

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

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Policy Coordination and Liaison Committee  
Hon. Marvin R. Baxter, Chair  
Civil and Small Claims Advisory Committee  
Hon. Lee Smalley Edmon, Chair  
Patrick O'Donnell, Committee Counsel  
Small Claims and Limited Cases Subcommittee  
Hon. L. Thomas Surh, Chair  
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DATE: October 26, 2007

SUBJECT: Small Claims: Appearance by Declaration or Telephone (Code Civ. Proc., § 116.540) (Action Required)

Issue Statement

With limited exceptions, the Small Claims Act does not currently authorize a court to grant the request of a party or witness to appear by written declaration or by telephone for good cause shown.<sup>1</sup> In some circumstances the requirement to personally appear may be so burdensome, perhaps at a cost greater than the amount in controversy, that it defeats the underlying purpose of small claims court as an accessible forum for the resolution of minor civil disputes.

Recommendation

The Policy Coordination and Liaison Committee (PCLC) and the Civil and Small Claims Advisory Committee (advisory committee) recommend that the Judicial Council sponsor legislation amending the Small Claims Act to authorize the court, in its discretion and upon a showing of good cause why a party or witness cannot appear in person at the small claims hearing, to allow a party or witness to appear by written declaration or by telephone.

The text of the proposed legislation is attached at page 6.

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<sup>1</sup> Exceptions include a plaintiff in the armed services, an incarcerated party, and a defendant who is a nonresident owner of real property. These individuals may appear by declaration or by another person. (See Code Civ. Proc., § 116.540(e), (f) & (g).)

### Rationale for Recommendation

Authorizing the court, in its discretion and for good cause, to allow a party or witness in small claims court to appear by written declaration or by telephone in appropriate circumstances will foster the resolution of small claims disputes by improving the accessibility of the forum. This proposal would further the legislative intent in enacting the Small Claims Act, which provides that “[i]n order to resolve minor civil disputes expeditiously, inexpensively, and fairly, it is essential to provide a judicial forum accessible to all parties directly involved in resolving these disputes.” (Code of Civ. Proc., § 116.120(b).) Furthermore, it is consistent with the legislative mandate that “the hearing . . . of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively.” (Code of Civ. Proc., §116.510.)

Under current law, a party who is physically incapable of getting to the courthouse or a defendant who is not present in California, including a corporation that has no employees or duly appointed or elected officers or directors in California, must nonetheless make a personal appearance in small claims court or risk an adverse judgment. This poses a hardship for, among others, students who have returned home to another state and find that their former landlord will not return a security deposit, out-of-state tourists who are involved in an accident in California, and persons who must drive eight hours or more to reach the courthouse. Similar burdens may be faced by a disinterested nonparty witness or custodian of records who has been subpoenaed in a small claims case and must make a personal appearance.

Members of the advisory committee noted that some judicial officers already allow parties and witnesses to appear in small claims court by declaration or telephone in appropriate circumstances. They also noted that the experience with persons in the military, prisoners, and out-of-state owners of California real property under Code of Civil Procedure section 116.540 (e), (f), and (g) seems to demonstrate that appearance by declaration is workable, at least in some circumstances.

Limited telephonic appearances are also allowed in other types of cases, including actions filed by a local child support agency in family support proceedings (Cal. Rules of Court, rule 5.324) and certain hearings and conferences in general civil cases (Cal. Rules of Court, rule 3.670), although these are generally not evidentiary hearings.

Appearance by telephone may affect the ability of a judicial officer to assess the credibility of the individual on the telephone and to determine who is appearing by telephone and whether an attorney is present. These factors, however, appear to be outweighed by the right of an individual to appear in small claims court, especially if a request is carefully weighed on a case-by-case basis and granted only upon a good cause showing that the party cannot personally appear. An ability to assess credibility is not necessarily dependent on personal, visual observance, as has been demonstrated by sight-

impaired jurors who competently sit on juries. Through careful questioning, a judge should be able to determine the identity of the person on the telephone and whether others may be present.

It is important to note that the proposal does not *require* a judicial officer to authorize an appearance by declaration or telephone; the appearance would be allowed on a case-by-case basis only if the judicial officer finds it appropriate. Reportedly this is already the practice of some small claims judicial officers throughout the state.

#### Alternative Actions Considered

The existing statute could be left unchanged, with the likely result that judicial officers would continue to allow parties to appear by declaration or telephone on an ad hoc basis. However, the PCLC and advisory committee considered it preferable to develop statewide authority authorizing the practice in small claims court if a judicial officer in his or her discretion believes that such an appearance is appropriate under the circumstances.

