

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR17-27

Title	Action Requested
Criminal Procedure: Use of Risk/Needs Assessments at Sentencing	Review and submit comments by April 28, 2017
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Approve Cal. Standards of Judicial Administration, standard 4.35	January 1, 2018
Proposed by	Contact
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Executive Summary and Origin

The Criminal Law Advisory Committee proposes adding new standard 4.35 of the California Standards of Judicial Administration on the use of risk/needs assessments. This standard would provide guidance to judges on the appropriate uses of the results of risk/needs assessments in criminal sentencing.

Background

As part of the realignment of California's criminal sentencing procedures, the Legislature declared that correctional practices should utilize "a data-driven approach" to reduce corrections and related criminal justice spending through evidence-based strategies "that increase public safety while holding offenders accountable." (Pen. Code, § 17.5(a)(7).) Many probation departments in California now employ a variety of risk/needs assessment instruments to conduct such assessments. They use the results of these assessments to establish an appropriate program of supervision and services for an offender and to prioritize limited probation resources.

The results of risk/needs assessments may also provide valuable information that can enhance the quality of judges' sentencing decisions for those offenders eligible for community supervision.¹ A core component of evidence-based sentencing is an actuarial assessment of the individual's "risk" of recidivism and treatment "needs." Evidence-based sentencing involves

¹ The Wisconsin and Indiana Supreme Courts have approved of using the results of risk/needs assessments at sentencing, while also establishing certain limitations on their use. (See *State v. Loomis* (2016) 371 Wis.2d 235; *Malenchik v. State* (2010) 928 N.E.2d 564.)

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

identifying offender risk factors, matching risk factors to supervision level, and providing proven treatment services and programs that are tailored to an individual defendant's specific characteristics.

A substantial body of scientific research demonstrates that the actuarial assessment of recidivism risk is more accurate and reliable than unstructured clinical judgment. (See, e.g., J.C. Oleson et al., *Training To See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessment Among Federal Probation Officers*, 75 *Federal Probation*, 52–56 (Sept. 2011).) Actuarial risk/needs assessments generally utilize a combination of “static risk factors”—offender characteristics positively associated with recidivism that cannot be changed through corrections programming—and “dynamic risk factors”—offender characteristics positively associated with recidivism that can be changed through appropriate intervention. Actuarial risk assessment involves the comparison of the subject individual offender to a database of other offenders who had similar risk factors and known subsequent criminal histories.

Prior council action

Effective January 1, 2015, the Judicial Council added several provisions related to risk/needs assessments to the criminal sentencing rules of court. It adopted rule 4.415, which provided, *inter alia*, that courts may consider “[t]he defendant’s specific needs and risk factors identified by a validated risk/needs assessment, if available,” in selecting the appropriate period and conditions of mandatory supervision. (Cal. Rules of Court, rule 4.415(c)(8).) The council also amended rule 4.411.5(a)(8) to require that presentence investigation reports include “[a]ny available, reliable risk/needs assessment information.”

The Proposal

This proposal would add a new standard of judicial administration to provide guidance to courts in using risk/needs assessments at sentencing in criminal cases. This use of risk/needs assessments is intended to (1) reduce bias in sentencing, (2) reduce the risk of future recidivism by targeting a defendant’s needs in a supervision plan, and (3) advance the legislative directive to improve public safety outcomes by routing offenders into community-based supervision informed by evidence-based practices. The proposed standard would provide courts with guidance on the proper and improper uses of the results of risk/needs assessments at sentencing, including how these assessments relate to a defendant’s amenability or suitability to supervision. The standard would also provide guidance on education and training.

An advisory committee comment to the standard would also provide further guidance on the use of the results of risk/needs assessments at sentencing, the limitations of risk/needs assessments, the validation of risk/needs assessment instruments, and the need for training and ongoing education on risk/needs assessments.

Proper use of the results of risk/needs assessments at sentencing

This proposed new standard would provide the following guidance on the proper use of the results of risk/needs assessments at sentencing:

- The results of a risk/needs assessment should be considered only in context with all other information considered by the court at the time of sentencing, including the probation report, statements in mitigation and aggravation, evidence presented at a sentencing proceeding conducted under section 1204, and comments by counsel and any victim.
- The results of a risk/needs assessment should be one of many factors that may be considered and weighed at a sentencing hearing. Information generated by the risk/needs assessment should be used along with all other information presented in connection with the sentencing hearing to inform and facilitate the decision of the court. Risk/needs assessment information should not be used as a substitute for the sound independent judgment of the court.
- Although it may not be determinative, the results of a risk/needs assessment may be considered by the court as a relevant factor in assessing:
 - Whether a defendant who is presumptively ineligible for probation has overcome the statutory limitation on probation;
 - Whether an offender can be supervised safely and effectively in the community; and
 - The appropriate terms and conditions of supervision and responses to violations of supervision.
- If a court uses the results of a risk/needs assessment, it should consider any limitations of the instrument that have been raised in the probation report or by counsel, including:
 - Whether the instrument's proprietary nature has been invoked to prevent the disclosure of information relating to how it weighs static and dynamic risk factors and how it determines risk scores;
 - Whether the instrument's risk scores are based on group data, such that the instrument is able to identify only groups of high-risk offenders, not a particular high-risk individual;
 - Whether any studies have raised questions about whether the instrument disproportionately classifies minority offenders as having a higher risk of recidivism; and
 - Whether the instrument has been validated on a relevant population.

