

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

LEG21-01

Title

Proposal for Judicial Council–Sponsored
Legislation: Authorization for Remote
Appearances and Expansion of Defendant
Personal Presence Provisions in Criminal
Proceedings

Proposed Rules, Forms, Standards, or Statutes

Amend Pen. Code, §§ 977, 1043, 1043.5,
1148, and 1193; enact Pen. Code, § 977.3

Proposed by

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Action Requested

Review and submit comments by
May 21, 2021

Proposed Effective Date

January 1, 2023

Contact

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Executive Summary and Origin

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to provide statutory authority for remote appearances in criminal proceedings, provide statutory authority for courts to order the personal presence of a misdemeanor defendant, and expand waiver of the defendant’s right to be personally present in a felony case.

Background

In 2020, four Judicial Council advisory committees developed a legislative proposal to provide statutory authority for courts to permit remote appearances in civil actions or proceedings, including trials and evidentiary hearings. The proposal originated with recommendations from the Commission on the Future of California’s Court System. The Criminal Law Advisory Committee has now developed this legislative proposal to authorize remote appearances through the use of technology in criminal proceedings, allow a court to order the personal presence of a misdemeanor defendant, and expand how a defendant can waive the right to be personally present in a felony case. The proposal is based on budget trailer bill language relating to the use of remote appearances through the use of technology in civil proceedings that is currently under

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee.
It is circulated for comment purposes only.*

consideration by the legislature, as well as lessons learned during the COVID-19 pandemic about remote appearances and the limits of existing provisions on ordering or waiving the defendant's personal presence.

The Proposal

Remote appearances through the use of technology

This proposal would permit remote appearances in criminal proceedings. In developing the proposal, the committee agreed on a set of principles to guide the recommendations on remote appearances through the use of technology, and acknowledged the need for broad support among justice system partners to facilitate the proposal's success in the legislative process. The guiding principles were adapted from the Information Technology Advisory Committee's remote appearance workstream.

- *Provide Access to Justice*
Remote appearances through the use of technology are an additional, optional mechanism to provide access to the courts. The proposal recognizes that people are increasingly familiar with and reliant on remote appearances through the use of technology for training, services such as medical appointments, and social interaction.
- *Preserve and Uphold Defendant's Rights*
Remote appearances through the use of technology must preserve and uphold a defendant's constitutional rights and facilitate confidential communications with counsel.
- *Ensure Dignity, Integrity, and Fairness of Process*
The courthouses and courtrooms of the California courts must provide a dignified, respectful, and stable backdrop for the resolution of criminal cases. Maintaining the dignity, integrity, and fairness of the process while providing remote access through the use of technology requires setting up technical and training standards.
- *Modernize and Improve Court Operations*
Remote appearances through the use of technology improve court operations through the use of innovation, technology, and the sharing of effective practices.

The proposal recommends authorizing remote appearances through the use of technology by defendants, attorneys, and witnesses.

Remote appearances through the use of technology by defendants

Existing law limits video appearances to the initial court appearance, arraignment, and plea by in-custody defendants. The committee recommends expanding this provision by permitting the court to allow remote appearances, with consent by defendants both in and out of custody, through the use of technology.

The committee also recommends deleting the existing provision in Penal Code section 977(c)(1) regarding defense counsel's physical presence, and replacing it with a flexible framework that allows defense counsel to either (1) opt to appear from a different physical location than the defendant if private communication with the defendant is available or (2) waive the requirement for private communication capability.

Remote appearances by attorneys through the use of technology (new section 977(d))

The committee recommends a new section to allow a court, as appropriate and practicable, to allow a prosecuting attorney or defense counsel to participate in a criminal proceeding remotely, without being physically present in the courtroom.

Replace “two-way electronic audiovideo communication”

In anticipation of future technological developments, the committee recommends replacing the term “two-way electronic audiovideo communication” with “remote appearances through the use of technology,” or appropriate variations.

Remote testimony by witnesses

The committee recommends a new Penal Code section that allows a witness in a criminal proceeding to testify remotely in a hearing or trial with the oral or written consent of the parties and the agreement of the court, and also requires the defendant to make an informed waiver, on the record, of the right to have the witness testify in person.

