

**CHAPTER 11  
CHILD CUSTODY AND VISITATION**

**Rule 5.11.1**

**Child Custody Recommending Counseling**

**A. FCS Counseling Sessions.** Detailed and important information about FCS counseling procedures before, during and after the counseling session is available online or from FCS (*Family Court Services Child Custody Recommending Counseling Information Sheet*, form SDSC FCS-022) and should be read by the parties no later than one week before the session.

**B.** Absent a court order, an FCS session may be set only once every 12 months.

**C. Cancellation, Rescheduling and Sanctions**

**1. Cancellation.** Only the moving party in an RFO may request that an FCS session be cancelled. This request must be made by notifying FCS directly, no later than 4:00 p.m. on the court business day before the session. The moving party is responsible for notifying the other party of the FCS cancellation. The cancellation must be based on one of the following reasons:

- a. The custody/visitation issue is settled.
- b. The parties are using a private counselor.
- c. The other party has not received timely notice of the session date.

**2. Rescheduling.** The parties may ask to reschedule an FCS session one time by notifying FCS directly of their joint agreement to reschedule, no later than 4:00 p.m. on the court business day before the session. All subsequent requests to reschedule require a court order.

**3. Sanctions.** The following conduct is good cause to order monetary sanctions of up to \$1,500 pursuant to Code of Civil Procedure section 177.5:

- a. Failure to timely cancel an FCS session.
- b. Failure to timely reschedule an FCS session.
- c. Failure of the moving party to notify the other party of a cancelled session.
- d. Failure to attend the counseling session.

**D. Materials for FCS Review**

**1.** No documents may be submitted to FCS for the counselor's review absent either a court order or a specific request for the materials by the counselor.

**2.** A party seeking a court order that documents be submitted to FCS for review must prepare a Notice of Lodgment attaching copies of the proposed documents and must serve the Notice of Lodgment with attached documents on the other side prior to requesting the court order.

**3.** If the court issues an order granting a request that materials be submitted to FCS for review, the requesting party must provide FCS with a conformed copy of the court order and a copy of those documents as to which the court has granted the request.

**4.** When FCS requests documents from one of the parties, the responding party must provide copies of the submitted documents to the other side as soon as possible and no later than when the requested documents are submitted to the FCS counselor.

**E. Ex Parte Communication with FCS.** Ex parte communications between FCS counselors, parties, attorneys, including minors' counsel, are governed by Family Code section 216 and California Rules of Court, rule 5.235.

**F. Peremptory Challenge.** A peremptory challenge of an FCS counselor is not allowed.

**G. Counselor Reassignment Due to a Conflict of Interest.** Before or during a counseling session, if a party or the counselor discovers a conflict of interest, the matter must be brought to the attention of FCS management for consideration of reassignment to a different counselor.

**H. Complaint Procedure.** Complaints about an FCS counselor must be submitted on the *Family Court Services Complaint Form* (form SDSC FCS-044) which is available online or from FCS. A complaint may not be based on a party's or an attorney's dissatisfaction or disagreement with the counselor's recommendation or a related court order. (Adopted 1/1/2005; Rev. & Renum. 1/1/2006; Rev. 1/1/2007; Rev. & Renum. 1/1/2008; Rev. 1/1/2009; Rev. 1/1/2010; 1/1/2011; Rev. 1/1/2012; Rev. 1/1/2013; Rev. 1/1/2014; Rev. 1/1/2015; Rev. 1/1/2016; Rev. & Renum. 1/1/2017; Rev. 1/1/2018)

**Rule 5.11.2**

**Non-Confidentiality and Recommendation**

**A. Non-Confidential.** Unless otherwise ordered by the court, all child custody recommending counseling in San Diego County is *non-confidential* as between the counselor, the court, the parties and their attorneys, but remains confidential as to the public.

**1. Confidentiality of Reports.** The confidentiality of FCS reports is governed by statute including, but not limited to, Family Code sections 3025.5 and 3177.

## **B. San Diego is a “Recommending” County**

### **1. FCS Report.**

a. If the parties reach an agreement during the FCS session and both parties are self-represented, the counselor may prepare a written agreement that will be approved and signed by the parties and filed with the court.

b. If the parties do not reach an agreement during the FCS session, the counselor will submit a comprehensive written report to the court that includes, but is not limited to, a custody and visitation recommendation and the reasons for the recommendation.

**2. Court’s Consideration of Report.** Absent timely evidentiary objections, the entire FCS report will be considered by the court and may be used as a basis for the court’s order.