#### Comments From Interested Parties

The proposal was circulated for statewide public comment in spring 2007. Sixteen comments were received from two courts, a retired superior court commissioner, a family law facilitator, court executive officers, court attorneys, court staff, private attorneys, and in-house corporate legal counsel and legal specialists.

Twelve commentators agreed with the proposal as drafted, three commentators agreed with the proposal if modifications were made, and one commentator disagreed with the proposal.

The commentator who disagreed with the proposal expressed that it would “facilitate abuse, undercut the purpose, and delay the workings of a forum designed to meet a very specific need.” He stated that involvement “by attorneys in the hearing would essentially be undetectable whether as having authored the proffered declaration or actually participating in the telephone call.” He commented that a declaration could be artfully crafted by an attorney while an uninitiated litigant may unwittingly fail to include elements necessary for success, which may have been elicited upon questioning by a judge. Further, he was concerned that absence of a party precludes agreement to having a matter heard by a temporary judge and eliminates any possibility of settlement. He noted that exceptions in the Small Claims Act are very specific, allowing as an alternative representation by another nonlawyer, which underscores the extraordinary circumstances contemplated by the existing statute.

He also stated that hardship for a corporate defendant without presence in California should not override small claims policy as stated in Code of Civil Procedure section 116.120(d), which provides that “the provisions in this chapter . . . and the rules of the

Judicial Council . . . shall operate to ensure that the convenience of parties and witnesses who are individuals shall prevail, to the extent possible, over the convenience of any other parties or witnesses.” Finally, the commentator focused on the perception of fairness, which includes the right of the litigants to have their day in court and the ability of the judge to test the credibility of all participants.

The advisory committee noted that while it is always possible that an unscrupulous attorney would attempt to remain silent on the other end of the telephone conversation, the general utility of allowing telephonic appearances in appropriate cases, in the advisory committee’s view, outweighs the unlikely possibility of that occurring. The court retains control over whether to allow the telephonic appearance and can directly ask the litigant on the phone to indicate who else is present. For the litigant and an attorney to circumvent this process, the litigant would have to lie and the attorney lurking in the background would be suborning the lie, which is unlikely in the committee’s view.

A corporate defendant will likely make a business decision whether to request an appearance by declaration or telephone. As noted above, the proposal does not require the court to grant the request. A judicial officer must first make a finding that there is good cause for not requiring personal attendance and will give appropriate weight to the testimony if the defendant is not present to be cross-examined.

Several commentators felt that the procedural steps (e.g., the good cause determination, notification to the parties, and time to produce witnesses if the request is denied) should be more clearly defined in the legislation. It was suggested that there should be advance notice of the request to file a declaration or for an appearance by telephone. A court staff attorney suggested that a Judicial Council form be filed at least five days before the hearing; a retired San Francisco commissioner suggested that a plaintiff’s request to file a declaration be filed with the claim form and the defendant’s request at least 10 days before the hearing. He further suggested that the form require the declarant to provide a telephone number and agree to be available by telephone should the court determine a need to question the declarant at the hearing. He also proposed that an order approving or denying the request be given to the parties in advance of the hearing, in time to adjust for a personal appearance if necessary. It was also suggested that the person submitting the declaration be required to compensate the other side for the inconvenience of having to come back to a continued hearing if the request were denied.

A commentator questioned whether a distinction should be made as to the types of witnesses who can use this alternative. For example, if the parties are two individuals, it may be important for both to appear for the purpose of assessing credibility and eliciting facts. Other disinterested factual witnesses such as nonparty witnesses, corporate custodians, nonresidents, or persons residing more than 75 miles from the court may have greater justification for not appearing or for appearing by telephone.

Owing to the legislatively prescribed informal nature of small claims proceedings and directive that the object of the hearing and disposition of small claims matters is to “dispense justice promptly, fairly, and inexpensively,” the advisory committee believes that the statute should be flexible and not include detailed pretrial time limits for notice of appearance and other procedures. For example, there may be occasions when a telephonic appearance needs to be triggered immediately. If a party would be aggrieved by having a telephonic appearance granted on short or no notice, the court would still have discretion to continue the case. If, after gaining experience with the procedures authorized by this change, the advisory committee determines that express supplemental procedures (such as notice requirements) are in fact necessary, it will revisit the matter.

The Superior Court of San Diego County suggested the addition of two sentences to the proposed legislation providing that (1) the judicial officer has a duty to ensure that “the identity of the testifying party has been established to the satisfaction of the court,” and (2) “[t]he court may revoke permission for the party or witness to appear by telephone or declaration when such revocation is warranted in the interests of justice.” The advisory committee agreed with these suggestions and incorporated them in the proposed legislation.

