §§12950 and 12950.1 and Un Ins C §§14005 and

14012), regarding transgender employment discrimination, were signed into law at the same time as SB 179.

- Assembly Concurrent Resolution No. 260, filed September 5, 2018, encourages inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns in statutes (both amended and new) and state agency policies, regulations, or guidance. The Rules and Projects Committee is considering form revisions based on this resolution.
- Despite these advances, past neglect and prejudice still lead many gay, lesbian, bisexual, transgender, and gender-nonconforming court participants (including judicial officers, attorneys, jurors, court staff, or parties) to expect that the judicial system is composed mainly of individuals who lack respect for or harbor hostility toward their respective communities. Understand that these participants may be on guard because of this past mistreatment.

Note: When referring to individuals who are lesbian, gay, bisexual, transgender, gender non-conforming, queer, or questioning, the inclusive term is LGBTQ.

In addition, many judges lack knowledge of and exposure to LGBTQ individuals, which may prevent the judges from developing strategies that reflect respect and inclusiveness in the courtroom. A report of the subcommittee of the Access and Fairness Advisory Committee on Sexual Orientation Fairness based on focus groups in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles identified the following issues in this area:

- Sexual orientation bias influencing judicial decision making;
- Lack of knowledge and understanding of sexual orientation issues and nuances;
- Need for preservation of privacy;
- Disrespect and mistreatment of individuals because of sexual orientation bias and homophobia;
- Exclusion of gay and lesbian individuals from informal legal system networks;
- Lack of equal employment opportunities and benefits for gay and lesbian attorneys and court personnel; and
- Barriers to court accessibility, including lack of substantive law that addresses gay and lesbian relationship issues, and language in current court forms that fails to reflect the relationship status of such litigants.

Although the Judicial Council study on sexual orientation fairness in the California courts did not address transgender or gender-nonconforming

litigants, you should use a similar approach to those enumerated below to provide fair treatment and eliminate bias with respect to these court users. Further, you should be attentive to the behavior and demeanor of your court staff to ensure that LGBTQ court users are being treated with dignity and respect.

What can you do to counteract the potential for bias with respect to sexual orientation and gender identity? First, participate in judicial education that addresses fairness issues to help recognize the myths and stereotypes that you may hold, and identify any unconscious bias you may hold. Second, on your own you can try to:

- Ask the preferred pronoun of participants (attorneys, parties, or witnesses) if you are unsure how to address them. Apologize if you make an error, do not make it again, and correct other participants who make an error in address.

TIP: In addition to the more familiar “she/her” and “he/him,” preferred gender (or gender neutral) pronouns may include pronouns such as “they/them” or “ze/hir.”

- Identify and recognize common myths, stereotypes, and biases about LGBTQ individuals.
- Identify ethical and legal obligations regarding fairness based on sexual orientation and gender identity.
- Identify ways to ensure sexual orientation and gender identity fairness in judicial conduct and decision making.
- Develop jury selection techniques for encouraging candid responses about potential biases, both positive and negative.
- Attempt to use gender-neutral language as much as possible.
- Do not make assumptions about individuals, such as in voir dire. Rather than asking about a husband or wife, ask about a spouse or significant other. If a potential juror has a child, do not assume the other parent is the opposite sex, or that the other parent is still involved with the potential juror and child.
- Frame effective voir dire questions while respecting the privacy of LGBTQ individuals in the jury selection process. Try to consider issues regarding bias about sexual orientation or gender identity beforehand if you know these issues might arise. For example, in a case involving an LGBTQ party, you might ask:
 - Is there anything in the statement of the case that makes you uncomfortable?

- This case involves _____. Do you think you could be fair to _____? Why or why not?
- Can you describe your interaction/experience with LGBTQ individuals?
- Do you have friends, relatives, or co-workers who are LGBTQ? If yes, when you found out, how did it affect your relationship, if at all?
- What do you think about allowing LGBTQ individuals to serve in the military? Why do you think some people oppose it?
- Are you a member of a religious or other organization that takes a position against homosexuality?

Open-ended, follow-up questions might include:

- Why do you feel that way?
- How do you feel about that?
- What makes you say that?
- Why do you think that happened?
- Why do you feel that happens very rarely?
- Would you tell me some more about that?
- Say some more please (why is that)?
- What personal experiences are you drawing on when you say that?

TIP: When dealing with gender identity issues in a case, do not use time in court (*e.g.*, a hearing or *voir dire*) to educate yourself. Keep focused on the core issues of the case. If you really do not know if something is relevant, you can take a break and research it.

Chapter 4

ACCESS

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IX. [§4.39] HOW COURTS ARE TRYING TO INCREASE ACCESS TO THE ECONOMICALLY DISADVANTAGED

I. [§4.1] WHAT ACCESS TO THE COURTS MEANS

While judicial fairness provides impartiality and equal opportunity to all parties, and avoiding bias provides equal treatment for these parties, the effort to create an inclusive judicial system falls woefully short without access to the courts for all.

“One of the goals of our legal system is to secure access to our courts for *everyone*.” *Hoversten v Superior Court* (1999) 74 CA4th 636, 641 (emphasis added), citing *Boddie v Connecticut* (1971) 401 US 371, 374, 91 S Ct 780, 784, 28 L Ed 2d 113; see also *Tennessee v Lane* (2004) 541 US 509, 124 S Ct 1978, 158 L Ed 2d 820 (regarding right of access to the courts for citizens with disabilities).

Access to the courts and access to justice are not limited to physical access to a courtroom building but include physical access to other areas as

well as to court programs and services. Historically, some of the access-to-justice issues confronting the judiciary included language assistance, physical access, self-help programs, litigation/mediation/collaboration, and technological access.

In 2013, Chief Justice Tani G. Cantil-Sakauye, in furthering the goal to provide access for all to the court, instituted “Access 3D,” or three-dimensional access: physical, remote, and equal.

Physical access: Keeping courthouse doors open and operating at hours that benefit the public. Having safe, secure, well-maintained, and cost-effective courthouses that are accessible to those with disabilities.

Remote access: Increasing ability to conduct branch business online to file court cases, access case information and records, and to make video appearances where and when appropriate.

Equal access: Language access: the judicial branch serves 38 million Californians who speak more than 200 languages. Language access must be advanced by providing and endorsing programs that enhance professional standards for interpreters and make language services available for those in need.

Under Access 3D, equal access also means:

- Our courts are available to all—from low- and middle-income litigants representing themselves to businesses urgently needing to resolve disputes;
- Adequately staffing our courts so that we have enough judges, bench officers, and court staff to serve the public;
- Making judicial branch business more transparent, particularly in how our taxpayer dollars are spent;
- Supporting a diverse judicial branch at all levels to benefit the public and to reflect the makeup of our state; and
- Making diverse appointments to the Judicial Council and its advisory committees and task forces to better represent the public.

In recent years there have been numerous advances in providing access to all. Technological advances improve access where there are spoken language and disability barriers in the courts. Self-help centers and remote access have been established to assist the economically disadvantaged navigate the legal system. Programs like collaborative justice courts help the homeless improve their lives. Every advance furthers the goal of “justice for all.”

II. THE REQUIREMENTS FOR PROVIDING ACCESS TO PERSONS WITH DISABILITIES

A. [§4.2] THE ADA

The Americans With Disabilities Act (ADA) (42 USC §12101 et seq) is a federal civil rights statute that requires all state and local governmental entities, including the courts (see 42 USC §12131), to accommodate the needs of persons with disabilities who have an interest in court activities, programs, and services. The ADA also requires the government to modify programs to integrate persons with disabilities, eliminate discriminatory practices or procedures, and provide alternatives to communications limitations and differences. It specifically provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 USC §12132.

