August 26, 2016

Via email and overnight mail

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate
San Francisco, CA 94102
invitations@jud.ca.gov

Re: Comments on Proposed Rules 4.105, 4.106, 4.107 and 4.335 and Revised Forms TR-300 and 310

Dear Members of the Judicial Council:

We, the undersigned, are civil rights and legal services organizations assisting low-income Californians who are charged with traffic infractions and are unable to pay the exorbitant fines, fees, and surcharges associated with these tickets. For the past several years, we, individually and in coalition, have advocated for systemic change in the traffic court system to help ensure that low-income defendants do not experience disproportionate and unconstitutional harm.

Although we commend the Judicial Council's Traffic Advisory Committee and Criminal Law Advisory Committee ("Committee") for incorporating many of our prior comments in the new set of proposed rules and revised notices, we reiterate our primary concerns that the traffic fines and fees are excessive, and that the courts should not be using driver's license suspension as a means to coerce payment. Even if courts adopt all of the model procedural protections under consideration, the dollar amounts of the traffic fines and fees will still be excessive, and some low-income families will still likely slip through the cracks – because they are homeless and do not receive the newly revised notices, because they cannot read the notices or understand how to clear their tickets or reduce their fines, because their financial circumstances change and they cannot make the agreed-upon payments, or for other reasons. The courts should not be in the business of saddling low-income families with crushing debts, or with suspending driver's licenses that are the key to our clients' economic survival.

Recognizing that significant additional reforms will be needed to resolve these underlying problems, we offer the following comments on revised Rule 4.105, proposed rules 4.106, 4.107 and 4.335 and revised forms TR-300 and 310. We also highlight critical areas that need to be addressed by the Judicial Council in further rule-making. The comments are not intended to be

exhaustive and we remain committed to working with the Judicial Council to find an adequate, fair, and just solution for all traffic court defendants.

Proposed Rule 4.105 – Appearance without deposit of bail

The amendment to Rule 4.105 would require that courts add a link to the state traffic court self-help website on their respective court websites. Although we support providing more information to defendants on their options to dispose of citations, the rules concerning deposit of bail should be modified further in order to ensure equitable access to justice.

Specifically, it is our position that traffic court defendants should not be required to post "bail" in order to get a trial by written declaration or to set a trial date without appearing for arraignment—such a policy creates a two-tiered system of justice where the privileged are able to avail themselves of convenient court processes but others are not. It is particularly inequitable to require payment to schedule a court date without an arraignment, given that low-income defendants are more likely to have difficulty finding transportation to court, and may not be able to take time off from hourly-wage jobs. Given the move away from "pay to play" rules, the Judicial Council should explicitly encourage the courts to stop requiring deposit of bail as a condition to accessing these procedures or, at a minimum, to set a bail schedule for these procedures that is "reasonable and sufficient for the appearance of the defendant." *See* Veh. Code § 40511. "Bail" in the amount of the full fine, fees, and surcharges owed on the ticket is not "reasonable" and is indeed, excessive.

In addition, we remain concerned about courts' practices in determining likelihood of appearing at trial under Rule 4.105(c)(3). The rule requires a deposit of bail before trial if the court finds, based on the circumstances of a particular case, that the defendant is unlikely to appear as ordered without a deposit of bail. *See* Rule 4.105(c)(3). It is standard practice in some courts, Los Angeles Superior for example, for the court to make a finding that a person is unlikely to appear at the next court date, and to require deposit of bail for trial, simply because the person had a failure to appear on that case. This means that even if the person had good cause for the failure to appear, the person would be required to post bail in order to get a trial at which she could demonstrate that good cause.[1] We hope that proposed Rule 4.106(c)(3), which mandates that "[c]ourts must permit a defendant to present a showing of good cause for failure to appear or pay without requiring … payment of bail, fines, penalties, fees, or assessments," remedies this

[1] According to a publicly filed declaration by Greg Blair, Senior Administrator for the Metropolitan Courthouse of the Superior Court of Los Angeles County, approximately 8,000 complaints for failure to appear were filed *every week* in the fiscal year of 2007-2008. *See* Respondent's Return to Sept. 12, 2012 Order to Show Cause at Attached Exhibit (Second Declaration of Greg Blair, Senior Administrator for the Metro. Courthouse of the Superior Ct. of L.A. County.), *Steen v. App. Div., Superior Ct. of L.A. County* (Cal. 2012) (No. S174733). In a single year, that means approximately 416,000 failures to appear were entered. Assuming that the rate of complaints filed for failure to appear remained roughly stagnant in the last seven years, that is a total of 3,120,000 failures to appear filed since to date since 2007. Proposed Rule 4.105 in its current draft form would be toothless to these millions of defendants in Los Angeles and will restrict, not promote, access to justice in their individual cases.

problem. However, Rule 4.105 should be amended to make clear that it is subject to Rule 4.106(c)(3). Rule 4.105 must also be amended to specify that a failure to appear may not in and of itself be grounds for requiring payment of bail for a trial under Rule 4.105(c)(3).

Proposed Rule 4.106 – Failure to appear or failure to pay for a Notice to Appear issued for an infraction offense

We commend the Committee for acknowledging that current court policies around the imposition of civil assessments and other sanctions for failures to pay or appear are overly punitive and for incorporating some of our prior recommendations in the new proposed rule. However, there are a number of ways in which Proposed Rule 4.106 should be reframed and amended in order to provide defendants with adequate notice and a meaningful opportunity to be heard on these issues.

