

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 848 (Umberg)
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Fiscal: Yes
Urgency: No
AWM

SUBJECT

Civil actions: parties and postponements

DIGEST

This bill removes the sunset on the statutory authorization for specified remote appearances in specified civil court proceedings.

EXECUTIVE SUMMARY

Before the COVID-19 pandemic, there was no explicit statutory authorization for parties in civil cases to appear in, or call witnesses via, electronic audiovisual means (shorthand to “remote means” or “remote proceedings”). Anecdotally, parties occasionally stipulated to remote appearances by witnesses, but the only sanctioned method of appearing, other than in person, was through the use of Court Call in specified proceedings. This changed when the COVID-19 pandemic made large-scale in-person gatherings a public safety hazard: the Judicial Council of California (Judicial Council) adopted emergency orders that, among other things, authorized remote proceedings in civil cases and in criminal cases with the consent of the defendant. Later, the Legislature enacted SB 241 (Umberg, Ch. 214, Stats. 2021), which created a statutory framework for remote appearances in civil proceedings, including trials, subject to certain technological requirements and safeguards. The remote proceedings statute is currently set to sunset on July 1, 2023.

This bill removes the sunset for the remote proceedings statute, thereby authorizing remote proceedings in civil cases on a permanent basis.

This bill is sponsored by the author and supported by California Defense Council, the California Judges Association, the Consumer Attorneys of California, Encore Capital Group and the Judicial Council. The bill is opposed by the California Court Reporters Association, the California Federation of Interpreters, the California Public Defenders

Association, the Pacific Juvenile Defender Center, SEIU California, and United Public Employees.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a party who has provided the requisite notice may appear telephonically in the following civil proceedings:
 - a) A case management conference, provided that the party has made a good faith effort to meet and confer before the conference and has timely filed and served a case management statement.
 - b) A trial setting conference.
 - c) A hearing on law and motion, except motions in limine.
 - d) A hearing on a discovery motion.
 - e) A conference to review the status of an arbitration or mediation.
 - f) A hearing to review the dismissal of an action.
 - g) Any other hearing, conference, or proceeding if the court determines that a telephone appearance is appropriate. (Code Civ. Proc., § 367.5(b), (e).)
- 2) Provides that, notwithstanding any party's notice of intention to appear telephonically at one of the above proceedings, the court may require a party to appear in person at a hearing, conference, or proceeding if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management of the particular case. (Code Civ. Proc., § 367.5(c).)
- 3) Authorizes parties to civil cases, including self-represented parties and nonparties subject to discovery requests, to appear remotely at a proceeding, and for the court to conduct the proceeding remotely, when the party has provided notice to the court and all other parties of the intent to appear remotely, subject to the limitations in 4)-7). (Code Civ. Proc., § 367.75(a).)
 - a) A court is prohibited from requiring a party to appear remotely. (Code Civ. Proc., § 367.75(f), (g).)
 - b) A court permitting remote appearances must ensure that technology in the courtroom enables all parties, whether appearing remotely or in person, to fully participate in the conference, hearing, or proceeding. (Code Civ. Proc., § 367.75(f).)
 - c) Separate procedures are set forth for remote appearances in juvenile dependency proceedings, at 9).
- 4) Authorizes a court to require an in-person appearance by a party or witness in a civil proceeding if any of the following conditions is present:

- a) The court does not have adequate technology to conduct the proceeding remotely.
 - b) Although the court has adequate technology, the quality of the technology or the audibility at the proceeding prevents the effective management or resolution of the proceeding.
 - c) The court determines, on the facts of the specific proceeding, that an in-person appearance would materially assist in the determination of the proceeding or in the effective management or resolution of the particular case. With respect to expert witnesses, however, an expert witness must be permitted to appear remotely absent good cause to compel in-person testimony.
 - d) The quality of the technology or audibility of the proceeding inhibits the court reporter's ability to accurately prepare a transcript of the proceeding.
 - e) The quality of the technology or audibility of the proceeding prevents an attorney from being able to provide effective representation to their client.
 - f) The quality of the technology or audibility of the proceeding inhibits a court interpreter's ability to provide language access to a court user or authorized individual. (Code Civ. Proc., § 367.75(b).)
- 5) Authorizes a court, on its own motion or by motion of any party, to conduct a trial or evidentiary hearing, in whole or in part, through the use of remote technology, subject to the limitations of 4) above, unless an opposing party shows why a remote appearance or testimony should not be allowed.
- a) Except where law expressly provides otherwise, if the court conducts a trial in whole or in part through remote means, the official reporter or official reporter pro tempore must be physically present in the courtroom.
 - b) Upon request, a court interpreter must be present in the courtroom. (Code Civ. Proc., § 367.75(d).)
- 6) Requires a court, prior to conducting remote proceedings, to have a process for a party, witness, official reporter or reporter pro tempore, court interpreter, or other court personnel to alert the judicial officer of technology or audibility issues that arise during the proceeding, and to require that a remote appearance by a party or witness have the necessary privacy and security appropriate for the proceeding. (Code Civ. Proc., § 367.75(e)(1)-(2).)
- 7) Requires a court to inform all parties, and particularly self-represented parties, about the potential technological or audibility issues that may arise when using remote technology, and which may require a delay or halt to the proceeding; and to make information available to self-represented parties regarding the options for appearing in person and through remote technological means. (Code Civ. Proc., § 367.75(e)(3).)

