



Judicial Council of California Administrative Office of the Courts

455 Golden Gate Avenue San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 28, 2011

Title	Agenda Item Type
Family Law: Children's Participation and Testimony in Family Court Proceedings	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 5.250	January 1, 2012
Recommended by	Date of Report
Elkins Family Law Implementation Task Force	October 6, 2011
Justice Laurie D. Zelon, Chair	Contact
Family and Juvenile Law Advisory Committee	Julia Weber, 415-865-7693
Hon. Kimberly Nystrom-Geist, Cochair	julia.weber@jud.ca.gov
Hon. Dean Stout, Cochair	

Executive Summary

The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend that the Judicial Council adopt new rule 5.250 to comply with the legislative mandate of Assembly Bill 1050 (Stats. 2010, ch. 187), which requires the Judicial Council to promulgate a rule of court to establish procedures for the examination of a child witness in family law proceedings under amended Family Code section 3042.

Recommendation

The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend that the Judicial Council, effective January 1, 2012; adopt rule 5.250 of the California Rules of Court to:

1. Establish procedures for the examination of a child witness in family law proceedings; and
2. Include guidelines on methods other than direct testimony for obtaining information or other input from children regarding custody or visitation.

The rule is attached at pages 6–11.

Previous Council Action

There has been no previous council action.

Rationale for Recommendation

Assembly Bill 1050 (Stats. 2010, ch. 187),¹ which amended the provisions of Family Code section 3042 regarding the testimony of children about their preferences related to custody, was signed by the Governor and filed with the Secretary of State on August 27, 2010. It requires the Judicial Council, no later than January 1, 2012, to promulgate a rule of court that establishes procedures for examination of child witnesses according to the requirements of amended section 3042.

Comments, Alternatives Considered, and Policy Implications

The invitation to comment was circulated from April 21, 2011, through June 30, 2011². In addition to the standard mailing list for proposals—which includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, attorneys, mediators, family law facilitators and self-help center attorneys, and other family law professionals and attorney organizations—the task force and committee sought comment from the Joint Rules Working Group of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (TCPJAC/CEAC).

¹ Assembly Bill 1050 is available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1001-1050/ab_1050_bill_20100827_chaptered.pdf.

² The proposed rule was originally circulated for comment as part of a larger proposal (SPR -36 Family Law: New, Restructured, and Amended Family Law Rules of Court) which has been deferred for Judicial Council consideration at a later date.

Eighteen commentators responded to the rule; 2 agreed; 7 agreed with the rule if modified; 4 did not indicate a position; 4 did not agree; and 1 commentator indicated a position outside of the given categories—“oppose, unless modified.”

Although the rule is legislatively mandated, the TCPJAC/CEAC raised concerns about its potential impact on the courts. Specifically, TCPJAC/CEAC indicated that the rule could increase staff workload if a duty to inquire whether or not a child wishes to testify was imposed on staff; have a fiscal impact if more minor’s counsel were to be appointed and presumably paid for by the court; and increase costs and time associated with hearings if children’s testimony had to be taken remotely.

The committee and task force took all of these concerns into consideration in developing the rule. Members closely followed the legislative mandate and sought to avoid creating any additional burdens on the courts. Instead, as a result of the legislative changes, the rule was designed to provide guidance to courts given that judicial officers may now be called upon to either permit children to address the court or state reasons on the record for not hearing from a child seeking to address the court. The rule does not impose an affirmative duty on court staff or any professionals to inquire whether or not a child wishes to testify, nor does it require appointment of minor’s counsel.

Family Code section 3042 requires a court to consider alternative methods of receiving children’s input when a court precludes calling a child as a witness. The task force and committee recommend avoiding adopting a rule that specifically requires certain alternative methods, but instead suggest that the rule provide options for the court to consider when it is statutorily required to identify alternatives to testifying. In taking this approach, the proposed rule addresses the legislative mandate and supports the need for judicial discretion in these complex cases.

Additional concerns included possible increases in court staff workload because subdivision (f) imposes informational requirements that could increase time for mediation and development of materials and that subdivision (g) imposes educational requirements for staff and judges. In developing the rule, the committee and task force sought to avoid burdening court staff and creating additional work. As recommended, subdivision (f) provides guidance to courts by suggesting what type of information should be provided to parents and children but does not require that specific materials be developed. Similarly, subdivision (g) does not impose any additional educational requirements. As recommended, (g) suggests rather than directs that educational content for judicial officers and staff should include content related to this rule. This is intended to assist judges and court staff to address the significant statutory changes relating to children’s participation.

Additional comments and responses to rule 5.250

One commentator generally supported this rule as a positive step in the right direction but requested assurance that there would be timely training about the new rule. Training has been provided at the 2011 Family Law Institute and at regional trainings for judicial officers, child custody mediators, and child custody recommending counselors. Also, training programs developed on family law and child custody plans are under way to include content on this topic.

Ten commentators suggested changes to improve the rule. One commentator believed that (d) needed to be changed to address concerns about the opportunity to cross-examine those providing information to the court; another commentator believed that (d)(2) should be deleted. To address these comments, the task force and committee modified subdivision (d) to provide that if the court precludes the calling of a child as a witness and specifies one of the other alternatives, the court must require that the information or evidence obtained by alternative means and provided by a professional or nonparty be in writing. In addition, the rule would require that the information fully document the child's views on the matters on which the child wished to express an opinion, describe the child's input in sufficient detail to assist the court in its adjudication process, and be provided to the court and to the parties by an individual who will be available for testimony and cross-examination. The proposed rule was also amended to require that information provided on the child's input be kept in the confidential portion of the family law file.

Another commentator suggested that the rule clarify that it is not applicable to probate guardianship proceedings. The task force and committee agreed to include an advisory committee comment to indicate that the rule "does not apply to probate guardianships except as and to the extent that this rule is incorporated or expressly made applicable by a rule of court in title 7 of the California Rules of Court."

