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June 20, 2008

Ms. Camilla Kieliger
Judicial Council
455 Golden Gate Avenue
San Francisco, California 94102

Re: Item SPR 08-40
Comment on Proposed California Rules of Court, rule 5.5552 (to be amended) and new proposed rule 5.553; revised forms JV-570 through 573

Dear Ms. Kieliger:

The Children's Advocacy Institute would like to thank you for the opportunity to comment on Proposed California Rules of Court, rule 5.5552 (to be amended) and new proposed rule 5.553; revised forms JV-570 through 573

The Children's Advocacy Institute (CAI), located at the University Of San Diego School Of Law, seeks to improve the health, safety, and well-being of California's children. CAI advocates in the legislature to make the laws, in the courts to interpret laws, before administrative agencies to implement laws, and before the public to educate and build support for laws to improve the status of children statewide and nationwide. CAI educates policymakers about children's needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury.

CAI along with the National Center for Youth Law was also a co-sponsor of SB 39 (Migden); the statute that in significant part is addressed by the proposed rules and forms.

CAI deeply appreciates the work that has gone into the proposed rule changes and the forms. However, we believe that the current rules and the forms – especially the forms – are confusing in that they fail clearly to differentiate between requests for records for children that have died and those that are still alive.

As the discussion correctly observes, the statutory rules for requesting records of children who have died are now significantly different – both procedurally and substantively – than those for children who happily remain alive.

Yet the forms try to deal with both situations and as a result we believe fail clearly to serve as a clear roadmap for implementing either.

Consider these examples:

1. The forms ask for the name of the child. When applied to children who have perished, and when measured against the public policy aim of public disclosure when children have died, it becomes readily apparent that the person requesting the information may not know the name of the child. Instead of seeking information about a particular child because of , say, a family connection and concern about the child's status and well-being, the person or entity requesting information about a deceased child will be doing so in order to ensure the efficacy of the overarching child welfare system

The findings and declarations for SB 39 frame this intent this way:

(b) A child's death from abuse or neglect often leads to calls for reform of the public child protection system. Without accurate and complete information about the circumstances leading to the child's death, public debate is stymied and the reforms, if adopted at all, may do little to prevent further tragedies.
(c) Providing public access to juvenile case files in cases where a child fatality occurs as a result of abuse or neglect will promote public scrutiny and an informed debate of the circumstances that led to the fatality thereby promoting the development of child protection policies, procedures, practices, and strategies that will reduce or avoid future child deaths and injuries.

The form should not be asking for the name of the child in instances where the child has died. It is already too late for this child. What is relevant now is what systemically can be learned, if anything from the child's death. And by definition the public seeking to discover what happened in the case of a child death based, for example, on a news report, may not know the name of the child; a situation different than the typical case of records requested when the child is alive. "Approximate date of death" should suffice to narrow the scope of the request along with, perhaps, a space for the petitioner to list any facts known about the child's death.

2. JV-570 asks for the relationship to the child and also asks for a detailed statement of reasons for requesting the file. None of these questions are in the slightest way relevant under section 827 and, hence, are likely to confuse, dissuade, and possibly frustrate the aim of SB 39. Since there is no balancing, "reasons' are immaterial for the release of records where deceased children are concerned. And, in any case, the reasons for the special rules for deceased children are deemed sufficient as a matter of law. They are, indeed, articulated by the Legislature itself in Section 1 of the measure. This will also lead to needlessly confusing adjudications, as petitioners do their level best to try and fill in sections that have no legal applicability to their petition, frustrating the very reason for the form, which is to streamline and simplify the matter.

3. Sections 6 and 7 of the same form are likewise confusing. The person filling out the form is not told until section 7 that they may not have to take exhaustive measures to locate all of the people listed in the section. And, even though the form in section 7 correctly notes that the petitioner need not serve all of the listed individuals, the form nevertheless asks for all of the same information anyway.