Rule of court

The committee recommends that the proposed legislation also specify that the Judicial Council may adopt rules effectuating the new provisions. Potential areas for rule making include the notice to be given by a person requesting a remote appearance, the manner in which remote appearances are to be conducted, the conditions required for a person to be permitted to appear remotely, and provisions relating to the courts' use of private vendors to provide remote appearance services.

Amendments to statutes requiring personal presence

Penal Code sections 1043(e) (misdemeanor trials), 1043.5 (preliminary hearing), 1148 (felony verdict), and 1193 (felony judgment) all require the defendant's personal presence. The committee recommends amendments to sections 1043, 1043.5, 1148, and 1193 to clarify that a defendant may appear remotely through technology under section 977.

Amending section 977 regarding a defendant's personal presence

Allow the court to order the defendant to be personally present in a misdemeanor case

Existing law states that a court may order a defendant's personal presence in a felony case, despite a waiver of personal appearance. Committee members identified difficulties in resolving

aging misdemeanor cases without the defendant's personal presence and expressed concerns about the absence of court authority to order the defendant to appear in person when counsel is appearing on the defendant's behalf under section 977(a).

The committee recommends adding to section 977(a) a provision for misdemeanors equivalent to the felony provision.

Eliminate the written waiver requirement and allow counsel to waive defendant's presence in felonies (section 977(b)(1) and (2))

The committee generally agreed that the existing waiver requirement for execution, in open court, of a written waiver of a defendant's personal presence in a felony criminal proceeding is cumbersome and poses unnecessary barriers. However, the committee is concerned that deleting the written waiver requirement could cause the court to lose jurisdiction to issue a bench warrant. In terms of due process considerations, the language of the written waiver in subdivision (b)(2) includes a provision that when waiving the right to be present, the defendant "further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place." This acknowledgment of notice through counsel ties into section 978.5(a)(5), which states that a defendant's failure to appear may result in the issuance of a bench warrant if the defendant authorized counsel to appear for him or her and the court or magistrate ordered the defendant to personally appear. The committee believes that an oral or written waiver that acknowledges notice through counsel would likely address jurisdictional concerns, and recommends revising the statute to allow the defendant to waive personal presence through either an oral or written waiver. To provide more flexibility, the committee recommends incorporating, in part, a provision from COVID-19 emergency rule 5, which allows counsel to waive a defendant's personal presence with certain representations. The committee also recommends adding a provision referencing a victim's right under article I, section 28 of the California Constitution to request a defendant's personal presence at a proceeding.

Alternatives Considered

After an initial brainstorming process and a review of remote appearance statutes in other states, the committee decided to limit the scope of the proposal to address remote appearances by the defendant, attorneys, and witnesses, with consent and in specified circumstances, and with the judge and court staff physically present in the courtroom. The committee discussed allowing the court to exercise its discretion to order a remote appearance rather than rely on a defendant's consent, but decided to focus its efforts on removing any statutory barriers to the optional use of video or other technologies for remote appearance with a defendant's consent.

The committee is aware of concerns that allowing prosecutors and defense attorneys to appear remotely could result in delayed resolution of cases, but ultimately decided that providing statutory authority for remote appearance by counsel when appropriate was valuable.

Fiscal and Operational Impacts

The proposal would provide courts with statutory authority to permit, but not require, remote appearances through the use of technology. Courts that choose to proceed with permitting remote appearances through the use of technology would need to devote fiscal resources and modify existing operations to support such appearances. Specifically implementing remote appearances in criminal cases would create staff, training, equipment, and software costs. However, the transition to remote appearances during the COVID-19 pandemic has already equipped some courts with the necessary resources.

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 12 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. Pen. Code, §§ 977, 977.3, 1043, 1043.5, 1148, and 1193, at pages 6–12

Sections 977, 1043, 1043.5, 1148, and 1193 of the Penal Code would be amended, and section 977.3 would be enacted, effective January 1, 2023, to read:

1 § 977.