- 8) Provides that, subject to the technological and qualitative limitations in 4), the statute does prohibit attorneys for represented parties from stipulating to the use of remote appearances.
- 9) Authorizes a juvenile dependency proceeding to be conducted in whole or in part as follows:
 - a) Any person authorized to be present at the proceeding may request to appear remotely.
 - b) Any party to the proceeding may request that the court compel the physical presence of a witness or party.
 - c) A witness may appear remotely only with the consent of all parties and if the witness has access to the appropriate technology.
 - d) A court may not require a party to appear through the use of remote technology.
 - e) The confidentiality requirements that apply to an in-person juvenile dependency proceeding also apply in a juvenile dependency proceeding conducted through the use of remote technology. (Code Civ. Proc., § 367.75(h).)
- 10) Requires the Judicial Council to adopt rules for the policies and procedures set forth above, including for deadlines by which a party must notify the court and other parties of its intent to appear remotely, and standards for a judicial officer to apply in determining whether a remote appearance is appropriate. (Code Civ. Proc., § 367.75(k).)
- 11) Provides that the remote technology provisions in 3)-10) will sunset on July 1, 2023. (Code Civ. Proc., § 367.75(l).)

This bill:

- 1) Removes the July 1, 2023, sunset on the remote technology provisions.

COMMENTS

1. Author's comment

According to the author:

SB 848 removes the sunset date on important judicial reforms that increase access to justice in our civil courts. Widespread and pervasive inefficiencies in our courts were well-documented before the COVID-19 pandemic. To make matters worse, these shortcomings were exacerbated during the pandemic to the point that California courts have reached a crisis point due to years of inaction and inflexibility. Several urgent reforms in order for the courts in order to ensure that

we minimize negative impacts on court clients, employees, lawyers, and access to justice in general.

Last year, SB 241 (Umberg, Ch. 214, Stats. 2021) was passed in order to address some of these shortcomings in our justice system, firstly, by allowing authorized parties to appear remotely and the court to conduct conferences, hearings, proceedings, and trials in civil cases, in whole or in part, through the use of remote technology. Also, SB 241 allowed for the remote appearance of noncontroversial witnesses. Additionally, SB 241 ensured clarity and predictability in pretrial and arbitration deadlines when trials are delayed. All of these reforms are critically important to shortening trial length, saving litigants money, and preventing gamesmanship, but unfortunately, the statutory allowance for these provisions is set to expire next year. Therefore, SB 848 removes the sunset clause on these important civil court reforms.

2. This bill removes the sunset on the statute authorizing remote proceedings and appearances in civil cases, as specified

Until the onset of the COVID-19 pandemic, the default mode for appearing in court on a civil matter was in-person. Telephonic appearances were permitted in specified proceedings, such as law and motion hearings, but were generally prohibited in trials and other proceedings involving witnesses.¹ In 2017, a bill to extend the telephonic appearance statute to also permit appearances via other audiovisual means failed.²

As this Committee heard at its joint informational hearing with the Assembly Judiciary Committee on February 23, 2021, *COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward*, the COVID-19 pandemic and the need to socially distance caused massive disruption to California's justice system. According to the Judicial Council, California's courts resolved nearly 1.4 million fewer cases during the first six months of the COVID-19 pandemic – a decline of 49.1 percent from the same six-month period in 2019.³ The pandemic-induced slowdown disproportionately affected civil cases because constitutional speedy trial guarantees for criminal cases require courts to prioritize those matters.⁴

To prevent cases from grinding to a complete halt, many courts pivoted to remote proceedings, which allowed them to process cases while still complying with state and local health and safety orders. This pivot was first authorized by the Judicial Council's

¹ See Code Civ. Proc., § 367.5; Cal. Rules of Court, r. 3.670.

² See SB 467 (Wilk, 2017).

³ Report to the Judicial Council, *Trial Court Budget: \$50 Million COVID-19 Backlog Funding* (Jan. 12, 2021), at Attachment A.

