

**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: Trial Court Presiding Judges Advisory Committee
Hon. Nancy Wieben Stock, Chair
Joshua Weinstein, Committee Counsel, 415-865-7688,
joshua.weinstein@jud.ca.gov

DATE: October 25, 2007

SUBJECT: Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court) (Action
Required)

Issue Statement

Several courts face serious calendar management difficulties because of the amount of time-not-waived criminal cases on or near the last day for trial. Often the number of cases is significantly larger than the number of available judges to try the cases. Calendar management problems are exacerbated by cases that are on or near the last day for trial, significantly reducing the court's flexibility and creating artificial calendar management emergencies.

Recommendation

The Trial Court Presiding Judges Advisory Committee, with the support of the Criminal Law Advisory Committee, recommends that the Judicial Council, effective January 1, 2008, amend rule 4.115 of the California Rules of Court to clarify that all requests for trial continuances, including trailing cases, must comply with the "good cause" requirement of Penal Code section 1050 and to encourage courts to actively manage trial calendars to preserve trial court flexibility and resources to minimize the number of statutory dismissals.

The text of the proposed rule amendment is attached at pages 9–10.

Rationale for Recommendation

Background and Proposed Rule

Calendar management has proven to be a significant challenge in some jurisdictions. Courts often lack a sufficient number of judicial officers and face significantly increasing caseloads. Exacerbating the problem are more last-day cases and less control of the court calendars. The increase in last-day cases and decreased calendar control results, at least in part, from continuances of cases in the trailing period (i.e., the 10-day grace period).¹ When cases are continued in the 10-day grace period, it increases the amount of cases on or near the last day for trial. Consequently, this reduces the courts' flexibility, reduces settlement incentives, and creates artificial emergencies.

To address this problem, the Trial Court Presiding Judges Advisory Committee² recommends amending rule 4.115 of the California Rules of Court, which governs criminal case assignments. The amendments would:

- Clarify that all requests for continuances of trials, including trailing cases, must comply with rule 4.113 and the good cause requirement for continuances found in Penal Code section 1050;
- Encourage courts to actively manage trial calendars to minimize the number of statutory dismissals;
- Provide guidance to resource-challenged courts to reopen discussions with criminal justice partners on how to minimize last-day cases; and
- Require courts to implement calendar management procedures, in accordance with local conditions and needs, to ensure that criminal cases are assigned to trial departments before the last day of the statutory speedy trial period.

Controversy Regarding the Proposal

Some prosecutors believe that the proposal conflicts with established law, but the Trial Court Presiding Judges Advisory Committee disagrees. In their comments, the Los Angeles County District Attorney's Office and Los Angeles District Attorney Steve Cooley in his capacity as president of the Los Angeles County

¹ The 10-day grace period to bring a case to trial under Penal Code section 1382(a)(2)(B) is explained in this section below.

² This proposal is a product of the Trial Court Presiding Judges Advisory Committee, but the Criminal Law Advisory Committee was significantly involved in its development. The Criminal Law Advisory Committee unanimously recommends the adoption of this proposal.

Prosecutors Association (grouped together as DAs for the purposes of this report)³ assert that they need not show good cause under Penal Code section 1050 when seeking a continuance in the 10-day grace period. The DAs' position is that the Penal Code section 1050 good cause requirement for continuances does not apply to cases within the 10-day grace period and thus the proposed rule conflicts with existing law.

To support this position, the comment by the DAs includes a detailed analysis and cites numerous cases. According to that analysis, “[i]t is well-established that the People need not demonstrate good cause to trail a case within the trailing period and that a trial court cannot dismiss a case prior to the expiration of the 10-day grace period.”⁴ The committee agrees that there is no question that the court may not dismiss cases prior to the expiration of the statutory speedy trial period, whether it is the initial 60-day period or the 10-day grace period. The proposed rule does not attempt to change that.

Nonetheless, the committee believes the rule is consistent with Penal Code section 1050. That section provides that “[c]ontinuances shall be granted only upon a showing of good cause.” (Pen. Code, § 1050(e).) There is no statute or appellate decision exempting this unambiguous good cause requirement during the 10-day grace period.

