

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR21-09

Title	Action Requested
Family Law: Changes to Notice Regarding Confidentiality of Child Custody Evaluation Report	Review and submit comments by May 27, 2021
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise form FL-328	January 1, 2022
Proposed by	Contact
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Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes revising the mandatory coversheet for all child custody evaluation reports. The proposed revisions to form FL-328 are needed to reflect the more stringent limitations on access to child custody evaluation reports involving serious allegations of child sexual abuse or child abuse conducted under Family Code section 3118.¹

Background

Effective January 1, 2021, the Judicial Council adopted *Confidential Child Custody Evaluation Report* (form FL-329) to serve as the standardized template for all information necessary to provide a full and complete analysis of a child custody evaluation involving serious allegations of child sexual abuse or child abuse under section 3118.² The Judicial Council also amended rule 5.220 of the California Rules of Court to differentiate between the requirements for child custody evaluations conducted under section 3111 and those under section 3118.

¹ All further statutory references are to the Family Code.

² The report is found at: <https://jcc.legistar.com/View.ashx?M=F&ID=8771124&GUID=146EBAE9-AD1F-4DD3-ACC0-CA59E7F6E939>.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.

On further review of the amendments to section 3118, the committee identified changes needed to an additional form—*Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328)—to fully implement the mandate of the statute. Per amended rule 5.220, effective January 1, 2021, this form is required to be used as the coversheet for child custody evaluations conducted under section 3111³ and section 3118.⁴

Child custody evaluations conducted under sections 3111 and 3118 have different statutory requirements relating to those persons or organizations who can access the report. For example, evaluation reports under section 3111 may be made available as described in subdivision (b):

The report shall not be made available other than as provided in subdivision (a)⁵ or Section 3025.5, or as described in Section 204 of the Welfare and Institutions Code or Section 1514.5 of the Probate Code. Any information obtained from access to a juvenile court case file, as defined in subdivision (e) of Section 827 of the Welfare and Institutions Code, is confidential and shall only be disseminated as provided by paragraph (4) of subdivision (a) of Section 827 of the Welfare and Institutions Code.

For evaluation reports under section 3118, subdivision (b)(6) provides that the evaluator or investigator shall:

File a confidential written report with the clerk of the court in which the custody hearing will be conducted and which shall be served on the parties or their attorneys at least 10 days prior to the hearing. On and after January 1, 2021, this report shall be made on the form adopted pursuant to subdivision (i). This report may not be made available other than as provided in this subdivision.

The committee proposes revising form FL-328 to reflect these statutory differences, as described in the following section.

The Proposal

The committee proposes revising the content under “Access to the Report” as follows:

- Add a bullet point with the title “Report conducted under Family Code section 3111”;

³ Section 3111 is found at:

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=3111&lawCode=FAM

⁴ Section 3118 is found online

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=3118&lawCode=FAM

⁵ Family Code section 3111 (a) provides, in pertinent part, that the child custody evaluation “shall be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys, and any other counsel appointed for the child pursuant to Section 3150.”

- Add a second bullet point entitled “Report conducted under Family Code section 3118”; and
- Under each new title, specify to whom the report may be made available.

Section 3111(b)(6) specifies that the evaluator must file the report with the clerk of the court and serve it on the parties or their attorneys. Therefore, the form would provide that the following persons have access to the report: the parties and their attorneys, family court judicial officers, and family court employees. While the statute is silent about counsel appointed to represent a child, section 3150 specifies that the child’s counsel must also be served with the report.⁶ Thus, form FL-328 would provide that counsel appointed to represent a child also has access to the report.

Other minor revisions would:

- Make the form gender neutral by replacing the reference to “his or her evaluation” in the first sentence of the form with “the evaluation”;
- Move the entries for “Monetary Sanctions” and “Attorney’s Fees and Costs” under the heading “Potential Consequences for the Unwarranted Disclosure of the Report” to avoid redundancy; and
- Simplify the language under “Unwarranted Disclosure of the Report” to focus on the definition of unwarranted disclosure.

Alternatives Considered

The committee considered delaying proposing changes to form FL-328 until the next spring (2022) cycle. However, the committee agreed that it is imperative that the form be revised to (1) protect the confidential child custody report; (2) advise parties and their attorneys, as well as court employees that they must not disclose the child custody evaluator’s report involving serious allegations of child sexual abuse to the same persons or organizations who may receive child custody evaluation reports under section 3111; and (3) identify those persons or organizations who are authorized to receive the report under section 3118.

When considering alternatives, the committee noted the potential consequences for an unwarranted disclosure of the child custody report found in the Family Code and case law. Specifically, section 3118 provides that the court can impose a penalty for the unwarranted disclosure of a child custody evaluation report. Further, the Court of Appeal in *Marriage of Anka & Yeager* (2019) 31 Cal.App.5th 1115, did impose a large monetary sanction (\$50,000) against an attorney in the case for the unwarranted disclosure of a child custody evaluation report.