⁴ E.g., White, *What happens when COVID-19 shuts civil courts?*, Los Angeles Times (Sept. 11, 2020), available at <https://www.latimes.com/business/story/2020-09-11/covid-shuts-courts-mediation-arbitration-boom> (last visited Mar. 22, 2022).

Emergency Rule 3, adopted on April 6, 2020.⁵ Then, in 2021, the Legislature enacted SB 241 (Umberg, Ch. 214, Stats. 2021), which authorized remote proceedings in civil and juvenile dependency proceedings, subject to certain technological and procedural requirements.⁶ The bill is scheduled to sunset on July 1, 2023.

A separate 2021 budget bill, among other things, requires the Judicial Council to submit, by January 1, 2023, two reports to the Legislature and the Governor relating to remote technology in the civil trial courts.⁷ The first report must address the courts' use of remote technology and contain data on the number of proceedings conducted with the use of remote technology, technology issues affecting remote proceedings, and other information necessary to evaluate the use of remote proceedings by the courts.⁸ The second report must contain recommendations for a statewide framework for remote civil court proceedings that addresses equal and fair access to justice, gathered from a working group convened by the Judicial Council and including various stakeholders to consider the issue.⁹

Chief Justice Tani G. Cantil-Sakauye also convened an Ad Hoc Workgroup on Post-Pandemic Initiatives (Workgroup). The Workgroup issued an interim report in August 2021 that addressed the courts' use of remote technology during the pandemic.¹⁰ The Workgroup found that the use of remote technology in civil cases was extremely successful for case clearance rates: the clearance rate in the later stages of the pandemic, when parties had adjusted to remote proceedings, actually exceeded the pre-pandemic clearance rate.¹¹ The Workgroup also found that remote options provides court users with more options for court access and can help individuals avoid barriers to participation posed by in-person appearances, such as needing to take a whole day off of work or traveling to a courthouse.¹² The Workgroup recommended that the courts should expand and maximize remote access on a permanent basis for most civil proceedings and not return to pre-pandemic levels of in-person operations.¹³

This bill would eliminate the sunset, thereby making the remote proceedings statute permanent.

⁵ Cal. Rules of Court, Appendix I, Emergency Rule 3; California Courts Newsroom, *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures* (Apr. 6, 2020), available at <https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-lower-jail-population-suspend-evictions-and-foreclosures> (last visited Mar. 22, 2022).

⁶ See Code Civ. Proc., § 367.75.

⁷ AB 177 (Assembly Committee on Budget, Ch. 257, Stats. 2021).

⁸ Code Civ. Proc., § 367.8.

⁹ *Id.*, § 367.9.

¹⁰ See Judicial Council of California, Ad Hoc Workgroup on Post-Pandemic Initiatives, Interim Report: Remote Access to Courts (Aug. 16, 2021).

¹¹ *Id.* at p. 4.

¹² *Ibid.*

¹³ *Id.* at p. 2.

3. Juvenile justice concerns

Some of the bill's opponents are not opposed to the bill's deletion of the sunset, but rather to the reach of the bill as interpreted by the Judicial Council. When the Judicial Council adopted a rule of court to implement SB 241, the rule included in its scope proceedings under Welfare and Institutions Code sections 601 and 602, known as juvenile justice or juvenile delinquency proceedings.¹⁴ These proceedings are technically civil, but are also quasi-criminal in nature because they so often involve "the possibility of a substantial loss of freedom."¹⁵ In recognition of the quasi-criminal nature of these proceedings, "the United States Supreme Court has extended constitutional protections to minors alleged to be juvenile delinquents, including notice of charges; right to confrontation and cross-examination; the privilege against self-incrimination [citation]; the standard of proof beyond a reasonable doubt [citation]; and double jeopardy [citation]."¹⁶ Bill opponents Pacific Juvenile Defender Center and the California Public Defenders Association argue that the provisions of SB 241 – designed for general civil cases – are improper for juvenile justice cases, and likely even violate the constitutional rights of those alleged to be juvenile defendants.

These opponents have expressed their interest in devising a framework for juvenile justice cases that provides an option for remote proceedings in some circumstances while also providing adequate due process protections for the accused. The author of the bill has agreed to work with these opponents on devising the appropriate language for inclusion in this bill.