Alternatives considered

Given that AB 1050 amended Family Code section 3042 to mandate that the Judicial Council promulgate a rule on implementing changes regarding children addressing the court, the task force and committee did not consider not complying with this statutory requirement. Through rule 5.250, members sought to provide information and assistance to trial court judicial officers who are required by statute to make these determinations, while seeking simultaneously to avoid placing any additional workload or resource burdens on the courts.

Implementation Requirements, Costs, and Operational Impacts

Although Family Code section 3042 may cause an increase in court staff workload (for example, section 3042(f) requires that child custody recommending counselors inform the court when they know a child wishes to address the court), the new rule itself does not require the court to incur costs. Further, the rule would not impose operational impacts on

the court. As previously noted, rule 5.250 provides guidance to the court about how to implement the requirements of the new legislative mandates of Family Code section 3042.

In addition to drafting the new rule, the task force and committee will also work with the Center for Families, Children & the Courts and the Education Division/Center for Judicial Education and Research to provide training to judicial officers and court staff in the form of broadcasts and reference materials as well as technical assistance.

Relevant Strategic Plan Goals and Operational Plan Objectives

This recommendation serves Goal III.B: Modernization of Management and Administration because it helps courts implement fair and effective practices regarding the participation of children in family court proceedings. In addition, it serves Goal IV: Quality of Justice and Service to the Public, by implementing court procedures and processes that are fair and understandable.

Attachments

1. Rule 5.250, at pages 6–11
2. Chart of Comments, at pages 12–31

Rule 5.250 of the California Rules of Court is adopted effective January 1, 2012, to read:

1 **Rule 5.250. Children’s participation and testimony in family court proceedings**

2
3 **(a) Children’s participation**

4
5 This rule is intended to implement Family Code section 3042. Children’s
6 participation in family law matters must be considered on a case-by-case basis. No
7 statutory mandate, rule, or practice requires children to participate in court or
8 prohibits them from doing so. When a child wishes to participate, the court should
9 find a balance between protecting the child, the statutory duty to consider the
10 wishes of and input from the child, and the probative value of the child’s input
11 while ensuring all parties’ due process rights to challenge evidence relied upon by
12 the court in making custody decisions.

13
14 **(b) Determining if the child wishes to address the court**

15
16 (1) The following persons must inform the court if they have information
17 indicating that a child in a custody or visitation (parenting time) matter
18 wishes to address the court:

19
20 (A) A minor’s counsel;

21
22 (B) An evaluator;

23
24 (C) An investigator; and

25
26 (D) A child custody recommending counselor who provides
27 recommendations to the judge under Family Code section 3183.

28
29 (2) The following persons may inform the court if they have information
30 indicating that a child wishes to address the court:

31
32 (A) A party; and

33
34 (B) A party’s attorney.

35
36 (3) In the absence of information indicating a child wishes to address the court,
37 the judicial officer may inquire whether the child wishes to do so.

38
39 **(c) Guidelines for determining whether addressing the court is in the child’s best**
40 **interest**

1 (1) When a child indicates that he or she wishes to address the court, the judicial
2 officer must consider whether involving the child in the proceedings is in the
3 child’s best interest.

4
5 (2) If the child indicating an interest in addressing the court is 14 years old or
6 older, the judicial officer must hear from that child unless the court makes a
7 finding that addressing the court is not in the child’s best interest and states
8 the reasons on the record.

9
10 (3) In determining whether addressing the court is in a child’s best interest, the
11 judicial officer should consider the following:

12
13 (A) Whether the child is of sufficient age and capacity to reason to form an
14 intelligent preference as to custody or visitation (parenting time);

15
16 (B) Whether the child is of sufficient age and capacity to understand the
17 nature of testimony;

18
19 (C) Whether information has been presented indicating that the child may
20 be at risk emotionally if he or she is permitted or denied the opportunity
21 to address the court or that the child may benefit from addressing the
22 court;

23
24 (D) Whether the subject areas about which the child is anticipated to
25 address the court are relevant to the court’s decisionmaking process;
26 and

27
28 (E) Whether any other factors weigh in favor of or against having the child
29 address the court, taking into consideration the child’s desire to do so.

30
31 **(d) Guidelines for receiving testimony and other input**

32
33 (1) If the court precludes the calling of a child as a witness, alternatives for the
34 court to obtain information or other input from the child may include, but are
35 not limited to:

36
37 (A) The child’s participation in child custody mediation under Family Code
38 section 3180;

39
40 (B) Appointment of a child custody evaluator or investigator under Family
41 Code section 3110 or Evidence Code section 730;

- 1 (C) Admissible evidence provided by the parents, parties, or witnesses in
2 the proceeding;
3
- 4 (D) Information provided by a child custody recommending counselor
5 authorized to provide recommendations under Family Code section
6 3183(a); and
7
- 8 (E) Information provided from a child interview center or professional so
9 as to avoid unnecessary multiple interviews.
10
- 11 (2) If the court precludes the calling of a child as a witness and specifies one of
12 the other alternatives, the court must require that the information or evidence
13 obtained by alternative means and provided by a professional or nonparty:
14
- 15 (A) Be in writing and fully document the child's views on the matters on
16 which the child wished to express an opinion;
17
- 18 (B) Describe the child's input in sufficient detail to assist the court in its
19 adjudication process;
20
- 21 (C) Be provided to the court and to the parties by an individual who will be
22 available for testimony and cross-examination; and
23
- 24 (D) Be filed in the confidential portion of the family law file.
25
- 26 (3) On deciding to take the testimony of a child, the judicial officer should
27 balance the necessity of taking the child's testimony in the courtroom with
28 parents and attorneys present with the need to create an environment in which
29 the child can be open and honest. In each case in which a child's testimony
30 will be taken, courts should consider:
31
- 32 (A) Where the testimony will be taken, including the possibility of closing
33 the courtroom to the public or hearing from the child on the record in
34 chambers;
35
- 36 (B) Who should be present when the testimony is taken, such as: both
37 parents and their attorneys, only attorneys in the case in which both
38 parents are represented, the child's attorney and parents, or only a court
39 reporter with the judicial officer;
40
- 41 (C) How the child will be questioned, such as whether only the judicial
42 officer will pose questions that the parties have submitted, whether
43 attorneys or parties will be permitted to cross-examine the child, or

