

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

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DATE: August 26, 2005

SUBJECT: Judicial Council Jury Instructions (amend Cal. Rules of Court, rules 229 and 855; repeal Cal. Stds. Jud. Admin., § 5) (Action Required)

Issue Statement

The Task Force on Jury Instructions, Criminal Subcommittee, has completed its work on the criminal jury instructions, which are before the Judicial Council in a separate proposal and which will become effective January 1, 2006, if approved by the council. In conjunction with council approval of the new instructions, two rules of court should be amended and one of the California Standards of Judicial Administration should be repealed to (1) specify that the Judicial Council endorses only the new Judicial Council criminal jury instructions for use in criminal cases in California courts and (2) permit the Administrative Office of the Courts (AOC) to require that commercial publishers obtain permission before publishing the council's civil and criminal instructions. The rule also would be amended to state the council's intent that the instructions be freely available for use and reproduction by parties, attorneys, and the public, except as limited by the rule.

Recommendation

The Task Force on Jury Instructions recommends that the Judicial Council, effective August 26, 2005:

1. Amend rules 229 and 855 of the California Rules of Court and repeal section 5 of the California Standards of Judicial Administration, to endorse the use of the new Judicial Council criminal jury instructions when they become effective on January 1, 2006; and

2. Amend rule 855 of the California Rules of Court to permit the Administrative Office of the Courts (AOC) to require that commercial publishers obtain permission before publishing the Judicial Council criminal jury instructions so that the AOC may ensure that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The amended rule would also permit the AOC to require other limitations on commercial publication as may be necessary, authorize the AOC to require that commercial publishers pay a fee or royalties for permission to publish the instructions, and state the council's intent that the instructions be freely available for use and reproduction by parties, attorneys, and the public, except as limited by the rule.

The text of the amended rules is attached at pages 5–7, and the text of the repealed standard is attached at page 8.

Rationale for Recommendation

Background and history

When the Judicial Council of California Civil Jury Instructions (CACI) were approved in July 2003, the council simultaneously adopted rule 855 to provide that they would be the official instructions recommended for use in the state of California. The council had previously amended rule 229 to that same end.

Status of CALJIC

For criminal cases, the Judicial Council currently recommends use of *California Jury Instructions, Criminal* (CALJIC), pursuant to rule 229(a) and section 5 of the Standards of Judicial Administration. CALJIC was produced and revised by judges of the Superior Court of Los Angeles County.

The AOC has established a transition arrangement with the Superior Court of Los Angeles County whereby the court will stop maintaining CALJIC when the Judicial Council approves its criminal instructions. The publisher of the CALJIC volumes, Thomson/West, may continue publishing CALJIC.

Public Access and Publication

With the approval of CACI in 2003 and with the simultaneous adoption of rule 855, the council intended that there be widespread public access to the Judicial Council jury instructions. Thus, as adopted in 2003, rule 855(e) required that the AOC provide copies and updates of the council's approved jury instructions to the public on the California Courts Web site. The AOC has done so with CACI.

Rule 855(e) also provided that the AOC may contract with an official publisher to publish the instructions in both paper and electronic formats. After several publishers

responded to a request for proposals, the AOC selected LexisNexis/Matthew Bender & Co., Inc., as the official publisher. Working closely with the AOC, LexisNexis has published paper and electronic versions of CACI, and it is preparing to publish the new criminal instructions.

Other commercial publishers have published CACI in paper and electronic formats. We anticipate that other commercial publishers also will publish the new criminal instructions.

The proposed amendments

The rules and standards are proposed for amendment as follows:

- Rule 855(c) would be amended to provide the following:
 - Addition of a statement that the Judicial Council intends that its instructions be freely available for use and reproduction by parties, attorneys, and the public, except as limited by the rule.
 - Addition of a provision authorizing the AOC to take steps necessary to require that commercial publishers obtain permission for publication of the instructions and pay a fee or royalties to do so.
 - Clarification that the Web site on which the AOC posts copies and updates of the instructions is the judicial branch’s public Web site.
- Rule 855(e) would be amended to include both the criminal and the civil instructions within the scope of Judicial Council instructions whose use is “approved,” “endorse[d],” and “strongly encouraged” by the council. The rule currently applies only to the Judicial Council civil jury instructions.
- Rule 229, on the form and format of jury instructions, would be amended to delete any reference to CALJIC and refer only to the jury instructions approved by the Judicial Council.
- Section 5 of the Standards of Judicial Administration, on the use of California jury instructions, would be repealed in its entirety because it endorses only the use of CALJIC.

