



**Santa Clara County
Trial Lawyers Association**



November 15, 2021

TO: The Judicial Council of California
Ad Hoc Committee on Civil Remote Appearance Rules
ATTN: Anne M. Ronan, Supervising Attorney, Corby Sturges, Attorney

FR: California American Board of Trial Advocates (CAL-ABOTA)
Consumer Attorneys of California (CAOC)
California Defense Counsel (CDC)
California Employment Lawyers Association (CELA)
Consumer Attorneys Association of Los Angeles (CAALA)
Alameda-Contra Costa Trial Lawyers' Association (ACCTLA)
San Mateo County Trial Lawyers Association (SMCTLA)
Capitol City Trial Lawyers Association (CCTLA)
San Joaquin Trial Lawyers Association (SJTLA)
Santa Clara County Trial Lawyers Association (SCCTLA)
Consumer Attorneys of San Diego (CASD)
Marin Trial Lawyers Association (MTLA)

San Francisco Trial Lawyers Association (SFTLA)
Orange County Trial Lawyers Association (OCTLA)
Association of Defense Counsel of Northern California and Nevada (ADC)
Association of Southern California Defense Counsel (ASCDC)
Orange County Chapter of the American Board of Trial Advocates

**RE: Civil Practice and Procedure: Remote Appearances
Invitation to Comment ITC SP21-08**

The above signed organizations respectfully submit these comments in response to the Judicial Council's Invitation to Comment SP21-08, relating to remote appearances. At the outset, we should re-affirm that we are fully supportive of the appropriate use of remote technology in trials, evidentiary hearings and other court proceedings. In fact, the Consumer Attorneys of California (CAOC) and the California Defense Counsel (CDC) were co-sponsors of SB 241 (Umbert), which as early as March 4, 2021 proposed enhancements in the ability to conduct court proceedings remotely. We also participated in the working group established by representatives of the Governor's Office, President pro Tem of the Senate, and Speaker of the Assembly, which crafted the language ultimately incorporated into SB 241 as enacted. It is in the spirit of collaboration in implementing the intent of SB 241 that we offer these comments.

I. The Implementing Rules Must Recognize the Statutory Right of Parties to Insist on In-Person Appearances in Trials and Evidentiary Hearings

Although subdivision (d)(1) of new Code of Civil Procedure Section 367.75 permits a court, upon its own motion or the motion of any party, to conduct a trial or evidentiary hearing in whole or in part through the use of remote technology, absent a showing by the opposing party as to why a remote appearance should not be allowed, this authority is limited by the language of Section 367.75 (f). This subdivision prohibits a court from requiring a party to appear through the use of remote technology. Unfortunately there is nothing in the proposed rules which recognizes the limitation imposed by subdivision (f) or facilitates the party's election to insist on an in-person appearance.

Subdivision (f) was incorporated into SB 241 to uphold a core principle of the discussions in the legislature over remote appearances, that no party should be forced into a remote proceeding, particularly trials. Should a party not agree to a remote appearance, the limitation in subdivision (f) effectively requires in-person proceedings, unless the party agrees otherwise. We can envision, for example, that a party could insist on an in-person appearance, but still stipulate to remote appearances by certain witnesses. At the same time, we cannot envision a party insisting on an in-person appearance, but the court permitting all other individuals to be remote (except the court reporter, who must be physically present during trials, pursuant to subdivision (d)(2)(A)). This would, again, effectively require the objecting party to appear using remote technology in violation of subdivision (f).

Ultimately, we believe that the lessons of the pandemic in the appropriate use of remote technology in court proceedings will be most fully realized through consent-based solutions. We also believe that this was the intent of the legislature in enacting SB 241.