1 whether a child advocate or expert in child development will ask the
2 questions in the presence of the judicial officer and parties or a court
3 reporter; and
4

5 (D) Whether a court reporter is available in all instances, but especially
6 when testimony may be taken outside the presence of the parties and
7 their attorneys and, if not, whether it will be possible to provide a
8 listening device so that testimony taken in chambers may be heard
9 simultaneously by the parents and their attorneys in the courtroom or to
10 otherwise make a record of the testimony.
11

12 (4) In taking testimony from a child, the court must take special care to protect
13 the child from harassment or embarrassment and to restrict the unnecessary
14 repetition of questions. The court must also take special care to ensure that
15 questions are stated in a form that is appropriate to the witness's age or
16 cognitive level. If the child is not represented by an attorney, the court must
17 inform the child in an age-appropriate manner about the limitations on
18 confidentiality and that the information provided to the court will be on the
19 record and provided to the parties in the case. In the process of listening to
20 and inviting the child's input, the court must allow but not require the child to
21 state a preference regarding custody or visitation and should, in an age-
22 appropriate manner, provide information about the process by which the
23 court will make a decision.
24

25 (5) In any case in which a child will be called to testify, the court may consider
26 the appointment of minor's counsel for that child. The court may consider
27 whether such appointment will cause unnecessary delay or otherwise
28 interfere with the child's ability to participate in the process. In addition to
29 adhering to the requirements for minor's counsel under Family Code section
30 3151 and rules 5.240, 5.241, and 5.242, minor's counsel must:
31

32 (A) Provide information to the child in an age-appropriate manner about the
33 limitations on confidentiality and indicate to the child the possibility
34 that information provided to the court will be on the record and
35 provided to the parties in the case;
36

37 (B) Allow but not require the child to state a preference regarding custody
38 or visitation (parenting time) and, in an age-appropriate manner,
39 provide information about the process by which the court will make a
40 decision;
41

1 (C) Provide procedures relevant to the child’s participation and, if
2 appropriate, provide an orientation to the courtroom where the child
3 will be testifying; and

4
5 (D) Inform the parties and then the court about the client’s desire to provide
6 input.

7
8 (6) No testimony of a child may be received without such testimony being heard
9 on the record or in the presence of the parties. This requirement may not be
10 waived by stipulation.

11
12 **(e) Responsibilities of court-connected or appointed professionals**

13
14 A child custody evaluator, a child custody recommending counselor, an
15 investigator, or a mediator appointed or assigned to meet with a child in a family
16 court proceeding must:

17
18 (1) Provide information to the child in an age-appropriate manner about the
19 limitations on confidentiality and the possibility that information provided to
20 the professional may be shared with the court on the record and provided to
21 the parties in the case;

22
23 (2) Allow but not require the child to state a preference regarding custody and
24 visitation (parenting time), and, in an age-appropriate manner, provide
25 information about the process by which the court will make a decision; and

26
27 (3) Provide to the parents of the child participating in the court process
28 information about local court procedures relevant to the child’s participation
29 and information about how to best support the child in an age-appropriate
30 manner during the court process.

31
32 **(f) Methods of providing information to parents and supporting children**

33
34 Courts should provide information to parties and parents and support for children
35 when children want to participate or testify or are otherwise involved in family law
36 proceedings. Such methods may include but are not limited to:

37
38 (1) Having court-connected professionals meet jointly or separately with the
39 parents or parties to discuss alternatives to having a child provide direct
40 testimony;

- 1 (2) Providing an orientation for a child about the court process and the role of the
2 judicial officer in making decisions, how the courtroom or chambers will be
3 set up, and what participating or testifying will entail;
4
5 (3) Providing information to parents or parties before and after a child
6 participates or testifies so that they can consider the possible effect on their
7 child of participating or not participating in a given case;
8
9 (4) Including information in child custody mediation orientation presentations
10 and publications about a child’s participation in family law proceedings;
11
12 (5) Providing a children’s waiting room; and
13
14 (6) Providing an interpreter for the child, if needed.

15
16 **(g) Education and training**

17
18 Education and training content for court staff and judicial officers should include
19 information on children’s participation in family court processes, methods other
20 than direct testimony for receiving input from children, and procedures for taking
21 children’s testimony.

22
23 **Advisory Committee Comment**

24
25 Rule 5.250 does not apply to probate guardianships except as and to the extent that the rule is
26 incorporated or expressly made applicable by a rule of court in title 7 of the California Rules of
27 Court.

SPRING11-SPECIAL: Family Law: Children’s participation and testimony in family court proceedings (Adopt rule 5.250)

(The proposed rule was originally circulated for comment as part of a larger proposal (SPR -36 Family Law: New, Restructured, and Amended Family Law Rules of Court) which has been deferred for Judicial Council consideration at a later date).

