

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

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Report

TO: Members of the Judicial Council

FROM: Mr. John A. Larson, Senior Court Services Analyst, 415-865-7589

DATE: November 28, 2006

SUBJECT: Juror note-taking (adopt Cal. Rules of Court, rule 2.1031) (Action Required)¹

Issue Statement

Note-taking during trial is a simple and effective aid for jurors, assisting in juror comprehension, retention of information, and attentiveness. While the practice is in wide use in the California, there is no rule of court encouraging all courts to permit juror note-taking as standard practice. To promote uniform access to this practice for all jurors, the rule being recommended for adoption would encourage a trial judge to permit jurors to take notes in all civil and criminal trials.

The Blue Ribbon Commission on Jury System Improvement and, subsequently, the Task Force on Jury System Improvements (task force) proposed, in its Final Report to the Judicial Council, a rule of court that would have required that all jurors be allowed to take notes. Because the task force concluded its activities in 2003, staff of the Administrative Office of the Courts (AOC) is acting as the proponent of the rule proposal² to encourage the practice in all trials. Staff has been guided by a Steering Committee for Jury Rule Proposals (steering committee). The steering committee is chaired by Justice Judith McConnell, Administrative Presiding Justice, Fourth Appellate District, and is comprised of trial court judges.³

¹ This rule was numbered as proposed rule 863 when it was circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, as well as new nomenclature for referring to individual standards. For the proposed rule to be consistent with the newly reorganized Rules of Court is now numbered as rule 2.1031.

² The task force concluded its activities in 2003 and issued its final report. In order to fulfill the mandate of the task force, staff of the Administrative Office of the Courts is recommending the rule discussed herein pursuant to rule 6.22(a) of the California Rules of Court: "A Judicial Council internal committee, advisory committee, or task force, or the Administrative Office of the Courts may recommend that the council adopt, amend, or repeal a rule or standard or adopt, approve, revise, or revoke a form." Cal. Rules of Court, rule 6.22(a). (Effective January 1, 2007, this rule will be numbered 10.22(a).)

³ The Steering Committee for Jury Rule Proposals also includes the following members: Hon. Jacqueline A. Connor, Judge of the Superior Court of Los Angeles County; Hon. Robert H. Oliver, Judge of the Superior Court of Fresno County; and Hon. Ronald Sabraw, Judge of the Superior Court of Alameda County.

The proposed rule:

- Encourages judges to permit jurors to take written notes in all civil and criminal trials.
- Encourages judges to inform jurors that they are permitted to take written notes.
- If note-taking is permitted, requires courts to provide jurors with suitable materials for note-taking.

Recommendation

Staff recommends that the Judicial Council, effective January 1, 2007, adopt rule 2.1031, encouraging a trial judge to permit jurors to take notes in all civil and criminal trials.

The text of proposed rule 2.1031 is attached at page 7.

Rationale for Recommendation

Permitting juror note-taking in all trials is one of the innovative jury practices the task force recommended be implemented statewide by rule of court.⁴ Note-taking is a simple way to assist jurors and to demonstrate respect for the role jurors play as fact-finders. Note-taking also comports with the way many people retain and process information. Research suggests that taking notes assists jurors' memory, especially in longer and more complex trials.⁵ In addition, while note-taking alone may not significantly increase juror satisfaction with the trial and the verdict,⁶ permitting note-taking may help jurors feel more confident in their decision-making process if other challenging aspects of the trial (length, complexity, controversy, stress) are present.

⁴ In 1995, the Chief Justice appointed members to the Blue Ribbon Commission on Jury System Improvement (the commission) and charged the body with making recommendations to improve jury service in California. In its 1996 final report to the Judicial Council, the commission recommended that the council adopt a rule of court that "requires the trial court to inform jurors of their right to take written notes . . ." The commission noted that juror note-taking was one of the more common in-court juror benefits practiced in California courts. The council referred the draft rule to the Rules and Projects Committee, which, in turn, decided not to circulate the rule for comment but called for further study of juror note-taking in courts statewide and for the development of educational materials in lieu of making the practice mandatory.

