



## Judicial Council of California . Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688

[www.courts.ca.gov](http://www.courts.ca.gov)

---

# REPORT TO THE JUDICIAL COUNCIL

For business meeting on February 28, 2012

---

Title	Agenda Item Type
Jury Instructions: Additions and Revisions to Criminal Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions (CALCRIM)</i>	February 28, 2012
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions	January 25, 2012
Hon. Sandy R. Kriegler, Chair	Contact
	Robin Seeley, 415-865-7710
	<a href="mailto:robin.seeley@jud.ca.gov">robin.seeley@jud.ca.gov</a>

---

### Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed additions, revisions, and revocations to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

### Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective February 28, 2012, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the 2012 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

A table of contents and the proposed additions and revisions to the criminal jury instructions are attached.

## Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the advisory committee's charge.<sup>1</sup> At its August 2005 meeting, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM*.

The council approved the last *CALCRIM* release at its April 2011 meeting.

## Rationale for Recommendation

The committee recommends proposed additions and revisions to the following instructions: 101, 201, 222, 240, 301, 505, 507, 508, 604, 766, 1030, 1151, 1700, 1801-1803, 2514, 2681, 3454-3454A, 3470, 3518. It further recommends adoption of a new instruction, 3551.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 80 additional instructions under a delegation of authority from the council to RUPRO.<sup>2</sup>

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant actions proposed to the council.

### Electronic communications and research—contempt of court

2011 legislation (Assembly Bill 141)<sup>3</sup> amended Code of Criminal Procedure section 1209(a) to define contempt of court as including “[w]illful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.”<sup>4</sup> *CALCRIM* No. 101, *Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)*, has been revised to

---

<sup>1</sup> Rule 10.59(a) states: “The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions.”

<sup>2</sup> At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 74 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

<sup>3</sup> Stats. 2011, ch. 181.

<sup>4</sup> Code Civ. Proc., § 1209(a)(6).

admonish jurors not to violate the prohibitions on communications and research, including prohibitions on electronic communications and research. Optional bracketed language, to be used in the court's discretion, admonishes further that violations may result in jurors being held in contempt of court.

### **Instructions referencing variations on the term “great bodily injury”**

A committee member who is a trial judge noticed that CALCRIM Nos. 505, 507, 508, 604, 2514, and 3470 use different terms for the same basic concept of “great bodily injury.” Committee members did not find any valid reason to use different terms for the same concept and were concerned that using different terms could lead to juror confusion. It noted further that the United States Supreme Court case, *Tennessee v. Garner* (1985) 471 U.S. 1, used the following terms interchangeably throughout: serious bodily injury, serious bodily harm, serious physical harm, great bodily harm, great personal harm, and grievous bodily harm. The committee concluded that choosing one term and using it consistently was the better course.

### **Balconies and burglary**

Supreme Court dictum suggests that an “unenclosed balcony” is not a residential structure under the “reasonable belief test” (*People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5), but *People v. Jackson* (2010) 190 Cal.App.4th 918, 924, review denied March 16, 2011, controls. In *Jackson*, new committee member Justice Thomas Lyle Willhite, Jr. wrote that a balcony was “functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for ‘residential activities.’” The issue is pending before the Supreme Court in *People v. Yarbrough*, S192751. The committee updated the bench notes to CALCRIM No. 1700, *Burglary*, to alert judges and attorneys of this precedent and the pending review.

### **Prostitutes and pandering**

In *People v. Zambia* (2011) 51 Cal.4th 965, Supreme Court Justice and former committee chair Carol A. Corrigan answered the long open questions of (1) whether specific intent is required for the crime of pandering and (2) whether one can encourage another person to become a prostitute when one believes that the target in question is already a prostitute. The answer to both questions is now yes. The committee revised CALCRIM No. 1151, *Pandering*, accordingly. It updated the instruction further to reflect the ruling in *People v. Dixon* (2011) 191 Cal.App.4th 1154, that pandering requires services procured for someone other than the defendant. The committee added citations to both cases to the bench notes.

### **Deliberations and deadlocked juries**

The committee drafted CALCRIM No. 3551, *Further Instruction About Deliberations*, at the suggestion of two council members who are former CALCRIM committee members, Judge Mary Ann O'Malley of Contra Costa County and Judge Teri Jackson of San Francisco. The judges expressed concern that without a CALCRIM instruction to give to deadlocked juries, the courts will be forced to either improvise or simply repeat the lengthy admonition approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118. The committee took care to avoid the

pitfalls mentioned in *People v. Gainer* (1977) 19 Cal.3d 835, 842, such as singling out minority jurors or admonishing them that “the case must at some time be decided.”

### **Comments, Alternatives Considered, and Policy Implications**

The proposed additions and revisions to *CALCRIM* circulated for comment from October 7 to November 30, 2011.

The committee is fortunate that it regularly receives comments from institutional commentators who take the time and effort to provide careful and often quite detailed comments. This time was no exception. The committee received comments from five institutional commentators and four individuals. The committee evaluated all comments and revised some of the instructions as a result. A chart with the text of all comments received and the committee’s responses is attached.

Of the comments received, most addressed proposed new instruction CALCRIM No. 3551, *Further Instruction on Deliberations*. Some commentators thought judges should continue to recite the language directly out of the *Moore* case, while others merely wanted to tweak the proposed draft. CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)*, and CALCRIM No. 1700, *Burglary*, discussed above, received five comments each.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CALCRIM* on a regular basis and submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

### **Implementation Requirements, Costs, and Operational Impacts**

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

## **Attachments**

1. Full text of new and revised *CALCRIM* instructions
2. Chart of comments