The ADA is based on congressional findings that:

- In 2010, approximately 56.7 million Americans had a disability;
- Historically, these individuals have been isolated;
- They continually encounter discrimination; and
- They are frequently subjected to unequal treatment, which, in many instances, is intentional.

B. [§4.3] CONDUCT PROHIBITED UNDER THE ADA

Under the ADA the following conduct is prohibited (28 CFR §35.130(a)–(b), (f)):

- Directly or indirectly excluding persons with disabilities.
- Providing less effective benefits or services to persons with disabilities than to persons without disabilities.
- Providing a separate benefit or service from that provided to the general public, except when absolutely necessary.
- Aiding or perpetuating discrimination by acts or omissions.
- Employing procedures, practices, or rules that screen out persons with a disability.
- Using sites or locations where persons with a disability cannot receive the benefit, service, or activity.
- Surcharging persons with a disability for a service, benefit, or activity.
- Forcing a person with a disability to accept a particular accommodation.

- Coercing or retaliating against anyone seeking to enforce the ADA.

C. [§4.4] THE ADA DOES NOT OVERRIDE STRICTER STATE OR LOCAL LAWS

Neither the ADA nor the implementing regulations that apply to public entities supplant state or local laws that provide equal or greater protections to a person with a disability. 28 CFR §35.103(b). For example, California has a broader definition of disability than the ADA that must be applied in California. See Govt C §12926.1(c). See the discussion at §4.9.

D. [§4.5] REQUIRED NOTICE

Courts should provide notice to the public about where to find the court's ADA coordinator or how to obtain communication assistance, as follows:

- Courts with 50 or more employees must appoint an employee to be the ADA coordinator for the court. 28 CFR §35.107(a).
- A court must post notices on where to find the ADA coordinator or otherwise obtain assistance. 28 CFR §35.106.
- A court and its employees have an obligation to provide effective communication regardless of the nature of the communication disability. See 28 CFR §35.160.

E. [§4.6] WHERE TO FIND MORE INFORMATION

The full text of the ADA is available at <https://www.ada.gov/pubs/adastatute08.htm>. The ADA homepage is located at <https://www.ada.gov/>. The American Bar Association also has various resources available on procedures for court compliance with the requirements of the ADA. These resources are available by contacting the ABA Commission on Disability Rights at 202-662-1570 or <https://www.americanbar.org/groups/diversity/disabilityrights/>. Finally, the Department of Fair Employment and Housing web site may be helpful: www.dfeh.ca.gov.

III. [§4.7] THE RULE OF COURT APPLICABLE TO REQUESTS FOR ACCOMMODATION

California Rules of Court 1.100 was adopted to ensure compliance with the ADA and state laws. The rule provides a procedure for attorneys, parties, witnesses, jurors, and any other persons with disabilities to request an accommodation in confidence and to make it directly to a designated court clerk, employee, or judicial officer. It is the “policy of the courts of this state to assure that qualified individuals with disabilities have equal and

full access to the judicial system,” but the rule is not intended to impose limitations or to invalidate the remedies, rights, and procedures accorded to persons with disabilities under state or federal law. Cal Rules of Ct 1.100(b).

A. [§4.8] THOSE ENTITLED TO RECEIVE ACCOMMODATION

Persons with disabilities are protected by (Cal Rules of Ct 1.100(a)(1)):

- The ADA,
- The Unruh Civil Rights Act (CC §51 et seq; see Govt C §§12926, 12926.1 (definition of disability)), and
- Other related state and federal laws.

The definition of “persons with disabilities” includes persons who have a physical or mental medical condition that limits one or more of the major life activities, have a record of such a condition, or are regarded as having such a condition. Cal Rules of Ct 1.100(a)(1).

Under the ADA:

- A “qualified individual with a disability” is an individual with a disability who, with or without reasonable modifications to rules, practices, or removal of physical, communication, or other barriers, meets the eligibility requirements for the receipt of services or participation in programs provided by the government entity. See 42 USC §12131(2). But see §4.9 for discussion of broader California definition of person with disability who is entitled to accommodation.
- No qualified person may be excluded from services or participation in programs provided by the courts. Qualified persons are entitled to full participation. See 42 USC §12132.

B. [§4.9] THE DIFFERENCE IN HOW DISABILITY IS DEFINED UNDER CALIFORNIA LAW AND THE ADA

For ADA purposes, disability is defined as a physical or mental medical condition that substantially limits one or more major life activities. 42 USC §12102(1); 28 CFR §35.108; CC §54(b)(1). But for California purposes, the test for disability is broader in that only a limitation on major life activities is required rather than the more strict ADA test of *substantial* limitation. Govt C §12926.1(c); Cal Rules of Ct 1.100(a)(1).

The federal regulations identify major life activities as including the following (28 CFR §35.108(c)(1)):

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing

- Hearing
- Speaking
- Communicating
- Learning
- Working

Examples of impairments that substantially limit one or more major life activities include (see 28 CFR §35.108(b)(2)):

- Mobility or other motor medical condition
- Psychological and mental illness
- Vision, hearing, or speech loss
- Loss of cognitive function
- Environmental sensitivities
- Chronic diseases

Major life activities are broadly defined for California purposes to include working and physical, mental, and social activities. Govt C §12926(m)(1)(B)(iii).

A person who is an alcoholic or a recovering alcoholic is an individual with a disability under the ADA and California law. Both exclude certain conditions from coverage. For example, California excludes sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs as disabilities. Govt C §12926(k)(6). Under the ADA, active users of illegal drugs are not covered (see 42 USC §12114).

Under 28 CFR §35.108(b)(3), homosexuality and bisexuality are also excluded.

TIP: For court purposes, the broader California definition is to be applied. Govt C §12926.1(a), (c). Thus, any person with a disability, regardless of the severity or nature of the limitation, is a “person with a disability.” Also, note that California law specifically states that if the ADA would provide broader coverage or include a physical or mental disability not covered under state law, the ADA definition applies. Govt C §12926(n).

C. [§4.10] THE PROCESS FOR REQUESTING AN ACCOMMODATION

An application for accommodation may be presented ex parte on Judicial Council form Request for Accommodations by Persons with Disabilities and Response (MC-410), in another written format, or orally. Cal Rules of Ct 1.100(c)(1). Applications must be forwarded to the ADA coordinator, access coordinator, or designee. Cal Rules of Ct 1.100(c)(1). “Applicant” means any lawyer, party, witness, juror, or other person with an interest in attending any proceeding before any court of this state. Cal Rules of Ct 1.100(a)(2).

The application should be made as far in advance as possible before the requested implementation date for the accommodation and, in any event, should be made at least 5 court days before that date. However, you may, in your discretion, waive this requirement. Cal Rules of Ct 1.100(c)(3). To manage the accommodation process effectively and efficiently in some situations, you will need advance notice to implement the accommodation. Some accommodations require the court to reserve additional personnel or devices. You may readily provide other accommodations with practically little notice, *e.g.*, supplying assistive listening devices, changing heat or air conditioning settings, or increasing the volume of the public address system.

Each application for accommodation must include a description of the accommodation that is sought and a statement of the medical condition that necessitates the accommodation. Cal Rules of Ct 1.100(c)(2). You have the discretion to require an applicant to provide additional information about the qualifying medical condition. Cal Rules of Ct 1.100(c)(2).