In late 2000, as part of its efforts to study in-court jury practices statewide, the task force surveyed the state's trial court presiding judges regarding the practice of juror note-taking. Informally known as the "Y2K Survey," the results with regard to note-taking were as follows:

- Nearly all of the presiding judges who responded to the survey indicated that all of the judges in their courts allowed jurors to take written notes during trials.
- The courts affirming the use of this practice included the state's three largest—those in Los Angeles, San Diego, and Orange Counties.
- Four courts indicated that, at most, one-half or fewer of their judges allowed this practice for jurors.

⁵ See S. Penrod, L. Heuer, "Tweaking Common Sense: Assessing Aids to Jury Decision Making" (1997) 3 (2/3) *Psychology, Public Policy, and Law* 265–266. See also L. Heuer, S. Penrod, "Increasing Citizen Participation in Trials through Note Taking and Question Asking" (1996) 79 (2) *Judicature* 256–263.

⁶ *Id.* at pp. 266–267.

Concerns exist that jurors may give too much weight to notes and not enough to what they observe actually occurring in the courtroom. These concerns have been addressed in studies of juror note-taking. For example, one evaluation of the potential disadvantages of juror note-taking shows that:

- “ • Jurors do not appear to overemphasize the evidence they have noted at the expense of evidence they did not record, and their notes do not produce a distorted view of the case.
- Note-takers can keep pace with the trial.
- Note-taking jurors do not distract other jurors.
- Note-takers do not have undue influence over non-note-takers.
- Jurors’ notes are an accurate record of the trial.
- Juror note-taking does not favor either the prosecution or the defense.
- Juror note-taking does not consume too much time.”⁷

Many of the details regarding implementation of juror note-taking are left to the discretion of the trial judge. Existing cautionary jury instructions regarding note-taking and the relative weight jurors should give notes during deliberations are cited in a comment that accompanies the rule.⁸ Because *Bench Handbook: Jury Management* (CJER, rev. 2006) provides guidance to bench officers on post-trial disposition of notes, the rule proposal does not include a provision regarding the disposition of notes.

Alternative Actions Considered

In 2005 the Criminal Law Advisory Committee (CLAC) and the Civil and Small Claims Advisory Committee (CSCAC) reviewed a version of the proposed rule that stated a trial judge must permit jurors to take notes in all civil and criminal trials. The committees recommended, and the Rules and Projects Committee (RUPRO) approved, circulating the mandatory version for public comment. After reviewing the comments at its July 15, 2005, meeting, the CLAC recommended the adoption of the mandatory rule. At its July 29, 2005, meeting, the CSCAC recommended the proposed rule as a Standard of Judicial Administration that stated a trial judge should permit jurors to take notes. The committee

⁷ *Id.* at p. 271.

⁸ Several pattern jury instructions address juror note-taking and are intended to be given if jurors take notes. These instructions would not conflict with a rule of court recommending the court permit juror note-taking. The proposed rule would not conflict with these jury instructions; a judge would continue to give the instructions in cases in which jurors take notes. CALJIC 1.105 and CACI 102 inform jurors that they have been given notebooks and pencils, which must not be removed from the jury box during the trial and may be taken into the jury room during deliberations. Both include an admonishment that notes are a memory aid, that a juror’s independent recollection should govern the verdict, and that a juror should not permit note-taking to interfere with the juror’s ability to listen to the testimony. CACI 5010 is to be given right before jurors retire for deliberations and it similarly informs jurors that they may take notes into the jury room and use them to help remember what happened during the trial, and that jurors’ independent recollections of the evidence should govern the verdict.

strongly supported and endorsed the practice of juror note-taking, but was concerned about the elimination of judicial discretion and the creation of an additional rule of court.

Because the advisory committee recommendations differed, the CSCAC revisited the proposal at its September 6, 2005, meeting, and discussed how the rule proposal represented trust and confidence in jurors, among other matters. The committee decided to join the criminal committee in recommending the adoption of the mandatory rule proposal. RUPRO approved the recommendation for council adoption at its September 14, 2005, meeting. Because another set of jury rule proposals was being readied for circulation for public comment in Spring 2006, the proposed rule pertaining to juror note-taking was withdrawn from the October 2005 Judicial Council meeting agenda so that it could be presented to the council as part of a cohesive set of jury-related rules in December 2006.⁹