4.106(c) – Procedure for consideration of good cause for failure to appear or pay

We thank the Committee for incorporating our prior comments into the new version of the rule, including: 1) the requirement that the court inform the defendant of the right to petition to vacate the civil assessment and instructions on how to do so, *see* 4.106(c)(1); 2) clarifying that a defendant may always submit a written petition to vacate, not simply upon order by the court, *see* 4.106(c)(2); 3) clarifying that the court must vacate the assessment upon a showing of good cause, *see* 4.106(c)(5); and 4) reminding the courts that they have discretion to consider whether an assessment should be imposed and if so, the amount, *see* 4.106(c)(6). We also continue to support Rule 4.106(c)(3)'s provision that the court may not require a defendant to deposit bail in order to present good cause for failure to pay or failure to appear. However, we urge the Committee to strengthen the rules in the following ways in order to fully protect defendants' rights.

First, Rule 4.106(c) should be reframed to clarify that the imposition of a civil assessment on the front-end is not mandatory and should not be automatic. Penal Code § 1214.1 states a court *may* impose a civil assessment of *up to* $300. However, many courts automatically impose the maximum amount for a failure to appear or failure to pay, even in the context of a missed installment payment of just $20 or $30. The $300 late penalty fee is among the most stringent in the nation[2] and the automatic levying of a late fee in this amount may violate the Eighth Amendment's prohibition on excessive fines and fees. The civil assessment should not be used as an additional punishment for poverty.

[2] *See, e.g.*, Beth A. Colgan, "Reviving the Excessive Fines Clause," 102 Cal. L. Rev. 277, 289, fn. 55 (2014) (comparing various states' statutory late fee assessments: ALA. CODE § 12-17-225.4 (2006) (30 percent of delinquent amount); ARIZ. REV. STAT. ANN. § 12-116.03 (West 2003) ("reasonable costs"); CAL. PENAL CODE § 1214.1(A) (West 2011) (up to $300); FLA. STAT. ANN. § 28.246(6) (West 2010) (up to 40 percent of amount owed); 730 ILL. COMP. STAT. 5/5-9-3(e) (West 2007) (30 percent of delinquent amount); MICH. COMP. LAWS ANN. § 600.4803(1) (West 2013) (20 percent of delinquent amount); N.C. GEN. STAT. ANN. § 7A-321(b)(1) (West 2004) (lesser of the average cost of collecting debt or 20 percent of the delinquent amount); TEX. LOC. GOV'T CODE ANN. § 133.103(a) (West 2013) ($25 fee for payments made thirty-one days or more after judgment).

The Judicial Council should also establish criteria for the courts to use in determining whether to impose any civil assessment at all and guidelines on appropriate and non-punitive assessment amounts. For instance, prior to levying an assessment for failure to appear or failure to pay, the court should consider a person's diligence in complying with prior court orders and payments, any information the court may have about the person's financial circumstances – whether obtained through an ability to pay determination, an amnesty application, or otherwise – and whether factors such as the court's own delays in processing the ticket contributed to a defendant missing her court date or otherwise failing to comply with a court order.

Second, Rule 4.106(c)(2) should be amended to eliminate the 20-day time limit in which a defendant may petition to vacate an assessment. It is likely that homeless individuals or those with unstable living conditions will not have received notice about the failure to appear or pay or the civil assessment being added. Even if our clients do receive notice, life circumstances, including homelessness, make it very difficult to respond to the court in that short amount of time. Instead, a defendant should be able to make a showing of good cause for failure to appear or to pay at any point, including after the civil assessment is levied. This mirrors Proposed Rule 4.335 which permits a defendant to request an ability-to-pay determination at or after adjudication or while the judgment remains unpaid, including when a case is delinquent or has been referred to a comprehensive collection program.

Third, Rule 4.106(c)(4), which states that a petition to vacate does not stay any order requiring payment of bail, fees or assessments should be stricken. Instead, the filing of a petition should stay any of those orders. The rule should also specify that any orders of license suspension that have been initiated be recalled upon the filing of a petition to vacate. Otherwise defendants who have good cause may be preemptively sanctioned and could face irreparable harm if their license is in fact suspended.

Fourth, Rule 4.106(c)(5) should be amended to expand the basis for determining good cause to vacate an assessment. Although the basis for a finding of good cause is not limited in the governing statute, *see* Penal Code § 1214.1, most courts restrict a finding of good cause to instances involving hospitalization, incarceration, active military duty or death of an immediate family member, as is currently specified in the advisory comments to the rule.

It is critical that the Judicial Council expand the bases for good cause for failure to appear or failure to pay, including explicitly listing inability to pay as a ground for showing good cause, especially since numerous—if not the vast majority of—courts in California do not currently provide adequate notice of a person's right to an ability to pay determination. Inability to pay is a common reason why low-income and indigent defendants may miss their court dates or fail to make a payment. If a defendant fails to appear or pay due to inability to pay, it is all the more unlikely that the defendant will be able to make an exorbitant extra payment of $300, which hurts both the defendant and the court's efforts to collect debt. Moreover, there are a number of other good reasons that a person might not have been able to appear in court beyond those reasons listed in the advisory comments, including a childcare or transportation emergency or other medical emergency not involving hospitalization.