Improper use of the results of risk/needs assessments at sentencing

This proposed new standard would provide the following guidance on the improper use of the results of risk/needs assessments at sentencing:

- The results of a risk/needs assessment should not be used to (1) determine whether to incarcerate a defendant, or (2) determine the severity of the sentence.

- The results of a risk/needs assessment should not be considered by the court for defendants statutorily ineligible for supervision.

Amenability or suitability to supervision

This proposed new standard would provide the following guidance on the use of the results of a risk/needs assessment in evaluating a defendant's amenability or suitability to supervision:

- A court should not interpret the risk score as necessarily indicating that a defendant is not amenable or suitable for community-based supervision. Community-based supervision may be the most effective for defendants with "high" and "medium" risk scores. A "low" risk score should not be interpreted as necessarily indicating that a defendant is amenable or suitable for community-based supervision. Risk scores must be interpreted in the context of all relevant sentencing information received by the court.
- A defendant's level of supervision should correspond to his or her level of risk of recidivism. A court should order that a low-risk defendant receive less supervision; a high-risk defendant, more.
- Irrespective of a defendant's level of risk of recidivism, a court should order services that address his or her needs.

Alternatives Considered

The committee initially considered recommending a proposal to add a new rule to the California Rules of Court on the use of risk/needs assessments at sentencing. It instead decided to propose a standard of judicial administration for several reasons, including (1) that the use of risk/needs assessments at sentencing is still relatively new, and (2) the absence of any published decisions from California appellate courts on this issue. Future proposals may look at converting the standard to a rule of court.

Implementation Requirements, Costs, and Operational Impacts

The proposed standard is nonbinding and does not require that courts use the results of risk/needs assessments. It is intended merely to provide guidance to those courts that opt to use these assessments at sentencing.

For those courts that elect to use the results of risk/needs assessments at sentencing, there would be costs to county probation departments, including the costs of validating the risk/needs assessment instrument, conducting the assessments on the individual defendants, and adding a description of the results of the assessments in presentence reports. Courts would incur the costs of judicial training and continuing education.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Standards of Judicial Administration, standard 4.35, at pages 6–11.

Standard 4.35 of the California Standards of Judicial Administration would be added, effective January 1, 2018, to read:

1
2 **Standard 4.35. Court use of risk/needs assessments at sentencing**

3
4 **(a) Application and purpose**

5
6 (1) This standard applies only to the use of the results of risk/needs assessments
7 at sentencing.

8
9 (2) The use of the results of risk/needs assessments at sentencing is intended to:

10
11 (i) Reduce biases in sentencing;

12
13 (ii) Reduce a defendant’s risk of future recidivism by targeting that
14 defendant’s needs with appropriate intervention services through
15 community supervision programs demonstrated to reduce recidivism;
16 and

17
18 (iii) Advance the legislative directive to improve public safety outcomes by
19 routing offenders into community-based supervision informed by
20 evidence-based practices.

21
22 **(b) Definitions**

23
24 (1) “Risk” refers to the likelihood that a person will reoffend, without regard,
25 unless otherwise specified, to the nature of the original offense or the nature
26 of the reoffense.

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28 (2) “Risk factors” refers to the “static” and “dynamic” factors that contribute to
29 the risk score.

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31 (3) “Static risk factors” refers to those risk factors that cannot be changed
32 through treatment or intervention, such as age or prior criminal history.

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34 (4) “Dynamic risk factors,” also known as “needs,” are factors that can be
35 changed through treatment or intervention.

36
37 (5) “Results of a risk/needs assessment” refers to both a risk score and an
38 assessment of a person’s needs.

39
40 (6) A “risk score” refers to a descriptive evaluation of a person’s risk level as a
41 result of conducting an actuarial assessment with a validated risk/needs
42 assessment instrument and may include such terms as “high,” “medium,” and
43 “low” risk.

1
2 (7) “Amenability” or “suitability” refers to the likelihood that the person can be
3 safely and effectively supervised in the community and benefit from
4 supervision services that are informed by evidence-based practices and have
5 been demonstrated to reduce recidivism.

6
7 (8) A “validated risk/needs assessment instrument” refers to a risk/needs
8 assessment instrument demonstrated by scientific research to be accurate and
9 reliable in assessing the risks and needs of the specific population assessed.

10
11 (9) “Supervision” includes all forms of supervision referenced in Penal Code
12 section 1203.2(a).

13
14 **(c) Proper uses of the results of a risk/needs assessment at sentencing**

15
16 (1) The results of a risk/needs assessment should be considered only in context
17 with all other information considered by the court at the time of sentencing,
18 including the probation report, statements in mitigation and aggravation,
19 evidence presented at a sentencing proceeding conducted under section 1204,
20 and comments by counsel and any victim.