**C. Subpoena Process.** As employees of the Superior Court, witness subpoenas for FCS counselors, are governed by Government Code sections 68097.1 and 68097.2, including the subpoenaing party’s obligation for all statutory fees and salary reimbursements.

**1. Counselor’s Availability and Service of Process.** Before serving the subpoena, the party must first contact FCS to confirm the counselor’s availability on the scheduled hearing date and time. After confirmation of the counselor’s availability, FCS must be served with the subpoena at least 10 calendar days before the hearing along with the required fee deposit.

### **2. Hearing Off-Calendar or Continued**

a. If the counselor’s appearance will no longer be required, the subpoenaing party must notify FCS at their earliest opportunity.

b. If the counselor’s appearance will still be required, but for a continued hearing date, a new subpoena will not be necessary *if* the subpoenaing party does both of the following: (1) contacts FCS, at their earliest opportunity, to determine the counselor’s availability on the continued hearing date and time; and (2) immediately provides FCS written notice that the counselor’s appearance is required on the new date and time.

**3.** If at the time of the hearing, the FCS counselor is no longer an employee of the Superior Court, is on leave, or other circumstances prevent the Superior Court from producing the counselor as a witness in response to a subpoena, FCS will assign the case for another child custody recommending counseling session with a different counselor.

**4. Depositions.** The court will not order depositions of counselors absent a showing of extraordinary good cause.

**5. FCS Files.** Certain privileges attach to FCS files. The court will not order the production of any FCS documents without a prior in-camera review. A party desiring an in camera review must serve FCS with a subpoena duces tecum for the file/documents at least 15 calendar days before the trial or hearing. If an objection is received, the subpoenaing party must file an RFO compelling the in-camera review.

(Adopted 1/1/2005; Renum. 1/1/2006; Rev. 1/1/2008; Renum. & Rev.1/1/2012; Rev. 1/1/2013; Rev. 1/1/2014; Rev. 1/1/2015; Rev. 1/1/2016; Rev. & Renum. 1/1/2017; Rev. 1/1/2018; Rev. 1/1/2019; Rev. 1/1/2020)

## **Rule 5.11.3**

### **Reserved for Future Use**

(Adopted 1/1/2005; Rev. & Renum. 1/1/2006; Rev. 1/1/2007; Rev. & Renum. 1/1/2008; Rev. 1/1/2009; Rev. 1/1/2010; Renum. & Rev. 1/1/2011; Rev. 1/1/2012; Rev. 1/1/2013; Del. 1/1/2014; Renum. 1/1/2017)

## **Rule 5.11.4**

### **Private (Non Court-Connected) Child Custody Counseling**

**A. Stipulation.** The parties may stipulate to use a private child custody counselor at the parties’ own expense. The private counseling may be confidential or non-confidential as agreed to by the parties.

**B. Qualifications.** It is the parties’ obligation to investigate and know that a private counselor meets the statutory qualifications, training and continuing education requirements.

**C. Formal Order.** It is the parties’ obligation to prepare a formal stipulation and order for the court’s signature with the statutorily required content before participating in private counseling.

**D. Agreements.** If the parties reach an agreement, the private counselor will prepare a report setting forth the terms of the agreement. If the counseling was stipulated as non-confidential, either party or the counselor may submit the report to the court.

### **E. Unresolved Issues**

**1. Confidential Counseling.** If no agreement is reached and the private counseling was stipulated to as confidential, the parties must then participate in non-confidential counseling before the matter is heard by the court. This non-confidential counseling may be either with a private counselor or with FCS.

**2. Non-confidential Counseling.** If no agreement is reached and the private counseling was stipulated to as non-confidential, the counselor will submit a full written report with a recommendation and reasons for the recommendation to the parties, their attorneys and the court before the hearing.

**3. Court’s Consideration of Report.** Absent timely evidentiary objections, the private counselor’s entire written report will be considered by the court and may be used as a basis for the court’s order regardless of whether the report is admitted into evidence.

**F. Ex Parte Communication with the Private Counselor.** Communications between a private counselor, parties, and attorneys, including minors' counsel, are governed by the provisions of Family Code sections 216 and 1818. (Adopted 1/1/2008; Rev. 1/1/2010; Renum. & Rev. 1/1/2011; Rev. 1/1/2012; Rev. 1/1/2013; Rev. 1/1/2015; Renum. 1/1/2017; Rev. 1/1/2019)

#### **Rule 5.11.5**

##### **Child Custody Evaluations**

**A. Order Appointing Evaluator.** The court may order a child custody evaluation in accordance with the law.

1. The *Order Appointing Child Custody Evaluator* (form FL-327) may be supplemented by and/or attached to a separate stipulation prepared by the parties. It is the responsibility of the parties to ensure that the form and content of the order, including but not limited to, the purpose and scope of the order, complies with the law. Failure to ensure the order complies with the law may be considered as a factor in a party's objection related to the evaluator's report.

