

Los Angeles Lawyer

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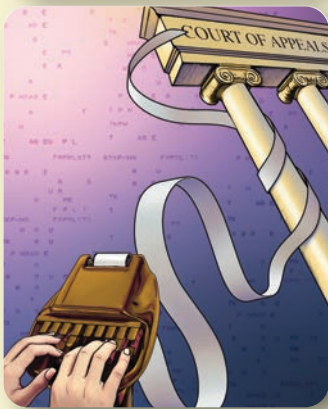
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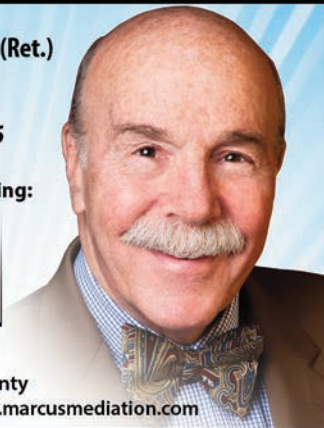
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FROM THE CHAIR

For one hundred years, President Woodrow Wilson's nomination of Louis Brandeis to the Supreme Court held the record at 125 days for the U.S. Senate to give its "advice and consent." However, on July 20, 2016, President Barack Obama's nomination of Judge Merrick Garland to

replace the late Justice Antonin Scalia surpassed that dubious record.

When the Supreme Court begins its new term on October 3, 201 days will have elapsed since Garland's nomination was announced. No vote or even a hearing will have been scheduled by the Senate, nor is either certain postelection. Majority Leader Mitch McConnell forecast this outcome by declaring in *The New York Times* that "the American people are choosing their next president, and their next president should pick this Supreme Court nominee."

The Supreme Court is effectively being held hostage by partisan politics. First, the U.S. Constitution does not limit a president's authority because he or she is a "lame duck." Further, an eight-member Supreme Court creates ample opportunity for deadlock.

A president's term does not end after three years and twenty-four days, or the time between Obama's second swearing-in and Justice Scalia's death. A *Washington Post* editorial noted, "Elections are supposed to provide regular and orderly guidance to government, not shut it down for months.... The only workable principle is that politicians be allowed—indeed, expected—do do their jobs for as long as the country has hired them."

The concept of U.S. senators using the American people to shield themselves from taking a perceived unpopular vote also has some historical irony. The Founding Fathers conceived of the Senate as a counterbalance against the possible "tyranny" that a popularly elected and democratic majority in the House could inflict on minority interests. For that reason, state legislatures chose senators under Article I, Section 3 until the Seventeenth Amendment became effective in 1913. Nevertheless, the Senate still retains some of its antidemocratic attributes by the election of only two senators per state.

Perhaps most important, the federal Constitution lacks the words "lame duck." A strict constructionist like Justice Scalia would almost certainly "roll over in his grave" by the nonexistent constitutional concept that a president, senator, or representative is stripped of his or her executive or legislative authority at some arbitrary and premature moment in time solely because their term of office is set to expire soon.

Finally, the legal ramifications of a Supreme Court deadlock were demonstrated in *United States v. Texas* in June. Unable to reach a majority decision, an appeals court ruling blocking Obama's immigration plan stood. This immediately affected the status of approximately five million undocumented immigrants threatened with deportation. It also could have set a precedent on executive authority on immigration matters and the standing of states to challenge that authority.

The Supreme Court needs a ninth justice now, not six or more months in the future when most of its cases will have been argued. Judge Merrick Garland is eminently well-respected and once was approved unanimously by many of the same senators who seek to deny him a hearing on his nomination and a vote. Regrettably, future Court nominees may find themselves in the same predicament where political considerations completely outweigh judicial merit. ■

Ted M. Handel is the 2016-17 chair of the Los Angeles Lawyer Editorial Board and Chief Executive Officer of Decro Corporation, a nonprofit housing developer, which has developed and manages affordable multifamily housing projects for low-income families.

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Joseph Brajevich General Counsel to the Los Angeles Department of Water and Power



JOSEPH BRAJEVICH | Before becoming general counsel to LADWP in 2016, Joseph Brajevich was a partner at Glaser Weill, LLP. He has also served as assistant general counsel to LADWP and counsel to the Port of Los Angeles, working on projects that included terminal construction and leasing, property development, and clean air standards. In private practice he represented both private and governmental entities in litigation, transactions and labor issues.

What is the perfect day? Every day. I have great kids, a job I love, and the opportunities available in the United States.

Where were you born? In Croatia, when it was under communist Yugoslavia.

As general counsel to the nation's largest municipal utility, what are your major job duties? Managing the day-to-day legal activities, setting the legal strategic and policy goals, and managing the unexpected.

How big is your department? There are 39 city attorneys in our department, and we have an annual \$6 billion budget.

You were assistant general counsel for LADWP for eight years. Is it better to be the big honcho? Of course.

LADWP is a revenue-producing, proprietary de-

partment of the city. How much did you give to the general fund last year? In the neighborhood of \$266 million.

LADWP was established more than 100 years ago. What are the biggest challenges for the future? The water challenge is the ongoing drought. The power challenge is being ahead of the curve on renewable energy.

In the nineteenth century, water was delivered by horse-drawn wagons. How is it delivered now? Fortunately for Los Angeles, we have many different sources. Part of our water comes from land holdings in the eastern Sierras. That water comes by gravity, a lot of which begins distribution through 72-inch water mains.

Was Chinatown fairly accurate about early efforts to acquire land and water rights? No, but it was a good movie.

Are Los Angeles residents saving enough water? We can never save enough, but the public has done a tremendous job. In the last ten years, our population has grown by one million people, but we use the same amount of water that we did ten years ago.

Average per capita water use is 131 gallons per day. What is the simplest way to cut back? Treat your water like you treat your money.

What about commercial entities? They do a tremendous job because it impacts their bottom line.

LADWP maintains a generating capacity of 7,600 megawatts. What does that mean? Technically, a lot. It translates to enough energy to keep all the lights on you see in Los Angeles.

How is this managed? One of the hardest jobs is the load dispatcher—it's intense. They have to forecast the demand and keep the lines at a certain level.

In 2015, 42 percent of the power supply was provided by coal. What is being done about this? We are drastically cutting back from coal. We just divested from our Navajo coal facility, so we are getting off at a faster rate than

is mandated.

Why is big coal so powerful? It was cheap once upon a time.

In 2007, LADWP started a long-term project to convert overhead power lines to underground. How is that going? It's easy when you're doing redevelopment, but when you launch the underground for the Wilshire corridor...

In the '80s, you went to UCLA and majored in political science. Are you a local Los Angeles boy? I am a San Pedro guy, pronounced "San Pea-dro." It is a unique community.

You graduated from Loyola Law School in 1991. Why did you want to become a lawyer? At a young age, I saw the law as the most effective way of making positive change.

Were you scared the first time you appeared in front of a judge? It was in federal court, and I had just been admitted to the bar—I felt the sweat building up.

With nearly 9,000 employees, what is the typical workers' compensation claim? Someone in the field to carpal tunnel syndrome; it's broad.

You have experience in both the private and public sector. What's the biggest difference? I get a bigger personal reward when I work in the public sector. Everything I do here impacts DWP customers.

What was your best job? This one. I love coming to work every day.

What was your worst job? I can still smell it—there was no mask, no ventilation. It was a parts manufacturing assembly line.

There have been accusations of transparency problems. What is being done about that? We have a transparency process. Last year, there were at least 63 community meetings for the rate process alone, but we can always improve.

LADWP has a pretty plush employment package, including tuition reimbursement, a generous pension plan, and an onsite fitness center.

Should rate payers be subsidizing these? Our retired CAO started out as a meter reader. Through the opportunities the department afforded, he worked his way up to CAO, and the rate payers benefitted by keeping experienced folks.

LADWP delivers 200 billion gallons of water yearly? What does that look like? You can fill up the Rose Bowl several times everyday.

According to a 2015 study ordered by Mayor Eric Garcetti, LADWP rates are lower than its neighboring utilities. Why? Planning by the folks who were here years ago and effective management by folks who are here now.

What characteristic do you most admire in your mother? Perseverance.

If you were handed \$10 million tomorrow, what would you do with it? I'd give a good chunk away to the Boys & Girls Clubs of the Los Angeles Harbor.

Who is on your music play list? From Ray Charles and Stevie Wonder to Croatian music.

What book is on your nightstand? *The Boys in the Boat*. I finally got around to it because I used to row at UCLA. And *A Life in Motion: An Unlikely Ballerina* by Misty Copeland.

Which magazine do you pick up at the doctor's office? One I'm too embarrassed to buy at a newsstand—*People* or *National Enquirer*.

What is your favorite vacation spot? I like variety; I like exploring.

What do you do on a three-day weekend? Combining spending time with family and going somewhere.

What are your favorite hobbies? Skiing and ocean kayaking.

Do you have any retirement plans? No.

Who is your favorite female movie star? Helen Mirren.

Which person in history would you like to take out for a beer? Booker T. Washington.

What are the three changes you would like to see in the world? Opportunities for our kids, an end to homelessness, and greater understanding amongst people.

Who are your two favorite presidents? Bill Clinton and Ronald Reagan, because they stuck to their principles but compromised to get stuff accomplished.

What would you like written on your tombstone? Never, ever gave up.

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The Benefits of a Judicial Council Coordination Proceeding

A JUDICIAL COUNCIL COORDINATION PROCEEDING (JCCP) is an organizational tool created by the California legislature that represents an important opportunity for young lawyers. Coordination brings to a single court two or more “civil actions sharing a common question of fact or law that are pending in different courts.”¹ A JCCP is a complex proceeding in which the coordination trial judge possesses wide latitude in management and decision making, as well as the discretion to conduct a trial or send the case to a different court for trial.² In order for the JCCP to be successful, it must be highly organized. Therefore, it is likely that once a coordination trial judge is assigned, case management orders will be entered quickly. The plaintiffs need to develop a leadership structure, and the defendants want to start setting up frameworks for pleadings and discovery. On the plaintiffs’ side, firms will vie for positions as liaison counsel, lead counsel, plaintiffs’ steering committee, or any other variant of leadership. A master complaint and master answer will be filed, and those pleadings will control the course of the case. In the flurry of motions and orders filed at the beginning of a JCCP, it is easy for an attorney other than the liaison or lead counsel to feel pushed aside. There are several opportunities, however, for a new lawyer to contribute and hone skills.

The groundwork for an effective JCCP is an effective leadership structure. While working for a well-known plaintiffs’ firm with a reputation for leadership in JCCPs and multidistrict litigation may facilitate this aspect of the process, a new or young solo practitioner may be intimidated by the big names entering the case. The key is to file the case early, be well-prepared, and reach out to the large firms to display eagerness for a leadership position. Perhaps they will not offer a leadership position right away, but there are always opportunities to be involved by a demonstration of skills, whether drafting special interrogatories, protective orders, or meet-and-confer letters.

Once in a leadership position, it is important to communicate with all parties involved, including the defense counsel, the plaintiffs’ steering committee, the court, and the court clerk. Other methods include setting up a private plaintiffs group on the case, ensuring every lawyer who filed a case is signed up for e-mail notifications of the message board postings. Instead of planning an in-person meeting, it may be helpful to set up a video conference call. Even though it may be necessary to provide some tutorials, the time saved from the traditional meeting format will be worth it. Serving on a committee that meets in person may require volunteering to start a Doodle in order to determine a convenient meeting time, thus avoiding a string of possibly contradictory e-mails.

The discovery process in a JCCP is highly streamlined and effective. First, it is likely that an early case management order will authorize only lead or liaison counsel to serve discovery. Thus, the defendant will only see one set of discovery from plaintiffs, and each plaintiff will not be drafting and serving individually. Conversely, each plaintiff will likely be preparing responses to a plaintiff fact sheet instead of responses to the traditional form interrogatories,

special interrogatories, and requests for production. A plaintiff fact sheet is prepared after a negotiation between lead counsel and contains questions that are generally unobjectionable. Lead and liaison counsel are responsible for taking and defending depositions. Traditionally, then, attorneys not in leadership positions do not attend depositions and are likely not permitted (through a case management order) to ask questions at depositions. However, a lawyer, especially a young lawyer, with a specific area of expertise should not shy away from making suggestions or providing input during the discovery process. By taking part in the case message board and providing quality feedback and suggestions on discovery and depositions he or she can become more valuable.

The JCCP process is an ideal vehicle to resolve cases efficiently. The court encourages substantive, and even dispositive, motions. This is beneficial for both plaintiffs and defendants. All sides are encouraged to determine special jury instructions early, file motions for summary adjudication to limit causes of action or defenses, and raise unique issues with the court. This process serves to 1) educate the judge (who may or may not be the trial judge) and 2) streamline the case for trial, which always has the effect of facilitating settlement. If the defendant hopes to rely on a far-fetched defense at trial, it can be flushed out by filing a motion that requires the defendant to introduce substantive evidence supporting his or her defense.

If briefing issues do not resolve the case, the JCCP procedure has a final bullet to assist the case—the bellwether process. The term bellwether is derived from the “ancient practice of belling a wether (a male sheep) selected to lead the flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray.”³ The same is true of plaintiffs in the JCCP context. Both sides can select certain cases to try before a jury to guide the resolution of the remaining cases. Under principles of collateral estoppel, the parties can be bound to the liability results of the bellwether cases and subsequently try only damages cases. For this procedure to be effective, the bellwethers must be chosen carefully. Even if the plaintiffs’ steering committee or designated trial counsel tries the case to the jury, it is important to remain involved. The trial attorney will value the perspective and assistance of an involved associate. In return, a new attorney can benefit from shadowing an experienced attorney and gain valuable experience throughout the process.

The JCCP process has only upsides for a new or young lawyer who is organized, communicates well, and is ready to participate. ■

¹ CIV. PROC. CODE §404 (i.e., in different counties, unlike the process of consolidation which joins two or more cases filed in the same county).

² See Cal. R. of Ct. 3.541.