A private attorney in Los Angeles wrote in support of the proposal, suggesting that appearance by declaration or telephone is absolutely necessary where the underlying purpose of a small claims process would be defeated, particularly where a personal appearance is extremely burdensome in light of the amount in controversy. She noted that the proposal is in keeping with the times because advances in technology and telecommunications make telephonic appearances a completely reasonable and viable option. She suggested that “the proposed amendments are not only necessary to address due process concerns but also ultimately in line with the purpose of the small claims procedure—to allow the efficient and cost-effective resolution of matters of a small jurisdictional amount.”

A chart of the comments and the advisory committee’s responses is attached at pages 7–18.

#### Implementation Requirements and Costs

The cost impacts of the proposed legislation should be minimal. Staff has been told that no reprogramming of case management systems or e-filing systems would be necessary. Existing forms and procedures may be used to implement the legislation; no new forms are contemplated at this time.

Attachment

Code of Civil Procedure section 116.540 would be amended to read:

1 **§ 116.540**

2

3 (a)–(m) \* \* \*

4

5 (n) The court in its discretion, upon a showing of good cause why a party or witness  
6 cannot appear in person at the small claims hearing, may allow any party or witness  
7 to appear by written declaration under penalty of perjury or by telephone. If a  
8 telephonic appearance is allowed, the court shall ensure that (1) the testifying party  
9 is sworn as a witness, (2) the identity of the testifying party has been established to  
10 the satisfaction of the court, and (3) his or her testimony is audible to the opposing  
11 parties and the public observers of the trial. The court may revoke the permission for  
12 the party or witness to appear by declaration or telephone when such revocation is  
13 warranted in the interests of justice.

**LEG07-06**

**Small Claims: Appearance by Declaration or Telephone (Code Civ. Proc., § 116.540)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Richard E. Best <b>Commissioner [Ret.]</b> San Francisco	AM	N	<p>I agree with the objective of the rule but believe it could be improved by increasing the ability to rely on the more efficient process.</p> <p>As drafted, no one can rely on such evidence being accepted or even considered, though the comment notes that some courts already accept such evidence. Perhaps a party would be permitted to file a form regarding its intent to appear by phone or submit a declaration which would entitle it to do so absent some objection by the opposing party or a specific determination by the judge pursuant to such objection or on its own motion. Procedures should exist for a person denied such right to adjust and produce witnesses.</p> <p>Is there some way to reduce the uncertainty that the court will at least consider the evidence from a declaration or telephonic testimony? How can someone rely on this rule with any confidence? Perhaps the parties should have the right to appear by rule unless the judge makes specific findings prior to the hearing and continues the matter so parties can adjust.</p>	<p>At this stage, the committee believes that the statute should be flexible and not include detailed pretrial time limits for notice of appearance and other procedures. For example, there may be occasions when a telephonic appearance needs to be triggered immediately. If a party is aggrieved by having a telephonic appearance “sprung” on him or her, the court would still have discretion to continue the case. The committee anticipates that a request will typically be made through correspondence in advance of the small claims hearing. The committee would like to gain experience under the proposal to determine whether supplemental procedures are necessary. If so, then rules of court and Judicial Council forms may be adopted as authorized in Code of Civil Procedure section 116.920 in response to experience with the statute.</p>

**LEG07-06**

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				<p>Should a distinction be made as the types of witnesses that can use this device? If there are two human beings as parties, it may likely be important that both appear both for credibility purposes as well as eliciting facts. Others may be less important or have greater justifications for not appearing: disinterested factual witnesses or corporate custodians; nonresidents or persons residing more than 75 miles.</p> <p>Should the rule be divided into two parts—one for declarations and one for telephonic testimony.</p> <hr/> <p>(second comment)</p> <p>Permit any declaration by a non-party or a custodian of records [via a declaration similar to that used in a records deposition] with the provision that</p> <p>(1) It must be filed with the complaint or, for defendants, filed and served at least 10 days prior to the hearing.</p> <p>(2) The declaration must include a telephone number where the declarant can be called collect.</p>	

**LEG07-06**

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				<p>(3) The declarant must agree to and be available during a time period to receive a call.</p> <p>(4) The judge, for good cause, may require a personal appearance, may continue the hearing for a personal appearance, and may require the party submitting the declaration to compensate the other side for the expense of returning for the hearing, in whole or part.</p> <p>Permit any non-party or a custodian of records to appear by telephone subject to a judge requiring personal appearance.</p> <p>Permit parties to appear by telephone only if advance notice is provided and/or court approval is obtained in advance based upon some hardship or other good cause. Provide a judicial council form for such request and order. This could be handled like an indigent application.</p> <p>Permit parties to file declarations only if approved in advance and subject to (2)–(4) above.</p>	