Confusion Between Two Good Cause Requirements

The position advanced by the DAs appears to confuse two distinct and separate good cause requirements: the good cause requirement under Penal Code section 1050 for a continuance and the good cause requirement under Penal Code section 1382 to avoid dismissal if the trial does not commence within the statutory time period.

Continuance requests must comply with the requirements in Penal Code section 1050, which provides that a motion to continue cannot be granted unless the moving party shows good cause. Specifically, as noted above, section 1050(e) provides that “[c]ontinuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.” The California Rules of Court explain that a continuance will be denied unless the moving party “presents affirmative proof in open court that the ends of justice require a continuance.” (Cal. Rules of Court, rule 4.113.) If the party requesting the continuance shows good cause under Penal Code section 1050, the trial may be postponed. There is no indication in Penal Code section

³ Although the issue was raised in a comment, it will be addressed here, rather than below in the comment response section.

⁴ See comment by the Los Angeles County District Attorney's Office.

1050, or the cases interpreting it, that it applies only to certain cases, that it does not apply to the prosecutor, or that its application is somehow dependent on whether the case is within or outside of certain statutory speedy trial periods.

Penal Code section 1382 addresses speedy trials. It provides that, if statutory time limits for commencing the trial are not met, “[t]he court, unless good cause to the contrary is shown, shall order the action to be dismissed.” (Pen. Code, § 1382(a).) Generally, a defendant charged with a felony must be brought to trial within 60 days of the arraignment. The trial court may set the trial beyond that 60-day period if (1) there is good cause to do so or (2) the defendant consents to trial outside of that 60-day period. If the defendant consents, but later withdraws his or her consent, the trial must commence within 10 days of the trial date.⁵ (Pen. Code, § 1382(a)(2)(B).) Thus, if a defendant waives his or her right to be tried within 60 days and then later withdraws the time waiver, the case must be brought to trial within that 10-day grace period and the prosecution need not show good cause to avoid dismissal under Penal Code section 1382 if the trial commences within that 10-day grace period. If the trial commences after the 10-day grace period, there must be good cause to do so under Penal Code section 1382. If the case is not brought to trial within the statutory periods and there is not good cause under Penal Code section 1382, the case must be dismissed. (Pen. Code, § 1382(a).)

Case Law Regarding Good Cause

Cases interpreting whether the court may dismiss a case within the 10-day grace period contribute to the confusion between the two good cause requirements. For instance, in *Bryant v. Superior Court* (1986) 186 Cal.App.3d 483, the court states that “[b]ecause no cause may be dismissed for delay within the 10-day grace period, no showing of good cause is necessary for the prosecution to obtain any continuance of trial within that period.” (*Id.*, at p. 488.) Read literally and in a vacuum, this quote could lead one to believe that the Penal Code section 1050 requirement to show good cause for a continuance does not apply to cases within the 10-day grace period.

The *Bryant* case, and the other cases cited in the DAs’ comments, however, addresses the narrow issue of whether the court may *dismiss* a case under Penal Code section 1382 before expiration of the 10-day grace period. As stated above, there is no disagreement on this point. The point that is not addressed in any of those cases is whether the prosecution must comply with Penal Code section 1050 when seeking a continuance during the 10-day grace period. Since the cases do not address or discuss the good cause requirement under Penal Code section 1050, they do not appear to stand for the proposition that the prosecution may veto a

⁵ This 10-day period is known as the 10-day grace period.

court in determining when a case is to be sent out for trial during the 10-day grace period.

The rule, however, is consistent with the one case that discusses whether, under Penal Code section 1050, the prosecution must show “good cause” for a continuance during the 10-day grace period. In *People v. Henderson* (2004) 115 Cal.App.4th 922, in analyzing the similar issue of whether dismissals or continuances are allowed during certain speedy trial periods for preliminary hearings, the court analogized to the 10-day grace period under Penal Code section 1382. The *Henderson* case recognizes that prosecutors must show good cause for a continuance within the 10-day grace period.

In the *Henderson* case, the district attorney appealed the dismissal of a burglary and assault prosecution. The court denied the prosecution request for a continuance of the preliminary hearing under Penal Code section 1050, as it was not supported by good cause. Upon denying the motion to continue, the trial court dismissed the case “[b]ecause the prosecutor was not ready to proceed.” (*Id.*, at pp. 928–929.) However, the statutory time period to conduct the preliminary hearing had not expired when the court dismissed the case. The prosecution appealed, arguing that “the magistrate had no authority to dismiss the complaint [simply] because the [prosecutor] failed to show good cause for a continuance under Penal Code section 1050.” (*Id.*, at p. 927.) On appeal, the court in *Henderson* reversed, finding that dismissal was not the appropriate remedy.