The rule does not require a specified showing of disability. The federal statutes and regulations also do not specify the nature of the showing needed to confirm the existence of a medical condition or disability requiring an accommodation. The court employee reviewing an accommodation request may have questions about the designated disability or the appropriateness of the requested accommodation. In these instances, you may ask the applicant to provide additional information about the medical condition or disability or the effectiveness of the requested accommodation. You and your court personnel should be careful, however, not to place an undue burden of proof on an applicant because doing so might constitute discrimination based on disability. Information about the disability might include a doctor’s letter, a document from a public agency (*e.g.*, the Social Security Administration or the Department of Veterans Affairs), or other verification you might consider to be reliable (*e.g.*, corroboration by a friend, spouse, or other person who knows or has observed the applicant). But see the discussion of confidentiality at §4.11.

D. [§4.11] THE RULE OF CONFIDENTIALITY

The identity of the applicant in all oral or written communications to the court, as well as all information, files, and documents the applicant

submits as part of the application process, are confidential unless the applicant chooses to submit a written waiver or requests a continuance that would involve the opposing party or parties. Cal Rules of Ct 1.100(c)(4); *Vesco v Superior Court* (2013) 221 CA4th 275, 279.

You should follow the same procedures that your court normally uses with respect to confidential information. Documents relating solely to a request for accommodation should be maintained in a sealed envelope with the case file or kept in a separate secured confidential filing cabinet.

If there is a request for a continuance of a hearing or trial, the opposing party must be given notice and an opportunity to view the request and attachments. The court must protect the applicant's privacy. For example, the court may hold the hearing in camera, order the opposing party and counsel not to disclose the contents of the request and attachments, seal the record of the proceedings, and take other steps as the court deems appropriate. See 221 CA4th at 279–280.

See also question #5, “Must the court keep the request confidential?” in “Providing Disability Accommodations While Court Is in Session” at <http://www2.courtinfo.ca.gov/cjer/documents/ADA-benchguide.pdf>.

E. [§4.12] A HEARING IS NOT REQUIRED

The rule does not require an evidentiary hearing in connection with a request for accommodation. The request may be presented *ex parte* and is purely administrative and is not an adversarial process. Unless the request is for a continuance of a hearing or trial, the opposing party is not involved in the request or consideration of an accommodation. See discussion of confidentiality in §4.11. The discussion concerning the accommodation should not be held in open court unless the applicant waives the confidentiality in writing. See Cal Rules of Ct 1.100(c)(4).

You must inform the applicant in writing—and, as may be appropriate, in an alternative format—if all or part of the request is denied. Cal Rules of Ct 1.100(e)(2). You must respond to the applicant. Cal Rules of Ct 1.100(e)(2). The failure to rule on a request for an accommodation of the applicant's disability is structural error requiring reversal. *Biscaro v Stern* (2010) 181 CA4th 702, 708–710. But see discussion in §4.14 on whether a hearing is available if a request is denied.

F. [§4.13] PRACTICAL TIPS FOR ADDRESSING ACCOMMODATION REQUESTS

The following are some practical tips for addressing accommodation requests:

- Do not regard a request for accommodation as a request for special privilege or special treatment. An accommodation of any particular

type is what a person with a disability needs to function in a world designed for persons without a disability.

- Do not assume that a person with a disability is going to request a greater, more complex, or more expensive accommodation than he or she needs. Many individuals with disabilities are very aware of the problem of scarce resources because many of them live without sufficient resources on a day-to-day basis. Most persons with disabilities are sensitive to asking for too much. Nevertheless, there will be people who will attempt to exaggerate their needs and who will attempt to abuse the system. Be intuitive and sensitive in identifying these situations. But in either case explore all alternative accommodations that may be available. See §4.16.
- Do not assume you know what is needed for someone requesting accommodation. It is patronizing, and you may not have enough knowledge or experience to be correct. For example, not all persons with mobility disabilities need or can use the same accommodation you granted to the last person who used a wheelchair. Similarly, not all persons who are hard of hearing can use an assistive listening device. The law requires the accommodation to be effective and tailored to an individual's need.
- Do not assume that someone who has no apparent disability does not, nevertheless, have a medical condition. There are nonapparent disabilities that require different types of accommodations. It is inappropriate to assume someone with a nonapparent disability should be required to provide medical documentation. Consequently, it is inappropriate to require a person with a disability to go to the expense and physical struggle to obtain a medical opinion or report unless there is absolutely no other means to corroborate the disability.
- Be patient. Just as the courts are sometimes unfamiliar with the ADA and Cal Rules of Ct 1.100, so are persons with disabilities. Some individuals with disabilities do not know how to present these issues to a court, in part because they have rarely been in court.
- Listen and ask questions, and then listen again.

G. [§4.14] WHEN TO GRANT AN ACCOMMODATION

In determining whether to grant an accommodation and what accommodation to grant, you must consider, but you are not limited by, the provisions of the ADA and related state and federal laws. Cal Rules of Ct 1.100(e)(1). You may deny an application only if you find any of the following (Cal Rules of Ct 1.100(f)):

- The applicant has failed to satisfy the requirements of Cal Rules of Ct 1.100;
- The requested accommodation would fundamentally alter the nature of the service, program, or activity; or
- The requested accommodation would create an undue financial or administrative burden on the court.

TIP: Even if a burden is established, you must consider whether another accommodation could be provided that will not create a burden. See 28 CFR §35.150(a)(3) (courts are required to provide as much accommodation as they can).

If the request is granted, the court must inform the applicant of the accommodation that will be provided and for how long, or that an alternative accommodation will be granted. Cal Rules of Ct 1.100(e)(2). If the request is denied, in whole or in part, you must inform the applicant in writing—and, as may be appropriate, in an alternative format. Cal Rules of Ct 1.100(e)(2). If the request is denied, the court must inform the applicant of the reason. Cal Rules of Ct 1.100(e)(2); see also 28 CFR §§35.150(a)(3), 35.164.

The Judicial Council form Request for Accommodations by Persons with Disabilities and Response (MC-410), includes a space on the form for your response, and you must provide specific reasons explaining why an accommodation is denied.

It was error for an ADA coordinator judge to deny a request for a continuance based on an ADA accommodation when none of the three grounds in Cal Rules of Ct 1.100(f) were satisfied. *Marriage of James & Christine C.* (2008) 158 CA4th 1261, 1276–1277. The ADA coordinator should not have deferred to the trial judge in making the determination because even though the issue was phrased as a request for a continuance, it was essentially an application for an ADA accommodation, and the ADA coordinator may deny such requests only if he or she finds one of the three grounds listed in Cal Rules of Ct 1.100(f). See 158 CA4th at 1274–1275.

An applicant whose request has been denied by a judicial officer may seek review of the determination within 10 days of the date of notice of the denial by filing a petition for extraordinary relief with the appropriate reviewing court. Cal Rules of Ct 1.100(g)(2). An applicant whose request has been denied by nonjudicial court personnel may seek review of the determination within 10 days of the date of notice of the denial by submitting a request for review to the presiding judge or designated judicial officer. Cal Rules of Ct 1.100(g)(1).

TIP: Any participant can seek review of a granted or denied request. Cal Rules of Ct 1.100(g).

H. [§4.15] KINDS OF ACCOMMODATIONS TO BE PROVIDED

“Accommodations” means actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Cal Rules of Ct 1.100(a)(3). Accommodations may include, but are not limited to, the following (Cal Rules of Ct 1.100(a)(3)):

- Making reasonable modifications in policies, practices, and procedures;
- Furnishing, at no charge to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, and readers or certified interpreters for persons who are deaf or hard of hearing; and
- Relocating services to accessible facilities or providing services at alternative sites (program accessibility).