Accordingly, we believe that the rule should specify that good cause exists if the defendant: 1) experiences "homelessness," defined as lack of a fixed and regular nighttime address, or

residence in a shelter or transitional living facility; 2) the defendant does not have the ability to pay; or 3) if the defendant experienced any other unforeseeable circumstance that caused the failure to appear. This subsection should again clarify that the imposition of a civil assessment is not mandatory. The Judicial Council should also require the courts to update their notices and instructions to include the expanded definition of good cause. Finally, the guidelines should be listed in the rule itself, rather than simply in the advisory comments.

Fifth, it is imperative that there be stronger guidelines informing the exercise of the court's discretion in determining whether to impose an assessment and the amount of the assessment. Currently, courts do not generally exercise discretion in levying assessments even though it is provided under statute. Pen. Code § 1214.1. Rule 4.106(c)(5) should *require* that the court exercise discretion, including considering a defendant's financial circumstances, if known, and other relevant factors as discussed above, in determining whether to impose an assessment and how much to impose, rather than simply suggesting so.

Rule 4.106(d) – Procedure for unpaid bail referred to collection as delinquent debt

Similar to our comments on Rule 4.105, we recommend that Rule 4.106(d)(3) specify that a failure to appear is not in and of itself grounds to presume an unlikelihood of appearing at court and therefore to require bail for trial.

Rule 4.106(e) – Procedure for failure to pay on an installment plan

We support rules that stop the all-too-common practice of courts preventing defendants from obtaining judicial review after a failure to pay or after a single payment is missed on a payment plan. To highlight one example of the practice, a member of our coalition recently had a client on public assistance who was diligently paying $25 a month and forgot to make a payment one month. Although he realized his mistake and sent in double the amount the next month to make up for the missed payment, the court had already tacked on a civil assessment of $300 and referred him to the DMV for license suspension. The severity of this sanction in relation to the offense of missing one small installment payment is excessive and violates the constitutional prohibitions on excessive fines.

Moreover, it is our observation that courts generally do not meaningfully consider a defendant's ability to pay when setting the amounts of installment plans and, as a result, many low income and indigent defendants are left with payment amounts that are simply unaffordable. For these defendants, and particularly defendants on public benefits, even $20 or $30 a month can be too high. Furthermore, even if a defendant is able to pay the installments at the time she enters into the plan, her financial circumstances may change during the course of the payment plan. Loss of a job or unexpected medical bills for example, can greatly tax a poor family and make it impossible for a defendant to continue with the same plan. Once a defendant misses an installment payment, courts routinely refer the defendant to the DMV for license suspension for failure to pay, which pushes the defendant into an even more untenable financial situation. It is therefore critical that a defendant have a chance to present her circumstances and request a reduction in the fine or installment amount.

We therefore commend the Committee for proposing Rule 4.106(e)(1), which requires a court to permit a defendant to modify a judgment upon a failure to pay a fine or make a payment under and installment plan. However, as we previously commented, the procedural protections set forth in the rule will be meaningless if the defendant is not notified of their existence. The rule must be amended to specify that after failure to pay a fine or make an installment payment, the court must send a notice to the defendant notifying her of the missed payment and of her options to remedy the problem. The defendant should be given at least 30 days to act on the matter.

The rule should also clarify what it means for a defendant to seek a "modification" of a judgment. To modify a judgment should mean to reduce, suspend, or waive the judgment amount; reinstate the payment period; convert any remaining balance to community service; or other disposition that the court, in its discretion, determines appropriate given the defendant's circumstances. The Committee should amend the rule to include this description.

If it is the Committee's position that those options are not within the definition of "modification," it should amend the rule to separately provide the defendant with a range of options to correct a missed payment, including giving the defendant an opportunity to simply make up the missed payment, to petition the court for a new payment plan, to seek a reduction in the total overall payment amount, or to convert any remaining balance to community service or other alternative.

It is also critical that a person be given notice and an opportunity to correct the missed payment *prior* to having a civil assessment or license suspension levied. The rule should be amended to provide that the defendant must be given an opportunity to remedy the missed payment, either by having an opportunity to make up the missed payment, by seeking a modified judgment, or requesting a new payment plan, prior to the court levying a civil assessment or referring the defendant for license suspension. Otherwise a defendant who is willing and able to continue making installment payments will be unjustly and excessively penalized for a failure to make one payment. Subsection (e)(3) should be amended to specify that any license suspension sanction that has been set in motion, be recalled until the defendant receives adequate notice and a meaningful opportunity to be heard. At the very least, Rule 4.106(e) should offer similar protection as the traffic court amnesty repayment plans which require that upon a missed payment the defendant receives a notice and 30 days to pay or to request a modified payment plan.

