

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT

W11-06

Title	Action Requested
Family Law: Live testimony at hearings and Declarations	Review and submit comments by January 24, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118	July 1, 2011
Proposed by	Contact
Family and Juvenile Law Advisory Committee Hon. Kimberly J. Nystrom-Geist, Cochair Hon. Dean Stout, Cochair Elkins Family Law Implementation Task Force Hon. Laurie D. Zelon, Chair	Deborah J. Chase 415-865-7598, deborah.chase@jud.ca.gov

Summary

Effective January 1, 2011, Assembly Bill 939 (Assembly Committee on Judiciary; Stats. 2010, ch. 352) added section 217 to the Family Code, which requires that at hearings on orders to show cause or motions brought under the Family Code, courts must receive competent live testimony that is relevant and within the scope of the hearing, unless the parties have stipulated otherwise or the court makes a finding of good cause to refuse to receive the live testimony.

Family Code section 217 requires the Judicial Council to adopt a statewide rule of court regarding the factors a court must consider in making a finding of good cause to refuse to receive live testimony at hearings on orders to show cause or motions filed under the Family Code.

Proposed rule 5.119 sets out the factors that courts must consider in deciding to refuse live testimony.

Proposed rule 5.118(f) sets out accompanying parameters about the length and content of declarations supporting orders to show cause and motions and replaces current rule 5.118, which

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allows the decision on any order to show cause or motion in family law to be made on the basis of the declarations alone.

Discussion

Effective January 1, 2011, Assembly Bill 939 (Assembly Committee on Judiciary; Stats. 2010, ch. 352) adds section 217 to the Family Code, which requires the court to receive live testimony that is competent, relevant, and within the scope of the hearing from the parties and other witnesses. It also sets out the requirement that parties seeking to present nonparty live testimony must file and serve a witness list or make an offer or proof with a brief description of the anticipated testimony.

Family Code section 217 further requires that the Judicial Council adopt a statewide rule of court setting out the factors a court must consider in making a finding of good cause to refuse to receive live testimony. This provision in AB 939 is based on recommendations made by the Judicial Council's Elkins Family Law Task Force, which was established in response to the decision in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337. The task force was to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for family law litigants, many of whom are self-represented.

In response to the need to provide litigants with the opportunity to testify at hearings on requests for substantive relief and in order to provide judicial officers with the information they need to make an order, the Elkins Family Law Task Force recommended that live testimony be allowed in any hearing on an order to show cause or motion brought under the Family Code, absent a stipulation of the parties or a finding of good cause.

Although Family Code section 217 requires that such a rule be adopted by January 1, 2012, the legislation becomes effective on January 1, 2011. Therefore, the Family and Juvenile Advisory Law Committee and the Elkins Family Law Implementation Task Force recommend that implementing rules of court related to live testimony should be adopted as soon as possible, so that courts, attorneys, and litigants will have appropriate guidance.

Rule 5.119

Proposed rule 5.119 sets out the factors that courts must consider when deciding to refuse to receive live testimony consistent with Family Code section 217. The rule states that these findings must be in writing or on the record. The rule further states that the court only need state those factors on which the decision was based.

Neither the statute nor the proposed rule eliminates judicial discretion to refuse to receive live testimony. Proposed rule 5.119 simply sets out factors that the court must consider when making that decision.

Proposed rule 5.119 also sets out the mechanism by which notice must be given when a party requests that the court receive live testimony from a nonparty witness.

Rule 5.118(f)

Proposed rule 5.118(f) sets out the parameters for length and content of declarations supporting orders to show cause and motions brought pursuant to the Family Code. This replaces current subsection (f) which is inconsistent with Family Code 217.

The proposed and amended rules are attached at pages 4–6.