State law (Govt C §§4450–4455) has required generally accessible features since 1969. California standards must meet or exceed those of the ADA. Govt C §§4450(c), 4451(d). But if the courthouse cannot be made fully accessible, the court must relocate services or provide services at alternative sites. Cal Rules of Ct 1.100(a)(3). Historic facilities have no blanket exemption from ADA compliance unless it can be demonstrated that the accommodation will “destroy the historic significance” of the facility. 42 USC §12204(c).

One potential solution under program accessibility is to train court personnel to provide services in alternative ways at alternative sites. See 28 CFR §35.150(b) (requiring delivery of services at alternative accessible sites if location is not accessible). Priority must be given to alternatives that provide the most integrated setting. 28 CFR §35.150(b)(1). For example, the testimony of a witness with a disability may be taken in an accessible room outside the courtroom. Such an accommodation is a type of program accessibility. Testimony may be taken from another courtroom that is accessible, a hospital room, or the witness’s home.

Under federal regulations, courts have a duty to provide auxiliary aids and services to promote communication, which includes providing qualified interpreters, note takers, readers, assistive communication devices, and technology sufficient to meet the needs of the individual with a disability. See 28 CFR §35.160(a)–(b); CC §54.8 (providing assistive listening devices), and discussion at [§4.18](#). The regulations provide that in “determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of the individuals with disabilities.” 28 CFR §35.160(b)(2).

Accommodations must address diverse disabilities, which can vary in nature and degree from person to person. Some examples of the type of accommodations that you may provide include the following:

- Changing a court schedule or calendar to accommodate for accessible public transportation, medication schedules, or other time-sensitive needs (*e.g.*, the inability to sit still for long periods or becoming easily fatigued).
- Giving additional time for a litigant with a disability to respond to court deadlines.
- Providing someone to read or help fill out forms for persons with visual, manual dexterity, cognitive, or other disabilities.
- Permitting telephonic appearances for hearings for persons who have environmental sensitivities, mobility, or other limitations.
- Providing assistive listening systems, sign language interpreters, oral interpreters, computer-aided real-time transcription (CART), written material on computer-readable disk, or relay services for a deaf or hard-of-hearing person.
- Providing Braille materials, or a qualified reader to read written documents or describe objects or diagrams for a person who is blind.

TIP: A “qualified” reader means someone who is able to read effectively, accurately, and impartially, using any necessary specialized vocabulary.

- Providing air purifiers, increasing fresh air ventilation or opening windows for a person who is sensitive to chemicals or scents, air conditioning, or other environmental elements in the court building or in specific rooms.
- Using natural light by opening window curtains or blinds or using portable lamps with a different lighting source for persons whose eyes are sensitive to fluorescent or LED lights.
- Permitting a person with an emotional or other disability to be accompanied by his or her own companion, or other assistive personnel.

In some cases, such as when a person with a disability is unable to proceed with the hearing or trial and requests a continuance, the continuance may be required as the only reasonable accommodation under the circumstances. See *Marriage of James & Christine C.* (2008) 158 CA4th 1261, 1276–1277. The opposing party may challenge a request for a continuance, after notice and an opportunity to view the request and attachments. See related confidentiality discussion in §4.11.

The court, not the individual with a disability, is responsible for providing the accommodations. A “public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” 28 CFR §36.160(b)(1). The rationale for this rule is that persons with disabilities should not be required to pay more for access to the courts and court services, programs, and activities, than persons without disabilities. Although not required, all courts should have a list of certified sign language interpreters and qualified readers for persons who are deaf or blind.

Technological equipment should be available, including assistive listening systems, printed matter in Braille, tape recordings, computer disks, computer-aided real-time transcription (CART), and other enhanced communications methods.

The accommodations by the court must begin on the date indicated in the response to the request for accommodation and must remain in effect for the period specified in the notice. Cal Rules of Ct 1.100(h). You have the discretion to grant accommodations for an indefinite time period or only for a particular matter or appearance. Cal Rules of Ct 1.100(h). This provision of the rule provides flexibility for the courts and may reduce the need to revisit the same accommodation request. Some witnesses or jurors may need an accommodation for the duration of their testimony or service. Some attorneys who need the same accommodation at all times and practice frequently before the court may need a permanent accommodation. Judicial Council form Request for Accommodations by Persons with Disabilities and Response (MC-410) has space to indicate the date or dates the accommodation is needed and for the granting of an indefinite accommodation.

The Providing Disability Accommodations While Court Is in Session guide, regarding requests for accommodations, is located at:

<http://www2.courtinfo.ca.gov/cjer/judicial/documents/ADA-benchguide.pdf>.

TIP: Consider suggesting that your court begin compiling information and that it create a database of accommodation requests and their disposition. Keeping a good record of accommodations and dispositions could help provide consistency within the court when new requests for accommodation are submitted. Also, CC §54.8 requires courts to maintain records of usage of assistive listening and computer-aided real-time transcription systems. Any database that is created, however, should not include the identity of, or any identifying information about, applicants.

I. [§4.16] SUGGESTING ALTERNATIVE ACCOMMODATIONS TO THOSE REQUESTED

The law and regulations do not prohibit courts from suggesting other means of accommodation to the applicant as alternatives to the requested means, but these alternative means must be equally effective as the requested accommodation. For example, if a juror is blind and requests written material introduced at trial to be transcribed in Braille, you may also consider whether providing a qualified reader or tape-recorded transcripts of the written material, as an alternative, would be effective.

Similarly, an effective communication aid for an applicant who has a hearing or speech disability might be to provide the applicant with paper and pencil, which may be as effective as providing a sign language interpreter.

J. [§4.17] COMMUNICATING WITH THE APPLICANT

California Rules of Ct 1.100(d) permits ex parte communication, but only for the purpose of the request for accommodation. The subject matter or merits of the proceedings before the court may not be addressed during the request process. Cal Rules of Ct 1.100(d). The rule requires that the court, usually the ADA coordinator, and the requestor engage in an interactive process to ensure that the accommodation request is effectively addressed. But see confidentiality discussion in §4.11.

IV. [§4.18] WHEN TO APPOINT AN INTERPRETER FOR A PARTY OR WITNESS WHO IS DEAF OR HARD OF HEARING

In assessing whether to appoint an interpreter for a party or witness who is deaf or hard of hearing, determine whether the party or witness can participate in the proceedings through the use of an assistive listening device

or computer-aided transcription equipment. See CC §54.8; Evid C §754(a). If these devices are not sufficient to allow the party or witness to participate in the proceedings, you must appoint a qualified interpreter. Evid C §754(b). A qualified interpreter is an interpreter who has been certified as competent to interpret court proceedings by an entity approved by the Judicial Council. Evid C §754(f), (h); Cal Rules of Ct 2.892. The qualified interpreter may be an oral interpreter, a sign language interpreter, or an interpreter for individuals who are deaf-blind, depending on the needs of the individual who is deaf or hard of hearing. Evid C §754(d).

TIP: Be aware that there is no provision in the code for using a noncertified or a generally certified interpreter. The Judicial Council has determined that a qualified ASL interpreter is one who holds a “Specialist Certificate: Legal” issued by the Registry of Interpreters for the Deaf (RID). More information and website links may be found at the Court Interpreters Panel website:
<https://www.courts.ca.gov/programs-interpreters.htm>.

If a qualified interpreter is required, the proceedings may not begin until the interpreter is in full view of and spatially situated to ensure proper communication with the individual who is deaf or hard of hearing. Evid C §754(n).

TIP: You should consider whether one interpreter is enough. If the proceeding is longer than 1.5 hours or is likely to last more than 1.5 hours you should have a team of interpreters in place throughout the entire proceeding. When circumstances allow, for extended proceedings—such as trials and evidentiary hearings—“team interpreting” helps prevent fatigue, ensures accuracy, and avoids interruptions to the flow of the proceedings. By alternating approximately every half hour, two or more interpreters can avoid fatigue—one potential cause of interpreter error—without needing to request a break in the proceedings.