³ In re Chevron U.S.A., Inc., 109 F. 3d 1016, 1019 (5th Cir. 1997).

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Avoiding Liability Issues While Enhancing Workplace Investigations

CRITICAL TO LIABILITY ISSUES and the quality of the working environment, workplace investigations have serious legal implications for subsequent litigation and human implications affecting day-to-day business operations. In many situations, investigations are mandatory. With respect to any action that may constitute discrimination, harassment, or retaliation, a prompt and thorough investigation is mandated by the California Fair Employment and Housing Act (FEHA).¹ There are also standards for these statutorily imposed investigations. For example, they must be undertaken in a manner that is prompt and thorough, and appropriate remedial action must be taken with respect to any findings of violation.² A review of these standards underscores the degree of obligation and why so many investigations are deficient and fail to protect the employer. In addition to the mandate of FEHA, other sources for the obligation to investigate include the OSHA regulation³ pertaining to working conditions and claims of employee misconduct in which the employer wishes to be protected from subsequent wrongful termination claims.

In this latter context these standards began to emerge when the California Supreme Court decided in 1998 *Cotran v. Rollins Hudig Hall International, Inc.*, in which the plaintiff had been accused of sexual harassment by two female employees.⁴ The employer conducted a thorough investigation and concluded the allegations were true, but they were in fact false. Both women later admitted that there had been no harassment but that they had been consensually involved with the plaintiff.⁵ Thus, the supreme court was faced with a situation in which the employer had thoroughly investigated and come to the good faith, but inaccurate, conclusion that harassment had occurred and terminated the plaintiff. This set of facts helped to initially define whether an employer had liability to the terminated plaintiff when his termination was based upon credible albeit inaccurate accusations.

Based upon the facts uncovered in *Cotran*, the supreme court began to establish the standard that would govern investigation requirements. In setting the initial standard for investigations, the supreme court concluded that it is for a jury to assess “through the lens of an objective standard”⁶ whether the termination was the result of “fair and honest reasons regulated by good faith on the part of the employer which are not trivial, arbitrary, capricious, unrelated to business needs or goals, or pretextual.”⁷ The court further held that there must be “a reasonable conclusion...supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.”⁸

The circumstances in *Cotran* underscore the importance of the statutory requirement that the investigation occur immediately upon notice to the employer that there is any reason to believe that there has been a violation and that the investigation must be legally “adequate.”⁹ *Cotran*’s progeny have further refined investigation requirements in addressing what constitutes an adequate investigation.

In *Silva v. Lucky Stores, Inc.*, applying the *Cotran* standard the court found that a misconduct investigation was adequate because 15 employees had been interviewed over a full month of investigation and no facts supporting any claim of pretext were advanced.¹⁰ In the context of upholding the investigation in *Silva*, the court emphasized that the investigator must be trained in the proper manner to conduct workplace investigations. The *Silva* court also held that methods of recording and memorializing witness interviews must be accurate, complete, and trustworthy.¹¹

In *Nazir v. United Airlines, Inc.*, the court found an inadequate

A professional investigation is how the employer convinces employees that they are treated with respect and fairness

investigation could not protect an employer from liability.¹² This finding was predicated on the premise that a failure to interview all potential witnesses rendered the investigation inadequate and incomplete. Of great significance, the court also held that failing to conduct a proper investigation was evidence of pretext in connection with the termination.¹³ The *Nazir* court further held that when the investigation was conducted by, or under the control of, an employee that was involved or potentially “has an axe to grind” (or someone within the control of or who reports to the person with an axe to grind), the investigation is tainted before it begins.¹⁴ The *Nazir* Court cited *Reeves v. Safeway*, in which the process was tainted along the way and in which the “cat’s paw” doctrine came into play rendering the outcome investigation ineffective and not credible.¹⁵ The cat’s paw doctrine involves one bad actor poisoning the well. The *Reeves* court stated: “If the supervisor makes another the tool for carrying out discriminatory action, the original actor’s purpose will be imputed to the tool.”¹⁶

Most recently, in *Mendoza v. Western Medical Center Santa Ana*, the court determined that the investigative process was tainted in a number of ways, rendering the investigation inadequate.¹⁷ The court held that the inadequate investigation was, in and of itself, evidence of pretext.¹⁸ There were a number of shortcomings in the investigation in *Mendoza*, in which one male employee reported sexual harassment against another. The employer interviewed the employees together and conducted interviews in a quasipublic manner (holding these discussions where they could be seen by numerous others).¹⁹ The investigation was conducted by an individual who was not a trained human resources investigator nor trained to be thorough in investigations.²⁰

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The court gave short shrift to the conclusion of the investigation that both the complainant and the alleged harasser were complicit in unprofessional behavior and that consequently both had been fired. The *Mendoza* court concluded that the employer seemed more interested in getting rid of a problem than getting to the truth.

Mendoza cited *Nazir* for the proposition that an inadequate investigation is evidence of pretext.²¹ *Mendoza* also held that the lack of a vigorous investigation by the defendants is evidence suggesting that the defendants “did not value the discovery of the truth so much as a way to clean up the mess that was uncovered” when *Mendoza* made his complaint.²² It is worth noting that the employer argued that there was a concession by the plaintiff’s expert that additional facts would not necessarily have been discovered had the alleged flaws in the investigation been addressed. The court noted, however, in that context that the question for the jury was the defendants’ subjective motivation in deciding to fire *Mendoza*, not whether the defendants had all the available material before them, and thus dismissed that line of argument.²³

The criteria for a legally adequate investigation, then, have been clearly established. Selection of the right investigator is a first critical step in conducting an effective, untainted investigation, which has the best chance of withstanding attack in subsequent litigation. The investigator should not be anyone involved in the issues at hand, including supervisors in the chain of command. As there are potential allegations of inappropriate training that have led to the alleged discrimination, harassment, or retaliation, having the investigation conducted by an individual in the chain of command lays open the risk of permitting the investigation to be conducted by someone who may become the target of a challenge that the investigation lacks independence and objectivity.

An investigation cannot be tainted in any respect. Thus, there may not be any express or implied pressures from the organization. When anyone in the chain of command indicates a preference as to the outcome of an investigation or expresses a desire to see it “done and over with,” the investigation is tainted because there cannot be any suggestion that the investigation is not aimed at getting to the truth in a thorough manner. Anything that puts pressure on the investigator to do otherwise potentially taints the investigation and will likely be an issue in the event of subsequent litigation.

It is critical that the investigator selected be well-trained, seeking the truth, and not subject to internal pressures that might later call into question the outcome or credibility of the decisions resulting from the investigation.

Investigations should only be undertaken by people who are well-versed in what constitutes violations of law as well as a prompt and thorough investigation. The investigator must know how to conduct investigations in a manner that sufficiently documents evidence and how to determine the nature and extent of a proper investigation. The more independent the investigator the better. Credibility is added when the investigation is undertaken by a third party rather than an employee of the company. Bringing in an outside investigator to conduct the investigation adds a layer of credibility as well as expertise. It lends strength to the ultimate conclusion and thus greater protection for the employer.

A well-trained, outside investigator who is not corporate legal counsel is the best choice for several reasons. Often, the obvious temptation may be to use company legal counsel; however, using in-house counsel leads to a myriad of problems. Hiring somebody whose job it is to represent the company and whose loyalty is to the company creates neutrality concerns at the outset. It is the job of organizational lawyers to protect the company. If placed in an investigatory role, that priority does not change.

Moreover, using the company legal counsel or attorney creates multiple roles for in-house counsel. Since the obligation to investigate any claim for discrimination, harassment, or retaliation is statutorily imposed, any dispute concerning the investigation is discoverable. Case law is clear that to rely upon an investigation to substantiate the fact that the organization satisfied its statutory obligation to engage in a prompt and thorough investigation, the investigation has to be produced. If it is not produced, it cannot be used. *Wellpoint Health Networks, Inc. v. Superior Court*²⁴ and other California courts have repeatedly reached the conclusion that a litigant must elect between claiming a privilege during discovery and not introducing the evidence at trial versus waiving the privilege for discovery and trial purposes.²⁵

That is just the beginning of the problem. At what point does the investigator no longer function as a neutral third party who is investigating but rather the organization’s lawyer again giving legal advice to his or her client. Communications from the company lawyer are not discoverable and protected by the attorney-client privilege. Communications from the investigator are part of the investigation and are discoverable, so the employer inherently becomes embroiled in a conflict over how much of the investigation communications can be accessed. The lesson is that the organization is best served by an investigator who is separate and distinct from the employer’s own legal counsel so that the neutrality of the former role can be maintained.

The investigation must be carefully planned, thorough, and inclusive. The investigator must thoroughly review allegations, policies, e-mail, and any other pertinent documents. He or she typically begins by preparing questions to use in conducting the interview—questions focusing on the issues presented, are the subject of substantial thought in advance of the investigation, and normally should be asked consistently at all interviews. The last aspect avoids the trap of asking only certain witnesses key questions and thereby missing critical information. The investigation must properly assimilate the information obtained, and the investigator should make credibility assessments.

If the answers to certain questions take the investigator in a new direction, the investigator should pursue this line of inquiry and explore the issues raised. Sometimes, witnesses may describe additional conduct that clearly violates policy by another employer, which may be ignored as a subject of inquiry because it appears not to be relevant to the present investigation. When it is later learned that this information was divulged to the investigator and nothing was done with it, the employer may be held accountable.

Investigations should also be conducted privately and with due respect for the employee who is the subject of the inquiry. Also, not only the employee who is the known subject of the inquiry but also the employees who are witnesses are often intimidated by the process. Thus, the investigator should be sensitive to the concerns that an investigation stirs up in all employees.

Credibility assessments and findings are critical to taking the remedial action that the FEHA requires. Appropriate remedial action is necessarily undefined because it has to fit all potential situations. When an investigator provides a report at the end of the investigation is the appropriate time to discuss the matter with legal counsel to determine the appropriate course of action. If there is some minor violation by a long-term employee, the responsive appropriate remedial action will differ from a substantial and ongoing course of harassing conduct that has been occurring or if the conduct is a singular occurrence but more severe. To aid in these decisions, the investigator’s credibility assessments are important. The investigator should determine whether a witness’s testimony is credible and, if not, why not. It is often helpful to have these assessments as a part of the process when it is time to make a decision about what action must be taken. Also, the trained investigator can defend these credibility decisions in testimony.

The *Mendoza* decision addresses the practicality that needs to underlie all investigations. The investigation has to be aimed at getting

to the truth rather than agenda-driven. It must be prompt and thorough. An inadequate investigation can be the basis for a finding of pretext and can create the likelihood of a verdict in favor of an employee claiming harassment, discrimination, or retaliation.²⁶

Workplace investigations have a profound effect upon all parties—witnesses and employees alike in the environment—yet the human impact of the way investigations are undertaken is seldom the subject of discussion in connection with legal analysis and review of investigations. Other than a spouse or significant other, the employment relationship is one of the most significant relationships in an individual's life. Employees take pride in developing expertise in what they do, in knowing their job well, and in doing it right. Employers want the most qualified persons who behave professionally and accomplish the most without distraction. A claim of conduct that may constitute harassment or discrimination pervading the workplace can have many negative consequences for various parties involved.

The party who is the subject of a complaint has his or her own substantial concerns. If he or she is not believed, how will all of this play out and how will his or her career be impacted? At the same time, the employer and its managing representatives still have day-to-day tasks that must be promptly accomplished, and they seek to avoid diversion from the demands of the schedule. An employer's representatives are often trained to go through the motions as quickly as possible and may neglect compliance with appropriate standards established by federal and state law. Neither the complainant nor the party complained against is put at ease if either senses the employer's lack of desire to get at the truth. A professional investigation is how the employer convinces employees that they are treated with respect and fairness. If the completed investigation finds harassment or discrimination then the employer must take appropriate remedial action.

One related issue concerns the accountability of a manager who runs a department or unit of the company and is accountable for everything he or she is not getting done. If the company does not convey to the manager that it is an important part of the job to conduct these types of investigations correctly—even if it takes time away from other matters—the quality of the investigation will very likely be diminished. The priority these matters are given is passed down from the top and through the ranks. For employers, management should ensure that any claims warrant prompt and thorough investigation so as to protect all involved, including the company. The investigation should be put in the hands of only those who are properly and

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thoroughly trained and should be conducted in accordance with the standards set forth by FEHA, OSHA, and state labor statutes. An even playing field in connection with any investigation protects everyone. Investigations performed by attorneys or investigators must have no agenda other than to get to the underlying facts in connection with the allegations in issue.

The investigation is a more reasonable cost of doing business than the alternative, which is often a significant liability for inadequate investigation. The cost can also be measured in employees who live in fear that they may be next if these types of investigations are perceived as less than fair in the day-to-day work environment.

If an investigation is not legally adequate as defined by *Cotran* and its progeny, it may have profound implications for subsequent litigation. It is surprising how vulnerable many investigations truly are. Investigations have the best chance of withstanding scrutiny if they are timely, thorough, and untainted.

An investigation can be effectively challenged based upon a number of deficiencies. If the investigation is tainted by factors such as an investigator with a bias, internal pressures to stop or limit the investigation or achieve a specific result or just to avoid dealing with the issues. The *Mendoza* Court made

clear that the determination to promptly terminate both employees without undertaking a thorough investigation displays an intention not to deal with these important issues rather than “getting to the truth,” which can constitute evidence of pretext.²⁷ Also, if the investigation is not promptly undertaken (as soon as the employer has information concerning any possible harassment, discrimination or retaliation), there is a statutory violation. If the investigation is incomplete because available documentary evidence or testimony is ignored or not discovered, or critical questions never asked of witnesses, the investigation is legally inadequate. If the investigation is performed by a biased investigator, an investigator subject to influence by a biased party, or by an unqualified investigator, the investigation is similarly vulnerable to legal challenge.