Finally, Rule 4.106(e)(5), which permits the court to deny a request to modify a judgement if an unreasonable amount of time has passed or the defendant has made an unreasonable number of request to modify, should be stricken. A defendant should never be denied the opportunity to petition to modify or vacate her judgment. Indeed, doing so would contravene Vehicle Code § 42003 and other statutes that permit a defendant to present proof of a change in circumstances at any time. Moreover, if a defendant is in fact unable to pay, it would not make sense to deny a request to modify solely because of the number of times that she has requested a modification or based on some length of time that a court finds "unreasonable." If a person cannot pay, she cannot pay. We believe that this subsection should be eliminated. In the alternative, we recommend narrowing the instances in which a request can be denied. For example, providing that "the court may only deny the defendant's request for an ability-to-pay determination if the

court determines that an unreasonable amount of time has passed *and* that the defendant had no good cause to delay the request."

Rule 4.106(f) – Procedure after a trial by written declaration in absentia for a traffic infraction

Because a defendant should not have to pay to avail herself of court procedures and doing so violates due process rights, no fee should be required for requesting a trial de novo after a trial in absentia. We request that this section be eliminated.

Rule 4.106(g) – Procedure for referring a defendant to the Department of Motor Vehicles (DMV) for license suspension for failure to pay a fine

We commend the Committee for acknowledging the critical need for the court to provide notice and a meaningful opportunity to be heard on ability to pay prior to license suspension. As the Committee is aware, we have been advocating for this provision in a number of forums, including in lawsuits against several counties. However, the Committee must expand the rule to include the following.

First, the rule must specify that a court is also prohibited from referring a person for license suspension of a failure to *appear* without giving the person notice and an opportunity to be heard on ability to pay, as well as a meaningful opportunity to be heard on the question of willfulness. This is because non-appearance may be due to an individual's inability to pay, or other excusable factors such never having received notice due to homelessness or other reason.

Second, the rule should make clear that the notice must be *adequate* and in conformance with the requirements on notice set forth in Rule 4.107 (to the extent the Committee amends Rule 4.107 in accordance with our proposals below). The Advisory comments must specify the same.

Third, the rule must specify that the ability to pay determination must be made in accordance to the requirements set forth in Rule 4.335 (to the extent the Committee amends Rule 4.335 in accordance with our proposals below).

Fourth, this subsection should make clear that the court should not notify the DMV unless and until the defendant has been provided adequate notice and a meaningful opportunity to be heard on inability to pay *and* that the person has nonetheless willfully failed to pay and/or appear, as set forth in Vehicle Code § 40508.

Proposed Rule 4.107 – Mandatory courtesy notice – traffic procedures

We are pleased to see that the Committee has enacted Rule 4.107 to address the concerns we have raised about the notice that must be provided to traffic court defendants concerning their right to an ability to pay determination. However, the courts' notice procedure and the notices themselves need to undergo significant changes in order to constitute adequate notice to defendants about their rights, responsibilities, and options.

First, we commend the Committee for making it mandatory for courts to send courtesy notices. Rule 4.107(a). It is not reasonable for the initial Notice to Appear to serve as a defendant's only

warning when the citation form is in small print, does not contain the amount of the ticket, does not contain information on an ability to pay determination (though as discussed below, we recommend the Notice to Appear form contain that information) and is often illegible. *See* Exhibit A (sample traffic citation). However, even if courts are required to send courtesy notices (which we believe that they should), we note that many people never receive the notices mailed by the court. This could be due to a change in address, a defendant not having a stable address, delays in court processing of tickets which results in the court using outdated address information, or other failures in the system. Many of our low-income clients are homeless, move frequently or live in housing with problematic mail delivery, which makes it more likely that they will not receive the notices.

In order to improve the likelihood that a defendant receives the notices from the court, Rule 4.107(a) should be amended to require that the court send courtesy notices not only to the address provided on the notice to appear, but also to the last known address in the DMV database. This way, if a person has updated their address with the DMV after receiving the ticket, the court will send the notice to the proper address. In addition, given the harsh consequences for failure to respond to a ticket, the court should also send the notices certified mail with return receipt requested, so that it is aware when defendants have not received the courtesy notices. It is also imperative the Judicial Council implement an electronic notification system in which the court can send individuals notifications via text message or email. (Additional suggestions for improving the notice process are set forth below).

Second, although the Committee has provided some guidelines for the minimum information that must be included in the notices—and in particular has specified that the notices must include information on the right to an ability to pay determination, including the availability of installment plans and community service options, Rule 4.107(b)(7)—the guidelines must be more specific about how that information is to be transmitted.

In order to constitute adequate notice, the notification of the defendant's right to an ability to pay determination should be displayed in clear fashion on the front of the notice, rather than in small print on the back. The notification must include a description of what the ability to pay determination entails, how the defendant may avail herself of the determination, and what relief may be afforded upon a finding of an inability or limited ability to pay, *e.g.* a reduction or waiver of the ticket amount, placement on a payment plan, or other outcomes. If a defendant is required to provide documentation or other evidence to show inability to pay, that information must be listed clearly on the notice.

The information about an ability to pay determination must also be displayed alongside the defendant's main suite of options to dispose of the ticket. For example, many courtesy notices contain some version of a list of three options in bold print on the front of the notice indicating that the defendant may either 1) forfeit bail 2) enroll in traffic school or 3) plead not guilty. The option to get an ability to pay determination must be provided alongside those options and must be prominently displayed on the front page of the notice, rather than being listed separately or on the back of the notice. Otherwise, the defendant may believe she is limited to those three options and that she can only request the ability to pay determination if she pleads not guilty to the ticket.