While dismissal was not the appropriate remedy, the *Henderson* court recognized that the prosecution was nonetheless required to show good cause in requesting a continuance. The court observed that not requiring the prosecution to show good cause for a continuance during certain speedy trial periods would illogically “shift control of the calendar from the court to prosecutor.” (*Id.*, at p. 940.)⁶ “We are mindful that this conclusion may place courts in a difficult situation where, after finding no good cause to justify a continuance, they are compelled to deny the continuance under [Penal Code] section 1050, but cannot dismiss the case when the prosecutor is not ready to proceed.” (*Id.*, at p. 939.) The court noted that “dismissal ‘is not appropriate, and lesser sanctions must be used by the trial court, unless the effect of the prosecution’s conduct is such that it deprives the defendant of the right to a fair trial.’” (*Id.*, at 940, quoting *Derek L. v. Sup. Court* (1982) 137 Cal.App.3d 228, 235.) The *Henderson* court observed that the trial court may

⁶ Cases interpreting the purpose of the 10-day grace period provide support for this conclusion. For example, the court in *Modina v. Sup. Ct.* (2000) 79 Cal.App.4th 1280 noted that the 10-day grace period “protects the People by giving them 10 days if necessary.” (*Id.* at p. 1287.) The “if necessary” portion is, essentially, the “good cause” requirement in Penal Code section 1050 for a continuance. If the prosecutor were entitled to the full 10 days, the prosecutor would be entitled to it whether it is “necessary” or not.

impose sanctions as provided by statute (fining the attorney up to \$1,000 and “filing a report with an appropriate disciplinary committee” under Penal Code section 1050.5(a)).

Finally, the *Henderson* court opined that when the prosecution fails to show good cause for a continuance but is unable to go forward, the court has no choice but to postpone the hearing unless to do so would deprive the defendant of his or her constitutional right to a fair trial. (*Id.*, at p. 940.) “While the court is not required to reschedule the hearing to the requested date, where the prosecutor has failed to show good cause to justify the request, the court must nevertheless postpone the hearing to another court date within the statutory period. . . . While the court retains the inherent authority to control its calendar and manage all the proceedings before it, it may be prudent to acquiesce to a reasonable request in order to avoid repeated motions for continuance.” (*Ibid.*)

Advisory Committee Comment

Both the Trial Court Presiding Judges Advisory Committee and the Criminal Law Advisory Committee noted that the conclusion in *Henderson* that the court must grant some continuances is not supported by citation to other authority and appears to be dicta, as it is unnecessary for the holding in the case. It also appears to be contrary to the plain language of Penal Code section 1050, which provides that a continuance may be granted *only* upon a showing of good cause. Both committees believe that the trial judge may commence the trial on the scheduled date when the prosecutor fails to show good cause for a continuance in the 10-day grace period. Nonetheless, the proposed rule amendments and advisory committee comments are silent as to the remedy (other than dismissal not being an appropriate remedy). Given the silence on this issue, both recognized that they need not be opine on whether the *Henderson* court correctly concluded that the case must be postponed. It is quite possible that the apparent conflict between this holding and the plain language of the statute will be resolved in future litigation.

The advisory committee comment provides background on the issue of the two similar but distinct “good cause” requirements. It states the basis for the distinction between the two requirements and cites relevant case law and statutes. The advisory committee comment also identifies two noteworthy items. First, it reminds users that failure to show “good cause” for a continuance during the 10-day grace period under Penal Code section 1050 does not warrant dismissal. Second, it recognizes the apparent conflict between the plain language of Penal Code section 1050, requiring “good cause” for any continuance and the statement in *Henderson, supra*, that “the court must nevertheless postpone the hearing to another court date within the statutory period” if the prosecution fails to show “good cause” for a continuance during the 10-day grace period. Finally, it concludes that, but for the statement in *Henderson* that the court “must” postpone

the trial, the court would be allowed to deny the continuance under the plain language of section 1050. The purpose of including these items in the advisory committee comment is to ensure that the relevant tangential issues that would not be appropriate to include in the rule text are nonetheless readily at the users' fingertips.

