



## 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 December 13, 2013

---

Title	Agenda Item Type
Judicial Council-Sponsored Legislation: Dismissals in the Interest of Justice	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Pen. Code, § 1385(a)	December 13, 2013
Recommended by	Date of Report
Policy Coordination and Liaison Committee	November 15, 2013
Hon. Kenneth K. So, Chair	Contact
Criminal Law Advisory Committee	Arturo Castro, 415-865-7702
Hon. Tricia Ann Bigelow, Chair	<a href="mailto:arturo.castro@jud.ca.gov">arturo.castro@jud.ca.gov</a>
	Sharon Reilly, 916-323-3121
	<a href="mailto:sharon.reilly@jud.ca.gov">sharon.reilly@jud.ca.gov</a>

---

## Executive Summary

The Policy Coordination and Liaison Committee (PCLC) and the Criminal Law Advisory Committee (CLAC) recommend that the Judicial Council sponsor legislation to amend Penal Code section 1385(a) to permit trial courts to state the reasons for a dismissal in the furtherance of justice either on the record or by setting forth the reasons in an order entered upon the minutes. Current law requires that trial courts state the reasons for a dismissal only in an order entered upon the minutes. The proposal is designed to relieve trial courts of an unnecessary mandate and eliminate extraneous proceedings resulting from automatic reversals for failure to set forth the reasons in the minutes.

## Recommendation

The PCLC and CLAC recommend that the Judicial Council sponsor legislation to amend Penal Code section 1385(a) to require that the reasons for dismissal be set forth either on the record or in an order entered upon the minutes.

The text of the proposed amendments is attached at page 5.

### **Previous Council Action**

The proposal was circulated for public comment during the spring 2010 cycle and was originally approved for council sponsorship by the PCLC in December 2010. A summary of the comments received is provided below.

Although the proposal received no significant opposition during the comment period, after PCLC approved the proposal, the California District Attorneys Association (CDAA) informed the Office of Governmental Affairs (OGA) that CDAA might oppose the proposed legislation. Specifically, since the reasons for dismissal are germane to charging decisions, plea offers, and sentencing hearings in later cases, CDAA expressed concerns about courts abandoning the practice of setting forth the reasons in writing in the minutes, which would eliminate a readily-available source of information about the dismissals, and the potential costs and burdens associated with obtaining transcripts from past cases to review the reasons for dismissal.

Because CDAA's concerns were not voiced until *after* PCLC approved the proposal for council sponsorship, OGA staff referred the proposal back to CLAC for reevaluation in light of CDAA's potential opposition. In the meantime, a prosecutor member of the advisory committee who is an active participant on CDAA's legislative committee carefully explained the purpose of the proposal to CDAA representatives. As a result, CDAA has since modified its stance on the proposal from opposition to "no position."

### **Rationale for Recommendation**

#### **Background**

Subdivision (a) of Penal Code section 1385 generally authorizes courts to dismiss actions in the "furtherance of justice" and requires that the reasons for dismissal be "set forth in an order entered upon the minutes." The requirement that the reasons for dismissal be entered upon the minutes serves two primary purposes. First, the requirement promotes judicial accountability by requiring trial courts to explain why such a "great power" was exercised. (*People v. Beasley* (1970) 5 Cal.App.3d 617, 637.) Second, the requirement facilitates appellate review of the reasons for dismissal. (*People v. Superior Court* (1996) 13 Cal.4th 497, 531.)

In addition, the Supreme Court recently clarified that, based on the language of the current statute, the requirement is mandatory, and failure to set forth the reasons for dismissal in writing in the minutes is not harmless error, even when the reasons for dismissal appear in the transcript of the oral proceedings. (*People v. Bonnetta* (2009) 46 Cal.4th 143.)

#### **Purpose**

This proposal is designed to authorize trial courts to state the reasons for dismissal on the record as an alternative to setting forth the reasons in an order entered upon the minutes as required by the current statute. As explained below, the proposed amendment would (1) satisfy the

underlying purposes of the current statute, (2) relieve trial courts of an unnecessary mandate, and (3) eliminate extraneous proceedings that result from automatic reversals for failure to comply with the current requirement.

Authorizing trial courts to set forth the reasons for dismissal either on the record or in the minutes would satisfy the goals of judicial accountability and effective appellate review because both the record and the minutes are public in nature and available for examination by both the public and appellate courts.