4. Form JV-573 as currently written risks significant legal confusion, again all because the forms try to grapple with requests for alive and deceased children together. While the latter part of the form clearly deals with when a child is deceased, the outset of the form does not, nor does it clearly articulate that it applies to when a child is alive. This is important (and emblematic) because the beginning of the form mentions the balancing of interests of individuals who are not children – something specifically and unambiguously forbidden by SB 39 where deceased children are concerned. (See W&I Code section 827(a)(2)(C): "If a child whose records are sought has died, and documents are sought pursuant to this paragraph, no weighing or balancing of the interests of those other than a child is permitted.")

6. This confusion – labeling certain parts of the discussion and forms as dealing with deceased children but not correspondingly labeling those other parts as dealing with when a child is alive – is seen throughout, and it risks an erroneous melding of the two universes. Thus, rule 5.552 is called "Confidentiality of Records," implying that it applies to all records, whereas rule 5.553 deals specifically with deceased children. The natural implication for lawyers trained to try and harmonize is to integrate the two. Again, this is because, while those provisions of the forms and rule dealing deceased children are so labeled, those dealing exclusively with children who have not perished are not.

Hence, for all these reasons, we strongly recommend that there be distinct guidance and forms for each kind of petition: forms for petitions when the child is still alive and forms for when the petition seeks information for when the child has died.

7. The forms as well miss another opportunity to avoid confusion. As the discussion correctly observes, SB 39 enacted a new statute providing for the administrative release of certain, insightful kinds of documents, a process entirely outside the W&I section 827 process. To prevent petitions from being filed when the person or entity requesting the documents might be satisfied with the administrative disclosures, the forms or form instructions might want to inform the public about the existence of these alternative pathways. This has two benefits true to the aims of the forms and the rule: (1) as just mentioned, it may obviate petitions entirely; and (2) it will as well clarify for judges that the statute governing such release (W&I Code section 10850.4) is entirely distinct from the 827 process. One cautionary note: to be consistent with the plain language of the statute, if there is information provided about the administrative option, it cannot be phrased so as to imply that the administrative release is in any way, shape, or form a pre-requisite to filing an 827 petition, since that is emphatically not the law.

8. Finally, JV-573 is also deficient in different way. Consider these parts of SB 39:

(B) This paragraph represents a presumption in favor of the
release of documents when a child is deceased unless the statutory reasons for confidentiality are shown to exist. (W&I Code section 827 (a)(2)(B))

(f) In petitions governed by paragraph (2) of subdivision (a) of Section 827 of the Welfare and Institutions Code, the Legislature has concluded that when a dependent child dies within the jurisdiction of the juvenile court, the presumption of confidentiality for juvenile case files

evaporates and the requirement of an expedited decision becomes manifest, because community reaction to the child's
death may abate with the passage of time and, without a prompt investigation and assessment, the opportunity to effect positive change may be lost. (Section 1, SB 39)

What is self-evident from reading the plain text and legislative history of SB 39 is that, when a child dies, the records should in the main be released.

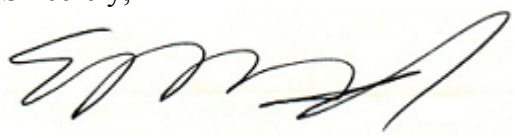
Yet, as a practical matter, the form (sections 5 and 6) turns this presumption and policy upside down. Utterly no judicial reasoning is required for an order denying that which the bill sought to disclose. Only a box must be checked. But judges for some reason need to explain themselves when they act as the law intended to them to act; namely, when they grant the petition. A form faithful to the letter and intent of the legislation – an intent that the legislation finds will save the lives of children in the future – should instead require judges to "show their work" when they act in a way *contrary to the presumption* and *contrary to the guiding principles* they set forth in binding code.

The discussion rightly insists that the form and rule be written in plain language, rightly concluding that the public are among those intended to seek out what happened to children trusted to the child welfare system they pay for and are morally responsible for.

All the more reason why the forms should be divided because lay people will earnestly try and fill out as much of the forms as they can, confusing adjudication, resulting in needless error, more litigation than is contemplated by SB 39's streamlining reforms, and a needless waste of already overstretched juvenile court resources.

Thank you for the opportunity to respond and we hope that our comments will prove helpful in reformulating an approach to implementing SB 39. Feel free to contact me if you have any questions or if you would like any further input regarding our position on the proposed rule and forms.

Sincerely,



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