Conclusion

Although there is an argument that the rule conflicts with case law, for the reasons discussed above the committee disagrees with that position. Moreover, the committee believes the benefits of the rule outweigh any possible risks. Requiring requests to continue a trial within the 10-day grace period are necessary to comply with the Penal Code section 1050 requirements will result in the court having more control over its calendars, reduce unnecessary continuances, and reduce artificial calendar management emergencies created by last day cases.

Alternative Actions Considered

The committee considered a rule amendment that simply clarified that the good cause requirement applied to all cases, without the additional language encouraging courts to actively manage trial calendars to minimize the number of statutory dismissals. This was rejected, as the committee concluded that, in addition to clarifying the state of the law on this issue, it was important to remind courts to actively manage calendars to reduce backlogs.

The committee also discussed not adopting any rule, under the belief that the law currently requires parties to show good cause under Penal Code section 1050 for all continuance requests. While the committee agreed that a court could legally require compliance with Penal Code section 1050 for continuance request during the 10-day grace period, the committee concluded that the proposed rule would provide judges with a significant calendar management tool. The proposed rule would clarify existing law and provide authority clearly supporting a judge in requiring a showing of good cause for a continuance during the 10-day grace period.

Comments From Interested Parties

The proposed rule was circulated for public comment for a nine-week period in spring 2007. Seven comments were received; two agreed with the proposal, two agreed if it was amended, two disagreed, and one did not state a position, but argued extensively against the provision applying good cause to trailing cases. One of the comments disagreeing with the proposal did not elaborate on the reasons for disagreement.

The comments that agreed if the proposal was modified and the remaining comment disagreeing (as well as the one that did not state a position) had the same

focus. Those comments ranged from the DAs' detailed analysis to single sentence comments, but they all disagreed, legally or practically, with the concept that the court should be in control of the trial calendar during the 10-day grace period. The committee disagreed with these comments for the reasons stated in the "Rationale for Recommendation" section above.

Given the confusion caused by the use of good cause in the two statutes, an advisory committee comment was added. The comment clarifies that the good cause requirement for a continuance in Penal Code section 1050 is separate and distinct from the good cause requirement to avoid dismissal under Penal Code section 1382, and it discusses the cases that contribute to this confusion. It also addresses the statements in the *Henderson* case regarding whether the court must nonetheless postpone the trial if good cause has not been shown.

A chart summarizing the comments and the committee responses is attached at pages 11–27.

Implementation Requirements and Costs

Implementation will reduce the costs caused by continuances on trial days. These costs are caused by calling jurors into court. This involves the costs of generating the jury pools (and additional pools for the next trial date), mailing jury summons, and otherwise diverting staff from other tasks. The proposal, by reducing continuances on the date a case is set for trial, would reduce these costs and increase the efficient use of judicial resources.

Attachments

Rule 4.115 of the California Rules of Court is amended, effective January 1, 2008, to read:

1 **Rule 4.115. Criminal case assignment**

2
3 **(a) Master calendar departments**

4
5 To ensure that the court’s policy on continuances is firm and uniformly
6 applied, that pretrial proceedings and trial assignments are handled
7 consistently, and that cases are tried on a date certain, each court not
8 operating on a direct calendaring system must assign all criminal matters to
9 one or more master calendar departments. The presiding judge of a master
10 calendar department must conduct or supervise the conduct of all
11 arraignments and pretrial hearings and conferences and assign to a trial
12 department any case requiring a trial or dispositional hearing.
13

14 **(b) Trial calendaring and continuances**

15
16 Any request for a continuance, including a request to trail the trial date, must
17 comply with rule 4.113 and the requirement in section 1050 to show good
18 cause to continue a hearing in a criminal proceeding. Active management of
19 trial calendars is necessary to minimize the number of statutory dismissals.
20 Accordingly, courts should avoid calendaring or trailing criminal cases for
21 trial to the last day permitted for trial under section 1382. Courts must
22 implement calendar management procedures, in accordance with local
23 conditions and needs, to ensure that criminal cases are assigned to trial
24 departments before the last day permitted for trial under section 1382.
25