Employer investigations and the law that governs them has been an evolving process. Following the rules is like following a proven recipe: Do it right and the meal is enjoyable and adds to your reputation as a good cook. Stray too far and you may get indigestion and acid reflux that continues throughout the dispute that follows. ■

¹ Gov'T CODE §§12940 *et seq.*

² Gov'T CODE §§12940 (j)(1), (k).

³ LAB. CODE §6310.

⁴ *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998).

⁵ *Id.* at 99.

⁶ *Id.* at 103.

⁷ *Id.* at 108.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998).

¹¹ *Id.* at 265.

¹² *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243 (2009).

¹³ *Id.* at 271-72.

¹⁴ *Id.* at 277.

¹⁵ *Id.* at 277 (citing *Reeves v. Safeway*, 121 Cal. App. 4th 95, 120 (2004)).

¹⁶ *Reeves*, 121 Cal. App. 4th at 113.

¹⁷ *Mendoza v. Western Med. Ctr. Santa Ana*, 222 Cal. App. 4th 1334 (2014).

¹⁸ *Id.* at 1343.

¹⁹ *Id.* at 1337.

²⁰ *Id.*

²¹ *Id.* at 1344 (citing *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 277-78 (2009)).

²² *Mendoza*, 222 Cal. App. 4th at 1344.

²³ *Id.*

²⁴ *Wellpoint Health Networks, Inc. v. Superior Ct. (McCombs)*, 59 Cal. App. 4th 110, 130 (1997).

²⁵ *See, e.g., Fremont Indemnity Co. v. Superior Ct.*, 137 Cal. App. 3d 554, 559-60 (1982) and *James Talcott, Inc. v. Short*, 100 Cal. App. 3d 504, 510 (1979).

²⁶ *Mendoza*, 222 Cal. App. 4th 1334.

²⁷ *Id.* at 1344 (citing *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 277-78 (2009)).

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Estate Planning Guidance for the Protection of Digital Assets

SINCE THE WORLD WIDE WEB WAS BORN IN 1989, Americans record and upload more and more of their everyday lives on it. In 1995, less than one percent of the world's population had an Internet connection. Today, more than 40 percent of the world's population has one.¹ When using the Web, individuals are storing personal information or creating content. In short, they are producing or storing digital assets.

Unfortunately, the growth of the Internet has outpaced the ability of federal and state governments to enact legislation to control it. There has been no certainty about what will happen to an individual's digital assets upon death. Federal and state laws may impede attempts by a fiduciary to access or manage digital property by threatening civil or criminal liability. Contract and probate law may also bar a fiduciary's access.

More important, few people make provisions for their digital assets. In 2013, a Harris poll found that "93 percent of Americans who have digital assets were unaware of or misinformed about what would happen to their digital assets should they die."² In a more recent poll, 70 percent of respondents with a will said they had not selected a digital executor.³

Executors, fiduciaries, guardians, agents, and trustees of revocable trusts need to identify, access, and control these accounts. Beyond concerns about digital asset value, there are public policy concerns about privacy, fraud, and identity theft. Providing for digital assets in an estate plan can be complicated for many reasons. For one, there is no legally accepted definition of the term "digital asset." Whatever digital assets are, they are not automatically inheritable, they are difficult to identify, and they are difficult to access.

Defining Digital Assets

The amorphous nature of the digital world makes it difficult to define a digital asset. For example, an individual may store a picture on an online site like Shutterfly and download it, thus transforming it into physical form while it still exists in its digital form. At the same time, the individual does not own the place where it is stored, the software used to store it, or the software used to transmit it. So what is owned? What is the asset? Current legislation does not even agree on what to call it.

The definition adopted by the Uniform Law Commission in the Revised Uniform Fiduciary Access to Digital Assets Act of 2015 (RUFADAA) states that a "digital asset means an electronic record in which an individual has a right or interest."⁴ Other federal legislation and the Privacy Expectation Afterlife and Choices Act (PEAC) use the term "content" instead of digital assets. In these statutes, "content," when used with respect to wire, oral, or electronic communications, is "any information concerning the substance, purport, or meaning of that communication."⁵

Many large Internet providers prefer the term "content" because it separates the idea of what the user produced from any license interest the user may have, as well as any content produced by a

third party. In states that have enacted legislation, "digital asset" is usually the term adopted.

There are five categories of digital assets: devices and data, electronic mail, online accounts, financial accounts, and business accounts. The first category includes devices that record or store digital data, including cameras, smartphones and computers. Electronic mail includes e-mail messages received, and if stored, messages sent. Ongoing access to e-mail is particularly important as e-mail is almost always used to verify identity and passwords. In this way e-mail acts like a master key to other digital assets.

Online accounts include most nonfinancial accounts such as social networking sites, media, and rewards programs. The largest subcomponent of this category is social media, including Facebook, Twitter, and LinkedIn. Financial accounts are accounts linked to banking and other financial arrangements, e.g. online bill payment and PayPal. Business accounts include stores or resources that rely on income streams as well as accounts used for business purposes such as cloud-based storage services like Dropbox for storing documents. Even when an attorney can identify digital assets, the issue becomes more complicated when exploring what part of a digital asset is owned or transferred. In general, information that individuals create online for their own use—the content—is inheritable property. However, the extent to which it is inheritable is at issue due to problems of location, accessibility, and control.

Locating Digital Assets

Before a digital asset may be distributed, someone must locate it. Some assets may be on personal electronics. Others may be stored in the "cloud" on a server accessible only through the Internet. Most online accounts and personal electronic devices have passwords. Without the password, does a fiduciary have the right to attempt to break it? If not, does the fiduciary have the right to demand the custodian retrieve either the password or the information for the client? Under current federal and state law, possibly not. Much of the content on the Web is created or manipulated with licensed software. While the content of digital assets may be a property interest, accessing the digital assets usually is through a license interest granted through the site's contractual terms of service (TOSA). Often the license is nontransferable and subject to a multitude of restrictions.

For example, the Internet company Yahoo provides:

No Right of Survivorship and Non-Transferability. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.⁶

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In addition, individuals often do not own the content they believe they do. Some content, such as music paid for on iTunes⁷ or books on a Kindle⁸ app, is not owned property, but licensed property. Another issue is that some companies, like Facebook, provide a term that grants them a license to use information that individuals post.⁹ Provisions like this may cloud individual rights in certain data.

Complicating the matter further is that digital assets may come under the purview of different areas of the law. When an individual dies and leaves digital assets behind, there is the added difficulty of determining which state law controls as to the nature of the individual's property interest. Is it the state in which the individual lived or the state mandated by the TOSA? Perhaps one state is a community property state and the other is not. Probate of the same estate in two states may result in different outcomes. Which law controls depends on what the court decides with respect to the contractual terms and to what extent they bind the deceased and his or her heirs. To date, courts have offered little guidance. Litigation so far usually involves access to e-mail accounts. These cases have arisen out of Internet providers' refusal based on federal laws and privacy concerns to give access to decedents' e-mail absent a court order. Cases such as *In re Ellsworth*, in which individuals have asked for access to the e-mails of their deceased children, have provoked publicity but little precedent.¹⁰

Federal Law

Federal law also poses a formidable barrier to digital asset access. Three years before the birth of the Internet, the federal government passed the Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act (SEC), commonly referred together as the Electronic Communications Privacy Act (ECPA) of 1986.¹¹ The SEC language specifically prohibits certain providers of public communications from disclosing the contents of a user's communications to the government or other entity.¹² This provision has been widely interpreted to impair the inheritability of digital assets in the absence of consent, either by signing up for an Internet service provider that permits disclosure or actions that convey consent.¹³ While the SEC has been updated by recent legislation, the language that prohibits the transfer of digital content has not been amended.¹⁴

Attempting to individually access digital materials without consent violates the federal Computer Fraud and Abuse Act (CFAA) of 1986.¹⁵ The CFAA criminalizes or creates civil liability for the unauthorized access of com-

puter hardware, devices, and data. The CFAA presents a problem of authorization. Under the language of the CFAA, even with permission to access another's e-mail, an individual may exceed authorized access in obtaining the information under the Internet provider's TOSA. In *United States v. Nosal*,¹⁶ the Ninth Circuit held that the language of the statute, "exceeds authorized access," is "limited to violations of restrictions on access to information and not restrictions on its use."¹⁷

Many consider the CFAA and its penalties unnecessarily harsh. When Aaron Swartz was indicted under the CFAA for downloading hundreds of articles from an MIT database, he faced potential penalties of \$1 million in fines, 35 years in prison, and asset forfeiture.¹⁸ He committed suicide before the case came to trial.¹⁹ In response to the Swartz case, Congresswoman Zoe Lofgren of California introduced an amendment to the CFAA, entitled Aaron's Law Act of 2013. The amendment seeks to replace the language "exceeds authorized access" to "access without authorization." Although the amendment was introduced in 2013, little progress has been made toward passage.²⁰ Today, the Federal CFAA may still impede access to digital assets.²¹

State governments have enacted laws similar to the CFAA. However, state versions may differ in important ways. California's version of the CFAA prosecutes unauthorized use of information.²² This is significantly different from the federal legislation, which prohibits unauthorized access. As explained by the Ninth Circuit in *United States v. Christensen*, "a plain reading of the [California] statute demonstrates that its focus is on unauthorized taking or use of information."²³

State Contract Law

State contract law also makes access difficult. Online accounts usually are created when an individual creates a name, a password, and agrees to a site's TOSA. Most users check a box indicating acceptance of terms. These checkboxes are known as clickwrap agreements, clickthrough agreements or clickwrap licenses. By their nature, most clickwrap agreements are contracts of adhesion, but courts have upheld them.²⁴

TOSAs also invariably contain a choice of law provision. Most choose the state in which the provider was incorporated. This is particularly important in California as many of the large companies, including Facebook, Twitter, eBay, and Yahoo state that California law governs all disputes.²⁵ Some TOSAs further provide that disputes will be resolved under the Federal Arbitration Act. In the aggregate, TOSAs combined with current federal legislation make it difficult, if not impossible, for heirs to access digital

assets of an individual who has not made written provision for them. Even if the creators made their wishes known, it is unclear whether they will be honored. Recently, some large Internet providers have attempted to ameliorate the effect of their TOSAs by providing a means for account holders to make their wishes known and transfer access to their account after their death. Through online tools, a user can specify a contact in the event of death or long-term inactivity. Google²⁶ and Facebook²⁷ have adopted these nonlegislative alternatives.

Proposed Legislation

Until recently, few states enacted legislation concerning the distribution of digital assets. Those laws often dealt only with the inheritability of e-mail and social networking sites.²⁸ Others provided only for termination of all online accounts.²⁹ None fully addressed a fiduciary's access to or responsibilities for digital assets. In 2012, the Uniform Law Commission began working on a draft of legislation to tackle the void in existing law regarding the role of fiduciaries in obtaining and distributing digital assets of deceased and incapacitated individuals.³⁰ The commission approved a final draft of the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014.

The law attempted to give fiduciaries legal access to digital assets while leaving the existing law of contract, copyright, banking, agency, employment, privacy and trusts in place. Industry and consumer groups opposed the legislation, arguing that it gave executors too much access, did not give adequate consideration to the privacy of the deceased or the privacy rights of third parties, and improperly overrode TOSAs.³¹ They argued against a fiduciary's wholesale access to a decedent's account unless the decedent specifically opted out.³² Although twenty-six states introduced versions of the final draft act, only one passed a modified version.³³

In 2015, e-commerce trade group NetChoice introduced PEAC.³⁴ Among others, members of NetChoice include AOL Corp., ebay, Expedia, Facebook, and PayPal Holdings.³⁵ PEAC is the digital industry's answer to the UFADAA.³⁶ In PEAC, privacy is the default. PEAC addresses two types of digital assets: electronic communications and other digital assets. Under PEAC, an estate representative can access a decedent's electronic communications only if 1) the request specifically identifies the account, 2) a court finds that the decedent consented to disclosure, and 3) the estate indemnifies the custodian. PEAC permits the estate representative access to only one year of records for all other digital assets unless the decedent opted out. Again, the representative must first obtain a

court order. Fiduciary rights are the same as that of the user under TOSAs unless the TOSA conflicts with a user's direction.³⁷ To date, PEAC has been enacted in a modified form only in Virginia.³⁸

In response to NetChoice and other industry objections, the commission revised the UFADAA in 2015.³⁹ The revised act (RUFADAA) introduces the concept of an online tool for directing fiduciary access much like Facebook's Legacy Contact and Google's Inactive Account Manager. With the online tool, individuals express their preferences online before they die. The RUFADAA also draws a distinction between disclosing a catalog of content and the underlying content. In other words, like PEAC, it makes a distinction between accessing the outside of an envelope and reading the letter inside. The RUFADAA takes a three-tiered approach to clickthrough agreements or boilerplate TOSA language prohibiting access. Access is granted or denied based in descending order on 1) directions from an online tool while the individual was alive, 2) if no online tool directions exist, decisions made through a will, power of attorney, or trust, or 3) if no directions in a will or online tool exist, then any TOSA language applies.

While the 2014 act gave fiduciaries blanket access to digital assets unless an individual opted out prior to death, RUFADAA changed this by requiring an owner's express authorization of his or her digital assets prior to death. NetChoice has expressed support for RUFADAA stating that PEAC and RUFADAA "contain the basic privacy protections that were lacking in previous attempts."⁴⁰

The revised act has been introduced in twenty-eight states and enacted in sixteen.⁴¹ In 2015, California introduced legislation based on RUFADAA to address the numerous legal questions regarding the inheritability of digital assets. The bill seeks to strike "a balance between providing a clear path for fiduciaries to access relevant information to handle the deceased person's estate, while respecting the privacy choices of not just the deceased person but those with whom the deceased was communicating."⁴² Like RUFADAA, AB 691 establishes the same system of priorities for determining access to a decedent's digital assets. Under the legislation, fiduciaries with specified documents also could obtain a generally described list of assets.

Digital Assets in Estate Planning

Because of the exponential growth of the Internet and corresponding growth in digital assets, and legal uncertainty, estate attorneys and digital asset planners should make their clients aware of the importance of providing for their digital assets. Preplanning will save

an estate money as trying to gain access to online accounts post mortem can be complicated, time consuming and expensive.