2
3 (a)

4
5 (1) In all cases in which the accused is charged with a misdemeanor only, he or
6 she may appear by counsel only, except as provided in paragraphs (2) and
7 (3). If the accused agrees, the initial court appearance, arraignment, ~~and~~ plea,
8 and all other proceedings may be by video conducted remotely through the
9 use of technology, as provided by subdivision (c). However, the court may
10 specifically direct the defendant, either personally or through counsel, to be
11 personally present at any particular proceeding or portion thereof.

12
13 (2) If the accused is charged with a misdemeanor offense involving domestic
14 violence, as defined in Section 6211 of the Family Code, or a misdemeanor
15 violation of Section 273.6, the accused shall be present for arraignment and
16 sentencing, and at any time during the proceedings when ordered by the court
17 for the purpose of being informed of the conditions of a protective order
18 issued pursuant to Section 136.2.

19
20 (3) If the accused is charged with a misdemeanor offense involving driving under
21 the influence, in an appropriate case, the court may order a defendant to be
22 present for arraignment, at the time of plea, or at sentencing. For purposes of
23 this paragraph, a misdemeanor offense involving driving under the influence
24 shall include a misdemeanor violation of any of the following:

25
26 (A) Subdivision (b) of Section 191.5.

27
28 (B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

29
30 (C) Section 23152 of the Vehicle Code.

31
32 (D) Section 23153 of the Vehicle Code.

33
34 (b)

35
36 (1) Except as provided in subdivision (c), in all cases in which a felony is
37 charged, the accused shall be personally present at the arraignment, at the
38 time of plea, during the preliminary hearing, during those portions of the trial
39 when evidence is taken before the trier of fact, and at the time of the
40 imposition of sentence. The accused shall be personally present at all other
41 proceedings unless he or she shall, with leave of court and with approval by
42 defendant's counsel, execute in open court, a written waiver of his or her

1 right to be personally present, as provided by paragraph (2). If the accused
2 agrees, ~~the initial court appearance, arraignment, and plea,~~ appearances may
3 be ~~by video~~ conducted remotely through the use of technology, as provided
4 by subdivision (c).

- 5
6 (2) ~~The accused may execute a written waiver of his or her right to be personally~~
7 ~~present, approved by his or her counsel., and~~ The waiver of a defendant's
8 right to be personally present shall be may be in writing and filed with the
9 court or, with the court's consent, may be entered orally, either by the
10 defendant or by the defendant's counsel of record. A defendant's oral waiver
11 of the right to be personally present shall be on the record and state that the
12 defendant has been advised of the right to be personally present for the
13 hearing at issue and agrees that notice to the attorney that the defendant's
14 presence in court at a future date and time is required is notice to the
15 defendant of that requirement. A waiver of the defendant's presence may be
16 entered by counsel, after counsel has stated on the record that the defendant
17 has been advised of the right to be personally present for the hearing at issue,
18 has voluntarily waived that right, and agrees that notice to the attorney that
19 the defendant's presence in court at a future date and time is required is
20 notice to the defendant of that requirement. However, the court may
21 specifically direct the defendant, either personally or through counsel, to be
22 personally present at any particular proceeding or portion thereof, including
23 upon request of a victim, to the extent required by Section 28 of Article I of
24 the California Constitution. ~~The~~ A written waiver of the defendant's personal
25 presence shall be substantially in the following form:

26
27 “Waiver of Defendant’s Personal Presence”

28
29 “The undersigned defendant, having been advised of his or her right to be
30 present at all stages of the proceedings, including, but not limited to,
31 presentation of and arguments on questions of fact and law, and to be
32 confronted by and cross-examine all witnesses, hereby waives the right to be
33 present at the hearing of any motion or other proceeding in this cause. The
34 undersigned defendant hereby requests the court to proceed during every
35 absence of the defendant that the court may permit pursuant to this waiver,
36 and hereby agrees that his or her interest is represented at all times by the
37 presence of his or her attorney the same as if the defendant were personally
38 present in court, and further agrees that notice to his or her attorney that his
39 or her presence in court on a particular day at a particular time is required is
40 notice to the defendant of the requirement of his or her appearance at that
41 time and place.”
42

1 (c)