**LEG07-06**

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2.	Stephen Bouch Executive Officer Superior Court of Napa County	A	N	No specific comments.	No response required.
3.	Joseph Chairez President Orange County Bar Association Irvine	N	N	<p>Allowing appearance in small claims court by declaration or telephone would potentially facilitate abuse, undercut the purpose, and delay the workings of a forum designed to meet a very specific need.</p> <p>Established as a forum, “. . . to resolve minor civil disputes expeditiously, inexpensively, and fairly accessible to all parties directly involved . . . (C.C.P., § 116.120 subdivision (b)),” the appearance by attorneys, participation by assignees, and representation by others is severely circumscribed in small claims court. Were appearance by declaration or telephone allowed, involvement by attorneys in the hearing would essentially be undetectable whether as having authored the proffered declaration or actually participating in the telephone call.</p> <p>Were appearance by declaration allowed, the uninitiated litigant may unwittingly fail to include in his declaration elements requisite for his success which essential facts may have been elicited upon</p>	<p>While it is always possible that an unscrupulous attorney would be on the other end of the telephone conversation, silently participating in the hearing, in the committee’s view, the general utility of allowing telephonic appearances in appropriate cases outweighs the rather unlikely possibility of that occurring. The court retains control over whether to allow the appearance and of course can directly ask the litigant on the phone who else is present. For the litigant and an attorney to circumvent proper procedure, the litigant would have to lie and the attorney (lurking in the background) would be suborning the lie. As noted in the response to commentator 1, the committee would like to gain experience under the proposal to determine whether supplemental procedures, by way of rules of</p>

**LEG07-06**

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				<p>questioning by a judge. Conversely, the seasoned litigant may proffer an artfully drafted declaration, knowing that neither he nor the seemingly air-tight claim or defense presented will be unassailable, but not for reasons of fairness.</p> <p>Additionally, the absence of a party from the courtroom precludes agreement to having the matter heard by a temporary judge, and eliminates any possibility of settlement of the matter without trial, whether by the parties themselves “on the steps of the courthouse,” or by way of court-affiliated mediation, so often available to parties in the small claims forum.</p> <p>Discussion offered in connection with the proposed amendment makes reference to “experience” with the three exceptions as to whom may presently appear in small claims court by way of declaration under C.C.P., § 116.540 subdivisions, (e), (f), and (g), and observes that it, “. . . seems to demonstrate that appearance by declaration is workable, at least, in some circumstances.” While no details or statistics are provided as to this “experience,” a review of C.C.P., § 116.540 subdivisions (e), (f), and (g) and the very</p>	<p>court and Judicial Council forms, are necessary.</p>

**LEG07-06**

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				<p>specific and extremely limited circumstances under which appearance by declaration is allowed, leads to the conclusion that there are likely very few of these occurrences. Too, given the overriding prohibitions in the small claims forum as to appearance by one other than the party “directly involved,” it should be noted that these subdivisions allow, as an alternative to appearance by declaration, representation by another. This underscores the extreme circumstances contemplated and required by C.C.P., § 116.540 for persons in any of these three instances of exception and their anticipated difficulty in personally appearing.</p> <p>As to the two other instances cited by the discussion in support of appearance by telephone, to wit, California Rules of Court, rules 3.670 and 5.324, it is noted neither involve trial.</p> <p>The discussion of the proposed amendment anticipates that, if adopted, a form would be developed whereby appearance by declaration or telephone would be requested with facts constituting “good cause” for the request presumably set forth therein. Under</p>	

**LEG07-06**

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				<p>applicable law, “‘Good Cause’ means circumstances sufficient to justify the requested order or other action, as determined by the judge.” C.C.P., § 116.130 subdivision (j). It appears then that this determination, to be made by a judge, and subsequent party notification is another step in the process of getting to hearing. The delay inherent in such added activity seems inconsistent with the “expeditious” resolution of these disputes. Further, it is likely, given the manner in which the small claims calendar is handled in many courts, that the judge making the determination of “good cause” may not be the judge who now must “hear” the case, perhaps on declarations alone.</p> <p>The discussion in connection with the proposed amendment noted that personal appearance may constitute a hardship for a defendant not in California or a corporation without presence here. C.C.P., § 116.340 subdivision (e) requires that service be made in California with only two narrowly drawn exceptions. Further, C.C.P., § 116.120 subdivision (d) expressly notes that, “[t]he small claims divisions, the provisions of this chapter, and the rules of</p>	