Three elements must be considered when incorporating digital assets into estate planning: the location of the digital asset, the accessibility of the asset, and the ability to control the asset. In terms of location, clients should be advised to catalog digital assets. Photographs, written communications and letters may be stored on an individual's personal computer or electronic devices while others may be stored in the "cloud" on a server accessible only through the Internet. Clients should make a list of how to access each digital asset. If the material is stored on personal electronics, it may not be accessible.

Account Passwords

Most online accounts have passwords. If the fiduciary does not have account passwords or the right to attempt to break them, he or she will need the right to demand the custodian turn over either the password or the information. The access list and the location list should be kept in more than one place. Regarding control, clients should put complete beneficiary designation for digital assets in wills or trusts. When drafting these provisions, the language must establish the scope of authority granted by the individual as well as any privacy concerns or wishes.

In the digital age, it is a lawyer's responsibility to recognize that digital assets are inheritable property and help clients plan for their distribution. ■

¹ Internet Live Stats, <http://www.internetlivestats.com/internet-users> (last visited Sept. 25, 2015).

² *Rocket Lawyer Designates April 'Make a Will Month' Offers Free Wills for the Entire Month*, Rocket Lawyer, <http://www.rocketlawyer.com> (last visited Oct. 8, 2016).

³ Ellen Huet, *Who Will Take Care of Your Digital Legacy After You Die? Poll Says Many People Haven't Specified*, FORBES, (Apr. 21, 2015), available at <http://www.forbes.com>.

⁴ Uniform Fiduciary Access to Digital Assets Act, Revised, §2(10) (2015), available at <http://www.uniformlaws.org> (last visited Oct. 9, 2016).

⁵ Privacy Expectation Afterlife and Choices Act (PEAC), §6(a), NETCHOICE <https://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac> (last visited on Aug. 29, 2016) (adopting definition for content used in Wire and Electronic Commc'ns Interception and Interception of Oral Commc'ns Act, 18 U.S.C. § 2510(a)).

⁶ General Information, Yahoo! Terms of Service, <https://policies.yahoo.com> (last visited Aug. 31, 2016).

⁷ See Charles Arthur, *No, Bruce Willis isn't suing Apple over iTunes Rights*, THE GUARDIAN, Sept. 3, 2012, available at <https://www.theguardian.com> (last visited Aug. 29, 2016).

⁸ Kindle Store Terms of Use, Amazon.com Help, <http://www.amazon.com> (last visited Aug. 29, 2016).

⁹ Facebook, Terms of Service, <https://www.facebook.com>, (last visited Aug. 31, 2016).

¹⁰ In re Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).

¹¹ Stored Commc'ns Act, 18 U.S.C., §§2701-12 (2000).

¹² *Id.* at 2702.

¹³ Borden, Matt. *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 408-411 (2014).

¹⁴ *Id.* at §2702.

¹⁵ Computer Fraud and Abuse Act, 18 U.S.C. §1030 (1986).

¹⁶ United States v. Nosal, 676 F. 3d 854 (9th Cir. 2012).

¹⁷ *Id.* at 864.

¹⁸ Sangkyo Oh & Kyungho Lee, *The Need for Specific Penalties for Hacking in Criminal Law*, SCI. WORLD J. (2014), available at <http://www.hindawi.com/journals/tswj/7367381> (last visited Aug. 31, 2016).

¹⁹ Marcella Bombardieri, Aaron Swartz and MIT: *The Inside Story*, BOSTON GLOBE, (Mar. 29, 2014), available at <https://www.bostonglobe.com>.

²⁰ H.R. 2454, 113th Congress (2013), available at <https://www.congress.gov>.

²¹ State versions of this law have been in play in divorce cases where one spouse may use data from the other spouse's e-mail account.

²² PENAL CODE §502(c).

²³ United States v. Christensen, 801 F. 3d 970, 994 (9th Cir. 2015).

²⁴ See Alison S. Brehm & Cathy D. Lee, *Click Here to Accept the Terms of Service*, A.B.A. COMM. L. (Jan. 2015), available at <http://www.americanbar.org>.

²⁵ See, e.g., Apple terms of use, <http://www.apple.com> (last visited June 30, 2016).

²⁶ Inactive Account Manager, Google, <https://www.google.com/settings/inactive> (last visited Aug. 31, 2016).

²⁷ Facebook, How do I add, change or remove my legacy contact? <https://www.facebook.com> (last visited June 30, 2016).

²⁸ See, e.g., Idaho SB 1044 (July 1, 2011).

²⁹ Nev. Rev. Stat. §143.188 (rev. 2016).

³⁰ Uniform L. Comm'n, JEB UTEA Report to Scope and Program (Jan. 8, 2013), <http://www.uniformlaws.org> (last visited Aug. 31, 2016).

³¹ *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, NAT. L. REV., (July 21, 2015), <http://www.natlawreview.com>.

³² *Id.*

³³ *Id.* Delaware passed a modified version of the law in 2014.

³⁴ PEAC; see also Althea Lange, *State Lawmakers Have Options to Protect Your Digital Legacy*, cdt, (Oct. 5, 2015), <https://cdt.org/blog/state-lawmakers-have-options-to-protect-your-digital-legacy/>, [hereinafter Lange].

³⁵ NetChoice, About Us, <https://netchoice.org/about>.

³⁶ Alessandro Malito, *Two groups battle it out to create uniform national rule for fiduciaries to access digital assets*, INVESTMENT NEWS, May 28, 2015, available at <http://www.investmentnews.com/article/20150528/FREE/150529924/two-groups-battle-it-out-to-create-uniform-national-rule-for> (last visited June 30, 2016).

³⁷ *Id.*

³⁸ VA. CODE ANN. 64.2-109 (2015).

³⁹ Lange, *supra* note 34.

⁴⁰ *Id.*

⁴¹ Uniform L. Comm'n, <http://www.uniformlaws.org> (last visited June 30, 2016) (enacting states are Arizona, Colorado, Connecticut, Florida, Idaho, Indiana, Maryland, Michigan, Minnesota, Nebraska, Oregon, South Carolina, Tennessee, Washington, Wisconsin, Wyoming).

⁴² A.B. 691, Revised Uniform Fiduciary Access to Digital Assets (Cal. 2015-2016).

by THE HONORABLE SAMANTHA P. JESSNER, THE HONORABLE AMY D. HOGUE,
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Streamlining Discovery

Judges find that informal discovery conferences often facilitate discovery disputes and may resolve the entire case

THE informal discovery conference (IDC) is a relatively new tool used by many judges in Los Angeles Superior Court (LASC) in civil cases as an effective way to resolve discovery disputes by mediation rather than litigation.¹ The purpose is to provide a “fast and informal resolution of discovery issues” by allowing parties to meet with the court informally to resolve or narrow disputed issues before or in lieu of filing a discovery motion.² In nearly every case, judges have found that the parties amicably resolve discovery disputes with the assistance of the court.³ For the parties, a successful IDC avoids the time and effort required to prepare or oppose a motion to compel. For the court, it eliminates staff and

court time required to calendar, work up, and decide a discovery motion. In most cases, the parties meet with the judge presiding over the case informally either by telephone or in person.

Although judges in the complex courts and a number of independent calendar courts have successfully used IDCs for years, additional courts have embraced the practice in order to cope with heavier calendars resulting from significant reductions in court funding. Since the beginning of the recession in 2009, budgeted funds for California’s court system have decreased by over \$1 billion, and the court system has suffered extensive layoffs and closures of 52 court houses across the state. The LASC was forced to reduce annual

spending by \$187 million, reduce its staff by one-quarter, and shutter eight courthouses.⁴ This budget shortfall led to a backlog in case disposition, with the number of civil cases pending over two years tripling. Committed to preserving access to justice, LASC responded with a radical restructuring of its operations.⁵

Based on historical data demonstrating that law and motion practice in civil personal injury cases was relatively minimal, the court transferred the pretrial case management of all personal injury cases (approximately 30,000 cases county-wide) from the independent calendar courts to a handful of personal injury courts in the Stanley Mosk Courthouse. With a docket of approximately

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7,500 cases in each personal injury court and the potential for a significant backlog in motion hearings, the personal injury courts, pursuant to a 2011 general (standing) order, formally adopted IDCs as the preferred method of resolving discovery disputes. The goal of this new procedure was to invest judicial time in the mediation of discovery disputes before any motions were filed and thereby reduce the backlog by minimizing or eliminating motions to compel further discovery.

Judges in the independent calendar courts have faced similar problems regarding backlog and resources. Having had the personal injury cases removed from their dockets and replaced with commercial disputes generating a greater volume of more complicated pretrial motions, many independent calendar court judges have turned to IDCs as a means of reducing or eliminating discovery motions. Although the budget crisis has abated somewhat since 2011, judges and lawyers continue to embrace IDCs as a sensible alternative to the more costly and time-consuming process of formally litigating motions to compel further discovery.

However, not all LASC judges conduct IDCs. Courts that try personal injury and complex cases use IDCs as a matter of course, but the practice varies among the independent calendar courts. Attorneys with cases in LASC's independent calendar courts should check to see whether the judge assigned to the case conducts IDCs. If the judge does not mention IDCs at the case management conference, lawyers should inquire about them. Judges often post this information on the court's website under the courtroom information menu for each department.

From a judge's point of view, IDCs have pros and cons. The authors surveyed over a dozen LASC judges in order to gain an understanding of why some judges are in favor of conducting IDCs and others are not.

The primary reason judges favor IDCs is the positive impact on their motion calendars. A litigated motion is costly and time-consuming for the court. Every appearance requires courtroom staff to calendar the motion and the judge and research attorney to work up a preliminary analysis of the motion. Staff also spend time checking in parties for the hearing and preparing minute orders that record the outcome. By contrast, IDCs typically do not require any participation by court staff beyond scheduling a date and time. The judge conducting an IDC can manage the amount of time invested by controlling how much (if any) briefing to receive in advance of the IDC and how much time to spend meeting with the attorneys.

Additionally, judges conducting IDCs report that the conferences are successful in

resolving a very high percentage of discovery disputes. They attribute the extraordinary success rate to several factors. First, the attorneys invest more time meaningfully meeting and conferring, knowing that the IDC judge will expect them to explain why they are at an impasse and the nature and extent of their pre-IDC efforts to resolve the dispute. It is recommended that attorneys meet in person to discuss disputed issues rather than rely solely on written correspondence before the IDC. As a result, the time spent preparing for the IDC begins the resolution process by helping the lawyers focus on the "real issues," knowing they will have to defend their positions while looking opposing counsel and the judge in the eye.

Further, judges who conduct IDCs also report that, unlike the one-sided correspondence written in "lawyer mode" and labeled as "meeting and conferring," the face-to-face or telephonic communication in an IDC requires attorneys to interact on a personal level. With a judge in the room or on the line and the potential for sanctions if the dispute is not resolved in the IDC, attorneys are less likely to engage in grandstanding and gamesmanship and more likely to adopt reasonable and conciliatory positions.

Finally, judges conducting IDCs regard their freedom in this informal environment to suggest practical and creative approaches to resolving the dispute as another key factor to the success of IDCs. For example, if the parties cannot agree whether a deposition should take place locally or in a distant location, the judge might suggest an expense-sharing arrangement as an acceptable middle ground that is far less expensive than a litigated motion to compel.

Some judges are opposed to IDCs. IDCs can present ethical dilemmas that do not arise in a formal motion hearing. Canon 3(B)(7) of the California Code of Judicial Ethics requires a judge to accord every party the full right to be heard and to decide an issue based only on the law and evidence presented. A judge who, at the parties' request, gives a preliminary ruling in an IDC may be concerned that the discussion may appear to violate Canon 3(B)(7) by deciding an issue without providing a full and complete hearing. The informality of the discussion in an IDC may also present ethical problems. For example, a judge may learn something about a party in an IDC that would never be presented in a formal motion. This may occur if a lawyer were to intimate that his client's lack of cooperation or belligerence is part of the problem during the IDC.

Not all judges are persuaded that IDCs necessarily provide a more efficient alternative for solving discovery disputes. Some regard the time to prepare and conduct an IDC as

more burdensome than preparing for and hearing a motion. One judge believes that parties are less likely to try to work through the issues themselves when they can instead rely on the IDC judge to help resolve their disputes.

Some judges are concerned that an agreement negotiated in an IDC will fall apart, resulting in a litigated motion. The fact that a judge has no authority to issue a binding order in an IDC is an important reason why some judges prefer to adhere to the methods for resolving discovery disputes set forth in the California Civil Discovery Act.⁶ One judge surveyed has adopted a hybrid model. After preliminary discussions, including a tentative ruling, at the motion hearing, this judge orders the parties to meet and confer and come back for a further hearing in a couple of weeks if they cannot agree on a compromise that takes into consideration the judge's comments at the motion hearing.

The following steps can help in preparation for an IDC. First, it is necessary to determine if the dispute under consideration is appropriate for conducting an IDC. Some discovery disputes present legal issues that are not amenable to a compromise solution. For example, if the dispute presents a bona fide issue of law regarding application of the attorney-client privilege, it may have to be resolved by a motion rather than an IDC. If either side wishes to preserve its position on discovery for appeal, a formal order from the court will be needed. Also, some discovery disputes are too complex to be addressed in the time offered for an IDC.

On the other hand, even if an IDC cannot resolve the entire dispute, it may be productive when the parties cannot agree on the points of impasse or on the issues that require a formal decision. In these cases, an informal meeting may be helpful to identify and narrow the issues to be litigated.

The second item is to identify the areas of impasse. In the courts that try personal injury cases, the parties must engage in "a reasonable and good faith attempt at an informal resolution of each issue to be presented" before requesting an IDC with the court.⁷ Most independent calendar courts conducting IDCs have a similar requirement. Even if there is no formal requirement, counsel would be wise to work together to identify (and hopefully narrow) the disputed issues in order to optimize the limited time allotted for the IDC.