Rule 5.119 of the California Rules of Court would be adopted and rule 5.118 would be amended, effective July 1, 2011, to read:

1 **Rule 5.118. Application for court order**
2

3 (a)–(e) ***
4

5 (f) ~~The court may grant or deny the relief solely on the basis of the~~
6 ~~application and responses and any accompanying memorandum of~~
7 ~~points and authorities. Declarations supporting applications for orders~~
8

9 (1) Length of declarations
10

11 (A) A declaration attached to an order to show cause or notice of
12 motion and responsive declaration must not exceed 10 pages in
13 length, and a reply declaration must not exceed 5 pages in length,
14 unless:
15

16 (i) The declaration is of an expert witness, or
17

18 (ii) The court grants permission to extend the length of a
19 declaration. A party may apply to the court ex parte with
20 written notice of the application to the other parties, at least
21 24 hours before the papers are due, for permission to file a
22 longer declaration. The application must state reasons why
23 the facts cannot be set forth within the declaration page
24 limit.
25

26 (2) Objections to declarations
27

28 (A) A declaration must be based on personal knowledge and explain
29 how the person has acquired that knowledge. The statements in
30 the declaration must be admissible in evidence.
31

32 (B) If a party believes that a declaration does not meet the
33 requirements of (A), the party must object to the declaration at the
34 time of the hearing, or any objection will be considered waived,
35 and the declaration may be considered as evidence.
36

37 (C) If the court does not specifically rule on the objection raised by a
38 party, the objection is presumed overruled. If an appeal is filed,
39 that decision can be challenged.
40
41

1 **Rule 5.119 Live testimony**

2
3 **(a) Purpose**

4
5 Under Family Code section 217, at a hearing on any order to show cause or
6 notice of motion brought under the Family Code, absent a stipulation of the
7 parties or a finding of good cause under (b), the court must receive any live,
8 competent, and admissible testimony that is relevant and within the scope of
9 the hearing.

10
11 **(b) Factors**

12
13 A court must consider the following factors in making a finding of good
14 cause to refuse to receive live testimony under Family Code section 217:

15
16 (1) Whether a substantive matter is at issue, such as child custody,
17 parenting time (visitation), parentage, child support, spousal support,
18 requests for restraining orders, or the characterization, division, or
19 temporary use and control of the property or debt of the parties;

20
21 (2) Whether material facts are in controversy;

22
23 (3) Whether live testimony is necessary for the court to assess the
24 credibility of the parties or other witnesses;

25
26 (4) The right of the parties to question anyone submitting reports or other
27 information to the court;

28
29 (5) In testimony from persons other than the parties, whether there has
30 been compliance with Family Code section 217(c); and

31
32 (6) Any other factor that is just and equitable.

33
34 **(c) Findings**

35
36 If the court makes a finding of good cause to exclude live testimony, it must
37 state its reasons on the record or in writing. The court is required to state
38 only those factors on which the finding of good cause is based.

39
40 **(d) Minor children**

41
42 When receiving or excluding testimony from minor children, in addition to
43 fulfilling the requirements of Evidence Code section 765, the court must

1 follow the procedures in Family Code section 3042 and California Rules of
2 Court governing children’s testimony.

3
4 **(e) Witness lists**

5
6 Witness lists required by Family Code section 217(c) must be served along
7 with the order to show cause, notice of motion, or responsive papers in the
8 manner required for the service of those documents. If no witness list has
9 been served, the court may require an offer of proof before allowing any
10 nonparty witness to testify.

11
12 **(f) Continuance**

13
14 The court must consider whether or not a brief continuance is necessary to
15 allow a litigant adequate opportunity to prepare for questioning the
16 witnesses. When a brief continuance is granted to allow time to prepare for
17 questioning witnesses, the court should make appropriate temporary orders.

18
19 **(g) Questioning by court**

20
21 Whenever the court receives live testimony from a party or any witness it
22 may elicit testimony by directing questions to the parties and other witnesses.
23

Item W11-06 Response Form

Title: Family and Juvenile Rules: Live testimony at hearings and Declarations
(adopt Cal. Rules of Court, rule 5.119 and amend rule 5.118(f))

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, January 24, 2011

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