Rationale for amended rule 855(c)

Amended rule 855(c) would reaffirm the council’s intent that its civil and criminal jury instructions be widely available for public access and public use. The amended rule's authorization for AOC limitations on use of the instructions by commercial publishers is not intended to otherwise limit the use and reproduction of the instructions by parties, attorneys, and the public.

The amended rule also would authorize the AOC to require commercial publishers to obtain permission to publish the instructions. As set forth in the proposed amendment, this will permit the AOC to ensure that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The AOC also could require other limitations on commercial publication of the instructions as may be appropriate. The rule provisions authorizing the AOC to require commercial publishers to pay a fee or royalties for publishing the instructions would allow the AOC to recover some of the costs for producing and updating the instructions.

To implement amended rule 855(c), the AOC would retain the Judicial Council's copyrights of its new criminal jury instructions and future updates of its civil and criminal instructions, and register the copyrights in these works. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC would provide a broad public license for such use and reproduction. With respect to commercial publishers, the AOC would license their publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters that may be necessary.

Alternative Actions Considered

An alternative would be to leave the rules and standard as they are, with the current endorsement of CALJIC, but this would be inaccurate if the council approves its new criminal instructions. As to rule 855(c), the possibility of not amending that section was considered and rejected because of the need to ensure accurate commercial publication of the Judicial Council instructions and accurate attribution of their authorship.

Comments From Interested Parties

The proposal circulated for public comment and the comment chart summarizing those comments is attached at pages 11–16. The proposal was specifically circulated to members of the Advisory Committee on Civil Jury Instructions and the Criminal Subcommittee of the Task Force on Jury Instructions.

Two comments were received regarding amended rules 229 and 855(e) and repeal of standard 5, and both agreed with the proposed changes.

Fifteen of the 17 commentators on revised rule 855(c), many of them members of the advisory committee and criminal subcommittee of the task force, agreed with the proposed changes. Several raised concerns, as follows:

- Whether the AOC is able to monitor commercial publishers. Staff will be able to do so through licensing agreements.

- Whether the AOC will be able to enforce the amended rule. The AOC will be able to enforce the amended rule by retaining the council's copyright of the instructions, establishing licensing arrangements with commercial publishers, and issuing a broad public license for use of the instructions.
- Whether the amended rule should apply to all publishers, not just commercial publishers. The intent of the rule is to permit the AOC to ensure the accuracy of commercial publications of the instructions while otherwise allowing free public use and reproduction of the instructions.
- The absence of procedures by which commercial publishers may obtain permission to publish the instructions. If the council approves the rule amendment, the AOC will establish straightforward licensing procedures.

Two commentators, both commercial publishers, opposed amended rule 855(c). They opposed any restriction on dissemination of the instructions, and one was concerned about the absence of rule procedures for obtaining publication permission and the possible burden on small publishers. The restrictions are for the purpose of ensuring accurate commercial publication, they should not present difficulties for commercial publishers, and they will not have an inhibiting effect on commercial publication of the instructions. The licensing procedures will be straightforward and should not burden small publishers.

A chart of the comments and staff's responses is attached at pages 9–15.

Implementation Requirements and Costs

Implementation costs will be minimal and will consist mainly of staff time to implement the changes in the proposed language of rule 855(c). If fees or royalties are charged for commercial publication of the instructions, revenue could be realized.

Attachments

Rule 229 of the California Rules of Court is amended, effective August 26, 2005, to read:

1 **Rule 229. Proposed jury instructions**

2
3 **(a) [Application]**

4
5 (1) This rule applies to proposed jury instructions that a party submits to the
6 court, including:

7
8 (A) “Approved jury instructions,” meaning jury instructions approved by
9 the Judicial Council of California ~~or criminal jury instructions~~
10 ~~approved by the Committee on Standard Jury Instructions, Criminal,~~
11 ~~of the Superior Court of Los Angeles County; and~~

12
13 (B) “Special jury instructions,” meaning instructions from other sources,
14 those specially prepared by the party, or approved instructions that
15 have been substantially modified by the party.