In light of the comments received during the circulation of other various jury proposals in Spring 2006 and concerns expressed during the circulation of the note-taking rule as originally proposed (see Comments from Interested Parties, below), staff recommended, with the concurrence of the steering committee, that the advisory committees amend their recommendation for the adoption of a mandatory rule, and substitute a rule that would state that a trial judge should permit jurors to take notes in all civil and criminal trials. This alternative was proposed in order to be responsive to concerns over judicial discretion raised during the comment period for the various other jury rule proposals (in particular proposed rule 2.1033 related to jurors submitting questions to witnesses) and to make rule 2.1031 consistent with the other jury rule proposals being recommended this year, none of which are mandatory in nature.¹⁰

Staff recommended this approach to give trial judges the greatest amount of discretion over note-taking while stating the council's recommendation that note-taking should be a universal practice statewide. The disadvantage of having no rule at all is the lack of a uniform standard statewide and the potential in some cases of withholding from jurors access to a simple tool to retain information. In addition, staff recommended adopting the proposal as a discretionary rule of court, rather than creating a separate standard of judicial administration, to give judges and practitioners an organized set of jury-related rules of court for ease of reference and administration. Because this rule proposal does not encompass a trial practice that is subject to statute, a rule drafted to authorize what a judicial officer "may" do in furtherance of the statute—so as not to exceed the council's constitutional rule-making authority—is not appropriate in this instance.

⁹ The recommendation for the adoption of rules 2.1032, 2.1033, 2.1034, 2.1035, and 2.1036 is presented in a separate report.

¹⁰ The Introductory Statement to the California Rules of Court states the following: "Throughout the rules, 'shall' and 'must' are mandatory, 'may' is permissive, and 'should' indicates a nonbinding recommendation." *California Rules of Court, State, 2006 Revised Edition* (Thomson/West, 2006), p. 1.

At their November 17, 2006, meeting the CSCAC reversed its previous recommendation and voted 15-4 against supporting a rule on juror note-taking in any form. The committee viewed a rule mandating the practice as an unwarranted intrusion on judicial discretion related to the conduct of individual trials. Alternatively, the committee voted unanimously to support the staff recommendation to substitute “should” only if a rule proposal on juror note-taking were to be considered by the council. One Committee member expressed reservations about even recommending the practice, stating that a complaint could be lodged against a trial judge before the Commission on Judicial Performance if a judge exercised his or her discretion in not permitting note-taking when the practice was recommended by the council through a rule or standard. Other members were unsure whether the term “should”—as opposed to “must”—was appropriate in a rule of court. Subsequently, the CLAC voted 8-4 at their November 20, 2006, meeting to amend their previous recommendation in favor of a mandatory rule and recommended a rule of court stating that a trial judge should permit jurors to take notes in all civil and criminal trials.

Comments From Interested Parties

Proposed rule 2.1031 in its mandatory form circulated for public comment from May 10 to June 20, 2005. Twenty-eight comments were submitted concerning the rule proposal. Seventeen agreed with the proposal, two agreed only if modified, and eight did not agree with the proposed rule. One commentator had no position.¹¹

The recommended modifications included adding language stating that materials for note-taking will be provided only if requested by the individual jurors. The CLAC and the CSCAC recommended against this modification. In addition, the advisory committees originally recommended against proposed modifications to put the proposal forward as a standard and to include language that trial judges should have discretion to disallow note-taking for good cause. The committees decided that such changes would undercut the purpose of the rule, to give jurors the right to take notes to aid in juror comprehension and attentiveness, as explained by both the Blue Ribbon Commission on Jury System Improvement and the task force.

Other comments in opposition to the rule included:

- Concern over the lack of definition of “suitable” writing materials and whether this could (or should) include computers and hand-held devices. The advisory committees believed the rule properly left discretion to the individual court over what constituted “suitable.”
- The lack of a specific reference to the American with Disabilities Act and whether note-takers for the disabled would be required. The advisory committees noted that courts are already required to make accommodations for disabled jurors and a specific reference in the rule was not required.

¹¹ A comprehensive comment chart, along with the advisory committees’ responses, is attached beginning at page 8.

- Not allowing note-taking during opening statements because they are not evidence. The advisory committees took no position on this issue. The proposed rule would permit note-taking during opening statements.
- Ensuring that the notes remain the property of the court. The advisory committees believed that post-trial disposition of notes should remain a discretionary matter with individual courts.