II. The Implementing Rules Should Contain Criteria for Courts to Establish Good Cause to Require In-Person Appearances by Expert Witnesses

Section 367.75 (c) permits an expert witness to appear remotely absent good cause to compel in person testimony. Despite the inclusion of this language in the legislation, we are not convinced of the justification to treat experts differently from other witnesses, and we may pursue legislation to address this issue when the legislature returns in January. The implementing rules would be improved, however, by clearly articulating criteria for courts in determining when good cause exists to require in-person testimony. Our proposed criteria would, for example, require the court to consider whether the testimony of the expert is critical or necessary for the determination of the proceeding, and whether the credibility of the expert is a factor in determining the impact of the expert's opinion.

The above signed groups join together in our support of the attached proposed revisions to the draft rules and share the concerns highlighted herein. We strongly urge their inclusion as to ensure that remote hearings can continue, not only to encourage efficiencies in the courts, but also by establishing a framework that protects the right to justice for all. Thank you for considering our comments.

Draft Revision to Judicial Council Proposed Court Rules

Additions: Blue underline

Deletions: ~~Red strikethrough~~

Black: Existing proposed Judicial Council draft

Link to proposed rules: <https://www.courts.ca.gov/documents/sp21-08.pdf>

(d) Court discretion to require in-person appearance

Although the court is to use best efforts in accommodating remote appearances where possible, notwithstanding the provisions of this rule and except as otherwise required by law, the court may require a party to appear in person at a proceeding in any of the following circumstances:

- (1) If the court determines on a hearing-by-hearing basis that an in-person appearance would materially assist in the determination of the proceeding or in the effective management or resolution of the case.
- (2) If the court does not have the technology to conduct the proceeding remotely.
- (3) If, at any time during a remote proceeding, the court determines that an inperson appearance is necessary, the court may continue the matter and require such an appearance. Such determination may be based on the factors listed in Code of Civil Procedure section 367.75(b)

(g) Remote proceedings for an evidentiary hearing or trial

...

(3) Expert notice of remote appearance

Pursuant to CCP 367.75(c) an expert witness may appear remotely if all parties stipulate or absent good cause to compel in-person testimony.

(A) The following factors must be considered in determining whether good cause exists to compel in-person testimony. If one or more of these factors are met, the expert must appear in person.

(i) Whether the witness's opinion is critical or necessary for the determination of the proceeding or the management or resolution of the action.

(II) Whether the credibility of the witnesses' testimony is a factor in determining the impact of the opinion offered.

(iii) Whether allowing the witness to appear remotely would materially prejudice one or more of the parties to the action.

(B) The court may determine on a hearing-by-hearing basis that an in-person appearance would materially assist in the determination of the conference, hearing, or proceeding or in the effective management or resolution of the particular case.

~~(3)~~ (4) Opposition to remote proceedings

(A) Filing and serving opposition

In response to notice of a remote proceeding under this subdivision set by local rule or otherwise provided under (g)(1) or (2), a party may exercise its right under subdivision (f) to object to appearing remotely ~~make a showing to the court as to why a remote appearance or remote testimony should not be allowed~~, by serving and filing an Opposition to Remote Proceedings at Evidentiary Hearing or Trial (form CIV-022) ~~by~~:

- (i) At least five days before the proceeding if for an evidentiary hearing or trial for which a party gives or receives at least 15 days' notice; or
- (ii) At least noon the court day before the proceeding if for an evidentiary hearing or trial for which a party gives or receives less than 15 days' notice.

(B) Court determination on opposition

In determining whether to conduct an evidentiary hearing or trial in whole or in part through the use of remote technology over opposition, the court must consider, along with the factors in section 367.75(b), any limited access to technology or transportation asserted by a party. If a party objects to appearing remotely pursuant to CCP 367.75 subdivision (f), all proceedings shall be held in-person, absent stipulation by the parties.

DRAFT FORM

Opposition to Remote Proceeding at Evidentiary Hearing or Trial

A box must be added to allow parties to exercise their right under CCP 367.75 subdivision (f) to object to appearing remotely, triggering all proceedings to be held in-person.