26 **Advisory Committee Comment**

27
28 Subdivision (b) clarifies that the “good cause” showing for a continuance under section 1050
29 applies in all criminal cases, whether or not the case is in the 10-day grace period provided for in
30 section 1382. The Trial Court Presiding Judges Advisory Committee and Criminal Law Advisory
31 Committee observe that the “good cause” requirement for a continuance is separate and distinct
32 from the “good cause” requirement to avoid dismissals under section 1382. There is case law
33 stating that the prosecution is not required to show good cause to avoid a dismissal under section
34 1382 during the 10-day grace period because a case may not be dismissed for delay during that
35 10-day period. (See, e.g., *Bryant v. Superior Court* (1986) 186 Cal.App.3d 483, 488.) Yet, both
36 the plain language of section 1050 and case law show that there must be good cause for a
37 continuance under section 1050 during the 10-day grace period. (See, e.g., section 1050 and
38 *People v. Henderson* (2004) 115 Cal.App.4th 922, 939–940.) Thus, a court may not dismiss a
39 case during the 10-day grace period under section 1382, but the committees believe that the court
40 must deny a request for a continuance during the 10-day grace period that does not comply with
41 the good cause requirement under section 1050.
42

1 The decision in *Henderson* states that when the prosecutor seeks a continuance but fails to show
2 good cause under section 1050, the trial court “must nevertheless postpone the hearing to another
3 date within the statutory period.” (115 Cal.App.4th at p. 940.) That conclusion, however, may be
4 contrary to the plain language of section 1050, which requires a court to deny a continuance if the
5 moving party fails to show good cause. The conclusion also appears to be dicta, as it was not a
6 contested issue on appeal. Given this uncertainty, the rule is silent as to the remedy for failure to
7 show good cause for a requested continuance during the 10-day grace period. The committees
8 note that the remedies under section 1050.5 are available and, but for the *Henderson* dicta, a court
9 would appear to be allowed to deny the continuance request and commence the trial on the
10 scheduled trial date.

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Joseph Chairez President Orange County Bar Association Irvine	AM	Y	<p>Courts and parties need the flexibility that trailing periods provide to handle the volume. I therefore agree to this proposal if the following phrase in 4.115(b) is deleted “including a request to trail the trial date.”</p> <p>Furthermore, a prosecutor bears the burden of proof (beyond a reasonable doubt) and the trailing time is an absolute necessity to be able to round up all necessary witnesses. It is not feasible for a prosecutor to comply with Penal Code, § 1050 during the trailing period in criminal cases; there is just no time given the volume of cases to be able to ascertain with any certainty (2 days in advance), if a witness is unavailable.</p>	Please see “Rationale for Recommendation” section of the attached Judicial Council report.
2.	Steve Cooley District Attorney/President Los Angeles County Prosecutors Association	N	Y	The Los Angeles County Prosecutors Association has reviewed the proposed changes to California Rules of Court, rule 4.115. As prosecutors and officers of the court, we fully appreciate the stresses placed on the court system by the high volume of last day trials. However, the proposed changes to California Rules of Court, rule 4.115 do not appropriately	Please see “Rationale for Recommendation” section of the attached Judicial Council report.