21
22 (2) The results of a risk/needs assessment should be one of many factors that
23 may be considered and weighed at a sentencing hearing. Information
24 generated by the risk/needs assessment should be used along with all other
25 information presented in connection with the sentencing hearing to inform
26 and facilitate the decision of the court. Risk/needs assessment information
27 should not be used as a substitute for the sound independent judgment of the
28 court.

29
30 (3) Although it may not be determinative, a risk/needs assessment may be
31 considered by the court as a relevant factor in assessing:

32
33 (i) Whether a defendant who is presumptively ineligible for probation has
34 overcome the statutory limitation on probation;

35
36 (ii) Whether an offender can be supervised safely and effectively in the
37 community; and

38
39 (iii) The appropriate terms and conditions of supervision and responses to
40 violations of supervision.

1 (4) If a court uses the results of a risk/needs assessment, it should consider any
2 limitations of the instrument that have been raised in the probation report or
3 by counsel, including:

4
5 (i) Whether the instrument’s proprietary nature has been invoked to
6 prevent the disclosure of information relating to how it weighs static
7 and dynamic risk factors and how it determines risk scores;

8
9 (ii) Whether the instrument’s risk scores are based on group data, such that
10 the instrument is able to identify only groups of high-risk offenders, not
11 a particular high-risk individual;

12
13 (iii) Whether any studies have raised questions about whether the
14 instrument disproportionately classifies minority offenders as having a
15 higher risk of recidivism; and

16
17 (iv) Whether the instrument has been validated on a relevant population.

18
19 **(d) Improper uses of the results of a risk/needs assessment at sentencing**

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21 (1) The results of a risk/needs assessment should not be used:

22
23 (i) To determine whether to incarcerate a defendant;

24
25 (ii) To determine the severity of the sentence.

26
27 (2) The results of a risk/needs assessment should not be considered by the court
28 for defendants statutorily ineligible for supervision.

29
30 **(e) Amenability or suitability to supervision**

31
32 (1) A court should not interpret a “high” or “medium” risk score as necessarily
33 indicating that a defendant is not amenable or suitable for community-based
34 supervision. Community-based supervision may be the most effective for
35 defendants with “high” and “medium” risk scores. A “low” risk score should
36 not be interpreted as necessarily indicating that a defendant is amenable or
37 suitable for community-based supervision. Risk scores must be interpreted in
38 the context of all relevant sentencing information received by the court.

39
40 (2) A defendant’s level of supervision should correspond to his or her level of
41 risk. A court should order that a low-risk defendant receive less supervision;
42 a high-risk defendant, more.

1 in the community. But when the person is not eligible for supervision, or the court has otherwise
2 decided not to grant or reinstate probation, the results of a risk/needs assessment should not be
3 used in determining the period of incarceration to be imposed. (See *State v. Loomis, supra*, 371
4 Wis.2d at p. 256 [holding that risk/needs assessments should not be used to determine the severity
5 of a sentence or whether a defendant is incarcerated]; *Malenchik v. State* (2010) 928 N.E.2d 564,
6 573 [“It is clear that [risk/needs assessments instruments are not intended] nor recommended to
7 substitute for the judicial function of determining the length of sentence appropriate for each
8 offender”].)

9
10 **Subdivision (e).** Risk/needs assessment instruments generally produce a numerical or descriptive
11 “risk score” such as “high,” “moderate,” or “low” risk. It is critical that courts and justice partners
12 understand the meaning and limitations of such designations. First, because risk assessments are
13 based on group data, they are able to identify groups of high-risk offenders, not a particular high-
14 risk individual. Second, in some assessment instruments, “risk” refers only to a generalized risk
15 of committing a new offense, not to the seriousness of the subsequent offense (e.g., violent, sex,
16 drug, or theft). Nor does “high risk” necessarily mean “highly dangerous.” A “high risk” drug
17 offender, for example, may present a high risk that he or she will use drugs again, but does not
18 necessarily present a high risk to commit a violent felony. Third, scientific research indicates that
19 medium- and high-risk offenders may most benefit from evidence-based supervision and
20 programs that address critical risk factors. Courts and probation departments should also consider
21 how presentence investigation reports present risk assessment information. A report that merely
22 refers to the defendant as “high risk” may incorrectly imply that the defendant presents a great
23 danger to public safety and must therefore be incarcerated. Conversely, “low risk” does not
24 necessarily mean “no risk.”

25
26 **Subdivision (f).** An instrument’s accuracy and reliability depend on its proper administration.
27 Training and continuing education should be required for anyone who administers the instrument.
28 Judges with sentencing assignments should receive appropriate training on the purpose, use and
29 limits of risk/needs assessments. (See Guiding Principle 4, Stakeholder Training, in Pamela M.
30 Casey et al., *National Center for State Courts, Using Offender Risk and Needs Assessment*
31 *Information Sentencing: Guidance for Courts from a National Working Group* (2011), pp. 21–
32 22.)