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
1.	Association of Family and Conciliation Courts Diane Wasznicky President, AFCC-CA Chapter Thousand Oaks	AM	The rule is primarily rule 5.250 which is the proposed rule on children testifying in the courtroom outlining the general analysis and suggested guidelines as to how this should occur with broad discretion in the courts. Although we agree there are some minor tweaks that might improve it and would dearly wish for some assurance that the needed training will occur and timely, we generally support this rule as a positive step in the right direction and certainly an improvement over the status quo.	Training has been provided at the Family Law Institute (2011) and at regional trainings for judicial officers, child custody mediators, and child custody recommending counselors Also, training programs developed on family law and child custody plans are underway to include content on this topic.
2.	Christine N. Donovan, CFLS Sr. Staff Attorney Superior Court of Solano County	A	Agree – no comments.	No response required.
3.	Bryan Ginter Attorney and Mediator Ginter Family Law Sacramento	AM	There is confusion regarding whether FC Section 3042 creates an affirmative duty on the stated professionals to FIND OUT whether a child wishes to testify. In pertinent part, the Code states: "To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 SHALL indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney MAY also indicate to the judge that the child wishes to address the court or judge." (emphasis added). My interpretation of this is that	The proposed rule does not seek to create an affirmative duty to find out whether a child wishes to testify. The committee does not recommend changing the rule to include this statement as the rule is designed to follow Family Code section 3042 and such an interpretation is more appropriately left to legislative and appellate processes.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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		<p>these professionals do NOT have an AFFIRMATIVE DUTY to ascertain whether a child wishes to address the court; rather, these professionals only must bring the child's wishes to the court IF it is revealed, somehow, through the respective process, such as custody mediation, that the child wishes to testify. In other words, I read the Code to say: the mediators can conduct their process as "normal," but, IF it HAPPENS to come out that the child wishes to address the court, then the mediator (or other professional) MUST let the court know...but there is no affirmative duty on the mediator to discover this. Similarly, I do NOT interpret the Code placing such an affirmative duty on parties or attorneys either. Since there is already confusion regarding potential affirmative action required by the Code, I am requesting that the proposed CRC 5.250 be modified to indicate something along the lines of: “This Rule does not create an affirmative duty on those persons mentioned herein to discover whether a child wishes to address the court.” The proposed CRC does not, unfortunately, clarify this issue. Keep in mind that, if there IS an affirmative duty by the professionals, parties or attorneys to find out whether the child wishes to testify, this will impact certain counties more than others, such as Yolo County, which currently does NOT have a policy where the court mediators MUST interview any children at the initial custody mediation session. Therefore, an affirmative duty to discover the child’s wishes will likely cause counties like Yolo to modify their local rules to REQUIRE that children are present, at least at the</p>	
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			initial mediation session, so the professionals can actively discover the child’s wishes.	
4.	Virginia Johnson Staff Attorney Superior Court of San Diego County	A	Agree with proposed changes.	No response required.
5.	Carl Loeber	N/I	Please .. when you propose the new Rule of Court for the AB 1050 (2010) Do not allow the courts to substitute out-of-court statements of children to investigators for the testimony of the children who are the most important parties of interest in the trials.	In developing the rule of court, the task force and the committee sought to reflect Family Code 3042 and its requirement that the court consider the best interest of the child in determining whether the child should address the court. Additionally, as legislatively mandated, the proposed rule provides for alternatives when a child is precluded from addressing the court. Training on the rule and the statute has been provided and is planned to be offered for judicial officers, attorneys, and court staff.
6.	Los Angeles County Bar Association, Family Law Section Charles Wake	Not agree, unless modified	Rule 5.250 The LACBA Family Law Section opposes with this proposed new rule unless subsection (d) is amended. Subsection (d) as proposed does not adequately preserve the integrity of the judicial process, which relies on the right to cross-examine as an essential element of establishing the facts. Indeed, subsection (d) appears to specifically authorize admission of hearsay evidence. Subsection (d)(1) should be amended to include a new paragraph stating that: “(F) The court shall not obtain information from any alternative source that is not subject to, or does not allow the opportunity for, cross-examination.”	The task force and committee agree with the suggestion and recommend including the following language regarding cross-examination in section (d)(2): <u>If the court precludes the calling of a child as a witness and specifies one of the other alternatives, the court must require that the information or evidence obtained by alternative means and provided by a professional or non-party:</u> <u>(A) Be in writing and fully document the child’s views on the matters on which the child wished to express an opinion;</u>

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			<p>Subsection (d)(2) should be amended to include a new paragraph stating that: “(D) Any evidence obtained by alternative means must be competent and admissible. Nothing in this subsection authorizes the court to consider otherwise inadmissible evidence.”</p> <p>Subsection (d)(3) should be amended to state that the court should balance the parties’ right to cross-examine with the considerations stated in Cal. Evid. Code §765(b). A new subparagraph should be added stating that: “(E) Any method adopted by the court for taking a child’s testimony shall preserve the parties’ right to cross-examine.”</p> <p>Subsection (d)(4) goes beyond Cal. Evid. Code §765(b) (“Section 765(b)”) by requiring that “special care” be given whenever a child testifies no matter what his or her age. Because subsection (d)(4) imposes restrictions more stringent than Section 765(b), a significant question exists concerning its validity if promulgated. <i>See, e.g., California Court Reporters Ass’n, Inc. v. Judicial Council of Calif.</i>, 39 Cal.App.4th 15, 33-34 (1995). To the extent subsection (d)(4) is consistent with Section 765(b) it</p>	<p><u>(B) Describe the child’s input in sufficient detail to assist the court in its adjudication process;</u></p> <p><u>(C) Be provided to the court and to the parties by an individual who will be available for testimony and cross-examination;</u></p> <p>The task force and committee do not agree with the suggestion given that evidence, by definition, must be competent and admissible.</p> <p>The task force and committee recommend the rule allow for judicial discretion in determining the method for obtaining children’s testimony and in deciding whether parties will have the opportunity to cross-examine their children when they are witnesses.</p> <p>Under Family Code section 211, the Judicial Council may provide by rule for the practice and procedure in proceedings under the Family Code. The task force and committee seek to fulfill the legislative mandate of Family Code section 3042(h) requiring that the proposed rule of court address examination of all child witnesses. The task force and committee do not believe the proposed rule is inconsistent with Evidence Code section 765 in light of the statutory requirement that the rule address child witnesses of all ages.</p>
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			is redundant. Subsection (d)(4) should therefore be removed.	
7.	Eric Norris, Ph.D Thousand Oaks	N	Allowing children to testify holds for more potential for harm to the children than providing alternate means of transferring information to the court (e.g., minor’s counsel, child custody evaluation, non-confidential mediation.)	Family Code section 3042 mandates promulgation of a rule of court to implement the statute.
8.	Gary W. Norris Law Office of Gary W. Norris Camarillo	N	<p>I am opposed to proposed rule 5.250 for several reasons. In my view, the alternatives of mediator recommendations and/or custody evaluations provides a means for a child’s participation on custody issues.</p> <p>In my experience, the proposed rule will cause a substantial increase in appointments of children’s counsel to work through the various stages of advocacy to consider whether to allow participation of the child in the family court proceeding and/or how this might occur.</p> <p>I would expect a substantial increase in the cost of litigation both to the court, the parents and for minor’s counsel, as well as the attendant delay in proceedings while potential participation of minors in the proceeding is weighed and debated.</p> <p>Moreover, in the setting of emotionally charged custody disputes, parents and attorneys who are charged with the obligation to zealously represent their clients will, of course necessity, consider the strategic and tactical advantages of pressing for the child to assert a right to participate in the proceeding where the parents see an advantage in manipulating</p>	Family Code section 3042 mandates promulgation of a rule of court to implement this section. The proposed rule provides guidance on children’s participation as required but does not require appointment of minor’s counsel.