Implementation Requirements and Costs

Given that most courts currently distribute steno pads and pens or pencils to jurors for note-taking, implementing the rule statewide will result in no appreciable increased costs.

Attachment

Rule 2.1031¹² of the California Rules of Court is adopted, effective January 1, 2007, to read:

1 **Rule 2.1031. Juror note-taking**

2
3 Jurors should be permitted to take written notes in all civil and criminal trials. At the
4 beginning of a trial, a trial judge should inform jurors that they may take written notes
5 during the trial. If note-taking is permitted, the court must provide materials suitable for
6 this purpose.

7
8 **Comment**

9
10 Several cautionary jury instructions address jurors' note-taking during trial and use of notes in
11 deliberations. (See California Civil Jury Instructions 102, 5010 and California Criminal Jury Instructions
12 102, 202.)

¹² This rule was numbered as proposed rule 863 when it was circulated for comment. However, at the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, as well as new nomenclature for referring to individual standards. For the proposed rule to be consistent with the newly reorganized Rules of Court, it is now numbered as rule 2.1031.

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Juror Note-Taking (adopt Cal. Rules of Court, rule 2.1031 [circulated as proposed rule 863])¹⁰

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mark Adams Attorney Stockton	A	N		
2.	Hon. Kathleen Akao Presiding Judge Superior Court of California, County of Santa Cruz Santa Cruz	A	N	We have been allowing this for years.	
3.	Mr. Johathan Bacon Attorney Association of Defense Counsel of Northern California, Nevada Walnut Creek	A	N		
4.	Hon. Thang Barrett Judge Superior Court of Santa Clara County San Jose	N	N	Mandatory language removes all discretion from the trial judge. Blanket directive for all cases is inherently problematic. Rule not necessary; if promulgated, add language allowing the court to dispense with the rule upon good cause.	Disagree; the Blue Ribbon Commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The

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Juror Note-Taking (adopt Cal. Rules of Court, rule 2.1031 [circulated as proposed rule 863])

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Hon. Thang Barrett (cont.)				task force viewed note-taking as a simple and effective aid for jurors. In addition, the Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule.
5.	Todd Barton Chief Executive Officer Superior Court of California, County of Kings Hanford	A	N	The notes must remain the property of the court.	Disposition of notes should remain within the discretion of the trial judge.
6.	Hon. Robert Dondero Presiding Judge Superior Court of San Francisco County San Francisco	A	N	Mandating the tolerance of the practice is sufficient. It will still be incumbent on the trial judge to outline the features of the note-taking practice.	Agree.
7.	Hon. Stan Eller Judge Superior Court of California, County of Mono Bridgeport	A	N		