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>address the problem. In the attempt to increase court efficiency by lessening the number of last-day trials, the proposed rule changes impede the prosecution’s right to proceed to trial up to the end of the statutory time frame and could very well result in increased and unwarranted case dismissals.</p> <p>1. <u>The proposed rule changes are contrary to Penal Code section 1382 and case precedent.</u></p> <p>As amended by the proposed changes, rule 4.115 would require that any request for a continuance, including a request to trail the trial date, comply with the good cause requirements of Penal Code section 1050. In requiring a showing of good cause for “any” People’s continuance within the statutory period, the proposed changes to California Rules of Court, rule 4.115 are in direct conflict with Penal Code section 1382 and California case precedent.</p> <p>Penal Code section 1382 (as amended in 1959) provides that once a trial has been</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>continued upon the consent of the defendant beyond the initial statutory period for trial, the prosecution is entitled to a 10-day grace period in which to bring the case to trial. (Penal Code sections 1382(a)(2)(B) and 1382(a)(3)(B).) The prosecution need not demonstrate good cause to trail a case within the grace period. In <i>People v. Malengo</i> (1961) 56 Cal.2nd 813, the California Supreme Court explicitly held:</p> <p>“No showing of good cause was necessary in support of this request to bring the defendant to trial within the ten days after the last date to which he had consented . . . since the statute provides that the action ‘shall not be dismissed’ if this is not done.” <i>Malengo</i>, 56 Cal.2nd at 815–816.</p> <p>In footnote 2, the <i>Malengo</i> Court, referring to the report of the Judicial Council concerning the 1959 amendment to Penal Code section 1382, continued:</p> <p>“This Construction of the amendment to section 1382 reflects the expressed purpose</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>of the Judicial Council in proposing its enactment. The council explained that ‘It is recommended that the section be amended to provide for dismissal of all cases not brought to trial within the statutory period (unless good cause is shown) <i>except</i> when the defendant has consented to the trial being set beyond the statutory period, and that in the latter situation the case must be dismissed <i>if it is not brought to trial within 10 days.</i>’ [Emphasis added.]</p> <p><i>Malengo’s</i> holding has been repeatedly followed in subsequent case law. See <i>People v. Hernandez</i> (1979) 97 Cal.App.3d. 451, 454–455 [The prosecution need not show good cause to trail within the grace period]; <i>Bryant v. Superior Court</i> (1986) 186 Cal.App.3d, 483, 488 [rejecting the argument that dismissal was necessary when the prosecution did not show good cause to trail within the grace period]; <i>Medina v. Superior Court</i> (2000) 79 Cal.App.4th 1280, 1287 [“. . .[T]he 10-day period not only protects the defendant by setting a time limit within which he must be</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>brought to trial, but . . . it also protects the People by giving them 10 days if necessary”].</p> <p>Further, Penal Code section 1050.5(b) explicitly forbids case dismissal should a prosecutor fail to comply with the good cause requirements of Penal Code section 1050(b). It is abundantly clear that the proposed changes to rule 4.115 are in direct conflict with both statute and case law providing that the prosecution has a right to a full 10-day grace period to bring a case to trial, and need not show good cause when requesting to trail a case within that period.</p> <p><u>II. The proposed rule changes will result in unwarranted dismissals.</u></p> <p>The proposed changes to rule 4.115 provide: “[C]ourts must implement calendar management procedures, in accordance with local conditions and needs, to ensure that criminal cases are assigned to trial departments before the last day permitted for trial pursuant to section 1382.” If</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>adopted, such calendar management procedures would undermine the stated policy of limiting the number of statutory dismissals. In the instance where the prosecution is unable to proceed until the end of the grace period, a judge will be required to either send the matter to a trial court before it is ready for trial or unlawfully dismiss the case before the end of the statutory trailing period. In the first instance, trial courts will be assigned cases that are not ready, making them unavailable for other trial matters. In the second instance, the court will unlawfully dismiss cases that could be ready for trial on the last day of the trailing period.</p> <p>Although the need for efficient calendar management is a significant concern, the proposed changes to rule 4.115 do not provide a just and equitable answer. The Los Angeles County Prosecutors Association objects to the changes because they are contrary to both law and the interests of justice.</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
3.	Betty Haviland Chief Deputy Criminal Division Santa Monica City Attorneys Office	AM	Y	In rule 4.115(b) delete, “including a request to trail the trial date.”	Please see “Rationale for Recommendation” section of the attached Judicial Council report.
4.	Michael M. Roddy Executive Officer Superior Court of California, County of San Diego	A	Y	No specific comments.	No response required.
5.	Lael Rubin Head Deputy District Attorney Los Angeles County District Attorney’s Office	N	Y	The Los Angeles County District Attorney’s Office shares the concerns of the Trial Courts Presiding Judges Advisory Committee regarding calendar management difficulties caused by the number of criminal cases proceeding on the last day for trial and the need to predict juror and courtroom availability to try those cases. We also agree that minimizing the number of statutory dismissals is in the interest of justice. However, we do <i>not</i> believe that this problem can be addressed through the proposed rule amendments, because (1) if adopted in their current form they would impinge upon the statutory and constitutional right of the People to proceed to trial upon cases until and including the last statutory day; and (2) if adopted in their	Please see “Rationale for Recommendation” section of the attached Judicial Council report.