As noted above, the current requirement is mandatory, even when the reasons for dismissal are separately set forth on the record and in transcripts. The mandatory nature of the current requirement occasionally results in automatic reversals, even though the spirit of the requirement is satisfied because the reasons are contained on the record and in transcripts. As a result, the current requirement leads to costly extraneous proceedings that would be unnecessary if courts were instead authorized to state the reasons for dismissal on the record. The proposal would relieve trial courts of an unnecessary mandate and eliminate costs associated with automatic reversals.

In direct response to CDAA's original concerns about this proposal, stating the reasons for dismissal on the record is effective because, as a practical matter, there are often multiple reasons not easily summarized in the minutes. Minutes are typically a brief summary of a clerk's interpretation of what was actually stated by the court, which raises concerns about accuracy and lack of thorough explanation. In addition, prosecutors seldom rely exclusively on the minutes to determine the reasons for a past dismissal; instead, prosecutors typically review transcripts and case files for notes that explain the reasons.

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

The proposal was circulated for public comment during the spring 2010 cycle. Nine comments were received. Of those, five agreed with the proposal, including the Judicial Council's Appellate Advisory Committee and the California Judges Association. Two commentators agreed with the proposal if modified, and two disagreed. The comments are summarized below:

- The California Judges Association supports the proposal because it allows the court to state the reasons for the dismissal on the record as an alternative to entering the reasons on the minutes of the court, thereby relieving the court of an unnecessary mandate and giving greater leeway to the court in fulfilling the requirement. The Appellate Advisory Committee, the Court of Appeal, Second Appellate District, the Superior Court of Riverside County, and the Superior Court of San Diego County also support the proposal.
- A member of the public commented that the proposal should be revised to require the court to state its reasoning for the record whenever a motion or request to dismiss in the interest of justice is made, even if the motion or request is denied. The committee declined this suggestion as unnecessary and beyond the scope of the proposal.

- The Superior Court of San Bernardino County opposed the proposed changes commenting that the proposal is not clear enough for the requirements to be understood and met. The court noted that the proposal has mixed references to the record and the minutes. The Orange County Bar Association also opposed the proposal, stating that not all courts are staffed with court reporters. While supporting the proposal, the Superior Court of Riverside County expressed similar concern relating to the availability of court reporters. The Superior Court of Orange County commented that the proposal should be revised to address the concern about the availability of court reporters. The committee revised the proposal as explained below to address these

A more detailed chart of comments received and committee responses is attached at pages 6–8.

As originally circulated, the proposal would have required courts to set forth the reasons for dismissal “on the record or, if requested by any party, in an order entered upon the minutes.” The original proposal limited the court’s ability to set forth the reasons in the minutes to only *upon request by a party*.

To address concerns expressed by commentators that some courts order dismissals without an oral record of the proceedings or in the absence of court reporters, the original proposal was modified to provide courts with complete discretion to decide whether to state the reasons on the record or to set forth the reasons in an order entered upon the minutes.

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

Expected costs and operational impacts would be limited to training court staff and judicial officers. The committee expects the proposal will eliminate various costs and burdens associated with extraneous proceedings resulting from automatic reversals for failure to set forth the reasons for dismissal in writing in the minutes as required under the current statute.

### **Relevant Strategic Plan Goals and Operational Plan Objectives**

The proposal supports the policies underlying Goal III, Modernization of Management and Administration, objective 5, which states: “Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.”

### **Attachments**

1. Proposed amendments to Penal Code section 1385, at page 5
2. Chart of comments, LEG10-01, at pages 6–8

Section 1385 of the Penal Code would be amended to read as follows:

- 1 Section 1385. Dismissal on judge or magistrate's own motion or application of prosecuting  
2 attorney; statement of reasons; ground of demurrer; authority to strike prior conviction of serious  
3 felony for purposes of enhancement of sentence  
4  
5 (a) The judge or magistrate may, either of his or her own motion or upon the application of the  
6 prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The  
7 reasons for the dismissal must be stated on the record or set forth in an order entered upon  
8 the minutes. No dismissal shall be made for any cause which would be ground of demurrer  
9 to the accusatory pleading.  
10  
11 \*\*\*

## LEG10-01

### Criminal Procedure: Dismissals in the Interests of Justice (amend Penal Code section 1385)

All comments are verbatim unless indicated by an asterisk (\*).