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			<p>the process to a given outcome. Providing a new procedure to inject the child into the proceeding will be used as a new weapon in contentious litigation.</p> <p>In my view, the best interests of the child are not served by such a process, and, in fact, all of the factors outlined above indicate the effect of the proposed rule will be detrimental to the child.</p> <p>The court rules and/or legislation would better serve the child to mandate mediator recommendation in all courts, rather than the path contained in proposed rule 5.250.</p>	<p>Family Code section 3042 requires the Judicial Council to promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody and visitation.</p>
9.	Hon. Mary Fingal Schulte Supervising Judge, Probate/Mental Health Panel Superior Court of Orange County	N/I	<p>Proposed rule 5.250 is silent on its applicability to probate guardianships of the person. The rule is mandated by Family Code section 3042(h), added to the section by Assembly Bill 1050 in the 2010 Legislature, effective January 1, 2012 (see section 3042(i)).</p> <p>Section 3042 is part of Chapter 2 of Part 2 of Division 8 of the Family Code, sections 3040–3048. Probate Code section 1514 concerns the appointment of a probate guardian for a minor. Section 1514(b) states:</p> <p style="padding-left: 40px;">(b) In appointing a guardian of the person, the court is governed by . . . Chapter 2 (commencing with section 3040) of Part 2 of Division 8 of the Family Code, relating to custody of a minor.</p> <p>Section 3042 therefore has some application to probate guardianships of the person. But neither amended section 3042 nor any of the Assembly and Senate analyses of Assembly Bill 1050 refer to</p>	<p>The task force and committee seek to fulfill the legislative mandate of Family Code section 3042 requiring the Judicial Council to promulgate a rule of court establishing procedures for the examination of a child witness, and guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody and visitation. The committee and task propose that an advisory committee comment be included with the proposed rule as follows: “This rule does not apply to probate guardianships except as and to the extent this rule is incorporated or expressly made applicable by a rule of court in title 7 of these rules.”</p>

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		<p>guardianship proceedings. Several of the latter refer to the family court but none discuss or even mention the probate department. Subdivision (h) of section 3042 reads:</p> <p>(h) The Judicial Council shall, no later than January 1, 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation.</p> <p>Probate Code section 1514(e)(2) provides:</p> <p>(2) If the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian, the court shall give consideration to that preference in determining the person to be so appointed.</p> <p>This provision is similar to Family Code section 3042(a) (as amended by AB 1050 merely to add the phrase “or visitation” following “custody”). Section 3042(a) states:</p> <p>(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody <i>or visitation</i>, the court shall consider, and give due weight to, the wishes of the child in making an order granting or denying custody <i>or visitation</i>. (Italics added.)</p> <p>But there are also differences between guardianships and family law custody proceedings. The Assembly Floor Analysis for AB 1050, defined the problem addressed by the bill in part as follows:</p> <p>The complexity of this situation is compounded by the fact that parents in family law</p>	
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			<p>proceedings, unlike in dependency proceedings, <i>still retain their decision-making authority, and their children are not actual parties to the case.</i> (Bill Analysis, Concurrence in Senate Amendments, analysis of Assembly Bill 1050 (2009-2010 Reg. Sess.), as amended August 2, 2010, emphasis added.)</p> <p>In probate guardianships, the parents of a minor for whom a guardian of the person is appointed no longer retain decision-making authority. Minors 12 years of age or older may petition for the appointment of a guardian for themselves, and may object to the appointment of a guardian on someone else’s petition. They must be personally served with the petition and Notice of Hearing (Prob. Code, §1511(b)); service on their parents on their behalf is insufficient. They thus may become parties. See Prob. Code, § 1510(a) and <i>California Guardianship Practice</i> 249, § 5.65 (Cont. Ed. Bar, 2011 edition.)</p> <p>Amended section 3042(c) sets the age of 14 as the age when a child has sufficient age and capacity to support the right to address the court concerning custody or visitation if he or she desires to do so. In guardianship practice, a 12 year old proposed ward not only is presumed to be of sufficient age to address the court, he or she can petition for the appointment of a particular person as his or her guardian or object to the petition of another asking for the appointment of a different person, or any person, as guardian.</p> <p>There are other differences between probate</p>	
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			<p>guardianships and family law custody proceedings. A probate guardianship will not ordinarily pit one of the child’s parents against the other, forcing the child to choose between them. Disputes between the parents involved in a dissolution action on issues other than custody or visitation may make the two main participants less amenable to an amicable resolution of the latter issues than the parties in a guardianship. A custody order in a dissolution action may be a choice in favor of one parent over the other, without evidence that the other parent would not also be a capable custodian. The child’s input in that situation may a critical factor in a close case. But the appointment of a nonparent as guardian over the objection of a parent would not be as close a case. Such an appointment requires findings that (1) a grant of custody to the parent would be detrimental to the child, and (2) appointment of the nonparent is required to serve the child’s best interests (Fam. Code, § 3041(a)). A guardianship action often follows a custody order in a dissolution action between the child’s parents and a demonstrated failure of the custody arrangement provided in that order. A change of custody in that circumstance may be more acceptable to and less traumatic for the child than the initial change of custody ordered in a dissolution action.</p> <p>The protections afforded by the proposed rule to children as witnesses, particularly younger children, are beneficial. But the courts and others interested in probate guardianships would prefer an opportunity to consider them in the unique circumstances of those proceedings, an opportunity that would not be</p>	
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			permitted if the statutory deadline for the rule applies to them. In my view, it does not.	
10.	Richard Rabbin Private Attorney Thousand Oaks	N	The rule proposed to allow children to testify is short sighted and potentially very damaging to the child and the family. This cannot be a recommendation made by those who are in the “front lines” of custody litigation. Children’s voice can come through therapists, evaluators, mediators, or minor’s counsel. This rule will allow parents to further use their children as tools against the other parent. Not a well thought out rule by intelligent people at work. This should be totally within the discretion of the judge.	Family Code section 3042 requires the Judicial Council to promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody and visitation.
11.	Gary R. Rick, Ph.D Ventura.	AM	The rule does not address the role of treating therapists who may come to the court via letter etc and claim the voice of the child. I suggest such information be accepted only by the prior request/order of the court. Otherwise, the court may be flooded with unwanted information of dubious meaning.	Family Code section 3042 requires the Judicial Council to promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody and visitation.
12.	Superior Court of Napa County Hon. Diane M. Price, Supervising Judge	N/I	1. <u>Applicability to Non-Recommending Courts</u> Generally speaking, we are unclear as to how this rule applies to mediators who do not make recommendations to the Court. For example, on page 71, pursuant to (d)(1)(A) mediators still have the discretion to interview children, but are required by (2)(A) to put the information in writing and by (C) to share that information with the court and parties. Currently, information provided to the mediator through a child interview in our non-recommending court is used only to inform the confidential mediation process. The interview is not written in detail or submitted to the Court. Section (2) of the proposal appears to disallow this practice by	1. Family Code section 3042 requires the Judicial Council to promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody and visitation. The rule is intended to apply in all counties regardless of what type of mediation service is provided. Family Code section 3180 currently allows all child custody mediators to interview children; section (d)(2)(A) would require that if the court specified an alternative for <i>obtaining</i> input by, for example, having a mediator interview a child and provide that information or evidence to the court, such