2
3 (1) 977(c)(1): The court may permit ~~the initial court appearance, and arraignment~~
4 ~~of defendants held in any state, county, or local facility within the county on~~
5 ~~felony or misdemeanor charges, except for those defendants who were~~
6 ~~indicted by a grand jury, remote appearances to be conducted by two way~~
7 ~~electronic audiovideo communication through the use of technology between~~
8 the defendant and the courtroom in lieu of the physical presence of the
9 defendant in the courtroom. ~~If the defendant is represented by counsel, the~~
10 ~~attorney shall be present with the defendant at the initial court appearance~~
11 ~~and arraignment, and may enter a plea during the arraignment. However, if~~
12 ~~the defendant is represented by counsel at an arraignment on an information~~
13 ~~in a felony case, and if the defendant does not plead guilty or nolo contendere~~
14 ~~to any charge, the attorney shall be present with the defendant or if the~~
15 ~~attorney is not present with the defendant, the attorney shall be present in~~
16 ~~court during the hearing. If the defendant is represented by counsel, the~~
17 ~~attorney shall not be required to be personally present with the defendant if~~
18 ~~the remote technology allows for private communication between the~~
19 ~~defendant and the attorney, unless, upon request of defense counsel, the court~~
20 ~~allows the appearance without private communication.~~ The defendant shall
21 have the right to make his or her plea while physically present in the
22 courtroom if he or she so requests. If the defendant decides not to exercise the
23 right to be physically present in the courtroom, he or she shall ~~execute a~~
24 ~~written~~ waiver of that right. A judge may order a defendant's personal
25 appearance in court for the initial court appearance and arraignment. In a
26 misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of
27 guilty or no contest from a defendant who is not physically in the courtroom.
28 In a felony case, a judge may, pursuant to this subdivision, accept a plea of
29 guilty or no contest from a defendant who is not physically in the courtroom
30 if the parties stipulate thereto.

31
32 (2)

33
34 (A) A defendant who does not wish to be personally present for noncritical
35 portions of the trial when no testimonial evidence is taken may make an
36 oral waiver in open court prior to the proceeding, or may submit a
37 written request to the court, which the court may grant in its discretion.
38 The court may, when a defendant has waived the right to be personally
39 present, require a defendant ~~held in any state, county, or local facility~~
40 ~~within the county on~~ with pending felony or misdemeanor charges to be
41 present for noncritical portions of the trial when no testimonial
42 evidence is taken, including, but not limited to, confirmation of the
43 preliminary hearing, status conferences, trial readiness conferences,

1 discovery motions, receipt of records, the setting of the trial date, a
2 motion to vacate the trial date, and motions in limine, by ~~two-way~~
3 ~~electronic audiovideo communication~~ remote appearance through the
4 use of technology between the defendant and the courtroom in lieu of
5 the physical presence of the defendant in the courtroom. If the
6 defendant is represented by counsel, the attorney shall not be required
7 to be personally present with the defendant for noncritical portions of
8 the trial, if the ~~audiovideo conferencing system or other~~ remote
9 technology allows for private communication between the defendant
10 and the attorney prior to and during the noncritical portion of trial. Any
11 private communication shall be confidential and privileged pursuant to
12 Section 952 of the Evidence Code.

13
14 (B) This paragraph does not expand or limit the right of a defendant to be
15 personally present with his or her counsel at a particular proceeding as
16 required by Section 15 of Article 1 of the California Constitution.

17
18 **(d)**

19
20 A court may, as appropriate and practicable, allow a prosecuting attorney or
21 defense counsel to participate in a criminal proceeding remotely through the use of
22 technology, without being physically present in the courtroom.

23
24 **(e)**

25
26 Consistent with its constitutional rule making authority, the Judicial Council may
27 adopt rules of court to implement the policies and provisions of this section.

28
29 **§ 977.3.**

30
31 **(a)**

32
33 A witness in a criminal proceeding may testify in a hearing or trial remotely
34 through the use of technology with the written or oral consent of the parties, on the
35 record, and the agreement of the court. The defendant must make an informed
36 waiver, on the record, of the right to have the witness testify in person.