When counsel engage in meet-and-confer efforts, they should be mindful that the IDC judge will want to address the overarching issues creating the impasse rather than particular discovery requests or objections to requests. For example, if there are objections to interrogatories, requests for production,

and requests for admission based on an overly broad time period identified in the requests, the parties should be prepared to address the timeframe appropriate for discovery as an overarching issue. Before asking a judge to participate in an IDC, the moving party should exhaust all efforts to compromise by amending the wording of disputed requests, and the responding party should fully respond to every portion of a request that is not objectionable. If, for example, a request is overly broad as to time, the responding party should fully respond to requests for information for any time period to which it has no objection.

Third, the party seeking discovery should be prepared to articulate why the information is necessary for trial. Although California permits discovery of information related to the subject matter and that may lead to the discovery of admissible evidence, an IDC judge attempting to mediate a discovery dispute will want to understand how the requested information is intended to be used at trial. Therefore, the admissibility of the information must be carefully considered. If the IDC judge regards the requested information as, for example, inadmissible character evidence, he or she is unlikely to be persuaded that it is necessary. Attorneys need to be ready to explain why the evidence sought will be admissible and relevant to proving or disproving an element of a cause of action or affirmative defense.

If there is concern that the opposing party may hold back information or documents, it is important to insist on amended discovery responses that recite the language required under the Code of Civil Procedure for an incomplete response. For interrogatories, any failure to respond fully must be supported by a verified response stating that the party has made “a reasonable and good faith effort to obtain the information by inquiry to other natural persons and organizations.”⁸ For documents, the verified response should “affirm that a diligent search and a reasonable inquiry has been made” and “specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer in, the (responding party’s) possession, custody, or control.”⁹ If the responses contain these explanations and are not contradicted by other evidence, a judge has no reason to compel further discovery, and there will be no need to invest the time in an IDC or a motion to compel.

Fourth, the party opposing discovery needs to be knowledgeable about the client’s records and access to information. Specifically, the counsel needs to learn how the client does business, where and how it stores records,

how difficult it will be to retrieve or sort the records, and whether the company can search electronically or has to conduct a manual search. A request can be made to the client to articulate the employee hours required to retrieve the requested information. Without making these inquiries, it is not possible to be properly prepared to persuade the opposing counsel or the IDC judge that a request is burdensome.

expensive than opposing and arguing a formal motion. Before refusing to extend time, a determination must be made whether a judge who has set aside time for IDCs will regard a refusal as unnecessarily burdensome and unreasonable.

IDCs in courts that try personal injury cases follow the procedures set out in LASC forms. To initiate an IDC, parties must reserve an IDC date using the online court reservation

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An IDC is not a time to bicker about opposing counsel, to engage in deprecation, or to settle scores. It is valuable time before the judge to move the case forward; therefore, it is prudent to approach it in the most professional and mature manner.

It is important to identify less burdensome alternatives. A random sampling of documents may provide a faster and cheaper way to find out whether there is anything probative to be produced. A two- or three-step process might be more economical. Offering, for example, to allow counsel to review three months of records as a first step and expand the time frame if justified may quickly curtail the extent of discovery. It is advisable to consider whether another party or a particular division in a company had a reason to collect requested information that would otherwise be burdensome to obtain. If the opposing party is asking for prior similar claims and the client does not index records based on the nature of the claim, whether the client forwards claims or complaints of a certain nature to a particular law firm or to a third-party consultant needs to be determined. If the client does, searching that entity’s records may be less burdensome.

Finally, it is necessary to ensure sufficient time to file a motion to compel discovery. Without a stipulation from both sides, an IDC judge cannot order one side or the other to extend the time to file a motion to compel. If an extension from the other side has not been obtained allowing enough time to participate in the IDC, the right to file a motion to compel may be lost. Because the court has no jurisdiction to hear a motion to compel filed after the time has lapsed, it may be necessary to file a protective motion to compel to preserve the client’s rights.

When resisting discovery, it may be wise to extend the time to file a motion to compel for purposes of participating in an IDC. If it is successful, the informal process will be less

system (CRS). Parties must meet and confer regarding the available dates in the CRS prior to reserving the IDC date.¹⁰ Parties brief the discovery dispute by completing an Informal Discovery Conference Form for Personal Injury Courts.¹¹ The opposing party may file and serve a separate IDC Form LACIV 239,¹² briefly setting forth that party’s response. Each side must briefly describe the discovery dispute—information requested and/or the basis for objection—in the space provided on the form, without adding extra pages.

In terms of timelines, parties must participate in an IDC before a motion to compel further responses to discovery will be heard, unless the moving party submits evidence, by way of declaration, that the opposing party has failed or refused to participate in an IDC.¹³ If the IDC is not productive, the moving party may advance the hearing on a motion to compel further discovery responses on any available hearing date that complies with the notice requirements of the Code of Civil Procedure.¹⁴

Scheduling or participating in an IDC does not toll or extend any deadlines imposed by the Code of Civil Procedure for noticing and filing discovery motions. Ideally, the parties should participate in an IDC before a motion is filed because the IDC may avoid the necessity of a motion or reduce its scope. Because of that possibility, attorneys are encouraged to stipulate to extend the 45 (or 60) day deadline for filing a motion to compel further discovery responses in order to allow time to participate in an IDC.¹⁵

If parties do not stipulate to extend the deadlines, the moving party may file the motion to avoid its being deemed untimely.

However, the IDC must take place before the motion is heard, so it is suggested that the moving party reserve a date for the motion hearing that is at least 60 days after the date when the IDC reservation is made.¹⁶

Finally, time permitting, the personal injury hub judges may be available to participate in IDCs in order to try to resolve other types of discovery disputes.¹⁷

The process for IDCs in the independent calendar courts is simpler and more informal. The first consideration is whether the presiding judge conducts IDCs. Second, it is necessary to determine how the judge prefers to conduct IDCs in order to ensure following that procedure. Although the PI courts follow a uniform procedure outlined in the General Order, there is no set procedure for the independent calendar courts.

In a survey of over a dozen independent calendar court judges, most said that they tell the attorneys about IDCs at the case management conference and encourage the attorneys to participate. Some judges order or suggest IDCs after one side files a motion to compel or complains about the other side's discovery in a court appearance. One judge conducts IDCs spontaneously as soon as the judge becomes aware of a discovery dispute.

Some judges conduct IDCs by telephone because it is more convenient for the parties. Others require an in-person meeting and

regard the face-to-face interaction as the key to success. Although a number of judges conduct IDCs in chambers or around the table in the jury room, some prefer to take the bench as a means of maintaining a more formalized discussion. Some judges ask for very brief—one or two pages—joint or separate statements while others prefer not to receive anything in writing. Most judges set aside 20 to 30 minutes for the IDC but are willing to extend the time if it will be productive. Several judges require written confirmation of any agreed upon resolution either by letter or stipulation.

Many of the judges surveyed commented that IDCs do more than resolve the discovery dispute. In their experience, the informal discussion breaks down barriers to communication and opens the door for discussing resolution of the entire action.

Following certain “best practices” for IDC hearings can optimize the results. Although an IDC is technically informal, counsel should be on their best behavior and strive to maintain a high degree of professionalism. IDCs are not an opportunity to vent, and the judges conducting them do not want to hear the lawyers recount past sins of their opposing counsel.

Next, lead trial counsel should participate. Having set aside time to resolve the dispute, an IDC judge expects to confer with lead

trial counsel on each side, or another attorney with full authority to make binding agreements.¹⁸

Also, it is important to be respectful and calm, as well as courteous of the opposing counsel, clients, court staff, judge, and all present during the conference. An IDC is not a time to bicker about opposing counsel, to engage in deprecation, or to settle scores. It is valuable time before the judge to meaningfully move the case forward; therefore, it is prudent to approach it in the most professional and mature manner.

Finally, what happens at the IDC stays at the IDC. Because the judges conducting informal conferences are not making rulings or speaking “on the record,” comments by the judge have no precedential value. There is accordingly nothing to be gained by quoting comments from the IDC judge in subsequent motion papers or proceedings.

Once the IDC hearing is concluded, if the dispute is not resolved, the parties may move to compel discovery in accordance with the Code of Civil Procedure. If the matter is resolved, the court may ask the parties to confirm their agreements in writing by letter or stipulation and, if a motion has already been filed, ask the moving party to take the motion off calendar by a certain date so that the court knows not to work up the motion.

IDCs are a powerful tool available to attorneys to resolve discovery disputes. IDCs give attorneys the ability to engage opposing counsel and the judge in a meaningful way to move cases forward more quickly and economically. The informal setting provides opportunities for creative advocacy, to demonstrate to the court that the attorney is focused on substance over form and to educate the court on the issues that matter most to the case. It also provides invaluable cost and time savings for the court and client. ■



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² LASC Stipulation-Discovery Resolution, Form LACIV 036 (Apr. 2011) [hereinafter LACIV 036].

³ LASC Fourth Amended General Order RE: Personal Injury Court Procedures ¶11 (Jan. 26, 2015) [hereinafter General Order].

⁴ LASC ANNUAL REPORT, 4, 7 (2015).

⁵ *Id.* at 4.

⁶ CODE CIV. PROC. §2016.010 *et seq.*

⁷ LACIV 036, *supra* note 2, ¶3.

⁸ CODE CIV. PROC. §2039.220.

⁹ CODE CIV. PROC. §2031.230.

¹⁰ General Order, *supra* note 3, ¶13.

¹¹ Form LACIV 239, ¶¶2, 3 (Apr. 2015).

¹² *Id.* at ¶2.

¹³ General Order, *supra* note 3, ¶12.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at ¶14.

¹⁸ *Id.* at ¶11.



by Robert M. Weinstock

Surviving the Appraiser Shortage

Attorneys who need to meet minimum appraisal and appraiser requirements in their practices have various options

MANY individuals, businesses, and lawyers in California require real property appraisals for matters such as refinancing, real estate transactions, divorce, estate tax, and eminent domain actions. However, there is a shortage of real estate appraisers¹ in California and throughout the United States. California's Bureau of Real Estate Appraisers (BREA) has noted a 50-percent decline in the number of licensed appraisers in California over the past seven years.² At present, there are 3,300 commercially licensed real estate appraisers in California. The state currently is issuing approximately 360 new licenses annually in California. Almost two-thirds of the appraisers in California are over age 50 and many are contemplating retirement.³ At the same time, the number of owner households is

expected to increase by 1.3 million per year.⁴

Industry experts identify several reasons for the decline in the number of appraisers.⁵ Stringent new education requirements that went into effect in 2015,⁶ a large increase in the required number of closely monitored experience hours, and lower fees have made real property appraising a less attractive profession. In addition, while the number of appraisers is declining, the number of complaints filed against appraisers by the general public is increasing exponentially.⁷

Legally, what is an appraisal? Who is an appraiser? When is an appraisal required? The answers depend on the situation and type of assignment for which the appraisal is being used. Attorneys should be aware of who can perform appraisals, who can testify as to value, and what an appraisal must con-

tain. Attorneys also should be aware of the various alternatives to formal appraisals.

Recently, it has been codified⁸ that certain transactions involving real property may proceed without obtaining a formal appraisal. This position is in direct contrast to that made by governmental agencies a few years ago when the issue focused on greater standards and more thorough accountability.⁹

While appraisal standards are not new, they came to the forefront as a result of the savings and loan crisis of the 1980s. Appraisers were said to be part of that scandal since many appraisals were found to be inad-

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equate or unfairly biased.¹⁰ In April 1989, as a result of the Financial Institutions Reform Recovery and Enforcement Act (FIRREA), uniform standards for appraisers were formalized.¹¹ These standards were to be enforced by each state's real estate appraiser regulatory agency.

As a direct result of FIRREA, government and nongovernment agencies attempted to determine what these standards were and to define the terms "appraisal" and "appraiser."¹² However, despite numerous attempts the answer is still not clear. Further, there is much inconsistency in application. (See chart.)

The initial goal was to make appraisals "independent, consistent and objective."¹³ The implementation of new standards and licensing requirements, however, had the indirect effect of reducing the number of appraisers. As a result of large barriers to entry, competition from nonappraiser alternatives, low fees, and other factors, the number of appraisers has steadily decreased. In 2015, for example, only 55 new trainee appraiser applications were filed for the entire state of Illinois.¹⁴ As a result of these new standards, which all states have adopted, the number of appraisers nationwide has declined substantially and will continue to decline.

Options for Attorneys

Attorneys who need to meet minimum appraisal and appraiser requirements for their legal work have several options. Real estate brokers, for example, frequently give broker opinions in estate planning matters. Accountants typically provide valuations and testimony in family law matters. Sometimes property owners will arrive at their own values. In addition, the word "evaluation" (which is different from an appraisal) has come into play. An evaluation is not required to comply with the qualifications and reporting standards of appraisals under certain circumstances. (See chart.) These informal methods of appraisal may or may not be acceptable.

California is not a mandatory license state, which means certain types of valuations can be performed by nonlicensed individuals. Other times, performing an appraisal without a state license can lead to a fine and imprisonment.¹⁵ The line can be blurred at times. In California, a licensed appraiser is required in any transaction in which a federal financial institution's regulatory agency is involved. Specifically, Business and Professions Code Section 11320 states:

No person shall engage in federally related real estate appraisal activity governed by this part...or any title designation or abbreviation as a licensed appraiser in this state without first obtaining a license as defined in Section 11302. Any person who willfully vio-

lates this provision is guilty of a public offense punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.