The notice should also contain a copy of any form the defendant must fill out in order to get the ability to pay determination. For instance, if the court uses a form that permits a person to show that they receive public benefits, or to list their income and expenses, that form should be included along with the courtesy notice. Our detailed comments on ability to pay determinations are below.

Third, the Judicial Council must ensure that the notices are readable and understandable for all members of the public. The notices most courts currently send out are written in confusing language, do not contain clear instructions, and contain small print and crowded typeface. In order to constitute adequate notice, the notices must be at a sixth grade reading level and should use short, direct sentences; use simple words that the client can reasonably be expected to understand; avoid multi-syllable words and acronyms as often as possible; avoid compound sentences or combined reasons by breaking them into two sentences; and explain complicated ideas. *See e.g.* California Department of Social Services, All County Information No. 1-02-14, CalWorks Requirements for Adequate Notice, dated Jan. 3, 2014, pg. 3 (setting forth requirements for CalWorks notices based on the 1983 *Turner v. McMahon* consent decree and so-called "Turner rules");[3] California Department of Social Services, All County Letter No. 86-57, "Plan for Implementation of Turner v. McMahon Consent Decree Regarding AFDC Notices of Action, dated June 30, 1986;[4] *Turner v. Woods*, 559 F. Supp. 603 (N.D. Cal. 1982), *aff'd sub nom. Turner v. Prod*, 707 F.2d 1109 (9th Cir. 1983), *rev'd sub nom. Heckler v. Turner*, 470 U.S. 184 (1985); Gov. Code § 6219(a) ("Each department, commission, office, or other administrative agency of state government shall write each document that it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style.").

In order to ensure that non-English speakers receive adequate notice, the courtesy notices must include translations in the defendant's preferred language where available. The information about preferred language could be collected during the citation process, if the defendant chooses to provide it. If the preferred language is not known, the courtesy notice must include a notice of language services and a county contact for translation assistance. *See e.g.* California Department of Social Services, All County Information No. 1-02-14, CalWorks Requirements for Adequate Notice, dated Jan. 3, 2014, pg. 4 (listing language access requirements for CalWorks notices).

Finally, inclusion of the information about trial by declaration and telephone scheduling options (optimally, without requiring deposit of "bail") should be mandatory under 4.107(b), rather than permissive.

Proposed Rule 4.107 should be amended to specify that the courtesy notices must conform to the above guidelines and the Judicial Council should design compliant statewide forms for use by all courts.

[3] *Available at* http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin/2014/I-02_14.pdf.
[4] *Available at* http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl86/86-57_1.pdf.

Proposed Rule 4.355 – Ability to pay determinations for infraction offenses

We are pleased that the proposed rules mandate ability to pay determinations and begin to set guidelines for determining a defendant's ability to pay. Ability to pay is a critical issue for traffic court defendants. We agree with the proposal to mandate that instructions and information on ability to pay be provided to all defendants and to permit defendants to make a request for an ability to pay determination in writing or by appearance. We also agree that defendants should be able to request an ability to pay determination at multiple points in the process including at or after adjudication, when a defendant has missed a payment, when an account is delinquent, after the account has been referred to collections and under changed circumstances. It is essential that a missed payment or appearance does not block a defendant from an avenue of relief.

We are also pleased that the Committee has proposed initial guidelines for ability to pay by enumerating factors for clerks to consider when making an ability to pay determination, including whether a person receives public benefits or her income is below a certain percentage of the federal poverty guidelines. Providing guidelines that clerks can use to make certain threshold ability to pay determinations should streamline the ability to pay determination and make it more accessible. We also agree that if a defendant disagrees with the ability to pay determination by a clerk or collection agency, she should have the right to judicial review and an appearance. We were encouraged to see that the proposed rule lists alternative options for courts in lieu of payment in full when a defendant does not have the ability to pay.

Despite being encouraged by many of the proposals, we do not think the proposed rules go far enough to establish a workable ability to pay process and standard. In order to truly protect defendants' rights and ensure that the ability to pay determination is meaningful, the ability to pay procedures must be strengthened to include stronger standards and presumptions for determining inability to pay. These standards and the processes for how they will be applied must be transparent and readily available to defendants. Our coalition has spent many hours researching and discussing ability to pay standards and principles. We would welcome the opportunity to work with the Judicial Council to further develop a standard and processes.

The following are our proposed principles and guidelines regarding ability to pay determinations:

1) Ability to Pay Determination

<u>Presumption of Inability to Pay</u>
There should be a presumption of inability to pay for people with income below a certain threshold, including:

1) People who receive a means-tested public benefit, including SSI, SSP, CalWorks, Tribal TANF, SNAP, county relief, general relief, or general assistance, CAPI, IHSS, Medi-Cal, Refugee Cash Assistance; or Veterans benefits;
2) People who have a monthly income below a certain percentage of the federal poverty guidelines (given the multiple levels of federal poverty guidelines used to determine eligibility for various federal means-tested programs for low-income people, we

recommend that courts use 250% of the federal poverty rate, as the state uses in determining eligibility for Medi-Cal for working disabled individuals); or

3) People who are homeless – defined by a person's lack of a fixed and regular nighttime address, or residence in a shelter or transitional living facility – or living in a mental health treatment facility or drug treatment facility.

As in the Civil Fee Waiver context, defendants should be able to self-certify that they are not able to pay due to one of the above categories.