2. Parties must immediately provide a copy of the order to the appointed evaluator.

**B. Finding a Qualified Private Child Custody Evaluator**

1. The specific criteria required under the law, including licensing, education and training, for a private mental health professional to be qualified as a court-appointed child custody evaluator is available on the California Court's website. The list of qualifications may then be used to search through any standard public resource, such as the internet, to find a mental health professional who meets all the legal criteria.

2. A private court-appointed evaluator must be able to sign under penalty of perjury and file a *Declaration of Private Child Custody Evaluator Regarding Qualifications* (form FL-326) within 10 days of the appointment.

3. The court does not maintain a list of qualified evaluators nor does it endorse any mental health professional.

4. The parties are responsible for ensuring a private child custody evaluator meets all the legal qualifications.

**C. Qualifications Declaration.** The parties are responsible for ensuring the timely filing of the qualifications declaration signed by the private evaluator. Failure to ensure the timely filing of the qualifications declaration may be considered by the court as a factor in a party's objection related to the evaluator's report.

**D. Child Custody Evaluator's Report.** The court may consider the evaluator's report in accordance with the law, including proceedings indirectly related to child custody or visitation.

**E. Peremptory Challenges and Challenges for Cause**

1. A peremptory challenge of a private evaluator appointed by the court is not allowed.

2. A party may challenge an evaluator for cause by noticed motion upon a substantial showing that the evaluator is biased or prejudiced against one of the parties or otherwise unable to render a fair and impartial evaluation.

**F. Withdrawing from a Case.** A private evaluator may petition the court to withdraw from the case for good cause by delivering a letter addressed to the trial judge assigned to the case stating the reasons for their request. A copy of the letter must also be served on all parties and minor's counsel. Any objections to the request to withdraw must be filed with the court and served on the evaluator, all parties, and minor's counsel, within 10 court days of notice of the petition to withdraw. Based on the court's review of the petition and any objections, the court may schedule a hearing or decide the matter by issuing an ex parte order. All withdrawals require a court order.

**G. Ex Parte Communications.** Ex parte communications between an attorney, including minor's counsel, and the court-appointed evaluator, are governed by Family Code sections 216 and 1818 and California Rules of Court, rule 5.235.

**H. Complaints.** Complaints about an evaluator must be in writing and addressed to the supervising judge of the family law division. Complaints must be as specific as possible in describing what the evaluator did or did not do. The supervising judge, or his or her designee(s), will investigate, evaluate and respond to the complaint in due course.

(Adopted 1/1/2005; Renum. 1/1/2006; Rev. 1/1/2007; Rev. 1/1/2008; Rev. 1/1/2010; Renum. & Rev. 1/1/2011; Rev. 1/1/2012; Rev. 1/1/2013; Rev. 1/1/2016; Renum. 1/1/2017; Rev. 1/1/2019)

#### **Rule 5.11.6**

##### **Supervised Visitation Providers**

**A. List.** A list of visitation monitors is available through the San Diego Superior Court Program Resource List (PRL) which is online. The individuals/entities have identified themselves to the San Diego Superior Court as visitation monitors. The visitation monitors are not affiliated with the court, and each visitation monitor is independently responsible for compliance with any and all applicable legal requirements. The court does not endorse, evaluate, supervise, or otherwise monitor the visitation monitors.

**B. Declaration of Qualifications.** All professional and non-professional supervised visitation providers must sign and file the *Declaration of Supervised Visitation Provider* (form FL-324), or a declaration containing the same qualifications information, before the first supervised visit.

**C. Qualifications.** It is the parties' obligation to investigate and know that a professional or non-professional supervised visitation provider meets the statutory qualifications, training and continuing education requirements.

(Adopted 1/1/2008; Rev. 1/1/2009; Rev. 1/1/2010; Renum. 1/1/2011; Rev. 1/1/2012; Rev. 1/1/2013; Rev. & Renum. 1/1/2014; Rev. 1/1/2015; Rev. 1/1/2016; Renum. 1/1/2017; Rev. 1/1/2019)