The term "federally related real estate activity" has been defined to mean any real estate-related financial transaction in which a federal financial institution's regulatory agency engages, contracts, or regulates, and which requires the services of a state-licensed real estate appraiser.¹⁶

What about the other reasons for an appraisal such as a divorce proceeding, a corporate dissolution, or an estate tax return? The answer is broadly defined in the Uniform Standards of Professional Appraisal Practice (USPAP).¹⁷ Again, these are the rules that were promulgated in an attempt at standardization. According to USPAP, an appraiser is defined as "one who is expected to perform valuation services competently and in a manner that is independent, impartial and objective."¹⁸ The definition says nothing about requiring a license but gives a much broader definition as "... one who is expected to perform."¹⁹

In California, the regulations for licensing of appraisers are found in Business and Professions Code Section 11300 et seq. However, according to Section 11319, the uniform standards are intended to be the "minimum standard of conduct and performance" for appraisers.²⁰ This is not the case in that USPAP defines an appraiser as "one who performs valuation services"²¹ while the statute defines it solely as someone who performs appraisals in a "federally related transaction."²²

Another basic legal question concerns what constitutes an appraisal? The USPAP and the statute conflict since the uniform standards define an appraisal as "the act or process of developing an opinion of value,"²³ whereas Section 11302 states that an appraisal means a "written statement independently and impar-

tially prepared by a qualified appraiser setting forth an opinion in a federally related transaction as to the market value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information." Further, Section 11302 states that an appraisal "shall, at a minimum, meet the requirements of USPAP." However, because of its broad definitions, USPAP is essentially more restrictive than California law. This is the opposite of the intent of California law that intended for USPAP to be the minimum standard.²⁴ The statute defines an appraiser as one who prepares a "written statement" regarding value in a "federally related transaction."²⁵ However, this conflicts with USPAP which states that an appraiser is "anyone who performs valuation services."²⁶

Therefore, assuming clients have a need for an appraisal that is not a federally related transaction (e.g., one in which a federal financial institution is involved), what options do they have? The answer apparently depends on the context in which the appraisal is used. To reiterate, California's requirements for a licensed appraiser can be summarized by two points: 1) one that is in writing (oral valuations and testimony appear to be excluded) and 2) one in which a federal financial institution is somehow involved. However, what about appraisals not in writing and not for a federally related transaction?

Nonfederally Related Appraisals

The courts in California and the federal government have been forced to decide the question of who is qualified to evaluate real property and when an appraisal is required. One specific exception to appraisals is for broker opinions in which a person licensed to sell real property under the California Department of Real Estate provides an estimate of value.²⁷

Appraisal Licensing Requirements

PURPOSE	LEGAL REQUIREMENTS
Lending (under \$250,000)	No appraisal required ¹
Federal Bank	License probably required ²
Family Law	Anyone, including spouses ³
Eminent Domain	Property owners and qualified experts ⁴
Charitable Gifting—noncash over \$5,000	Licensed appraiser required ⁵
Probate	No license required, probate referee or conservator ⁶
Property Tax	Licensed or certified appraiser ⁷
Estate and Gift	No license required, minimum standards ⁸
Litigation Evidence	No license required, goes to weight ⁹

¹ 12 C.F.R. 323.3; ² 12 C.F.R. 323.4, BUS. & PROF. CODE §11300. ³ FAM. CODE §§1000, *et seq.* ⁴ GOV'T CODE §7260. ⁵ I.R.S. PUBL'N 561, 2006-46. ⁶ PROB. CODE §§8903, 2610. ⁷ REV. & TAX CODE §20802(a)(3). ⁸ See, e.g., Estate of Richmond, T.C.M. 2014-26. ⁹ EVID. CODE §813; Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

MCLE Test No. 261

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcleselftests>.

1. In California, a state-certified real estate appraiser's license is required to value real property.
True.
False.
2. The California decision in *Sargon Enterprises, Inc. v. University of Southern California* seeks to clarify the decision in *Daubert v. Merrell Dow Pharmaceuticals* with respect to who can provide expert witness testimony.
True.
False.
3. The definitions of appraisal and evaluation are synonymous.
True.
False.
4. The Federal Reserve Bank has recognized the appraiser shortage by allowing some types of bank loans to be made without getting formal appraisals.
True.
False.
5. Which of the following qualifications is required to appraise valuable artwork for the purpose of a charitable contribution?
 - a. Earning an appraisal designation from a recognized professional appraiser organization.
 - b. Regularly performing appraisals for which the individual receives compensation.
 - c. Meeting any other requirements as prescribed by law.
 - d. All of the above.
6. An unlicensed individual performing a written appraisal for the purpose of a large bank loan (e.g. over \$1 million) could be guilty of a crime.
True.
False.
7. Which of the following occupations would be legally qualified to provide an opinion as to the value of a single-family residence without violating state law?
 - a. Real estate broker.
 - b. Land surveyor.
 - c. Engineer.
 - d. Any of the above.
8. According to *Daubert v. Merrell Dow Pharmaceuticals*, only licensed appraisers may testify as to the value of a real property.
True.
False.
9. In an eminent domain matter, the court may accept a real estate broker's opinion as to the value of a taken property.
True.
False.
10. The Uniform Standards of Professional Appraisal Practice is a standard to which all licensed appraisers

- are required to adhere.
True.
False.
11. The need for formality of appraisers and appraisals came to the forefront as a result of the 1980s savings and loan crisis.
True.
False.
 12. Probate referees are permitted to value property for the purpose of a probate without obtaining a separate state license.
True.
False.
 13. The term "federally related real estate activity" is directed toward the valuation of government-owned real property.
True.
False.
 14. The future of appraisal is moving away from custom appraisals and toward computerized valuation models and/or appraisal management companies.
True.
False.
 15. According to the Uniform Standards of Professional Appraisal Practice, these standards apply only to licensed appraisers.
True.
False.
 16. The absence of a qualified appraisal in filing an estate tax return can result in penalties.
True.
False.
 17. An appraisal of real property for the purpose of a loan can be used in a divorce proceeding.
True.
False.
 18. In a family law matter, a spouse may testify as to the value of their real property.
True.
False.
 19. Valuations of real properties by persons located outside the United States may not be used since no one personally inspected the property.
True.
False.
 20. The value of a property as determined by Zillow or Trulia may not be entered into evidence in a civil litigation case since it is not considered an appraisal.
True.
False.



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5. A B C D
6. True False
7. A B C D
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

Specifically, the law states that the term “appraisal” does not “include an opinion given by a real estate sales licensee or engineer or land surveyor in the ordinary course of his or her business in connection with a function for which a license is required.”²⁸ Thus, an exception to the Business and Professions Code requiring appraisers to be licensed has been carved out in certain circumstances.

The California Evidence Code generically discusses the issue of expert opinions. It states:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing....²⁹

The issue of whether or not a valuation opinion is admissible is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.³⁰ *Daubert v. Merrell Dow Pharmaceuticals* clarified Federal Rules of Evidence Section 720 and stated that the judge is the gatekeeper as to expert witness testimony.³¹ In an unpublished case, *Johnson v. Dawkins*, the court stated that the absence of a real estate license goes to the weight of testimony, not to whether the testimony can be admitted: “The absence of a license at best went to the weight of his testimony, there is no requirement that one be licensed in California to give expert testimony as an appraiser.”³²

The courts have dealt with the issue of what constitutes an appraisal and an appraiser in several situations, including tax matters, probate, gifts, and various aspects of family law. With respect to tax matters, the federal government provides guidance in Section 2 of Internal Revenue Bulletin 2006-46, which relates to the appraisal requirements for types of noncash charitable contributions. The document states that for an appraiser to be qualified to value noncash charitable contributions over \$5,000, he or she must be “an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary, (2) regularly performs appraisals for which the individual receives compensation, and (3) meets such other requirements as may be prescribed by the Secretary in regulations or

other guidance.”³³ The bulletin further provides that “an individual will not be treated as a qualified appraiser unless that individual (1) demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and (2) has not been prohibited from practicing before the Internal Revenue Service.”

A seminal case of a tax nature involves the question of who is a qualified appraiser. In *Estate of Richmond*, the executors of an estate hired the taxpayer’s certified public accountant to perform entity appraisals for submission on an estate tax return.³⁴ The IRS complained that the taxpayer’s appraiser was not qualified. The Tax Court agreed and imposed not only the taxes, penalties and interest but also a 20 percent “accuracy-related penalty” for a “substantial estate tax valuation understatement.”³⁵ The court ruled that despite being a CPA with a master’s degree in taxation, and having written 10 to 20 valuation reports, some of which he testified to in court, he was not qualified as an expert.³⁶ As a disclaimer, the accountant was providing an opinion as to the value of a business and not real property.

California requires assets subject to probate to be valued by a probate referee (formerly, an inheritance tax appraiser).³⁷ Probate referees are allowed under the California Probate Code.³⁸ They are required to be either appraisers, accountants or attorneys. This differs from *Estate of Richmond* in which the court stated that an accountant was not a qualified appraiser to value business interests in an estate tax setting. However, there is a question as to whether a probate referee can provide a qualified appraisal for tax purposes under Internal Revenue Bulletin 2006-46 since a qualified appraiser under the Code of Federal Regulations is defined as an individual who has earned an appraisal designation from a recognized professional appraiser organization and regularly performs appraisals.³⁹ The California Probate Code allows another exception to Business and Professions Code Section 11302 (b) to allow probate referees to provide appraisals in probate matters.⁴⁰ On the other hand, there is no clear guidance as to whether probate referees can provide valuations on nonprobate matters such as estate taxes or eminent domain cases.⁴¹

Regarding gifts, the Department of Treasury issued Publication 561 in 2007, which states that any noncash donation to a qualified charity over \$5,000 requires a qualified appraisal by a qualified appraiser.⁴² The definition of qualified appraiser includes one who is licensed to value property in his or her state. Hence, for the valuation of a non-cash real estate gift to a qualified organization, it appears that only licensed real property

appraisers can value the asset.

In family law, each spouse has an interspousal duty to accurately value assets. The courts call for the fair and equitable disposition of assets. The court in one case said nonbinding arbitration between the two spouses could not be used to determine value.⁴³ For community property assets:

”[A]bsent an in-kind division or sale and division of proceeds, valuation of each item in the community estate is an essential prerequisite to the court’s responsibility to effect a net equal division. Valuation is ultimately a question of fact, to be resolved in the exercise of the trial court’s broad discretion based on the range of evidence presented. The trial court’s determination will be upheld on appeal so long as supported by substantial evidence in the record.⁴⁴

In family law proceedings, the value of real property may be established by evidence other than expert appraisal. The court in *In re Marriage of Folb* discussed using lending appraisals as well as recent sales of the property as evidence of value.⁴⁵ Essentially this is left up to the trier of fact.

Can a spouse prepare an appraisal on his or her property? “The property owner or owner’s spouse is competent to testify as to the value of his or her own property even though not qualified to testify as an expert.”⁴⁶

Opinion of Value Evidence

The issue of who may provide evidence of value has been dealt with numerous times, most notably in the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals*.⁴⁷ The *Daubert* case is found to apply to California cases via *Sargon Enterprises, Inc. v. USC*.⁴⁸ Moreover, valuation evidence also has been addressed in California Evidence Code Sections 810 to 824.⁴⁹

California Civil Jury Instructions Section 3501 discusses what an appraisal is and how a jury should weigh the issue of value. Further, the court in *Alles v. Hill*⁵⁰ determined the property owner was also a real estate broker and the issue of competence was a matter of fact. Further, the trier of fact should determine whether the expert met the qualifications of Evidence Code Section 813. Finally, in *Daubert*, the court becomes the “gatekeeper” to ensure that the scientific methodology upon which the expert opinion is founded is reliable.⁵¹

In eminent domain cases, the only type of evidence that can be used to establish value is the opinion of qualified experts and property owners.⁵² Evidence Code Sections 810 to 813 are said to apply specifically to eminent domain cases.

Evidence Code Section 813 provides that the value of property may be shown only by

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the opinions of witnesses qualified to express such opinions and of the owner of the property being valued. Evidence Code Section 813 applies only to eminent domain and inverse condemnation proceedings by virtue of Evidence Code Section 810.⁵³

Lack of Appraisers

The Ninth District Federal Reserve Bank was the first governmental agency to formally address the appraiser shortage, which was later codified to apply to all districts. In an about-face, it provided guidelines on when member banks should consider lending without a formal appraisal, even though these are federally related transactions.⁵⁴ According to the guidelines, appraisals should be considered unnecessary under certain circumstances. It is important to understand which transactions may not require an appraisal but an evaluation may be used instead.⁵⁵ The appraisal regulation notes three general exceptions in which an evaluation may be used: the transaction is for less than \$250,000, the transaction is a real estate-secured business loan under \$1 million in which repayment is not dependent on the sale or cash flow of the real estate, and the transaction involves an existing extension of credit.⁵⁶

In the late 1980s, the appraisal industry was concerned with formalization, objectivity, and standards. Now, however, the Ninth Dis-

trict apparently is concerned with banks' inability to timely finalize lending transactions.⁵⁷

Options to a Formal Appraisal

Most real property appraisers say that the future of the industry lies in appraisal management companies (AMCs).⁵⁸ Most appraisers are unhappy with AMCs because they have had the effect of reducing appraisal fees and increasing deadlines.⁵⁹

An AMC is essentially an administrative entity that procures appraisals by licensed appraisers. It is not in and of itself a licensed appraiser. The BREA issues approximately 125 new AMC licenses per year.⁶⁰

Business and Professions Code Section 11302 (d) (1) defines an AMC as "an appraisal management company," which means any person or entity that satisfies all of the following conditions:

- (A) Maintains an approved list or lists, containing 11 or more independent contractor appraisers licensed or certified pursuant to this part, or employs 11 or more appraisers licensed or certified pursuant to this part.
- (B) Receives requests for appraisals from one or more clients.
- (C) For a fee paid by one or more of its clients, delegates appraisal assignments for completion by its independent contractor or em-

ployee appraisers.

Appraisers do not like AMCs because they search for appraisers who can produce the valuation at the lowest cost and quickest turnaround. Lenders like AMCs for the same reasons. Appraisers say they feel as if they are being asked to perform appraisals in a less than fully competent manner and for a reduced price. On the other hand, this is another reason that fewer appraisers are entering the market.⁶¹

Another alternative to formal appraisals is automated valuation models (AVMs). These are computer-generated appraisals provided on online real estate data bases, for example Zillow, Trulia, and RealQuest. When a user inputs a home address on Zillow, a value is generated using computer models that require no human input. Some companies now are writing software to perform advanced commercial real property appraisals.