4. Arguments in support

According to the Judicial Council, writing in support:

The remote access to the courts originally authorized by temporary emergency rules during the pandemic demonstrated its value as the pandemic revealed the need for a variety of options for accessing courts, both in-person and remotely. In order to avoid further delays or outright denials of access to justice, remote access must become a basic service rather than a temporary way to address current statutory restrictions on access to the courts. Investment in those services as well as the flexibility to continue expanding the remote access under the authority of SB 241 continues to provide increased access to the courts by the public and reduces disruption to the public and prepares courts for future crises – whether caused by pandemics, wildfires, natural disasters, bad weather or other unexpected events. Courts must be allowed to continue to utilize and develop the tools rolled out during the pandemic and maximize the ability to

¹⁴ See Cal. Rules of Court, r. 3.672.

¹⁵ *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 801.

¹⁶ *In re Kevin S.* (2003) 113 Cal.App.4th 97, 108.

provide a full menu of equal, safe, and reliable access to justice and court services, and removing the sunset of [Code of Civil Procedure] section 367.75 is an important step to ensuring that this is possible.

5. Arguments in opposition

According to SEIU California, writing in opposition:

The type of remote proceedings that were utilized during the COVID pandemic when physical courtrooms were shuttered, and as envisioned by last year's SB 241 are, in fact, experiments that have not been assessed for their impacts on litigants, the integrity of the record or those who are charged with delivering the service of justice. There is not yet any empirical evidence about the success, failures, or weakness of remote proceedings or how it has affected justice in California. To eliminate the sunset date in [Code of Civil Procedure section] 367.75 is a putting-the-cart-before-the-horse approach that is risky to a vital component of our democracy. We ought not to rush to permanently reform our trial court system without thoughtful review, assessment and implementation—the risk is just too great.

SB 848 would also undo a critical component of last year's carefully negotiated agreement among the affected parties on SB 241 and budget funding of \$30 million in ongoing funds allocated to trial courts to increase the number of official court reporters creating the verbatim record in family and civil proceedings

According to the Pacific Juvenile Defender Center, writing in opposition:

The Pacific Juvenile Defender Center (PJDC) writes in opposition to SB 848...unless amended to clarify that Code of Civil Procedure section 367.75 does *not* apply to proceedings under Welfare & Institutions Code section 601 and 602, commonly referred to as juvenile delinquency or juvenile justice proceedings. Such clarification is needed because the Judicial Council recently adopted Rule of Court 3.672 that, in our view – as well of the view of many other youth-serving organizations and the Juvenile Court Judges of California – erroneously swept Welfare & Institutions Code section 601 and 602 proceedings within the ambit of Code of Civil Procedure section 367.75...

A minor accused in a juvenile delinquency proceeding is entitled to all of the constitutional protections afforded to an adult accused in a criminal proceeding except for the rights to a jury trial and to bail. In particular, a minor is entitled to an attorney, to confront and cross-examine witnesses, and to proof of guilt beyond a reasonable doubt. (*In re Gault* (1967) 387 U.S 1; *In re Winship* (1970) 397 U.S. 358.) Accordingly, a juvenile delinquency proceeding is very different than a

civil proceeding and, in fact, much more akin to an adult criminal proceeding. Thus, while juvenile delinquency proceedings are not criminal, they are also not civil for purposes of new Code of Civil procedure section 367.75...

A discussion of these critically important constitutional and statutory rights of children accused of crimes was not part of the legislative discussion resulting in the enactment of Code of Civil Procedure section 367.76, which addresses *only* civil proceedings. The United States and California Constitutions, as well as Welfare and Institutions Code section 679 only permit remote proceedings at the express request of the minor.

Accordingly, we must oppose SB 848 unless and until it is amended to clarify that Code of Civil Procedure section 367.75 does not apply to proceedings under Welfare and Institutions Code sections 601 and 602.

SUPPORT

California Defense Council
California Judges Association
Consumer Attorneys of California
Encore Capital Group
Judicial Council of California

OPPOSITION

California Court Reporters Association
California Federation of Interpreters
California Public Defenders Association
Pacific Juvenile Defender Center
SEIU California
United Public Employees

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 538 (Susan Rubio, Ch. 686, Stats. 2021) authorized a party or witness to appear remotely at the hearing on a petition for a domestic or gun violence restraining order.

SB 241 (Umberg, Ch. 214, Stats. 2021) titled the 2021 Court Efficiency Act, among other things, authorized specified remote appearances in specified civil court proceedings. The remote proceedings portion of the bill is set to sunset on July 1, 2023.

AB 177 (Assembly Committee on Budget, Ch. 257, Stats. 2021) among other things, required the Judicial Council of California to convene a working group for the purpose for recommending a statewide framework for remote civil court proceedings that addresses equal and fair access to justice, to be submitted no later than January 1, 2023.

SB 467 (Wilk, 2017) would have extended the existing civil Court Call framework to appearances via video teleconferencing and other remote electronic means. SB 467 died in the Assembly Judiciary Committee.