16
17 (2) * * *

18
19 **(b)–(e) * * ***

Rule 855 of the California Rules of Court is amended, effective August 26, 2005, to read:

1 **Rule 855. Judicial Council Jury Instructions**

2
3 (a)–(b) * * *

4
5 (c) **[Public access]** The Administrative Office of the Courts must provide copies
6 and updates of the approved jury instructions to the public on its the judicial
7 branch’s public Web site. The Administrative Office of the Courts may
8 contract with an official publisher to publish the instructions in both paper and
9 electronic formats. The Judicial Council intends that the instructions be freely
10 available for use and reproduction by parties, attorneys, and the public, except
11 as limited by this subdivision. The Administrative Office of the Courts may
12 take steps necessary to ensure that publication of the instructions by
13 commercial publishers does not occur without its permission, including,
14 without limitation, ensuring that commercial publishers accurately publish the
15 Judicial Council’s instructions, accurately credit the Judicial Council as the
16 source of the instructions, and do not claim copyright of the instructions. The
17 Administrative Office of the Courts may require commercial publishers to pay
18 fees or royalties in exchange for permission to publish the instructions.

19
20 (d) * * *

21
22 (e) **[Use of instructions]** Use of the Judicial Council instructions is strongly
23 encouraged. If the latest edition of the ~~civil~~ jury instructions approved by the
24 Judicial Council contains an instruction applicable to a case and the trial judge
25 determines that the jury should be instructed on the subject, it is recommended
26 that the judge use the Judicial Council instruction unless he or she finds that a
27 different instruction would more accurately state the law and be understood by
28 jurors. Whenever the latest edition of the Judicial Council ~~civil~~ jury
29 instructions does not contain an instruction on a subject on which the trial
30 judge determines that the jury should be instructed, or when a Judicial Council
31 instruction cannot be modified to submit the issue properly, the instruction
32 given on that subject should be accurate, brief, understandable, impartial, and
33 free from argument.

Section 5 of the California Standards of Judicial Administration is repealed, effective August 26, 2005:

1 **Sec. 5. Use of California Jury Instructions—Criminal (CALJIC)**
2

3 ~~Whenever the latest edition of California Jury Instructions—Criminal (CALJIC)~~
4 ~~contains an instruction applicable to a case and the trial judge determines that the~~
5 ~~jury should be instructed on the subject, it is recommended that the judge use the~~
6 ~~CALJIC instruction unless he or she finds that a different instruction would more~~
7 ~~adequately, accurately, and clearly state the law. Whenever the latest edition of~~
8 ~~CALJIC does not contain an instruction on a subject upon which the trial judge~~
9 ~~determines that the jury should be instructed, or when a CALJIC instruction cannot~~
10 ~~be modified to submit the issue properly, the instruction given on that subject~~
11 ~~should be accurate, brief, understandable, impartial, and free from argument. When~~
12 ~~an instruction requested by a party is a modified CALJIC instruction, the party~~
13 ~~should indicate therein, by use of parentheses or other appropriate means, the~~
14 ~~respect in which it is modified. A trial judge in considering instructions to the jury~~
15 ~~shall give no less consideration to those submitted by the attorneys for the~~
16 ~~respective parties than to those contained in the latest edition of California Jury~~
17 ~~Instructions—Criminal (CALJIC).~~

SP05-07
Permission Required to Publish Judicial Council Jury Instructions
(amend Cal. Rules of Court, rule 855(c))

	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
1.	Mr. Terry Bridges Attorney Reid & Hellyer Riverside	A	N	Expresses concern about requiring the AOC to “police” the published instructions.	Staff will be able to monitor publication by commercial publishers through license arrangements.
2.	Hon. J. Stephen Czuleger Assistant Presiding Judge Superior Court of Los Angeles County Los Angeles	A	Y	None	None
3.	Hon. Barton C. Gaut Associate Justice Court of Appeal, Fourth Appellate District, Division Two Riverside	A	N	Agrees with proposed changes but would delete the statement of the council’s intent. He also would delete the word "commercial" from the proposed language because the requirements should apply to all publishers, not just commercial ones.	The intent provision in the rule amendment has been revised from the publicly circulated version. The word “commercial” remains because the rule amendment intends to continue free public use of the instructions while authorizing limitations only on commercial publishers.
4.	Hon. William C. Harrison Judge Superior Court of Solano County Fairfield	A	N	The council needs to protect its property rights.	None
5.	Hon. J. Gary Hastings Associate Justice Court of Appeal, Second Appellate District, Division Four Los Angeles	A	N	Expresses concern about requiring the AOC to “police” the published instructions.	Staff will be able to monitor publication by commercial publishers through license arrangements.