As with all interpreters, a qualified interpreter for individuals who are deaf or hard of hearing must take an oath that he or she will make a true interpretation to the witness and a true interpretation of the witness’s answers with his or her best skill and judgment. Evid C §751(a). The

interpreter must advise you whenever he or she is unable to comply with this oath. Evid C §751(b).

If the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hard of hearing, the court must, in consultation with the individual or his or her representative, appoint an intermediary or relay interpreter. Evid C §754(e), (g). This can arise when the person who is deaf or hard of hearing has impaired mental capacity, is a child who does not have complete ASL skills, or is foreign-born and uses a foreign sign language. If an otherwise valid privilege exists between an individual who is deaf or hard of hearing and another person, that privilege is not waived by use of an interpreter to facilitate their communication. Evid C §754.5.

The court must pay the interpreter actual travel costs and the prevailing rate paid to persons employed by the court to provide other interpreter services unless the interpreter's service is part of his or her regular duties as a state, county, or local government employee. Evid C §754(i). Each court must maintain a current roster of qualified, certified interpreters. Evid C §754(o).

V. [§4.19] A JUROR IS NOT AUTOMATICALLY INELIGIBLE FOR SERVICE BECAUSE OF A DISABILITY

A person is not ineligible to serve as a juror solely because of a loss of sight or hearing or any other disability that impairs the person's mobility or ability to communicate. CCP §203(a)(6). Such a person may be excused from jury service, however, on the ground of undue hardship (see Cal Rules of Ct 2.1008(d)(5)), or may be excused for cause if you are satisfied that the person is incapable of performing the duties of a juror (see CCP §§225(b)(1)(A), 228).

VI. [§4.20] HELP TO BE GIVEN TO JURORS WITH DISABILITIES

Often a potential juror with a disability will explain what he or she needs in order to serve as a juror. Alternatively, you or the attorneys, as part of the voir dire process, may ask the potential juror what is needed.

You must appoint a service provider, if needed, to facilitate the communication or participation of a juror who is deaf, hard of hearing, blind, visually impaired, or speech impaired. CCP §224(c). If the parties do not peremptorily challenge a person with a disability, the parties must stipulate to the presence of the service provider in the jury room during deliberations and prepare and deliver to the court proposed jury instructions to the service provider. CCP §224(a). The term "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, interpreter for individuals who are deaf-blind, reader, or speech

interpreter. CCP §224(b). A sign language interpreter, oral interpreter, or interpreter for individuals who are deaf-blind must be a “qualified interpreter” under Evid C §754(f). Service providers appointed by the judge are entitled to be compensated by the county as provided in Evid C §754(i). CCP §224(c). The service provider must take an oath that he or she will make a true interpretation with his or her best skill and judgment. Evid C §751(a)–(b).

You should emphasize to the examining attorney the need to proceed slowly enough for all questions and answers to be properly transmitted. The jurors—other than the juror who is deaf or hard of hearing—should be advised to keep their eyes on the witness instead of watching the interpreter. Consider seating the interpreter next to or slightly behind the witness so that a juror who is deaf may observe both the witness and the interpreter.

You must instruct the jury and the service provider that the service provider may not participate in the jury’s deliberations in any manner except to facilitate communication between the juror with a disability and the other jurors. CCP §224(b). You might give the following instructions to the jurors (CACI 5004):

[Name or number of juror] has been assisted by [a/an] [type of service provider] to communicate and receive information. The [service provider] will be with you during your deliberations. You may not discuss the case with the [service provider]. The [service provider] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [name or number of juror].

All jurors must be able to fully participate in deliberations. In order to allow the [service provider] to properly assist [name or number of juror], jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to [name or number of juror], not to the [service provider].

[Two [service providers] will be present during deliberations and will take turns in assisting [name or number of juror].]

You might give the following instruction to the service provider (see CCP §224(b)):

You are allowed to be present in the jury room with the jury in this case during deliberations, but only for the purpose of facilitating communication for [name of juror] with the other jurors in this case. You may not discuss the case with any of the jurors, including [name of juror], or otherwise participate in the jury deliberations. You may not make any statements in

the jury room, except as related to facilitating communication between [name of juror] and the other jurors.

TIP: Because jury instructions are typically read by the court at a much faster pace than normal speech, consider giving the service provider an advance copy of the jury instructions. See CCP §224(a).

On request, the court must provide any juror who is deaf or hard of hearing with an assistive listening system or a computer-aided transcription system. CC §54.8(a). The proceedings may not begin until the system is in place and functioning. CC §54.8(i). On the juror's request, the jury deliberation room must also be equipped with such a system for the juror's use. CC §54.8(g).

A CART reporter may be present in the jury room during deliberations to operate a computer-aided real-time transcription system for a juror who is deaf or hard of hearing. CC §54.8(h). If this occurs, jurors must be instructed not to communicate with the court reporter with respect to the substance of their deliberations. The transcription the CART reporter is providing will not become part of the official record; will not be made available to counsel, the court, or the public; and will be deleted.

VII. [§4.21] ETHICAL OBLIGATIONS WITH RESPECT TO PERSONS WITH DISABILITIES

In all courtroom proceedings, you must refrain from engaging in conduct that exhibits bias based on disability, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants; you must also prohibit others from engaging in such conduct. Cal Rules of Ct, Standards of J Admin 10.20(a)(2). The Code of Judicial Ethics requires you to prohibit attorneys in proceedings before you from manifesting, by words or conduct, bias or prejudice based on disability against parties, witnesses, counsel, or others. Code of Judicial Ethics, Canon 3(B)(6).

VIII. [§4.22] THE CONSTITUTIONAL AND STATUTORY REQUIREMENTS FOR PROVIDING LANGUAGE ASSISTANCE

In January 2015, the Judicial Council adopted the Strategic Plan for Language Access in the California Courts. The statewide Language Access Plan (LAP) provides recommendations, guidance, and a consistent statewide approach to ensure language access throughout the courts.

TIP: “Bench Card: Working With Court Interpreters,” which summarizes how to determine if an interpreter is needed and how to manage the process of using an interpreter, is available at: <http://www2.courtinfo.ca.gov/cjer/judicial/documents/secured/BenchCard-Interpreters.pdf>. Keep this bench card on the bench for easy reference.

You must appoint an interpreter if, after an examination of a party or witness, you conclude that (Cal Const art I, §14; Evid C §752(a); Cal Rules of Ct, Standards of J Admin 2.10(a)):

- The party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel or
- The witness cannot speak English so as to be understood directly by counsel, court, and jury.

Note: In January 2015, statutory authority for courts to provide interpreters free of charge to all parties was expanded to cover all types of cases, including family, civil, and small claims cases (see Evid C §756). Also, small claims cases no longer have separate procedures for appointing interpreters. Finally, Cal Rules of Ct 1.300 (Language Access Services), regarding provision of language services, delays in providing services, and use of technology, was enacted effective September 1, 2019.

According to the 2015 Judicial Council Report to the Legislature, 2015 Language Need and Interpreter Use Study, the need for interpreters in court proceedings remains consistent, as over 200 languages are spoken in California and nearly seven million people have English language limitations; such individuals can be described as limited English proficient (LEP). The top 10 languages in order of court interpreter usage in the courts are:

- Spanish
- Vietnamese
- Korean
- Mandarin
- Farsi
- Cantonese
- Russian
- Tagalog
- Arabic

- Punjabi

Spanish remains the primary language in which interpretation was provided by the courts statewide.