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
8.	Hon. James Emerson Judge Superior Court of Santa Clara County San Jose	A	N	The changes reflect the procedure commonly followed in my department. I don't know of other judges who do not encourage note-taking with cautionary instruction found in CALJIC 1.05	Agree.
9.	Ms. Kathleen Goetsch CEO Superior Court of Merced County Merced	AM	N	<ul style="list-style-type: none"> Jurors to provide their own materials. If we provide looks like we <i>want</i> them to take notes; make it "if requested" Note-takers for blind jurors would be required 	<ul style="list-style-type: none"> Disagree. In criminal cases courts should provide materials. In civil cases courts may seek reimbursement for costs from parties. No position. Accommodations for jurors with disabilities are already required.
10.	Mr. Robert Harrison Partner Neil, Dymott, Frank, Harrison & McFall San Diego	A	N		
11.	Hon. Richard J. Henderson Judge Superior Court of Mendocino County Ukiah	A	N	I have been allowing juror note-taking for last 5 years without any apparent problems. I think it increases (some) juror concentration.	Agree.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
12.	Hon. Dallas Holmes Judge Superior Court of Riverside County Riverside	A	N	Jurors must be allowed to take notes just as judges do. I can't believe any judge in California would oppose this rule.	Agree.
13.	Superior Court of Los Angeles County Los Angeles	N	Y	Oppose because this is an unnecessary interference by the Judicial Council's rule making authority in the actual trial. The thrust of the rule is admirable and constitutes "best practice" but is best handled through judicial education and not a rule of court.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors.
14.	Mr. Stephen Love Executive Officer Superior Court of California, County of San Diego San Diego	A	N		
15.	Hon. Socrates Manoukian Judge Superior Court of Santa Clara County San Jose	N	N	Much ado about nothing. Represents incremental erosion of judicial independence and chips away at a judge's ability to control his/her courtroom in a manner that meets the needs of the situation that the particular judge is facing. Do not allow note-taking during opening statements because they are not evidence. The judge	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Hon. Socrates Manoukian (cont.)			may believe that note-taking may cause the juror to focus in on something that is not subsequently supported by any evidence. Omits discussion of Americans with Disabilities Act. There is no mention of whether the court must provide a stenographer if the juror cannot read or write. I have offered to provide one to a prospective juror who told me in confidence that he could not read or write anything other than his name. I have had a deaf juror serve with a court-provided ASL interpreter.	jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule. Judicial discretion is retained with regard to “suitable writing materials;” the language allows each court to determine what is suitable for that particular court’s capabilities. In addition, discretion is retained over the disposition of juror notes after trial. Accommodations for jurors with disabilities are already required.
16.	Hon. Judith McConnell Presiding Justice Court of Appeal, Fourth District, Division One San Diego	A	N	This rule clearly embodies the proposal of the Blue Ribbon Commission and Task Force on Jury System Improvements and is a good step forward.	Agree.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
17.	Hon. Kevin McKenney Judge Superior Court of Santa Clara County San Jose	AM	N	Concern is mandating to the trial judge who may have a concern for a particular case. Better language would be “must permit jurors to take written notes, unless for good cause, note taking would not be in the best interests of justice” or similar language.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule.
18.	Hon. Heather Morse Judge Superior Court of Santa Cruz County Santa Cruz	A	N	Please also consider that jurors are now requesting to take notes on laptops. Courts should be considering issues surrounding electronic note taking, such as what courts should do to insure notes remain in courtroom, what types of facilities are needed, etc.	The advisory committees believe “suitable writing materials” allows discretion for each court to determine what is suitable for that particular court’s capabilities.

Juror Note-Taking (adopt Cal. Rules of Court, rule 2.1031 [circulated as proposed rule 863])

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
19.	Hon. Dennis Murray Presiding Judge Superior Court of California, County of Tehama Red Bluff	N	N	Inappropriate to render this a rule of law by making it a rule of court. Should be included in the Standards of Jud. Admin. There has long been a difference of opinion on note-taking, especially when it comes to short trials. I respect the blue ribbon commission’s opinion regarding juror note-taking, but it is just an opinion. It should not be reduced to the only practice. I submit it is unwise for the council to manage best practices in the courtroom by rules of court. Rules, as opposed to recommendations, stifle creativity and development of alternatives which may ultimately be improvements to courtroom practices.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule.
20.	Hon. Leslie Nichols Judge Superior Court of Santa Clara County San Jose	N	N	I have encouraged allowing juror note taking to my colleagues. I lean toward the use of standards as opposed to rules on this matter. Every rule curtails the discretion of the trial judge. A rule not adhered to creates the possibility of appellate court review. I fully instruct the jurors on note taking. Of course, I tell them that they are not required to take notes, and without insulting their great intelligence, I encourage them to carefully listen to the testimony and observe	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not

Juror Note-Taking (adopt Cal. Rules of Court, rule 2.1031 [circulated as proposed rule 863])

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Hon. Leslie Nichols (cont.)			the witnesses carefully. I also explain that I will provide for the destruction of the notes. I would prefer that the judge in the courtroom have broad discretion to deal with these issues as they arise, unencumbered by a rule. In addition, “suitable” writing materials not defined in the rule; what about computers? Hand held devices record and take photos and videos. Unless the court is granted wide discretion to depart from the rule a juror can use a computer or hand held device, then of necessity, they will take that into the jury room. For myself, I favor broad discretion.	be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule. Judicial discretion is retained with regard to “suitable writing materials;” the language allows each court to determine what is suitable for that particular court’s capabilities. In addition, discretion is retained over the disposition of juror notes after trial.
21.	Steven Penrod Professor of Psychology John Jay College of Criminal Justice New York	No Position	N	Larry Heuer and Barnard College/Columbia U. and I have published several research studies and papers on juror notes (and questions)—the procedures prove innocuous, though jurors like them. Papers can be found at http://web.jjay.cuny.edu/~spenrod/papers/ open with password: rdp	
22.	Karen Richardson Asst. Court Executive Officer Superior Court of Marin County San Rafael	A	N		