Inability to Pay Determinations Based on Individual Circumstances

If a person's income does not fall into one of the presumed inability to pay categories she should be entitled to an inability to pay determination based on her individual circumstances. This determination should take into account various factors including income, expenses, debt (including court debt), dependents and other financial obligations. We are currently researching which factors would most accurately and fairly reflect a defendant's ability to pay and would welcome the opportunity to share our findings.

2) Standards for reducing and waiving fees, payment plans and alternatives to payment

The proposed Judicial Council rule provides that based on the ability to pay determination, the court *may exercise its discretion* to provide for payment by installment plan, conversion to community service, suspend the fine or offer an alternative. Provision of these alternatives should not be discretionary. There must be strong and transparent guidelines for the relief available to a defendant who is unable to pay or has a limited ability to pay. Unless the court is *required* to employ these guidelines or offer these options, the inability to pay determination will not be meaningfully implemented, particularly given that there are rarely attorneys in traffic court to raise these issues.

There should be a standardized process for determining the amount that someone will pay so that it is fair and transparent. We are working on developing a calculator that could be used to determine the amount a person could be required to pay after taking into account various factors including income, debt, dependents and cost of living, and would invite the Judicial Council to work with us on this effort.

Payment Plans

If a defendant meets the presumption for inability to pay, there should be a presumed suspended fine or $0 payment plan. Similar presumptions, resulting in $0 or suspended payments, are currently employed in California child support cases, welfare overpayment cases, wage garnishment, and federal student loan repayment. Some California traffic court judges already use their discretion to suspend fines and fees. The Judicial Council should adopt this presumption to create statewide consistency.

Additionally, for people whose income is higher than the presumption, or who have some ability to pay, any alternative to monetary payment should be reasonable (see community service

discussion below). In no case should a payment plan be an excuse to avoid reducing a defendant's fine. When a ticket amount is high and someone has limited or no means to pay, simply putting someone on an installment plan for the entire amount is not a sustainable solution. Therefore, the installment plan should only be calculated after the total amount of the fine is reduced or waived based on a person's financial circumstances.

One possible formula is: (1) the court determines how much a defendant is able to pay each month; and (2) the remaining fines and fees are waived after twelve months of payments at that rate. This cuts down on the court cost of administering lengthy payment plans and creates some equity. For example, if the court determines a defendant could pay $10 a month, any amount above $120 (12 x 10) should be waived. To avoid undue administrative and practical burdens, defendants should be allowed to pay the entire amount in any number of payments necessary to satisfy their obligation within twelve months (*i.e.*, if a person receives enough money to pay the total remaining 12 month amount during the second month she could pay it and the balance would be waived). There should be no sanctions levied for a failure to make one payment. Importantly, defendants should not be required to pay an additional fee to get on an installment plan.

Community service

Although reasonable alternatives to payment must be provided to traffic court defendants, requiring low-income people and people of color to labor in order to work off infraction fines, reinforces historical problems around forced labor for the state. The Judicial Council must implement guidelines around community service that protect defendants' rights and ensure that completion of community service is feasible given defendants' circumstances. The below are our recommendations.

First, any alternative, including community service, must be subject to a similar reasonableness determination as applied to a defendant's ability to pay. The court must provide a number of alternatives that take into account individuals' life circumstances, including employment and family obligations, and must include options for people with physical or mental disabilities. If a defendant meets the presumption of inability to pay as outlined above, the person should be waived from any community service requirement.

For defendants with conflicting obligations, particularly employment or with other life stressors due to poverty, flexibility should be the guiding principle. Low-income people have multiple stressors in their lives, many of which are related to their very survival, and court action should not exacerbate these stressors. Weekend or evening community service should be possible and defendants should be encouraged and enabled to propose their own community service sites. For instance, one of our clients was able to do his community service at his local church; another at a community-based non-profit. Such flexibility strengthens community ties and stabilizes individuals' lives. Community service credit should also be available for hours spent in job training, drug or mental health treatment, education, securing or providing child care, or participating in other approved public interest or personal improvement activities.

Courts should also allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. *See e.g*. U.S. Department of Justice "Dear Colleague" letter, dated Mar. 14, 2016 ("With respect to community service programs, court officials should consider delineating clear and consistent standards that allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations."). [5] Defendants who demonstrate good cause to waive community service should be eligible to have their community service obligation waived. Good cause can mean a disability, a defendant's (or his dependent's) physical or mental illness, lack of proper transportation, lack of adequate childcare, or other circumstances that would prevent someone from completing their community service.

Second, the community service plan should only be considered after appropriate fine and fee waivers and reductions have been considered. It would be counter-intuitive to develop procedures to reduce the financial burden on low-income defendants yet require them, should they opt for community service, to "work off" the entire amount of unadjusted fines and fees. Furthermore, neither community service programs nor payment plans should become a means to impose greater penalties on the poor by, for example, imposing user fees or interest to participate in these alternatives. *See e.g*. U.S. Department of Justice "Dear Colleague" Letter, dated Mar. 14, 2016.

Third, setting an hourly rate, even if minimum wage or more, creates the risk that people with large amounts of outstanding debt will be bound to work without pay for an unreasonable amount of time. If an hourly rate is set, it should be at least set at the minimum wage in the local city or county, there should be limits on the number of hours required per month, and after a certain number of months, the remaining balance should be forgiven.