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>current form, they would serve only to increase rather than decrease the number of dismissals.</p> <p>A. <u>The proposed changes conflict with existing law.</u></p> <p>The proposed changes provide in part that: “Any request for a continuance, <i>including a request to trail the trial date</i>, must comply with rule 4.113 and section 1050’s requirement for a showing of good cause to continue a hearing in a criminal proceeding.” (Ital. added.) We object to this proposed change to the extent that it would require a showing of good cause for the People to trail a case within either the initial statutory time for trial or the 10-day grace period afforded by Penal Code section 1382.</p> <p>Simply stated, under Penal Code section 1382, once a trial has been continued upon consent of the defendant beyond its initial statutory time for trial, the prosecution is then entitled to a 10-day grace period or</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>trailing period in which to bring the case to trial. It is well-established that the People need not demonstrate good cause to trail a case within the trailing period and that a trial court cannot dismiss a case prior to the expiration of the 10-day grace period:</p> <p style="padding-left: 40px;">Because no cause may be dismissed for delay within the 10-day grace period, no showing of good cause is necessary for the prosecution to obtain any continuance of trial within that period.</p> <p><i>(Bryant v. Superior Court (1986) 186 Cal.App.3d 483, 488 citing Malengo v. Municipal Court (1961) 56 Cal.2d 813, 815–16 [rejecting the argument that a dismissal was warranted because the prosecution did not demonstrate good cause to trail a case within the 10-day grace period] and People v. Hernandez (1979) 97 Cal.App.3d 451, 454–55 [reversing an order of dismissal because the People need not demonstrate good cause to trail within the grace period]; see also People v. Ferguson</i></p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>(1990) 218 Cal.App.3d 1173, 1183 [stating that “neither judicial convenience, court congestion, nor judicial pique, no matter how warranted, can supply justification for an order of dismissal.”]; <i>People v. Rubaum</i> (1980) 110 Cal.App.3d 930, 934–935 [noting that a trial court has no discretion to dismiss prior to the expiration of time under Penal Code section 1382 “since that would be contrary to legislative policy which established the 10-day period as a reasonable delay.”].) Both the statute and the case law are crystal clear: <i>the prosecution is entitled to a full 10-day grace period to bring a case to trial and need not show good cause when requesting to trail a case within that period.</i></p> <p>Neither is the prosecution required to demonstrate good cause to trail a case within the initial statutory time period. (<i>People v. Flores</i> (1978) 90 Cal.App.3d Supp. 1, 5–9 [reversing a misdemeanor dismissal within the initial 45-day time for trial under section 1382]; <i>People v. Wilson</i> (1963) 60 Cal.2d 139, 147–48 [concluding</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>that dismissal of a felony on day 59 of 60 was premature].)</p> <p>The sole case that has upheld an order of dismissal during the statutory trailing period involved an extraordinary abuse, where the prosecutor failed to explain why cases were not ready for trial and admitted off the record that she intended delay solely to harass defendants and their counsel. (<i>People v. Torres</i> (1984) 159 Cal.App.3d Supp. 8 [concluding that a prosecutor may no use the trailing period in order to improperly control the court’s calendar].)</p> <p>By contrast, however, the published reports reveal many reasons why cases have not been ready for trial, which did not constitute good cause for a continuance, but which would require a case to trail within the grace period:</p> <p>a. Witness was on vacation. (<i>People v. Rubaum, supra</i>, 110 Cal.App.3d at pp. 932–33 [reversing an order of dismissal made during the trailing period]; <i>People</i></p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p><i>v. Flores, supra</i>, 90 Cal.App.3d Supp. at pp. 5–9 [reversing an order of dismissal because the People’s rights trump section 1050].)</p> <p>b. Witness, who had appeared the day before, failed to appear the next day and had not been ordered back. (<i>People v. Superior Court (Alexander)</i> (1995) 31 Cal.App.4th 1119, 1133 [disapproving a judge’s calendar management policy which robbed the People of the right to trial cases under section 1382].)</p> <p>c. Witness was ill. (<i>People v. Flores, supra</i>, 90 Cal.App.3d Supp. at pp. 10–12.)</p> <p>d. Witness had to testify in another court. (<i>Malengo v. Municipal Court, surpa</i>, 56 Cal.2d at pp. 814–16.)</p> <p>e. Witness subpoena was not issued because defense counsel represented that the defense would not be ready for trial. (<i>People v. Arnold</i> (1980) 105 Cal.App.3d 456, 458–59 [reversing an order of dismissal where the trailing period had not even begun].)