An evaluation is a transaction that does not require the services of a state-certified or licensed appraiser.⁶² The *Federal Register* states that "while licensed or certified appraisers may be qualified to perform evaluations, the agencies do not believe these appraisers are the only persons that can render a competent estimate of the value of real estate for exempt transactions."⁶³

This is another area in which consumers are opting for low-priced appraisals. Some valuation firms are turning to hiring personnel in India, China, and other countries in which labor costs are low. There may or may not be an actual property inspection, but a real person addresses valuation issues and writes reports. A licensed appraiser may or may not sign off on reports, but the reports give the appearance that a real person addressed the valuation.

In 2012, as a result of the shortage of appraisers and the backlog of valuations preventing loans from closing on time, federal financial regulators came up with the term "de minimis valuation thresholds."⁶⁴ This is a \$250,000 threshold below which an appraisal is not required for a federally related transaction.

Last year, the Federal Financial Institutions Examination Council, FDIC, and the American Bankers Association considered increasing the amount of a de minimis valuation threshold to \$500,000. However, various appraisal associations oppose this action, saying it would have a negative impact on real estate lending practices. In fact, some appraisal organizations have proposed lowering the threshold to \$25,000.⁶⁵ In many states (other than California), homes can cost significantly less than \$250,000. Therefore, the need for appraisers in those states has declined.

The appraisal industry has come full circle.



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What was intended as a way to make appraisers more competent and objective has turned into the use of automatized valuation models, appraisal management companies, and de minimis valuation requirements. The direction appears to be away from mom-and-pop appraisers toward administrative entities and computer-generated valuation models as consumers of appraisals look to innovative ways to get their properties appraised. ■

¹ Unless mentioned otherwise, all references to appraisers shall refer to licensed real property appraisers.
² Background Paper, Joint Oversight Hearing, Bureau of Real Estate Appraisers, No. 6, 13 (March 9, 2016) [hereinafter Background Paper].
³ *The Appraiser Shortage, What Can Be Done?* APPRAISAL BUZZ (March 8, 2016).
⁴ White Paper, Mortgage Bankers' Ass'n, 4 (July 2015).
⁵ *The number of real estate appraisers is falling. Here's why you should care*, MARKET WATCH (Nov. 18, 2015).
⁶ The Real Property Appraiser Qualification Criteria (Jan. 1, 2015).
⁷ Background Paper, *supra* note 2, at 10.
⁸ See 12 C.F.R. §34.43.
⁹ 12 C.F.R. §§34.43-44.
¹⁰ Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183.
¹¹ *Id.*
¹² See, e.g., THE APPRAISAL FDN., 2016-2017 UNIFORM STDS. OF PROF'L APPRAISAL PRAC., 6, 151 [hereinafter USPAP].
¹³ *Id.*
¹⁴ Isaac Peck, *The Disappearing Appraiser*, WORKING RE, (Spring 2016) [hereinafter Peck].
¹⁵ PENAL CODE §1170.
¹⁶ BUS. & PROF. CODE §11302 (j).
¹⁷ USPAP, *supra* note 11.
¹⁸ USPAP, *supra* note 11, at 1.
¹⁹ *Id.*
²⁰ BUS. & PROF. CODE §11319.
²¹ USPAP, *supra* note 11, at 1, 105, 141.
²² BUS. & PROF. CODE §11302.
²³ *Id.*
²⁴ BUS. & PROF. CODE §11319.
²⁵ *Id.*
²⁶ USPAP, *supra* note 11, at 1, 105, 141.
²⁷ BUS. & PROF. CODE §11302 (b).
²⁸ *Id.*
²⁹ EVID. CODE §801.
³⁰ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
³¹ *Id.*
³² *Johnson v. Dawkins*, No. G037998, (Cal. Ct. App. Nov. 19, 2008).
³³ See also I.R.C. §170(f)(11)(E)(ii).
³⁴ *Estate of Richmond*, TCM 2014-26.
³⁵ *Id.* at 46.
³⁶ *Id.* at 13. As a disclaimer, this case applied to specific facts. The reader is encouraged to read the particulars of this case.
³⁷ PROB. CODE §§8900-8909.
³⁸ *Id.*
³⁹ 26 C.F.R. 1.170A-13C(5).
⁴⁰ BUS. & PROF. CODE §11302(b); see also PROB. CODE §§400-08.
⁴¹ See CODE CIV. PROC. §873.010
⁴² DETERMINING THE VALUE OF DONATED PROPERTY, I.R.S., Publ. 561 (April, 2007).
⁴³ *In re Marriage of Cream*, 13 Cal. App. 4th 81, 85 (1993). See also *In re Marriage of Dennis*, 467 N.W. 2d 809 (Iowa Ct. App. 1991).
⁴⁴ *In re Marriage of Nichols*, 27 Cal. App. 4th 1090

(1994). See also *In re Marriage of Foster*, 42 Cal. App. 3d 583 (1974).
⁴⁵ *In re Marriage of Folb*, 53 Cal. App. 3d 862, 870-871 (1975).
⁴⁶ EVID. CODE §§813(a)(2), (c); 814.
⁴⁷ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
⁴⁸ *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747 (2012).
⁴⁹ EVID. CODE §813(a)(1)(2)(3).
⁵⁰ *Alles v. Hill*, 108 Cal. App. 2d 730 (1952).
⁵¹ *Daubert*, 509 U.S. 579.
⁵² *Aetna Life & Cas. v. City of L.A.* 170 Cal. App. 3d 877 (1985).
⁵³ *Folb*, 53 Cal. App. 3d at 870.
⁵⁴ *Banking in the Ninth, Overcoming the Appraiser Shortage*, Fed. Reserve Bank of Minneapolis (Dec. 9, 2013) available at <https://www.minneapolisfed.org>.

[hereinafter Banking in the Ninth].
⁵⁵ Evaluations are defined in the document Interagency Appraisal and Evaluation Guidelines, revised June 7, 1994.
⁵⁶ 12 C.F.R. §34.43.
⁵⁷ *Banking in the Ninth*, *supra* note 54.
⁵⁸ *Peck*, *supra* note 14.
⁵⁹ *Id.*
⁶⁰ Background Paper, *supra* note 2, at 10.
⁶¹ *Peck*, *supra* note 14.
⁶² *Id.* at 7.
⁶³ 12 C.F.R. §34.43 (b).
⁶⁴ See, e.g., 12 C.F.R. §34.43; Fed. Reserve Sys. §225.63(b); Office of Thrift Supervision §564.3(b) (Office of the Comptroller, Fed. Res. Sys).
⁶⁵ AMERICAN SOCIETY OF APPRAISERS, REGULATORY ISSUES FACING THE REAL ESTATE PROFESSION, available at <http://www.appraisers.org>.



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by JENS B. KOEPKE

NO REPORT, NO APPEAL

Settled statements and electronic recordings often prove to be unfavorable alternatives to official court reports

ONE of the effects of the court funding crisis that peaked in 2012 is the lack of official, state-funded court reporters in many civil courtrooms. With no official court reporter, it is now up to the parties to decide whether they want to hire and pay for a private court reporter. But what if they choose not to or cannot? They may lose certain appellate rights. The rules of court provide the alternative of a settled statement, but that option is complicated, expensive, and less effective than a verbatim transcript. Moreover, the third alternative, electronic recording of court proceedings, is available only in limited civil cases—cases with an amount less than \$25,000 in controversy. With only these few options available, it is important that trial and appellate lawyers understand the ramifications involved in not having a court reporter.

A recent California court of appeal decision that is now before the supreme court shows that not having a court reporter during a trial or hearing can doom an appeal. In *Jameson v. Desta* the court held that the plaintiff Jameson was “precluded from obtaining a reversal” of the trial court’s nonsuit ruling against him because there was no reporter’s transcript of the trial, which was the result of there being no court reporter.¹

The circumstances in *Jameson*, although unique in some aspects, may be repeated thousands of times each year in courts across California. Bringing his action in pro per, Barry S. Jameson sued Taddese Desta, M.D., over medical treatment he received while incarcerated. After three prior appeals, the case was finally set to go to trial. At a hearing 10 days before the trial, the trial court informed the parties that the court no longer provided court reporters for civil

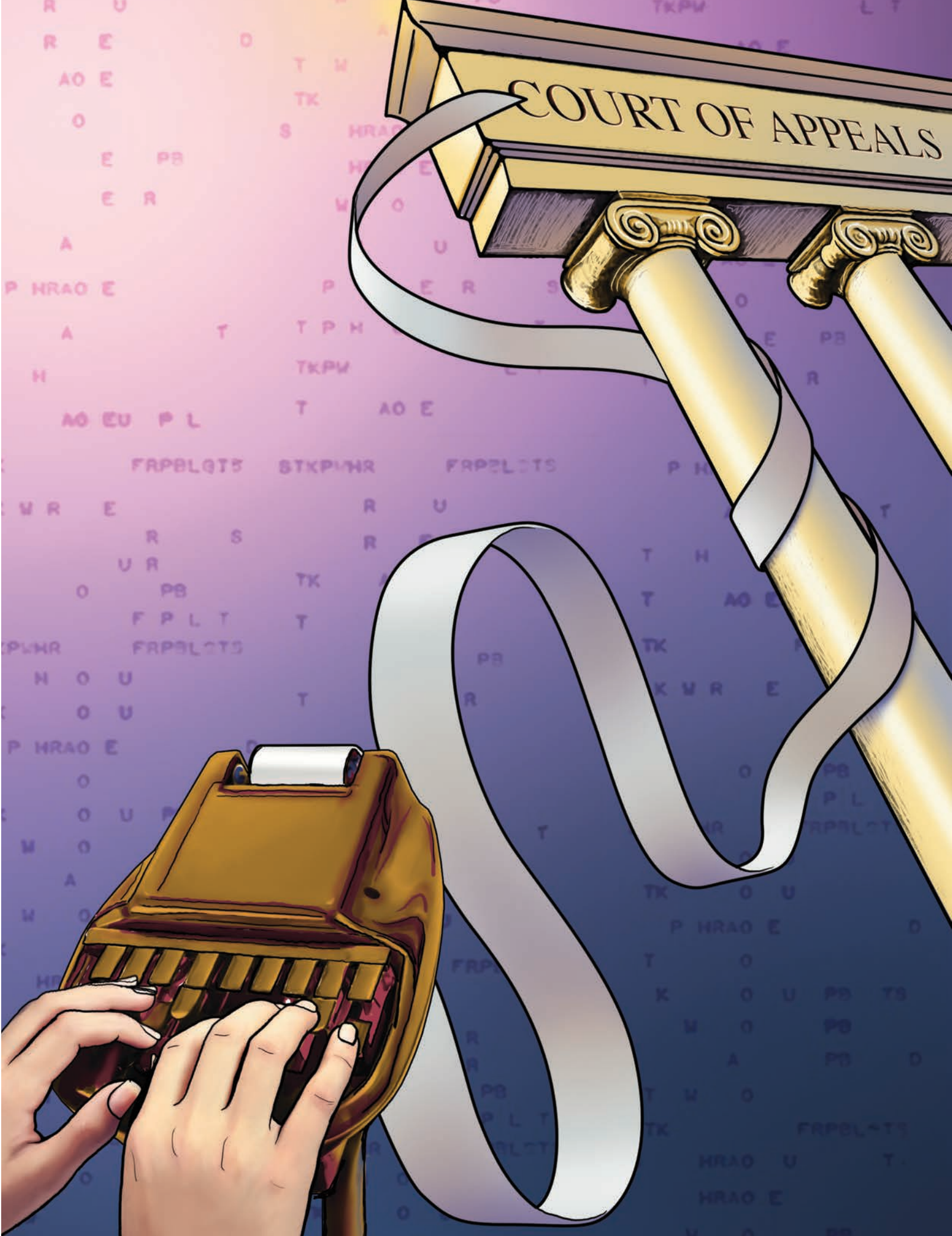
trials and that the parties would have to provide their own. Neither party sought to provide a court reporter and the trial proceeded without one.²

After both parties had given opening statements, Desta moved orally for nonsuit. The trial court granted nonsuit and entered judgment. Jameson appealed that ruling, as well as others. On appeal, Jameson argued that the trial court erred by not having the trial recorded by a court reporter. He also argued that the nonsuit ruling was erroneous for a number of reasons.³

First, the court of appeal held that the trial court did not have an obligation to have the trial recorded by a court reporter.⁴ The court cited to Government Code Section 68086, which establishes fees that will be charged parties for use of official court reporters in civil actions—all cases except criminal and juvenile—and makes those fees recoverable as taxable costs.⁵ The statute also provides that 1) parties should be given “adequate and timely notice” of the availability of official court reporters, 2) if an official reporter is not available, “a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter” and does not have to pay any other fees, and 3) that the costs of a substitute court reporter are also taxable costs.⁶ Rule of Court 2.956 mirrors many of the provisions in Section 68086, but also specifies that each trial court should adopt and post a policy enumerating which courtrooms

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provide official court reporters and either publish that policy in a newspaper, send each party a copy of the policy at least 10 days before any hearing is held, or adopt the policy as a local rule.⁷ The rule also repeats that, if no official court reporter is available, a party can arrange for its own court reporter but it “is that party’s responsibility to pay the reporter’s fee.”⁸

The *Jameson* court held that Section 68086 and Rule 2.956 “clearly indicate” official court reporters may not be available for a civil case and instead parties may have to arrange and pay for their own reporters.⁹ The court also found that the 10-day notice given the parties was sufficient under the rules and noted that the San Diego Superior Court had a local rule and policy that official court reporters are normally unavailable in civil matters.¹⁰

Jameson also rejected plaintiff’s argument that he should be treated differently because he had obtained a fee waiver as an indigent litigant. The court held that the fee waiver only applied to the statutory fees charged for official court reporters but not the costs of a substitute court reporter, nor did the fee waiver mandate that the court “provide him with the services of a court reporter free of charge.”¹¹

Second, the court of appeal addressed the substantive question of the propriety of the nonsuit. The court quoted from a minute order in the record that reflected the trial court had granted the nonsuit after admitting all of *Jameson*’s exhibits, because he did not have an expert available and could not prove a breach of the standard of care or causation.¹² The court then held that “[b]ecause an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter’s transcript.”¹³ Even though *Jameson* had raised several legal arguments in support of reversal, “none of these contentions is cognizable in the absence of a reporter’s transcript.”¹⁴

The court of appeal acknowledged that this was a harsh result, particularly given that “*Jameson*’s incarceration and his financial circumstances” made it more difficult for him. Nonetheless, the court ultimately concluded: “While this court is sympathetic to the plight of litigants like *Jameson* whose incarceration and/or financial circumstances present such challenges, the rules of appellate procedure and substantive law mandate that we affirm the judgment in this case.”¹⁵

Thus, *Jameson* illustrates that a party who fails to have trial or motion proceedings recorded by a court reporter has little or no chance of successfully appealing from an adverse judgment. Moreover, it puts a face on the impact the court funding crisis has on real-world litigants.