Additional comments on Rule 4.335

The rule's provision that permit a court to deny a request to modify a judgement if an unreasonable amount of time has passed or the defendant has made an unreasonable number of request to modify, should be stricken, for the reasons cited in the comments on 4.106(e)(5).

Finally, the proposed rule should specify that the court's ability to suspend the "fine," applies to base fines, fees, assessments and other penalties. 4.335(c)(6).

Revised Forms TR-300 and 310

TR-300 – Agreement to Pay and Forfeit Bail in Installments

We are pleased to see that the Committee has expanded the information in the bail forfeiture in installments form TR-300's waiver of rights. Whereas the first version of the proposed rule informed defendants that they would be waiving their rights to an ability to pay determination and to request community service, the new version also informs defendants that if they have experienced a change in financial circumstances at any point before final payment, they may request the court consider their ability to pay, after which the court may modify the plan, suspend

[5] *Available at*: https://www.justice.gov/crt/file/832461/download.

all or part of the fine or convert some of the fine to community service. Proposed TR-300 Advisement of Rights. However, as we stated in our previous comments, in order to provide clear notice to the defendant, the information about ability to pay determinations should be included on the face of the installment form itself, in addition to being included in the Advisement of Rights.

The form should also be revised to comport with Proposed Rule 4.106(e), subject to our comments to that rule. That rule explicitly gives defendants the right to request an ability to pay determination upon a missed payment. And our comments to that rule would provide notice to a defendant of that right upon a missed payment and give the defendant a reasonable time to correct or request modification. The provisions set forth in the rules and our comments are inconsistent with TR-300's provisions that all payments must be made on time with no grace period, that failure to make one payment may result in the total amount being due, and that the defendant must see the clerk the day after a missed payment. These provisions should be stricken from the form to cohere with the other proposed rules and the guiding principle of flexibility that must be applied to installment plans.

With respect to fees, although the statute requires a defendant pay administrative costs associated with the installment plan, we recommend that the Judicial Council require the court to waive these fees. Strapping more debt onto defendants with limited means is harmful and counterproductive.

Finally, we are pleased to see that the Committee has proposed including spaces on the form where a defendant can submit her cell phone and/or email for SMS or email notification about installment payments. This type of electronic notification system should be expanded in the court system, including on the traffic ticket itself, to help ensure that transient or homeless individuals actually receive follow-up notices from the court.

TR-310 – Agreement to Pay Traffic Violator School Fees in Installments

The same comments for TR-300 apply here.

Critical Areas for Further Reform

Procedure for notifying defendant of charges and options

First, as discussed above, it is our understanding that many people never receive the courtesy notices mailed by the court. In addition to our suggestions above about mailing notices via certified mail, because many of our clients do not have stable housing, we also recommend that the courts implement an electronic notification system whereby courtesy notices or reminders about courtesy notices be sent by the court via text message and email, in addition to being sent via regular mail.[6] The text or email alert could inform a person of the due date of their ticket,

[6] It is our experience that some courts presume that having a car indicates a certain level of wealth and therefore that someone cited for a moving violation cannot be homeless. We note that there are many individuals who are homeless, despite owning a car, and also that there many instances in which a person may be cited for a moving violation while driving a friend or family member's car. Moreover, even if the

amount of the ticket, and direct them to contact the court to find out how to dispose of the ticket. An email alert could include additional attached information, such as the courtesy notice in its entirety. We were pleased to see the addition of an SMS and email notification system added to form TR-300 and hope that it can be expanded to this context. Since not all defendants will have text and email capability, it is important for the court to continue to send the notices by regular mail as well.

Second, the Judicial Council must address the issues with court delay in processing traffic citations. It is our understanding that in many counties there is a lengthy delay in the time it takes between the citation being issue and the court registering the citation in its system. This results in scenarios where a person comes to court or otherwise tries to address their citation, but is told that their citation is not yet in the system. This can occur both when a person tries to appear or address the citation before the date listed on the citation and when the person comes on the day specified by the citation. A traffic court defendant who must check back multiple times is more likely to end up missing a payment or appearance. It is especially egregious for a person to be penalized for a failure to pay or appear in this situation, where the person clearly exercised due diligence in disposing of the ticket.

Notice to Appear forms

The Judicial Council must improve notice procedures at a traffic defendant's point of entry into the system – when the person is first cited for an infraction. As we have stated in previous comments, the Judicial Council should itself use its authority under Vehicle Code § 40500(b) to modify its standard Notice to Appear forms to include a notification of the right to a judicial determination of ability to pay, the options available to those who can't afford to pay, and a warning that a person's driver's license may be suspended or other sanctions may be imposed for non-payment unless the court determines that the person does not have the ability to pay.

We also suggest that the amount of the fine be included on the ticket itself. The base fines and fees for all of the infraction offenses are readily available in the Judicial Council's Uniform Bail Schedule and the citing officer should be required to list the infraction's amount on the Notice to Appear. Doing so would provide more immediate and adequate notice to the defendant and would at least provide the defendant with basic information in the event she does not receive a courtesy notice.