**LEG07-06**

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				<p>the Judicial Council regarding small claims actions shall operate to ensure that the convenience of parties and witnesses who are individuals shall prevail, to the extent possible, over the convenience of any other parties or witnesses.”</p> <p>In enacting the provisions applicable to the small claims forum, the Legislature found that, “[i]ndividual minor civil disputes are of special importance to the parties and of significant social and economic consequence collectively.” C.C.P., § 116.120 subdivision (a). Studies have determined that the perception of litigants of the fairness of the judicial system is tied to process, as distinguished from that of attorneys who perceive results as indicative of fairness, and that satisfaction with this “process” centers on “being heard.” It would seem that anything short of personal appearance would necessarily adversely impact on the sense of “being heard.” Small claims may be the only experience which a person may have with the courts. It should be an opportunity to meet their opponent, have their “day in court” and the credibility of all participants tested and evidence judge[d?]. For the foregoing reasons, it is</p>	

**LEG07-06**

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				believed that the proposed amendment does not further the purpose of this unique judicial forum.	
4.	Christine Copeland Staff Attorney Superior Court of Santa Clara County	A	N	No specific comments.	No response required.
5.	Theresa Gary Family Law Facilitator Superior Court of Kern County	A	N	No specific comments.	No response required.
6.	Cheryl Jones Principal Legal Specialist Capital One Services, Inc. Richmond, Virginia	A	Y	No specific comments.	No response required.
7.	Kristina L. Kavalieratos Litigation Specialist Capital One Financial Corporation Richmond, Virginia	A	N	No specific comments.	No response required.
8.	Superior Court of Los Angeles County	A	N	No specific comments.	No response required.
9.	Adrienne McMillan Staff Attorney Access Center Superior Court of San Francisco County	AM	N	It would be great if a request form with instructions (this form must be filed with the court at least 5 days before the scheduled hearing date) could be made available. It's unclear how such a request is to be made.	See response to commentator 1.
10.	Pam Moriada Program Manager	A	N	No specific comments.	No response required.

**LEG07-06**

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	Superior Court of Solano County				
11.	Julie D. Nelson General Counsel, Litigation, GCG Citicorp Credit Services, Inc. Jacksonville, Florida	A	Y	No specific comments.	No response required.
12.	Marianne Peters Senior Litigation Specialist Capital One Richmond, Virginia	A	N	No specific comments.	No response required.
13.	Michael M. Roddy Executive Officer Superior Court of San Diego County	AM	Y	<p>The proposed new subsection should be amended as follows to allow the court the ability to protect the integrity of the small claims proceeding:</p> <p>(n) The court in its discretion, and for good cause shown, may allow any party or witness to appear by telephone or by written declaration under penalty of perjury. If a telephonic appearance is allowed, the court shall ensure that: (1) the testifying party is sworn as a witness; (2) the identity of the testifying party has been established to the satisfaction of the court; and (3) his or her testimony is audible to the opposing parties and the public observers of the trial. The court may revoke the permission for the party or witness to appear by telephone or by declaration when such revocation is warranted in the interests of justice.</p>	The committee has incorporated the commentator's suggestions in the proposed legislation.

**LEG07-06****Small Claims: Appearance by Declaration or Telephone (Code Civ. Proc., § 116.540)**

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14.	Dominique Sanz-David LRA Access Center Superior Court of San Francisco County	A	N	This is a great idea. I think this will make the judicial system seem a lot more fair and accessible.	No response needed.
15.	Deborah E. Yim Associate Reed Smith LLP Los Angeles	A	Y	<p>We wholeheartedly support the Civil and Small Claims Advisory Committee’s proposed amendments to Code of Civil Procedure, section 116.540. Allowing a party or witness in small claims court to appear by written declaration or by telephone is absolutely necessary where the underlying purpose of a small claims process would be defeated, particularly in instances where a personal appearance is extremely burdensome in light of the amount of controversy.</p> <p>Moreover, the proposed amendments are in keeping with the times. Advances in technology and telecommunications make telephonic appearances a completely reasonable and viable option. We think it is safe to say that the majority of courts in California already allow telephonic appearances, and if they do not, have the capability to do so.</p>	No response needed.

**LEG07-06**

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				Thank you for your consideration and support of this very important issue. The proposed amendments are not only necessary to address due process concerns but also ultimately in line with the purpose of the small claims procedure—to allow the efficient and cost-effective resolution of matters of a small jurisdictional amount.	
16.	Lisa M. Young Assistant General Counsel Chase Bank, USA, N.A. Chicago	A	Y	No specific comments.	No response required.