A. [§4.23] WHEN AN INTERPRETER IS NEEDED

An interpreter may be needed if (Cal Rules of Ct, Standards of Jud Admin 2.10(a), (b)):

- An interpreter was needed at the prior hearing;
- A person who is limited English proficient (LEP) requests an interpreter;
- An attorney requests an interpreter;
- A person is not able to communicate because of an apparent language barrier; or
- Court staff determines there is a need.

You should conduct an examination on the record to determine whether an interpreter is needed on the request of a party or attorney, or if it appears that either a party's or witness's primary language is a language other than English, or a party or witness may not speak and understand English sufficiently to participate fully in the proceedings. Cal Rules of Ct, Standards of J Admin 2.10(b). Your examination of the party or witness should normally include questions about the following subjects (Cal Rules of Ct, Standards of J Admin 2.10(c)):

- Identification, *e.g.*, name, address, birth date, age, and place of birth.
- Active vocabulary in vernacular English, with questions phrased to avoid "yes" or "no" replies, for example:
 - How did you come to the court today?
 - What kind of work do you do?
 - Where did you go to school?
 - What was the highest grade you completed?
 - Describe what you see in the courtroom.
 - What have you eaten today?
 - What do you believe this case is about?
- The court proceedings, *e.g.*, the type of case before the court, the purpose of the proceedings and function of the court, the rights of a party, and the responsibilities of a witness.

After the examination, you should state your conclusion on the record. The case file should be clearly marked to ensure that an interpreter will be

present when needed in the proceedings. Cal Rules of Ct, Standards of J Admin 2.10(d).

There are situations where a temporary interpreter (such as a family member) may be used. See discussion in §4.30.

1. [§4.24] Must a Certified Interpreter Always Be Used?

You must use a certified interpreter for any of the following languages designated by the Judicial Council:

- American Sign Language (ASL)
- Arabic
- Cantonese
- Farsi (Persian of Iran)
- Japanese
- Korean
- Portuguese
- Spanish
- Tagalog
- Vietnamese
- Eastern Armenian
- Western Armenian
- Mandarin
- Khmer (Cambodian)
- Punjabi
- Russian

A certified interpreter must be used for the above languages unless good cause is shown for why a certified interpreter is not available. Govt C §§68561(a), 68562(a), 68566. Good cause may be established by a showing on the record that no certified interpreters are available. See Govt C §68561(c); see also §§4.27–4.30. Such a showing may be made by establishing that a diligent search was made for a certified interpreter. A diligent search might include, but is not limited to, asking staff to review the Master List of Certified and Registered Court Interpreters (see Judicial Council forms INT-100-INFO, INT-120). The Master List resource is available online at <https://www.courts.ca.gov/35273.htm>.

In some trial courts, the responsibility of providing a diligent search is not left to the individual court, but to the trial court Interpreter Services Office. If you are in such a court, you should consult that office about any issues regarding whether a diligent search was made.

Certified interpreters are not available for nondesignated languages, but interpreters for those languages may be registered interpreters. Govt C §68561(d); see also §4.27.

2. [§4.25] The Difference Between Certified and Registered Interpreters

Certified interpreters are interpreters of a designated language who have passed a state-approved written exam and Bilingual Interpreting Exam or exam for American Sign Language for their designated language; have registered with the Judicial Council; have attended an ethics workshop; have taken a Judicial Council orientation course; and have submitted proof of attendance at continuing education programs and regular assignments.

Registered interpreters are court interpreters of nondesignated languages who pass a written exam and an oral proficiency exam in English and their non-English language(s), register with the Judicial Council, and otherwise meet the same continuing education and regular assignment requirements as certified interpreters.

TIP: When confronted with a need for interpreters of nondesignated languages, you should attempt first to get a registered interpreter. Although the screening is not as rigorous as it is for certified interpreters, passing the English language exam and providing proof of continuing education and regular work assignments provide a better assurance of quality than can be obtained otherwise.

3. [§4.26] The Process to Appoint a Spoken Language Interpreter

The following procedures apply to all trial court proceedings in which the court appoints an interpreter for a person (including a party or witness) who has limited English proficiency (LEP); the procedures apply to spoken language interpreters in languages designated and not designated by the Judicial Council.

a. [§4.27] Appointment of Certified or Registered Interpreters

To appoint a certified or registered court interpreter, you must require the following to be stated on the record (Cal Rules of Ct 2.893(c), Govt C §68561(g)):

- The language to be interpreted;

- The interpreter's name;
- The interpreter's current certification or registration number;
- A statement that the interpreter's identification has been verified as required by statute;
- A statement that the interpreter is certified or registered to interpret in the language to be interpreted; and
- A statement that the interpreter was administered the interpreter's oath or that he or she has an oath on file with the court.

b. [§4.28] Appointment or Use of Noncertified or Nonregistered Interpreters

If after a diligent search (see §4.24) a certified or registered interpreter is not available, you can either appoint a noncertified or nonregistered interpreter who has been provisionally qualified or, in limited circumstances, use a noncertified or nonregistered interpreter who is not provisionally qualified. Cal Rules of Ct 2.893(b)(4), (5), (d)(1).

In all cases in which a noncertified or nonregistered interpreter is appointed or used, you must require the following to be stated on the record (Cal Rules of Ct 2.893(d)(2), Govt C §68561(f)):

- The language to be interpreted;
- A finding that a certified or registered interpreter is not available and a statement regarding whether a Certification of Unavailability of Certified or Registered Interpreter (form INT-120) for the language to be interpreted is on file for this date with the court administrator;
- A finding that good cause exists to appoint a noncertified or nonregistered interpreter;
- The interpreter's name;
- A statement that the interpreter is not certified or registered to interpret in the language to be interpreted;
- A finding that the interpreter is either provisionally qualified or qualified for temporary use to interpret in the proceeding (see §§4.29–4.30); and
- A statement that the interpreter was administered the interpreter's oath.

(1) [§4.29] Provisional Qualification

A noncertified or nonregistered interpreter is provisionally qualified if the presiding judge of the court or a judicial officer designated by the presiding judge (Cal Rules of Ct 2.893(b)(6), (d)(3)):

- Finds the noncertified or nonregistered interpreter to be provisionally qualified after having the proposed interpreter answer the questions in Qualification of a Noncertified or Nonregistered Spoken Language Interpreter form INT-110 (see form INT-100-INFO); and
- Signs the form INT-110 order allowing the interpreter to be considered for appointment. The period covered by this order may not exceed 6 months.

Form INT-110 questions can either be asked in voir dire or the interpreter can complete the form for your review. See Form INT-110.

To appoint a provisionally qualified interpreter, in addition to the information that must be stated on the record in all proceedings involving interpreters (see §4.28), you must state on the record (Cal Rules of Ct 2.893(d)(3)(B)):

- A finding that the interpreter is qualified to interpret the proceeding, following the procedures adopted by the Judicial Council (see forms INT-100-INFO, INT-110, and INT-120);
- A finding, if applicable, that good cause exists for the court to appoint the interpreter beyond the time ordinarily allowed (see Cal Rules of Ct 2.893(f)(1)(B)); and
- If a party has objected to the appointment of the proposed interpreter or has waived the appointment of a certified or registered interpreter.