Upon implementing a text message and email notification procedure, the Judicial Council must modify the Notice to Appear citation forms to enable the citing officer to enter a current phone number and/or email address for the defendant, if the defendant wishes to provide that information. The form should also contain a place for the individual to note if she is unlikely to receive mail at the address listed, because it is not a permanent address or not stable for any reason.

link between driving and homelessness were true, we note that the traffic court procedures discussed in this letter are equally applicable to citations issued to pedestrians for non-driving-related infractions.

Finally, in addition to changing the Notice to Appear form, a procedure should be put in place whereby the citing officer gives out information on how to obtain an ability to pay determination, the alternatives available to those on public benefits and with low incomes who cannot pay in full and instructions on how to access language translation services.

Trial in Absentia

It is imperative that the Judicial Council address the due process violations inherent in finding people guilty in absentia. Many courts use this process to turn open cases into convictions, using the fiction that the defendant has chosen a trial by written declaration. Though the statutory authority for this practice is broad under Vehicle Code § 40903, we urge the Judicial Council to carefully consider the constitutional and practical implications of this practice—particularly without clear procedures for overturning these convictions—and consider prohibiting or severely limiting its use.

* * *

We thank the Committee for the opportunity to comment on these proposed rules. As noted, these comments are not exhaustive and we welcome the opportunity to work with the Committee to further improve court practice around imposition of fines and fees.

Sincerely,

Christine P. Sun
Micaela Davis
ACLU of California

Theresa Zhen
A New Way of Life Reentry Project

Elisa Della-Piana
Lawyers' Committee for Civil Rights
of the San Francisco Bay Area

Rebekah Evenson
Bay Area Legal Aid

Stephen Bingham
Retired attorney from Bay Area Legal Aid

Antionette Dozier
Western Center on Law and Poverty

Brittany Stonesifer
Legal Services for Prisoners with Children

Brandon Greene
East Bay Community Law Center

Clare Pastore
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Eliza Schafler
Neighborhood Legal Services
of Los Angeles County

Enclosure

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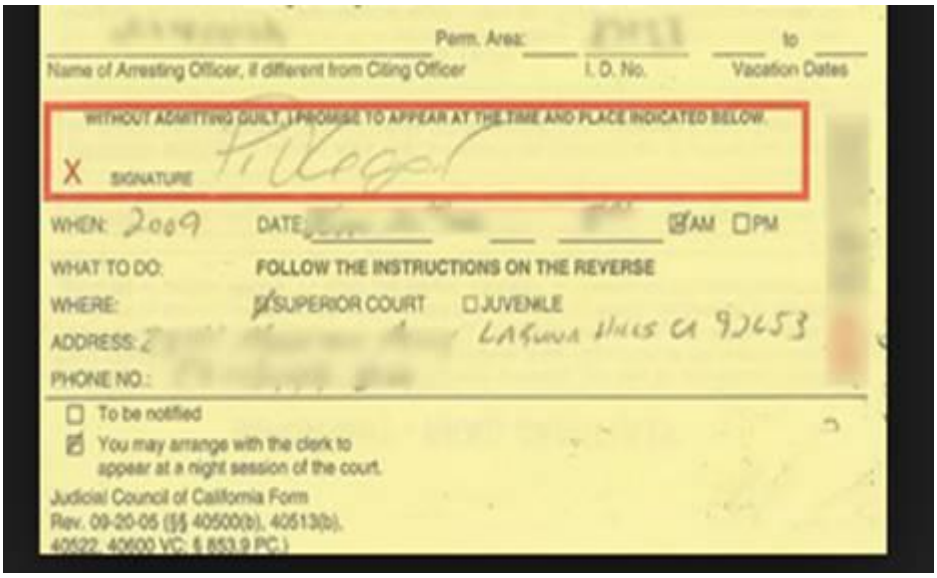
EXHIBIT A



Perm. Area: ____ ____ ____ to ____

Name of Arresting Officer, if different from Citing Officer | I. D. No. | Vacation Dates

WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AT THE TIME AND PLACE INDICATED BELOW.

X SIGNATURE

WHEN: 2009 DATE: ____ ____ ____ ☑ AM ☐ PM

WHAT TO DO: FOLLOW THE INSTRUCTIONS ON THE REVERSE

WHERE: ☑ SUPERIOR COURT ☐ JUVENILE

ADDRESS: [illegible] LAGUNA HILLS CA 92653

PHONE NO.: [illegible]

☐ To be notified

☑ You may arrange with the clerk to appear at a night session of the court.

Judicial Council of California Form
Rev. 09-20-05 (§§ 40500(b), 40513(b), 40522, 40600 VC; § 853.9 PC.)

WHAT TO DO

You are required to appear at court for a misdemeanor violation. For all violations, your court date/time/place are on the front of this notice to appear. Have the citation with you when contacting the court. In all infraction cases, you must do one or more of the following for each violation:

- Pay the fine (bail).
- Appear in court.
- Contest the violation.
- Correct the violation (traffic cases, when applicable).
- Request traffic school (traffic cases, when applicable).
- Request trial by written declaration (traffic cases).

If you do not do one of the above actions, then a "failure to appear" charge will be filed against you (Veh. Code, § 40508(a)) and your driver license may be withheld, suspended, or revoked. In some courts you may be charged an amount in addition to the bail amount and the case may be turned over to a collection agency. (Pen. Code, § 1214.1.)