</p> <p>f. Witness subpoena was mailed and returned to sender, and the prosecutor needed additional time to locate and</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>personally serve the victim. (<i>People v. Hernandez, supra</i>, 97 Cal.App.3d at pp. 453–55 [reversing an order of dismissal where three days remained to trail the case].)</p> <p>g. Assigned prosecutor was engaged in another trial. (<i>People v. Ferguson, supra</i>, 218 Cal.App.3d at p. 1176, 1184 [reversing an order of dismissal during the trailing period].)</p> <p>h. Assigned prosecutor did not promptly appear in the trial court because she was covering two courtrooms located next door to each other. (<i>People v. Johnson</i> (1984) 157 Cal.App.3d Supp. 1, 5-8 [reversing an order of dismissal entered during the trailing period].)</p> <p>In each of these cases, and many others like them, dismissals would have resulted under the proposed amendment to rule 4.115 requiring good cause to trail cases. The People are aware of the necessity to manage the scheduling of jury trials, and this office has made every effort to expeditiously prepare cases for trial. Nonetheless, unexpected circumstances can and will arise</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>that prevent trials from commencing as anticipated. In such instances, the desire for efficiency cannot overcome the fundamental right of the prosecution to proceed on criminal charges. (<i>People v. Johnson, supra</i>, 157 Cal.App.3d Supp. at p. 8; see also Cal. Const., art. I, section 29 [People’s right to due process of law].) Moreover, Penal Code section 1050.5, subdivision (b) specifically forbids the dismissal of cases in instances where a prosecutor fails to comply with the requirements of section 1050.</p> <p><u>B. The proposed rule changes will increase the total number of dismissals.</u></p> <p>The proposed changes provide, in part: “Accordingly, courts should avoid calendaring or trailing criminal cases for trial to the last day Courts must implement calendar management procedures, in accordance with local conditions and needs, to ensure that criminal cases are assigned to trial departments before the last day permitted or trial pursuant to section 1382.”</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>In theory, active calendar management practices that avoid setting trials on the last day can prevent last-day dismissals caused by lack of available courtrooms. However, when a case is set for trial before the last day and an unforeseen problem arises, the trial court <i>should</i> trail the case to the last day to solve the problem and avoid dismissing the case. Under the proposed rule change, a trial court faced with an unexpected obstacle to readiness before the last day would either unlawfully dismiss the case rather than trail it to the last day or assign the case to an available courtroom before it is actually ready for trial. The former practice is undesirable because it immediately causes rather than prevents a dismissal, prevents problems from being solved that could be solved, and effectively shortens the statutory time period at the expense of the People’s right to proceed, as described <i>infra</i>, section A. The latter practice is undesirable because it causes an otherwise available courtroom to become unavailable to try another matter. Moreover,</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>premature assignment of cases to trial courtrooms encourages judges to unlawfully compel prosecutors to actually commence trial, in violation of principles of separation of powers. (See <i>People v. Municipal Court (Pellegrino)</i> (1972) 27 Cal.App.3d 193 [rejecting a trial court’s attempt to commence criminal proceedings over the prosecution’s objection by appointing “special counsel” to file a criminal complaint].)</p> <p>Calendar management needs will vary in accordance with local conditions. However, the proposed rule changes invite courts to implement local procedures <i>solely</i> to prevent trailing cases to the last day, without more broadly encouraging courts to consider solutions to court congestion through various means such as early disposition, readiness conferences, and jury trial scheduling practices. As written, the proposed rule changes assume that trailing trials to the last day is always an evil to be avoided regardless of the fact that it may permit justice to be done in a case that</p>	

SPR07-36
Criminal Cases: Rules for Continuances and Calendar Management
(amend rule 4.115 of the California Rules of Court)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				would otherwise be dismissed. Therefore, our office objects to the proposed rule changes to the extent that they disapprove trailing cases to the last day for trial.	
6.	Superior Court of California, County of Los Angeles	A	Y	No specific comments.	No response required.
7.	Della Thompson-Bell Legal Counselor City of Torrance	N	Y	No specific comments.	No response required.