37
38 **(b)**

39
40 Consistent with its constitutional rule making authority, the Judicial Council may
41 adopt rules of court to implement the policies and provisions of this section.

1 § 1043.

2
3 (a)–(d) * * *

4
5 (e)

6
7 If the defendant in a misdemeanor case fails to appear in person or to appear
8 remotely through the use of technology in accordance with Section 977 at the time
9 set for trial or during the course of trial, the court shall proceed with the trial, unless
10 good cause for a continuance exists, if the defendant has authorized his counsel to
11 proceed in his absence pursuant to subdivision (a) of Section 977.

12
13 If there is no authorization pursuant to subdivision (a) of Section 977 and if the
14 defendant fails to appear in person at the time set for trial or during the course of
15 trial, the court, in its discretion, may do one or more of the following, as it deems
16 appropriate:

- 17
18 (1) Continue the matter.
19 (2) Order bail forfeited or revoke release on the defendant’s own recognizance.
20 (3) Issue a bench warrant.
21 (4) Proceed with the trial if the court finds the defendant has absented himself
22 voluntarily with full knowledge that the trial is to be held or is being held.

23
24 Nothing herein shall limit the right of the court to order the defendant to be
25 personally present at the trial for purposes of identification unless counsel stipulate
26 to the issue of identity.

27
28 § 1043.5.

29
30 (a)–(c) * * *

31
32 (d)

33
34 Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to
35 be present or to appear remotely through the use of technology in accordance with
36 Section 977.

37
38 § 1148.

39
40 If charged with a felony the defendant must, before the verdict is received, appear in
41 person or appear remotely through the use of technology in accordance with Section 977,
42 unless, after the exercise of reasonable diligence to procure the presence of the defendant,

1 the court shall find that it will be in the interest of justice that the verdict be received in
2 his absence. If for a misdemeanor, the verdict may be rendered in his absence.

3
4 **§ 1193.**

5
6 Judgment upon persons convicted of commission of crime shall be pronounced as
7 follows:

8
9 **(a)**

10 If the conviction is for a felony, the defendant shall be personally present or appear
11 remotely through the use of technology in accordance with Section 977 when
12 judgment is pronounced against him or her, unless the defendant, in open court and
13 on the record, or in a notarized writing, requests that judgment be pronounced
14 against him or her in his or her absence, and that he or she be represented by an
15 attorney when judgment is pronounced, and the court approves his or her absence
16 during the pronouncement of judgment, or unless, after the exercise of reasonable
17 diligence to procure the presence of the defendant, the court shall find that it will be
18 in the interest of justice that judgment be pronounced in his or her absence;
19 provided, that when any judgment imposing the death penalty has been affirmed by
20 the appellate court, sentence may be reimposed upon the defendant in his or her
21 absence by the court from which the appeal was taken, and in the following
22 manner: upon receipt by the superior court from which the appeal is taken of the
23 certificate of the appellate court affirming the judgment, the judge of the superior
24 court shall forthwith make and cause to be entered an order pronouncing sentence
25 against the defendant, and a warrant signed by the judge, and attested by the clerk
26 under the seal of the court, shall be drawn, and it shall state the conviction and
27 judgment and appoint a day upon which the judgment shall be executed, which
28 shall not be less than 60 days nor more than 90 days from the time of making the
29 order; and that, within five days thereafter, a certified copy of the order, attested by
30 the clerk under the seal of the court, and attached to the warrant, shall, for the
31 purpose of execution, be transmitted by registered mail to the warden of the state
32 prison having the custody of the defendant and certified copies thereof shall be
33 transmitted by registered mail to the Governor; and provided further, that when any
34 judgment imposing the death penalty has been affirmed and sentence has been
35 reimposed as above provided there shall be no appeal from the order fixing the time
36 for and directing the execution of the judgment as herein provided. If a pro se
37 defendant requests that judgment in a noncapital case be pronounced against him or
38 her in his or her absence, the court shall appoint an attorney to represent the
39 defendant in the in absentia sentencing.

40
41 **(b)**

1 If the conviction be of a misdemeanor, judgment may be pronounced against the
2 defendant in his absence.
3