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		<p>requiring the interview to be put in writing and to be shared with the court and parties. We suggest that the “must” requirement in (2) be changed to “may” to allow non-recommending Court the flexibility to maintain its confidential process.</p> <p>If we are correct in our interpretation of section (2), does this mean mediators will be required to testify regarding their reporting of the child interview? What safeguards will be established for the documentation? In other words, will it be kept in the confidential portion of the file, will access be limited?</p> <p>2. <u>“Testifying” versus “Addressing the Court”</u> We are concerned that the rule goes too far in promoting “testifying” versus “addressing the court.” We understand that there are competing priorities that must be balanced to accomplish the goals of the rule (for example prohibition against ex parte communication between the judge and child) but are concerned that the trauma children will likely experience as a result of testifying about their family is not given enough weight in the current proposal.</p>	<p>information or evidence would need to be in writing and fully document the child’s view on the matters on which the child wished to express an opinion. If the interview information is not submitted to the court, which is likely in confidential mediation proceedings, there would be no requirement that it be in writing. The committee and task force have added “provided to the court” to further clarify this section.</p> <p>The committee and task force propose adding <u>(d)(2)(D) Be filed in the confidential portion of the family law file.</u></p> <p>2. Due process precludes evidence being considered by the judicial officer that the parties do not have the ability to respond to or notice of; therefore, the rule seeks to provide that when children address the court as witnesses, their participation should reflect standard requirements regarding submission of evidence and presentation of testimony, per the guidelines provided in the rule and under Evidence Code section 765 and any other relevant provisions.</p>
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		<p>The term “testifying” suggests that the child must be placed under oath, which we do not favor. We prefer options such as “hearing” from the child on the record in chamber” included as part of (3)9A).</p> <p>3. <u>Providing Information to Parents and Children</u> The introductory paragraph to section (f) needs clarification. It is clear from (e) that identified information <i>must</i> be provided to parents and children when children are participating in the family court process. The introduction to section (f) however says information <i>should</i> be provided, creating confusion. We suggest (f) include a sentence that says something similar to “Although courts are required to provide the information listed in (e), courts have flexibility to determine how the information should be provided.”</p> <p>4. <u>Training for Judge and Staff</u> We are supportive of (g) which recognizes the need for education and training for judges and court staff. We caution, however, that this needs to be intensive training to ensure development of the necessary knowledge and skills to properly interview children. Without such training, well intended interviews may result in bad information which in turn contributes to decisions that do not promote the child’s best interest.</p> <p>We are also concerned that the time commitment for an effective interview, which includes proper orientation of the child and rapport building, is beyond what high volume family law courts can</p>	<p>3. Section (e) applies specifically to child custody evaluators, recommending counselors, investigators, and mediators assigned or appointed to meet with a child in a family court proceeding. Section (f) applies more generally, suggesting that information be provided to parties and parents and support to children when they want to participate or are otherwise involved in family law proceedings.</p> <p>4. The committee recognizes the importance of providing high quality, appropriate training in this area. The rule does not require that court staff be employed to interview or meet with children; rather, when court staff are appointed or assigned to meet with children, the rule provides guidance and mandates regarding the information that must be provided and reflects existing law regarding statement of preference. The courts retain discretion as to how to best implement the requirements of Family Code section 3042.</p>
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			<p>currently provide. Ideally, court mediators would be extensively involved in this process to support judicial officers,; however, as stated above we are unclear as to the role of non-recommending mediators contemplated by this rule.</p> <p>5. <u>Effectiveness of Rule?</u> We are interested in knowing if the AOC will be collecting data on the outcomes of this rule? Will there be longitudinal studies to follow children who participates in family court?</p>	<p>5. The committee supports data collection on children’s participation, however, given current budget limitations, no plans are in place to systematically collect information from courts on children’s participation.</p>
13.	Superior Court of Orange County Family Law Operations	N/I	Rule 5.250(d)(4) and 5.250(e)(1)(B): the word “visitation” should be replaced by “parenting time.”	The rule now includes both terms – “visitation” and “parenting time.”
14.	Superior Court of San Diego County, Michael M. Roddy Executive Officer	AM	Page 66 – Child Custody Mediation – for all references to court-connected child custody mediation, why isn’t child custody recommending counseling used?	<p>Family Code section 3183 provides that on and after January 1, 2012, all court communications and information regarding the child custody recommending process shall reflect the change in the name of the process and the name of the providers. The mandate under Section 3183 relates to communications between the courts and litigants. To assist the courts in providing such information to litigants, the task force and committee recommended revising form FL- 314-INFO and approving new form FL-313-INFO (See item SPR11-39 titled “Family Law: Child Custody Information Sheets (approve form FL-313-INFO; revise form FL-314-INFO”).)</p> <p>The task force and committee did not propose changes to the child custody mediation rules and rules were not circulated to include child custody recommending mediation or mediators because the term “mediation” continues to encompass the work</p>