⁶ Family Code section 3150 can be found at: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=3150&lawCode=FAM.

As currently drafted, when the child custody evaluator attaches the report involving a serious allegation of child sexual abuse to *mandatory* form FL-328, a party or a court employee is likely to be under the impression that the report may be disclosed to any of the persons or organizations listed on the form (including the juvenile court, social services workers, and law enforcement officers) in the same manner as a report conducted under section 3111; this is incorrect.

Disclosing the section 3118 evaluation report as currently shown in the form could potentially subject the party or court employee to sanctions. Therefore, the committee decided to propose changing the form as previously described. In addition, the committee directed staff from the Center for Families, Children & the Courts to provide education and training to court professionals about the changes needed to form FL-328 for all reports conducted under section 3118.

The committee also considered whether the form should include space for the court's "filed" stamp. Although the child custody evaluator's report under section 3118 (*Confidential Child Custody Evaluation Report* (form FL-329)) includes a space for the court's file stamp, form FL-328 is still required to be the cover page to that report.⁷ Thus, some committee members raised concerns that not being able to place a file stamp on form FL-328 could cause confusion for court clerks about how to process the confidential evaluation.

In light of the above, the committee recommended adding a specific question to receive feedback from the courts about whether there is a need for a file stamp on the cover sheet under their current business practices. Given that form FL-328 has not included a file stamp since its adoption on January 1, 2010, it may not be an issue or conflict with existing court procedures for filing the reports. Nonetheless, the committee believes that feedback from the courts would be valuable in terms of developing a form that works well in all courts, whether the confidential report of the evaluation is filed with the clerk at the window or is e-filed with form FL-328 attached.

Fiscal and Operational Impacts

The impact to the courts includes costs to copy the new and revised forms, as well as the cost to educate court-connected child custody evaluators about the changes to form FL-328. These costs are required to have the mandatory form comply with the Family Code.

⁷ Form FL-329 is found at: <https://www.courts.ca.gov/documents/fl329.pdf>.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Are there any concerns about the proposed language in form FL-328 regarding those persons who may have access to the evaluation report under Family Code section 3118 (for example, are the proposed revisions consistent with statute)?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Neither the current form nor the proposed revised form includes a file stamp box. Should form FL-328 be revised to include a file stamp box? (For example, does having (or not having) a file stamped box affect efficiency in processing the confidential child custody reports? Would including a file stamp box help improve existing court procedures for filing the reports compared to the current version of form FL-328, that does not include one?)
- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Form FL-328, at page 6
2. Link A: Fam. Code, § 3111,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3111
3. Link B: Fam. Code, § 3118,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3118

Notice Regarding Confidentiality of Child Custody Evaluation Report

1 Case name:

2 Case number:

If directed by the court, the child custody evaluator must file a written, confidential report of the evaluation. At least 10 days before any hearing regarding custody of the child, the report must be filed with the clerk of the court and served on the parties or their attorneys and counsel appointed for the child.

Important Notice: This form must be attached as the first page of the child custody report. The child custody evaluation report **MUST NOT** become part of the public court file. It is confidential and private.

THE ENCLOSED CHILD CUSTODY EVALUATION REPORT IS CONFIDENTIAL

Unwarranted Disclosure of the Report

You must not make an unwarranted disclosure of the contents of the child custody evaluation report. A disclosure is unwarranted if it is done either recklessly or maliciously and is not in the best interest of the child.

Potential Consequences for the Unwarranted Disclosure of the Report

- **Monetary Sanctions:** The court may order a fine against the disclosing party in an amount that is large enough to prevent that person from disclosing information in the future.
- **Attorney Fees and Costs:** The sanction may also include reasonable attorney fees, costs incurred, or both, unless the court finds that the disclosing party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Access to the Report

- **Report conducted under Family Code section 3111**

This report may not be made available to anyone other than the following (Fam. Code, §§ 3025.5, 3111):

- a. The parties and their attorneys (including attorneys from whom the parties seek legal representation) and attorneys appointed to represent the child
- b. Court professionals who would receive it directly from the court to do their job, including:
 - Family court judicial officers
 - Family court employees
 - Family law facilitators
 - Juvenile court judicial officers
 - Juvenile probation officers
 - Child protective services workers
 - Law enforcement officers
 - Probate court judicial officers
 - Guardianship investigators
- c. Others, but only by court order

- **Report conducted under Family Code section 3118**

This report of a serious allegation of child sexual abuse or an allegation of child abuse may not be made available to anyone other than the following (Fam. Code, § 3118; Cal. Rules of Court, rule 5.220(g)(2)):

- The parties and their attorneys
- Family court judicial officers
- Family court employees
- The attorney appointed to represent the child under Family Code section 3150

Information About Child Custody Evaluations

For more information, visit the California Courts Online Self-Help Center: www.courts.ca.gov/selfhelp. See also Family Code sections 3110–3118 and 3025.5, and rules 5.220 and 5.225 of the California Rules of Court.