(2) [§4.30] Temporary Use

At the request of an LEP person, a temporary interpreter may be used to prevent burdensome delay or in other unusual circumstances if (Cal Rules of Court 2.983(b)(7), (d)(4)) you find on the record that

- The LEP person has been informed of the right to an interpreter and waived the appointment of a certified or registered interpreter or an interpreter who could be provisionally qualified by the presiding judge as provided in §4.29;
- Good cause exists to appoint an interpreter who is not certified, registered, or provisionally qualified;
- The interpreter is qualified to interpret that proceeding, after

- Having the proposed interpreter answer the questions in Judicial Council form Temporary Use of a Noncertified or Nonregistered Spoken Language Interpreter (INT-140) (see form INT-100-INFO), and
- Signing the form INT-140 order allowing the interpreter to be considered for appointment;
- The use of temporary interpreter is limited to a single brief, routine matter before the court. Use of the interpreter in this circumstance may not be extended to subsequent proceedings without again following these procedures.

Form INT-140 questions can either be asked as voir dire or the proposed interpreter can complete the form. See INT-140.

Note: The temporary use provision is only intended to permit a one-time use of a non-certified, non-registered interpreter who is not provisionally qualified. Advisory Committee Comment to Cal Rules of Ct 2.893(d)(4). In determining whether the proceeding is a “brief, routine matter,” consider the complexity of the matter at issue and the likelihood of potential impacts on the LEP person’s rights, and keep in mind consequences that could flow from inaccurate or incomplete interpretation. Advisory Committee Comment to Cal Rules of Ct 2.893(b)(7), (d)(4).

TIP: If a court reporter is transcribing the proceedings or an electronic recording is being made, the “on the record” requirement is satisfied if the required details are stated in open court. If it is not being transcribed or recorded, the “on the record” requirement may be satisfied by stating the required details and then documenting them in a written document (*i.e.*, a minute order or formal order) that is entered in the case file. Advisory committee comment to Cal Rules of Ct 2.893(c), (d)(2).

c. [§4.31] Limit on Appointment of Provisionally Qualified Noncertified and Nonregistered Interpreters

A noncertified or nonregistered interpreter who is provisionally qualified may not interpret in any trial court for more than any four 6-month periods, except in limited circumstances. Cal Rules of Ct 2.893(f).

If an interpreter is provisionally qualified in more than one court at the same time, each 6-month period runs concurrently for purposes of determining the maximum periods allowed. Cal Rules of Ct 2.893(f)(3).

Beginning with the second 6-month period, a noncertified or nonregistered interpreter may be appointed if he or she meets all of the following conditions (Cal Rules of Ct 2.893(f)(4)):

- The interpreter has taken the State of California Court Interpreter Written Exam at least once during the 12 calendar months before the appointment;
- The interpreter has taken the State of California's court interpreter ethics course for interpreters seeking appointment as a noncertified or nonregistered interpreter, or is certified or registered in a different language from the one in which he or she is being appointed; and
- The interpreter has taken the State of California's online court interpreter orientation course, or is certified or registered in a different language from the one in which he or she is being appointed.

Beginning with the third 6-month period, a noncertified or nonregistered interpreter may be appointed if he or she meets all of the following conditions (Cal Rules of Ct 2.893(f)(5), (6)):

- The interpreter has taken and passed the State of California Court Interpreter Written Exam with such timing that he or she is eligible to take a Bilingual Interpreting Exam; and
- The interpreter has taken either the Bilingual Interpreting Exam or the relevant Oral Proficiency Exam(s) for his or her language pairing at least once during the 12 calendar months before the appointment (this does not apply to any interpreter who seeks appointment in a language pairing for which no exam is available).

The second and third 6-month period restrictions may be waived by the presiding judge for good cause whenever there are fewer than 25 certified or registered interpreters enrolled on the Judicial Council's statewide roster for the language requiring interpretation. Cal Rules of Ct 2.893(f)(7).

d. [§4.32] Appointment of Intermediary Interpreters Working Between Two Languages That Do Not Include English

An interpreter who works as an intermediary between two languages that do not include English (a relay interpreter) is not eligible to become certified or registered. However, a relay interpreter can become provisionally qualified if the judge finds that he or she is qualified to interpret the proceeding following procedures adopted by the Judicial Council (see forms INT-100-INFO, INT-110, and INT-120). The limitations on appointment of provisionally qualified noncertified and nonregistered interpreters do not apply to relay interpreters. Cal Rules of Ct 2.893(e).

e. [§4.33] Video Remote Interpreting

In March 2019, following a pilot project conducted in 2018, the Judicial Council approved Recommended Guidelines for Video Remote Interpreting (VRI) for Spoken Language-Interpreted Events (<http://www.courts.ca.gov/documents/vri-guidelines.pdf>). The council also voted to create a new VRI program for the judicial branch to expand LEP court user access to qualified interpreters, which is anticipated to launch in 2020. The VRI guidelines are based on current best practices and include recommended minimum technology guidelines to facilitate its use. The guidelines also cover the prerequisites and considerations regarding use of VRI in court proceedings to help ensure appropriate use and due process for LEP court users. The guidelines also contain suggested language for a judicial officer when considering objections related to remote interpreting.

Note: The Judicial Council is working to establish a web-based VRI Resource Center, which will include educational materials for courts and will be housed at <http://www.courts.ca.gov/VRI.htm>.

4. [§4.34] An Interpreter Must Be Sworn in at Every Proceeding

An interpreter must take an oath that he or she will make a true interpretation to the witness in a language the witness understands and a true interpretation of the witness's answers to questions to the attorneys, the judge, and the jury, in the English language, with his or her best skill and judgment. Evid C §751(a). An interpreter regularly employed by the court, and certified or registered under Govt C §§68560–68566, may file such an oath with the court clerk. This filed oath may serve for all subsequent proceedings until the court revokes the interpreter's appointment. Evid C

§751(d). In a proceeding in which an individual who is deaf or hard of hearing is testifying, the interpreter must advise the court if he or she is unable to comply with this oath. Evid C §751(b).

B. [§4.35] INTERPRETER REQUIREMENTS

California Rules of Ct 2.890 sets forth various requirements for interpreters, including that an interpreter must:

- Accurately and completely represent his or her certification, training, and relevant experience. Cal Rules of Ct 2.890(a).
- Use his or her best skills and judgment to interpret accurately without embellishing, omitting, or editing. Cal Rules of Ct 2.890(b).
- Interpret everything that is said during the entire proceedings when interpreting for a party. Cal Rules of Ct 2.890(b).
- Interpret everything that is said during the witness's testimony when interpreting for a witness. Cal Rules of Ct 2.890(b).
- Be impartial and unbiased and refrain from conduct that may give an appearance of bias. Cal Rules of Ct 2.890(c)(1).
- Disclose to the judges and all parties any actual or apparent conflict of interest. Any condition that interferes with the objectivity of an interpreter is a conflict of interest. A conflict may exist if the interpreter is acquainted with or related to any witness or party to the action or if the interpreter has an interest in the outcome of the case. Cal Rules of Ct 2.890(c)(2).
- Refrain from engaging in conduct creating the appearance of bias, prejudice, or partiality. Cal Rules of Ct 2.890(c)(3).
- Refrain from making statements to any person about the merits of the case until the litigation has concluded. Cal Rules of Ct 2.890(c)(4).
- Refrain from disclosing privileged communications between attorney and client. Cal Rules of Ct 2.890(d); see also Evid C §754.5.
- Refrain from giving legal advice to parties and witnesses, nor recommend a specific attorney or law firm. Cal Rules of Ct 2.890(e).
- Maintain an impartial, professional relationship with all court officers, attorneys, jurors, parties, and witnesses. Cal Rules of Ct 2.890(f).
- Convey to the court immediately any reservation about his or her ability to satisfactorily interpret for a party or witness. Cal Rules of Ct 2.890(h); see also Evid C §751(b).