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				being done by child custody recommending mediators under Family Code section 3160. In addition, Section 3183 does not specifically require a change in the statewide rules of court.
15.	Superior Court of Santa Clara County Hon. Michael M. Clark, Mary Arand, Neal Cabrinha, Mary Ann Grilli	AM	<p>RULE 5.250(d) This subsection should be modified/revised. The section as currently drafted indicates that the court could order that the child to participate in mediation only if the court precluded the child from testifying. In counties with confidential mediation, mediation is not an appropriate method to “obtain input” from the minor child, as doing so would violate confidentiality.</p> <p>The court might allow the child to participate in mediation, either confidential or recommending, as a first step in either resolving the case or determining if the child really wants to testify. The court should not be restricted in allowing a child to participate in mediation to those cases where a decision has already been made concerning testimony.</p> <p>Appointment of minor’s counsel should also be an option to assist in learning what the child’s wishes are.</p> <p>RULE 5.250(d)(3), at line 20, change the word “should” to “may.” The court should retain discretion on how to handle children’s testimony.</p>	<p>The task force and committee’s proposal does not include limiting children’s participation in mediation, rather, this section addresses alternatives for the court to obtain input when a child has indicated an interest in addressing the court. Family Code section 3180 allows the mediator to interview a child. There is no section requiring or prohibiting a child from participating in child custody mediation. As noted, if a child participates in confidential mediation, the parents may obtain information that might be useful in their efforts to resolve their parenting dispute. The rule does not seek to limit the ability of the court or mediators to include children in the process, however, when information is provided to the court, the rule seeks to provide parameters for the receipt of that information.</p> <p>Section (d)(5) addresses the appointment of minor’s counsel when a child will be called to testify, however, the court retains the discretion to appoint minor’s counsel in a family law case regardless of whether the child wants to address the court.</p> <p>By using “should,” the court retains discretion and the rule provides guidance. Courts currently have the discretion to follow the procedures described, however, the rule seeks to provide the guidance required in Family Code section 3042.</p>

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			<p>5.250(d)(3): Add a statement that the judicial officer may choose not to wear a robe during the testimony of the child, as another means to make the [incomplete sentence.]</p> <p>5.250(d)(3)(B): add “any other person designated by the court.”</p> <p>5.250(d)(5): the on the first line in this section the word “will” should be replaced by “may”. The court should have discretion to appoint minor’s counsel before determining whether the child will actually be called to testify.</p> <p>5.250(d)(6) is really stating that no testimony of a child must be done off the record, even with a stipulation. This should be stated more clearly.</p>	<p>This is currently governed by statute and rule.</p> <p>This section provides examples but is not limiting.</p> <p>This section was designed to address those situations in which a child is going to testify; the law currently allows the court to appoint minor’s counsel at their discretion.</p> <p>The task force and committee agree and propose the following change: <u>“No testimony of a child may be received without such testimony being heard on the record or in the presence of the parties. This requirement may not be waived by stipulation.”</u></p>
16.	Superior Court of Shasta County Stacy Larson, Family Law Facilitator, Redding	AM	<p>CRC 5.250(b)(2): It would seem the child himself/herself could submit this information to the court through a guardian ad litem or concerned family member to ensure that the court can take appropriate action in appointing a guardian ad litem and counsel or have the child interviewed by a mediator/child custody recommending counselor.</p> <p>CRC 5.250(d)(3)(B): We should omit the colon after “such as” as it is improper.</p>	<p>The rule addresses children as witnesses not as parties and provides methods for obtaining input, including direct testimony and alternatives to testimony including appointment of counsel and interviews with child custody recommending counselors and mediators. It does not preclude the court from appointing a guardian ad litem in a given case.</p> <p>The change has been made.</p>
17.	Superior Court of Ventura County Caron Smith	AM	Summary of Comment	This section was designed to apply to third-party professionals not self-represented litigants or