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	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
6.	Hon. Harry Hull Associate Justice Court of Appeal, Third Appellate District Sacramento	A	N	Expresses concern about enforcement of the rule.	The AOC can require permission from commercial publishers by obtaining a copyright of the instructions.
7.	Hon. Jamie A. Jacobs-May Judge Superior Court of Santa Clara County San Jose	A	N	Expresses concern about enforcement of the rule.	The AOC can require permission from commercial publishers by obtaining a copyright of the instructions.
8.	Ms. Pamela Jester Director Continuing Education of the Bar Oakland	N	Y	CEB disagrees with restricting the dissemination of the instructions. It is concerned that the rule will have a chilling effect on small publishers. CEB also complained of the lack of detail regarding the requirements for obtaining permission to publish the instructions. CEB was concerned in particular about favoritism toward the official publisher and a chilling effect on small publishers who might find compliance with the rule burdensome.	Staff respectfully disagrees. There should be no chilling effect on commercial publishers. The purpose of the rule amendment is to ensure accurate publication.

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	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
9.	Mr. Tom Leighton Vice President, Content Acquisition Thomson/West Eagan, Minnesota	N	Y	Thomson/West objects to restriction on dissemination of the instructions. It states that the instructions were in the public domain, and that therefore government control of them is a form of prior restraint that raises constitutional implications. Thomson/West also questions the appropriateness of the AOC's controlling unofficial versions of the instructions, as distinct from the official versions produced by the official publisher. Thomson/West notes further that the terms of the original Request for Proposal (RFP) soliciting bids for an official publisher stated that "[t]he text of the instructions and the accompanying notes and commentary will be placed in the public domain." They contend that the rule change would conflict with the terms of the RFP, is detrimental to unsuccessful bidders and the public, and provides an unfair windfall to the winning bidder.	Staff respectfully disagrees. There should be no chilling effect on commercial publishers. The purpose of the rule amendment is to ensure accurate publication. The AOC may copyright the new Judicial Council criminal jury instructions, consistent with the Constitution. The RFP has no bearing on the rule amendment.
10.	Mr. Stephen Love Executive Officer Superior Court of San Diego County San Diego	A	Y	None	None

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	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
11.	Ms. Pam Moraud Court Program Manager Superior Court of Solano County Fairfield	A	N	None	None
12.	Hon. Steven Z. Perren Associate Justice Court of Appeal, Second Appellate District, Division Six Ventura	AM	N	Questions why rule is phrased as a statement of intent.	The intent provision in the rule amendment has been revised from the publicly circulated version.
13.	Mr. Tyler Pon Supervising Deputy Attorney General Department of Justice, Office of the Attorney General Oakland	AM	N	Agrees with proposed changes but would delete the statement of the council's intent. He also would delete the word "commercial" from the proposed language because the requirements should apply to all publishers, not just commercial ones.	The intent provision in the rule amendment has been revised from the publicly circulated version. The word "commercial" remains because the rule amendment intends to continue free public use of the instructions while authorizing limitations only on commercial publishers.
14.	Mr. Lael Rubin Head Deputy District Attorney Los Angeles County District Attorney Los Angeles	N	N	Expresses concern about potential chilling effect of rule and lack of clarity in what will be required of publishers.	There should be no chilling effect because the purpose is to ensure accurate publication. The requirements for obtaining permission will be straightforward.

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	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
15.	Mr. Leonard Sacks Attorney Attorney at Law Granada Hills	A	N	None	None
16.	Ms. Sharol Strickland Executive Officer Superior Court of Butte County Oroville	A	N	None	None
17.	Mr. Ty Tasker Los Angeles	AM	N	Expresses concern that clear guidelines should be set forth in the rule so that publishers know what to expect.	The requirements for granting permission will be straightforward.
18.	Hon. Lynn Taylor Judge (Ret.) Superior Court of Marin County San Rafael	AM	N	Agrees with proposed changes but would delete the statement of the council's intent. She also would delete the word "commercial" from the proposed language because the requirements should apply to all publishers, not just commercial ones.	The intent provision in the rule amendment has been revised from the publicly circulated version. The word "commercial" remains because the rule amendment intends to continue free public use of the instructions while authorizing limitations only on commercial publishers.
19.	Hon. James D. Ward Associate Justice Court of Appeal, Fourth Appellate District, Division Two Riverside	A	N	None	None

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	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
20.	Mr. Robert Warren Attorney Gibson, Dunn & Crutcher Los Angeles	A	N	Expresses concern about requiring the AOC to “police” the published instructions.	Staff will be able to monitor publication by commercial publishers through license arrangements.

SP05-01
Permission Required to Publish Judicial Council Jury Instructions
(amend rule 855(c) of the Cal. Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Staff Response
1.	Richard Haeussler Haeussler & Associates Attorney Newport Beach	A	N	None	None
2.	Mr. Stephen Love Executive Officer Superior Court of San Diego County San Diego	A	Y	None	None