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
23.	Mr. Leonard Sacks Attorney at Law Granada Hills	A	N	I have some misgivings that the trial judge should have power to allow or disallow note-taking, but on balance believe that there should be a uniform rule.	Agree.
24.	Hon. John Smiley Presiding Judge Superior Court of Ventura County Ventura	A	N		
25.	State Bar of California Committee on Administration of Justice San Francisco State Bar of California (cont.)	N	Y	CAJ's comments on this proposal are limited to the proposed rule's application to civil cases, as that is CAJ's subject matter area. CAJ opposes this rule because it would be mandatory that jurors be permitted to take notes in all civil cases, thereby depriving the trial judge of any discretion. Although CAJ has no objection to juror note-taking in general, and recognizes that a judge is free to permit juror note-taking in all cases, there may be unique circumstances under which a trial judge has concluded that note-taking would not be appropriate. CAJ believes the trial judge should retain the ability to exercise discretion if such circumstances arise.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
26.	Hon. Gregory Ward Judge Superior Court of Santa Clara County San Jose	N	N	There is no need for this rule.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors.
27.	Hon. John Whiteside Judge Superior Court of Stanislaus County Modesto	N	N	This is unnecessary micromanagement. A judge should be allowed to forego this advisement in very short, uncomplicated cases, especially when there is a court reporter.	Disagree; the blue ribbon commission and the task force both believed that note-taking enhances juror comprehension and promotes greater attentiveness during trials. The task force viewed note-taking as a simple and effective aid for jurors. In addition, Criminal Law Advisory Committee could not envision an instance when jurors should not be allowed to take notes. The Civil and Small Claims Advisory Committee concurred by recommending a rule.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
28.	Mr. Dean Zipser President Orange County Bar Association Irvine	A	Y		

California Civil Jury Instruction 102, 5010

102. Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not remove the notebooks from the jury box at any time during the trial. You may take your notes into the jury room during deliberations.

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

[The court reporter is making a record of everything that is said. If during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's record as accurate.]

Directions for Use

The last bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings.

Sources and Authority

- “Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include ‘an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker’s own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.’” (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)
- “In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is ‘the better practice’ for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we

found the less complete instruction given in *Whitt* to be adequate: ‘Be careful as to the amount of notes that you take. I’d rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious note.... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back’” (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

(New September 2003)

5010. Taking Notes During the Trial

If you have taken notes during the trial you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

Sources and Authority

- “Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include ‘an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker’s own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.’” (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)
- “In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is ‘the better practice’ for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: ‘Be careful as to the amount of notes that you take. I’d rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes. ... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance,

during the deliberation [*sic*] as to what a witness may have said, we can reread that transcript back” (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

(Revised February 2005)

California Criminal Jury Instructions 102, 202

102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. Here are some points to consider if you take notes:

- 1. Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;**

AND

- 2. You may use your notes only to remind yourself of what happened during the trial, but remember, your notes may be inaccurate or incomplete.**

I do not mean to discourage you from taking notes. I believe you may find it helpful.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on note-taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)

AUTHORITY

- Resolving Jurors’ Questions. Pen. Code, § 1137.
- Jurors’ Use of Notes. *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 18.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[2] (Matthew Bender).

(New January 2006)

202. Note-Taking

You have been given notebooks and may have taken notes during the trial. Please do not remove your notes from the jury room. You may use your notes during deliberations only to remind yourself of what happened during the trial. But remember, your notes may be inaccurate or incomplete. If there is a disagreement about what actually happened at trial, you may ask the court reporter to read back the relevant parts of the testimony to assist you. It is the testimony that must guide your deliberations, not your notes.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on note-taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214 [279 Cal.Rptr. 720, 807 P.2d 949], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d 394, 889 P.2d 588].)

AUTHORITY

- Jurors' Use of Notes. *People v. Whitt* (1984) 36 Cal.3d 724, 746 [205 Cal.Rptr. 810, 685 P.2d 1161].

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

(New January 2006)