



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

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 13, 2013

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Title	Agenda Item Type
Judicial Council–Sponsored Legislation: Misdemeanor Juror Contempt	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Pen. Code, § 166	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>
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### Executive Summary

The Policy Coordination and Liaison Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code section 166 to delete a category of juror misconduct that constitutes misdemeanor contempt of court: the willful disobedience by a juror of a court admonishment against any communication or research about a pending trial, including electronic or wireless communications. The proposal was developed at the request of numerous criminal judges who expressed concerns that the provision inadvertently impairs the ability of courts to investigate whether juror misconduct occurred, increasing the risk of mistrial and reversal on appeal.

### Recommendation

The Policy Coordination and Liaison Committee and the Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to delete subdivision (a)(6) from Penal Code section 166, which renders the following category of juror misconduct a misdemeanor contempt of court: “Willful 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.”

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

### **Previous Council Action**

Subdivision (a)(6) was added to Penal Code section 166 by Assembly Bill 141 (Fuentes; Stats. 2011, ch. 181), which requires courts to admonish jurors against any conversation, research, or dissemination of information regarding a pending trial, including all forms of electronic and wireless communication. The bill also amended Code of Civil Procedure section 1209 to render the same conduct punishable as civil contempt.

The bill was supported by the Judicial Council and was designed to address concerns that use of electronic devices by jurors during trials poses an increasingly significant threat to the integrity of the trial process.<sup>1</sup> Subdivision (a)(6) was specifically designed to provide courts with sufficient tools to enforce the admonishments as necessary.

### **Rationale for Recommendation**

Penal Code section 166 generally proscribes specific conduct that may constitute misdemeanor contempt of court and includes subdivision (a)(6), which prohibits the following: “Willful 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.”

Courts are required to investigate allegations of misconduct by jurors during trials to ensure the integrity of the proceedings. To determine whether misconduct involving the use of an electronic device has occurred, courts must often question jurors because, in many instances, only jurors can explain the subject and purpose of the electronic communication.

However, by making electronic communication about the trial a crime, subdivision (a)(6) inadvertently impairs the ability of the court to determine if misconduct occurred. Because a prosecutor may charge the juror with a misdemeanor, questions posed by the court may implicate the juror’s constitutional rights against compelled testimony and self-incrimination. The implication of the juror’s constitutional rights could thwart the court’s ability to conduct an informal inquiry into the juror’s alleged use of electronic communications during the trial.

The committees believe the proper remedy for this category of juror misconduct is civil, as opposed to criminal, contempt of court. Although civil contempt proceedings raise similar constitutional implications, the authority to initiate civil contempt proceedings lies exclusively with the court. Thus, if the court believes that questioning the juror is necessary to preserve the integrity of a trial, the court could first offer the juror immunity from civil contempt sanctions in

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<sup>1</sup> One year earlier, the council also supported, on the recommendation of the Joint Legislation Working Group of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee, an identical bill (Assem. Bill 2217; Fuentes) that was eventually vetoed by Governor Arnold Schwarzenegger.

exchange for a formal inquiry on the record. This process would ensure that the conduct of the trial, including any inquiry of a juror into the use of electronic communications during the trial, remains squarely within the province of the court.

Courts need to have the ability to inquire into juror activities that may bear on the outcome of the trial without implicating the juror's constitutional rights associated with the possibility of criminal contempt of court sanctions. Some ability to question jurors is critical, allowing the court to determine if misconduct occurred. The flexibility to question a juror without implicating his or her constitutional rights is essential and will avoid jeopardizing the integrity of the proceedings and increasing the risk of mistrial and reversal on appeal. This recommendation is designed to eliminate the unforeseen consequence of implicating a juror's constitutional rights by deleting the recently added subdivision (a)(6) from Penal Code section 166.

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

The proposal was circulated for public comment during the spring 2013 cycle. Three comments were received. All three commentators—the Superior Courts of Los Angeles and San Diego Counties and the Orange County Bar Association—agreed with the proposal without additional comment. No opposition to the proposal was received.

A chart with all comments received is attached at page 6.

As noted above, the Judicial Council supported the bill that added subdivision (a)(6) to Penal Code section 166. The council supported the bill at the recommendation of the Trial Court Presiding Judges and Court Executives Advisory Groups' Joint Legislation Working Group (JLWG). The Criminal Law Advisory Committee considered declining the proposal in light of the council's past support for the legislation.

The legislation, however, was not reviewed by the Judicial Council's Criminal Law Advisory Committee—which includes judges, court administrators, prosecutors, and defense attorneys—until *after* its enactment. The committee decided to recommend this proposal because its concerns about the bill were not considered by the Judicial Council *before* the decision to support the legislation. Notably, the JLWG reviewed this proposal during the comment period and voted unanimously to support it.

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

No implementation requirements, costs, or operational impacts are expected. Rather, as described above, the committee expects that the recommendation will promote court efficiency by eliminating obstacles to court inquiries into juror misconduct, reducing the risk of mistrials and reversals on appeals.

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

This recommendation supports strategic Goal III, Modernization of Management and Administration, and objective III.B.5 of the related operational plan: "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 166, at page 5
2. Chart of comments, at page 6

Section 166 of the Penal Code is amended, effective January 1, 2015, to read:

1 **Penal Code Section 166**

2 (a) Except as provided in subdivisions (b), (c), and (d), a person guilty of any of the following  
3 contempts of court is guilty of a misdemeanor:

4

5 (1) Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of  
6 justice, in the immediate view and presence of the court, and directly tending to interrupt its  
7 proceedings or to impair the respect due to its authority.

8

9 (2) Behavior specified in paragraph (1) that is committed in the presence of a referee, while  
10 actually engaged in a trial or hearing, pursuant to the order of a court, or in the presence of any  
11 jury while actually sitting for the trial of a cause, or upon an inquest or other proceeding  
12 authorized by law.

13

14 (3) A breach of the peace, noise, or other disturbance directly tending to interrupt the  
15 proceedings of the court.

16

17 (4) Willful disobedience of the terms as written of any process or court order or out-of-state court  
18 order, lawfully issued by a court, including orders pending trial.

19

20 (5) Resistance willfully offered by any person to the lawful order or process of a court.

21

22 ~~(6) Willful disobedience by a juror of a court admonishment related to the prohibition on any~~  
23 ~~form of communication or research about the case, including all forms of electronic or wireless~~  
24 ~~communication or research.~~

25

26 ~~(7)~~ (6) The contumacious and unlawful refusal of a person to be sworn as a witness or, when so  
27 sworn, the like refusal to answer a material question.

28

29 ~~(8)~~ (7) The publication of a false or grossly inaccurate report of the proceedings of a court.

30

31 ~~(9)~~ (8) Presenting to a court having power to pass sentence upon a prisoner under conviction, or to  
32 a member of the court, an affidavit, testimony, or representation of any kind, verbal or written, in  
33 aggravation or mitigation of the punishment to be imposed upon the prisoner, except as provided  
34 in this code.

35

36 ~~(10)~~ (9) Willful disobedience of the terms of an injunction that restrains the activities of a criminal  
37 street gang or any of its members, lawfully issued by a court, including an order pending trial.

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39 (b)-(e) \* \* \*

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**LEG13-02****Proposed Legislation: Criminal Procedure: Misdemeanor Contempt by Jurors** (*amend Penal Code section 166*)

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association, by Wayne R. Gross, President	A		No committee response required.
2.	Superior Court of Los Angeles County	A		No committee response required.
3.	Superior Court of San Diego County, by Mike Roddy, Executive Officer	A		No committee response required.