- Report to the court immediately any effort to impede his or her compliance with the law, Cal Rules of Ct 2.890, or any other official policy governing court interpreting and legal translating. Cal Rules of Ct 2.890(i).

Other than the requirements noted above, interpreting in a court setting requires an unusually high oral comprehension of two languages, and specific cognitive and motor skills that allow the interpreter to orally render what is heard in one language into the same message in another language, without additions, deletions, or changes in speech style. This language skill must be able to be applied in speech contexts that range from casual, colloquial, or uneducated styles, to speech that is highly formal, technical, and grammatically complex.

The court interpreter has a two-fold duty to the court:

1. To ensure that the official record of the proceedings in English reflects precisely what was stated in another language by a non-English-speaking witness or defendant.
2. To place non-English-speaking participants in legal proceedings on an equal footing with those who understand English.

C. [§4.36] YOU MAY AUTHORIZE A PREAPPEARANCE INTERVIEW WITH AN INTERPRETER

For good cause, you may authorize a preappearance interview between the interpreter and the party or witness. Cal Rules of Ct, Standards of J Admin 2.10(e). Good cause exists if the interpreter needs clarification of any interpreting issues, including colloquialisms, culturalisms, dialects, idioms, linguistic capabilities and traits, regionalisms, register, slang, speech patterns, or technical terms. Cal Rules of Ct, Standards of J Admin 2.10(e). The attorneys may attend the interview. Cal Rules of Ct, Standards of J Admin 2.11(a)(12).

During the preappearance interview with a non-English-speaking party, give the following explanation regarding the procedure to be used when the non-English-speaking party is not testifying (Cal Rules of Ct, Standards of J Admin 2.11(a)(14)):

- The interpreter will interpret all statements made in open court.
- The party must direct any questions to counsel. The interpreter will interpret all questions to counsel and the responses. The party may not seek advice from or engage in discussion with the interpreter.

TIP: A preappearance interview may be helpful in determining whether an intermediary or relay interpreter is needed for a party or witness who is deaf.

D. [§4.37] INSTRUCTIONS TO GIVE THE INTERPRETER, ATTORNEYS, AND WITNESS

California Rules of Ct, Standards of J Admin 2.11(a)(1)–(11) set forth various instructions that you should give to an interpreter, either orally or in writing. Standard 2.11(b) sets forth various instructions for the attorneys and Cal Rules of Ct, Standards of J Admin 2.11(a)(13) sets forth various instructions for witnesses.

E. [§4.38] HOW TO EXAMINE JURORS FOR POSSIBLE LANGUAGE BIAS

If one of the parties requires an interpreter, you may want to examine the prospective jurors about any possible language bias. For example:

- [Plaintiff’s/Defendant’s] first language is Spanish. Therefore, an interpreter has been provided by the court. Does this bother or offend you in any way?
- Will the fact that an interpreter is provided in this proceeding affect your decision on the evidence?
- Can you use the same standard to evaluate the credibility of a witness regardless of which language the witness speaks?
- Do any jurors understand Spanish?
[If the answer is yes]:
 - Do you promise to listen to the interpreter’s response and not to interpret on your own?
 - If there is a problem or difference of opinion regarding proper translation, do you promise to notify the court as soon as possible?

IX. [§4.39] HOW COURTS ARE TRYING TO INCREASE ACCESS FOR THE ECONOMICALLY DISADVANTAGED

California has long focused on making the court system more accessible to the economically disadvantaged. The California Commission on Access to Justice in its 1998 report, *A Call for Equal Access to Civil Justice*, noted that “[j]ust and fair administration of our rule of law requires sufficient courtrooms, fair judges and competent attorneys who are equally accessible to all persons within the society regardless of wealth or other circumstances.” It made various suggestions regarding what is needed to achieve equal access to justice, including the following:

- Increasing statewide funding for legal services to the poor and the courts.

- Developing innovative and less costly delivery of legal services for all Californians, including the expansion of mediation and other alternative dispute resolution methods.
- Expanding the availability of prepaid legal services and preventive law measures.
- Providing user-friendly courts and increasing public education about legal rights and responsibilities.
- Identifying local access-to-justice needs, and generating ideas and solutions to meet these needs. Developing a network of local leaders from business, government, and the private and nonprofit sectors willing to work with the legal community to improve access to equal justice in the local community.

Each year over 4 million Californians come to court without legal representation. In 75 percent of all civil and 90 percent of family cases at least one side is unrepresented, and 90 percent of tenants in eviction cases represent themselves.

California remains committed to providing access. In 2013, Chief Justice Tani G. Cantil-Sakauye instituted Access 3D. In 2014, the Chief Justice established the Futures Commission to take an in-depth look at the way the trial courts are serving the people of California and to think about how court operations could be improved and streamlined. In 2017, the Commission released its report.

As self-help centers were consolidated with the family law facilitators (providing help primarily in family law matters, restraining orders, and occasionally guardianships or conservatorships), a major recommendation was to increase and improve assistance for other self-represented litigants. This includes developing an early education program for self-represented litigants in small claims and civil cases such as unlawful detainer, automobile cases, and employment cases, and also creating Center for Self-Help resources to assist courts in their role as self-help providers.

Other recommendations include streamlining litigation methods and case management to reduce costs (both for courts and litigations) and improving technological access to the courts, including remote access (which again saves money and time for litigants).

Implementing these recommendations will further the Chief Justice's vision of meaningful access to justice for all Californians—that the courts are available to all, from low- and middle-income litigants representing themselves to businesses urgently needing to resolve disputes.

RESOURCES

— California Center for Judicial Education and Research (CJER)

The California Center for Judicial Education and Research has various publications and resources on access and fairness issues, including:

- [Access, Ethics & Fairness Toolkit](#)
- [Sexual Harassment Resource Guide for Judicial Officers](#) (2019)
- [Continuing the Dialogue—Gender Identity](#) (Video, 2019)
- [Bench Card: Working with Court Interpreters](#) (2017)
- [Providing Disability Accommodations While Court Is in Session](#) (2016)
- [Disability Accommodations in California Courts](#) (2016)
- [California Judges Benchguide 2: Disqualification of Judge](#) (Cal CJER 2010)

— Language Access and Interpreter Resources

- [Language Access Toolkit](#)
- [Video Remote Solutions for Courts](#)
- [Judicial Resources Network Language Access Resource Center](#)
- [Court Interpreters Program](#)
- [Judicial Council Master List of Certified and Registered Court Interpreters](#)
- [Strategic Plan for Language Access in the California Courts](#) (2015)
- [2015 Language Need and Interpreter Use Study](#)
- [Professional Standards and Ethics for California Court Interpreters](#) (5th ed, 2013)

— Access and Fairness Resources

The Judicial Council Advisory Committee on Providing Access and Fairness has various resources at <https://www.courts.ca.gov/7769.htm>. Among its publications are:

- [Disability Etiquette: Interacting With Persons With Disabilities](#) (2009)
- [Sexual Orientation Fairness in the California Courts](#) (2001)
- [Report on Racial and Ethnic Bias in the Courts](#) (1997)

— **Additional Resources**

- [California Code of Judicial Ethics](#)
- Rothman, California Judicial Conduct Handbook (Thomson Reuters 4th ed 2017)
- [ADA home page](#)
- [ABA Commission on Disability Rights](#)
- [California Department of Fair Employment and Housing](#)
- [Report to the Chief Justice: Commission on the Future of California's Court System](#) (Futures Commission Report 2017)
- [Securing Equal Access to Justice for All: Guidance and Model Policies to Assist California's Superior Courts in Responding to Immigration Issues](#) (DOJ guide)
- [Transgender Law Center](#)
- [National Center for Transgender Equality](#)

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