	Commentator	Position	Comment	Committee Response
1.	Appellate Advisory Committee	A	No specific comment.	No response required.
2.	California Judges Association Jordan Posamentier Legislative Counsel	A	We support the proposed amendment to Penal Code section 1385, which would allow the court to state the reasons for the dismissal on the record as an alternative to entering the reasons on the minutes of the court. This change relieves the court of an unnecessary mandate and gives greater leeway to the court in fulfilling the requirement. The court reporter's transcript would be sufficient to document the reasons without the clerk being required to interpret the reasons as set forth by the judge.	No response required.
3.	Court of Appeal, Second Appellate District Katherine Lynn Managing Attorney	A	I agree with the proposed changes.	No response required.
4.	Gerald H. Genard Danville	AM	The change does not go far enough. The court should be required to state its reasoning for the record whenever a motion or request to dismiss in the interests of justice is made, even if the motion or request is denied. There are times when not dismissing a matter would be so manifest an injustice as to constitute egregious error and an abuse of discretion. Requiring the lower court to set forth reasons for a denial of a dismissal request forces the judge to give serious consideration to the issue and creates a record for the appellate court to consider without the need for blind deference to the	The committee declined this suggestion as unnecessary and beyond the scope of the proposal. Trial courts are not required to state reasons for refusing to dismiss under Penal Code section 1385. ( <i>People v. McCowan</i> (1986) 182 Cal.App.3d 1, 17; <i>People v. Benevides</i> (1998) 64 Cal.App.4th 728, 734.)

**LEG10-01****Criminal Procedure: Dismissals in the Interests of Justice** (amend Penal Code section 1385)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			lower court's action.	
5.	Alvina J. Hollensbe Court Executive Assistant Superior Court of San Bernardino County	N	Do not agree with the proposed changes. The proposed legislation is not clear enough for the requirements to be understood and met. There are mixed references to the record and the minutes. Does this apply to every dismissal in a criminal case on the court's own motion? For example, dismissals after a request for further action to the judge and a dismissal is ordered but no hearing is held? A dismissal on a case where the warrant is too old to prosecute and no hearing is held?	To accommodate courts that dismiss under Penal Code section 1385 without an oral record of the proceedings or in the absence of court reporters, the committee modified the proposal to authorize courts to set forth the reasons either on the record or in writing in the minutes. As such, courts that dismiss without formal hearings would be authorized to set forth the reasons in an order entered upon the minutes.
6.	David Hughes Manager Superior Court of Orange County	AM	Not all courts, including [the Superior Court of Orange County], have a court reporter for misdemeanor and infraction matters. Further, the prosecutor in Orange County submits requests to dismiss actions in writing en masse rather than in open court. Therefore, it is recommended that the second sentence in PC 1385(a) be amended to read: "The reasons for the dismissal must be set forth on the record, or if there is no court reporter, or if requested by any party, in an order entered upon the minutes."	Please see response to comment 5.
7.	Orange County Bar Association Lei Lei Wang Ekvall President	N	No reason to change [or] modify this section. If amended it would require misdemeanor courts to order a court reporter so that a transcript could be produced. These courts are not staffed with court reporters. Additionally, this requirement would create a chilling effect and	Please see response to comment 5.

**LEG10-01****Criminal Procedure: Dismissals in the Interests of Justice** (amend Penal Code section 1385)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			judges might be less likely to use 1385.	
8.	Hon. Craig Riemer Superior Court of Riverside County	A	<p>I strongly support this proposed statutory amendment. The current statute results in senseless appeals, as I know from personal experience. Following a trial in which the jury reached a guilty verdict as to one misdemeanor count (petty theft) but hung on a second misdemeanor count (2nd degree burglary), the People announced an intention to retry the defendant on the second count. I dismissed the case. The People appealed. The dismissal order was reversed solely because, although my reasons for dismissing the second count were stated on the record, they were not contained in the minutes. So, many months and many dollars later, I dismissed it again. A monumental waste of time, effort, and money to achieve no better record of reasons than had already been stated in open court and recorded by the court reporter.</p> <p>However, it is my understanding that not all courts provide court reporters in misdemeanor proceedings. Thus, there may not always be a record of the oral statement of reasons. The proposal may want to take that possibility into account.</p>	Please see response to comment 5.
9.	Superior Court of San Diego County Mike Roddy Court Executive Officer	A	No specific comment.	No response required.