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	<p>Family Law Case Coordinating Attorney</p>	<p>The removal of subsection (d)(2) of proposed rule 5.250 is dictated by the need to preserve judicial discretion, and to provide self-represented litigants the ability to effectively participate in the process. Short of that, the subsection should be modified to read as a nonexclusive list of suggestions.</p> <p>Preserve Judicial Discretion</p> <p>Family Code section 3042 requires the Judicial Council to promulgate procedures for a child witness and “guidelines” to obtain information by an alternative method. Proposed rule 5.250 is intended to be the response to this legislative mandate. Subsection (d)(2), however, creates a restraint on judicial discretion, not a guideline. Subsection (d)(2)(A) requires the court to order that all information “be in writing and fully document the child’s views.” Subsection (d)(2)(B) further requires that the information or input be in “sufficient detail to assist the court in its adjudication process.”</p> <p>Subsection (d)(1) of the proposed rule affirms the legislative intent to preserve judicial discretion to select the alternative means to obtain information. This discretion is illusory when coupled with the court’s restraint from determining how the information is presented. This requirement effectively constrains the court’s ability to select the best alternative means. Requiring a written document precludes the court from selecting any method that does not produce a written document.</p>	<p>parties. The following is proposed new language for clarification in this section:</p> <p style="text-align: center;"><u>If the court precludes the calling of a child as a witness and specifies one of the other alternatives, the court must require that the information or evidence obtained by alternative means and provided by a professional or non-party:</u></p> <p>(d)(2) is designed to require that information from professionals be in writing and in sufficient detail to allow parties the opportunity to respond and the court to make an informed decision.</p> <p>In a situation in which (d)(2) would apply, the child would not be called as a witness. Rather, the court would be receiving input by alternative means from someone other than the child. Even if the court allowed for video testimony from a third-party, the information regarding the child’s input should be in writing and in sufficient detail so as to reflect as much input accurately from the child and allow the parties the opportunity to respond.</p> <p>Under (d)(2), the information about the child’s input</p>
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		<p>For example, the court may decide the best alternative method is the use of a video, a modified version of Skype, or other technology based method. The rule, as written, would not allow the court to order these methods, or other technological innovations. Courts must be allowed to determine, on a case-by-case basis, the best method for obtaining information and input from a child, considering among other things, the child’s emotional needs, and the facts of the case.</p> <p>Participation of Self-Represented Litigants</p> <p>Proposed rule 5.250 (d)(1) allows the parents of the child to be a source for to obtaining input and information from the child. The strict requirements of subsection (d)(2), preclude all but the most sophisticated self-represented parents from being able to provide this information to the court in the manner required.</p> <p>The Elkins Family Law Task Force’s Final Report and Recommendations at page 8 laments that some local rules and procedures “have had the unintended consequences of creating barriers.” The requirements listed in subsection (d)(2) create the type of barrier the Elkins Task Force condemned. The California Supreme Court in <i>Elkins v. Superior Court</i> envisioned that “Proposed rules could be written in a manner easy for a layperson to follow, be economical to comply with, and ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court.” Proposed rule 5.250 (d)(1), falls completely short of the Court’s vision.</p>	<p>would be provided to the court by someone other than the child since the child will not be a witness. The rule provides for judicial discretion in hearing directly from children, but provides guidance for information from third parties so as to obtain the best detailed information about the child’s input as possible when the child is not a witness.</p> <p>See comment above and new language proposed for (d)(2) clarifying that this input is from non-parties.</p>
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			<p>The rule is clearly written for professionals. “Adjudication” is a term not used, nor understood by laypeople. Many self-represented litigants do not have the capacity to produce the document required in subsection (d)(2)(A). In addition to not being familiar with the legal terms of art replete in the rule, many litigants read at a 4th grade level. In addition, for many, English is their second language. For these self-represented litigants, producing a written document that comports with the proposed rule is difficult, if not impossible. If a parent were to try to hire someone to help them comply with the rule, they likely would find the cost prohibitive. As a result, their opportunity to present their case is lost.</p> <p>In addition, the requirement of a written report by a third party professional (such as a child custody evaluator or investigator) will impose an additional financial burden on the party seeking to present the evidence. The additional cost may effectively preclude the party from being able to comply. If the court decides to obtain the information from a child custody recommending counselor, there would be an additional burden on court resources, which are already inadequate to meet the needs of the families we serve.</p> <p>Proposed rule 5.250 (d)(2) runs contrary to perhaps the most significant charge of the Elkins Family Law Task, to propose measures to ensure access to justice for family law litigants.</p>	
18.	Trial Court Presiding Judges Advisory Committee	N	Proposed rule 5.250 (d)(2) (Guidelines for receiving testimony and other input) p. 69	

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	<p>(TCPJAC)/Court Executive Advisory Committee (CEAC) Joint Working Group</p>		<p><input checked="" type="checkbox"/> Potential Fiscal Impact <input checked="" type="checkbox"/> Increased training needs <input checked="" type="checkbox"/> Increased Staff Workload</p> <p>This proposal will create the following impacts on the courts:</p> <ul style="list-style-type: none"> • Possible increase in court staff workload as it is unclear whether the duty to inquire as to whether or not a child wishes to testify is an affirmative duty on court staff professionals. • Fiscal impact - It is anticipated that these rules will result in increases in the appointment of counsel for the child which could have a significant fiscal impact. • Fiscal impact - Increases to accommodate remote testimony and other alternatives to testifying (e.g., court reporters or listening devices) will have a fiscal impact. • Fiscal and workload impact - Increases in hearing time are expected when alternative methods are required to take testimony of children. 	<ul style="list-style-type: none"> • The rule does not propose that a duty be imposed on court staff or any professionals to inquire whether or not a child wishes to testify. Likewise, the statute does not impose an affirmative duty on court staff professionals to inquire as to whether a child wishes to testify. • The proposed rule does not require appointment of minor’s counsel. The rule is mandated by amendments to Family Code section 3042 and provides guidance for courts on receiving input from children. • The alternatives to testifying are provided as options for courts to use at their discretion and are not specifically required. Family Code section 3042 requires courts to consider alternative methods of receiving children’s input when they preclude calling child as a witness; the rule offers some discretionary options and does not seek to be all-inclusive. • Family Code section 3042 (not the proposed rule) imposes the requirement that when a child who wants to address the court is precluded from doing so, alternative methods must be used; the
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Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SPRING11-SPECIAL: Family Law: Children’s participation and testimony in family court proceedings (Adopt rule 5.250)

(The proposed rule was originally circulated for comment as part of a larger proposal (SPR -36 Family Law: New, Restructured, and Amended Family Law Rules of Court) which has been deferred for Judicial Council consideration at a later date).

All comments are verbatim unless indicated by an asterisk (*).

			<ul style="list-style-type: none"> • Increase in court staff workload - Subsection (f) imposes informational requirements that could increase time for mediation, development of materials, etc. • Increase in judicial and court staff workload - Subsection (g) imposes educational requirements for staff and judges. • Increase in court staff workload - Child custody recommending counselors, employed by the court, may see an increase to their workload in complying with the new provisions that require information or evidence obtained by alternative means, when a child is precluded from being called as a witness. 	<p>rule provides some options for those alternatives, not all of which would require additional hearings.</p> <ul style="list-style-type: none"> • Subsection (f) as proposed provides guidance to courts suggesting what type of information should be provided to parents and children but does not impose a requirement. • Subsection (g) as proposed suggests that educational content for judicial officers and staff should include content related to this rule but does not impose any additional educational requirements. • Family Code section 3042, not the proposed rule, imposes the requirement that alternative methods be used when a child is precluded from addressing the court. Family Code section 3042(f), not the rule, also requires that child custody recommending counselors inform the court when they know a child wishes to address the court.
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Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.