Implications of *Jameson v. Desta*

Jameson is now before the California Supreme Court (fully briefed and awaiting oral argument), which agreed to consider the following question: When there are fee waiver litigants, can a Superior Court use a policy “that has the practical effect of denying the services of an official court reporter” to these litigants “if the result is to preclude those litigants from procuring and providing a verbatim transcript for appellate review?” Thus, on its surface, *Jameson* is likely to answer only the question whether *fee waiver* litigants will be spared these effects. It is reasonably likely that the Supreme Court will provide broader guidance as well. But if it does not, even a reversal of the ruling as to indigent clients will leave a large swath of litigants for whom the *Jameson* holding could be fatal. Thus, there are important potential lessons to be drawn from *Jameson*:

- As the *Jameson* court noted: “This case aptly demonstrates that civil justice is not free.”¹⁶ Even many represented clients will find the cost of paying for private court reporters daunting, but if they elect to spare the expense, that decision may affect their ability to litigate effectively, especially at the appellate level.
- If parties hope to appeal any legal issue that has evidentiary ramifications—which

most trial issues (like nonsuit, new trial, jury instructions, evidentiary exclusions) do—they have to ensure the proceedings are recorded. Even rulings on motions that are subject to *de novo* review could be affected. For example, justices in courts of appeal have disagreed whether they can review an anti-SLAPP ruling without a transcript of the hearing.¹⁷

- Not having a reporter’s transcript could be even more deadly for parties trying to obtain writ relief. Rule of Court 8.486(b) requires writ petitioners to include a copy of a reporter’s transcript or explain why one is not available and fairly summarize the proceedings, including the parties’ arguments and the court’s statements.¹⁸ The rule also explicitly says that if the required record is not provided or the parties do not provide “facts sufficient to excuse the failure,” then the court “may summarily deny” the petition.¹⁹ Writ petitions are notoriously difficult to get granted. A lack of reporter’s transcript—because there was no court reporter—makes it that much more difficult and provides justification for the court of appeal to simply send out a summary denial.

The broader lesson from *Jameson* is obvious: civil litigants who have the means to do so should be certain to arrange for a private court reporter at every court appearance that has some prospect of raising an appealable issue. Those who do not have the means should see if a cost-sharing arrangement can be negotiated with the other side. And counsel in those situations must inform their clients of the risks of not paying for a court reporter.

Settled Statement

The legislature and the Judicial Council anticipated that reporter’s transcripts would not always be available. Thus, the Rules of Court allow a party to use a settled statement in lieu of a reporter’s transcript. However, the settled statement procedure is complicated, not favored by trial courts, and often expensive.

Rule 8.130(h) gives the parties an option to use an agreed or settled statement in place of a reporter’s transcript when “any portion of the designated proceedings cannot be transcribed.”²⁰ Rule 8.137 lays out a specific procedure for utilizing settled statements. Rule 8.137(a) requires the appellant to file a motion in the trial court—along with its Rule 8.121 designation of record—requesting the use of a settled statement. The motion must be supported by a showing that 1) there is a substantial cost saving and it will not significantly burden the other side, 2) the oral proceedings “were not reported or cannot be transcribed,” or 3) the appellant cannot pay for a reporter’s transcript and funds are not available in the Transcript Reimbursement Fund.²¹ If the trial court denies that motion, the appellant must file a normal designation within 10 days of the denial.²² If the trial court grants the motion, the appellant has 30 days to file a “condensed narrative of the oral proceedings that the appellant believes necessary for the appeal.”²³ If the narrative describes “less than all the testimony,” the appellant must state the points to be raised on appeal, and the appeal will be limited to those points.²⁴ The respondent has 20 days to file “proposed amendments” to that narrative.²⁵ The court clerk is then required to set a date for the settlement hearing that is within 10 days of the respondent’s filing.²⁶ At that hearing, “the judge must settle the statement” and set a deadline for the appellant to file it.²⁷ If the respondent does not object to what the appellant files within five days, it is deemed ready for certification by the trial judge.²⁸

If the parties are working through the settled statement process cooperatively and amicably, they will present a settled statement that they already agree upon to the trial court, which will likely sign off on and certify it. It can then be used on appeal. Indeed, if the proceedings were fairly short or simple, or if the parties are working together cooperatively, the appellant can probably use an “agreed statement” as a substitute for the reporter’s transcript.²⁹ And the

agreed statement procedure in Rule 8.134 is much simpler and straightforward.³⁰ However, what happens if the parties are not working together amicably?

Cases Challenging the Settled Statement Process

Three recent cases illustrate the difficulties inherent in the settled statement process, the trial courts' dislike of it, and the likelihood that what appeared to be a small silver lining in using a settled statement may be illusory or short-lived.

In *Mooney v. Superior Court*, a marital dissolution case, the wife elected to use a settled statement after losing a one-day bench trial (in which she appeared in pro per) and made the required motion.³¹ At the first hearing, the trial court told the wife's attorney (she was now represented) that she had the burden of persuading the court that a settled statement could be produced without significantly burdening the husband or the court, and set another hearing.³² At the second hearing, the trial court abandoned the burden requirement, but nevertheless set yet another hearing and ultimately conditioned allowing a settled statement on the wife's paying \$10,000 to the husband's attorney to cover the costs of responding to the settled statement, since it was "not fair" to force the attorney (who was the only counsel at the trial) to do most of the work on the settled statement.³³ In granting the wife's writ petition, the court of appeal held that the trial court had abused its discretion by failing to rule on and not granting the wife's original request to use a settled statement and in conditioning it on a payment of the husband's attorney fees.³⁴

As shown in *Mooney*, just going through the settled statement procedure could easily become an expensive and complicated affair. For an indigent or economically disadvantaged party, it could be altogether unaffordable. One appellate practitioner reported that the procedure required multiple court hearings and drafts, ultimately costing the client substantially more than the cost of a reporter's transcript of that length of hearing.

Randall v. Mousseau also illustrates trial courts' unfamiliarity, if not dislike, of the settled statement approach, as well as the risk of not following the procedure fully. Randall sued Mousseau for breach of contract, the case proceeded to a bench trial, neither side opted to hire a court reporter, and the trial court found for the defendant.³⁵ Randall appealed and timely filed a request for a settled statement under Rule 8.137, with a proposed statement attached. Mousseau objected, arguing that Randall could not use a settled statement because she voluntarily chose not to have a court reporter present, but he provided no amendments to the statement. The trial court denied Randall's request, finding that it placed a burden on Mousseau and the court.³⁶ On appeal, Randall did not challenge that denial, but simply argued that there was an adequate record to reverse the underlying judgment.

The court of appeal disagreed, finding that since Randall had not supplied an adequate record (without a settled statement), the underlying judgment could not be reviewed, and since she had not raised the denial of her settled statement request in her appellate briefs, she had forfeited that issue.³⁷ Nevertheless, the court said that since with the widespread absence of court reporters, "this issue is likely to recur," it would address the settled statement issues.³⁸ It started by explaining that as far back as 1889, the supreme court had held that a trial court has a duty to settle a statement, so as not to impede a party's right to appeal.³⁹ In light of that, it held the trial court abused its discretion by refusing to allow Randall a settled statement without pointing to any deficiencies in her proposed statement. Although a trial court need not accede to a party's version of the statement, it cannot simply refuse to allow one, and this trial court's focus on the burden on Mousseau was erroneous, since burden is only one of three alternative grounds in Rule 8.137 for

when a settled statement is appropriate.⁴⁰

The silver lining that may be present when using a settled statement was created by the decision in *In re Marriage of Fingert*, in which the court of appeal ruled that a settled statement can substitute for a statement of decision and thereby overcome the impact of the implied findings doctrine.⁴¹ But in the very recent case of *A.G. v. C.S.*, a different district of the court of appeal rejected *Fingert's* reasoning.⁴²

In *A.G.*, a mother appealed from a custodial order in favor of the father and a denial of a restraining order after the family court held a bench trial.⁴³ Neither of the parties had requested a statement of decision, and the appellate record consisted of a clerk's transcript of the pleadings and a settled statement in lieu of a reporter's transcript.⁴⁴

In deciding whether the family court had abused its discretion on the custody order, the court of appeal struggled with whether to apply the implied findings doctrine since no statement of decision had been issued. The mother argued that the doctrine should not apply since there was a settled statement, but the Court concluded that the settled statement would not prevent application of the implied findings doctrine.⁴⁵ The court emphasized that while a statement of decision is a formal legal document that strives to contain the full factual and legal basis for a trial court's decision, a settled statement is only a "condensed narrative of the oral proceedings that the appellant believes are necessary for the appeal."⁴⁶ Given that, the court explained, a "settled statement does not guarantee the reviewing court has before it the factual and legal basis for the trial court's determination," creating a "consequent uncertainty" that required invoking the deferential implied findings doctrine.⁴⁷

The decision in *A.G.* illustrates that not getting a statement of decision after a court trial is always foolhardy. It is foolhardy with or without a court reporter. But if you don't have a court reporter, a statement of decision is especially crucial, because it might save the day—as it evidently would have in *A.G.*

Even after issuance of the decisions in *Mooney*, *Randall*, and *A.G.*, questions and problems concerning the use of settled statements remain. For example, the rules are silent as to how the final settled statement is transmitted to the court of appeal—is it part of the nonexistent reporter's transcript, part of the clerk's transcript if one is used, or must the parties include it in their appendix if they choose that route? And whose job is it to ensure transmission to the court of appeal?

More important, relying on a settled statement rather than a court reporter's verbatim record, to support one's case in an appeal presents the essentially intractable problem of ensuring that the reviewing court has a reliable record of what happened. In presenting proposed narratives for certification by the trial judge, the parties will probably present very different narratives of what happened during the oral proceedings. Even if the 8.137 procedures have been done on a timely basis (which in our overcrowded court dockets is hard to imagine), the hearing on the settled statement will likely not happen until several months after the proceedings took place. Even if it was a short hearing (maybe a motion), it is unlikely that the trial court will have much of an accurate memory of exactly what happened at the hearing. If it was a trial lasting several days, how is the trial court supposed to remember what precisely was said during key parts of the testimony?

It is easy to see why trial courts would not be fond of this procedure. Some trial judges take their own notes during trial, but these can hardly be seen as coming close to a replacement for the accuracy of a court reporter's transcript. Each side's counsel's notes are even more suspect, as they are focusing on many other things besides making accurate and complete summaries of the proceedings. Another appellate lawyer recounted yet another thorny wrinkle in the process—what if the trial counsel (particularly one that has had a falling out with the appellant) refuses to help or cooperate with the appellate

counsel in preparing the settled statement? In light of all this, how then can the court of appeal, which is relying on the settled statement to determine whether there has been any legal error, have any real confidence that the statement reflects the precise events, testimony, and reasoning at the proceeding below?

If it does not, there is no normal appellate remedy, as the supreme court has ruled that the trial court's ruling settling the statement is not appealable.⁴⁸ Absent evidence of fraud or collusion, parties have no route to challenge the substance of the settled statement.⁴⁹ That, of course, increases the risk of taking the settled statement route.

Given the complexities of the settled statement procedure and the inherent difficulty of ensuring a settled statement's reliability, if parties are unable or unwilling to engage a court reporter, they need to make certain to do everything that is possible to carry their burden to furnish an adequate record to demonstrate error if the case proceeds to an appeal.⁵⁰ Some practitioners may think that a settled statement will fill that gap. However, before choosing not to pay for a court reporter in reliance on being able to use a settled statement in an eventual appeal, trial lawyers and their appellate consultants should understand 1) that the process is quirky, time-consuming

and expensive, 2) the substance of the resulting settled statement is unreviewable, and 3) the statement may not always be an effective substitute for a reporter's transcript or a missing statement of decision, as in *A.G.*

Electronic Recording

In limited civil cases, which are appealed to the Appellate Division of the Superior Court,⁵¹ the applicable statutes and Rules of Court authorize electronic recording as a third means of providing a record of oral proceedings.⁵²

Government Code Section 69957 provides that a court may order electronic recording if an official court reporter is not available.⁵³ Rule 2.952 allows for electronic recording "when a court has ordered" it, and says that upon the parties' stipulation "approved by the reviewing court" the original electronic recording can be transmitted as the record on appeal, or the appellant can pay for a written transcript of all or some of the recording.⁵⁴ Rule 8.835 provides that if proceedings in limited civil cases "were officially recorded electronically," written transcripts "may be prepared" or the electronic recording may be used as the record on appeal if the appellate division "has a local rule" allowing this.⁵⁵

There are no analogous provisions in the Rules of Court for the court of appeal. The Judicial Council once promulgated rules allowing electronic recording in unlimited civil cases (the cases appealed to the court of appeal).⁵⁶ But in *California Court Reporters Ass'n v. Judicial Council of Cal.*,⁵⁷ the First District of the court of appeal declared those rules invalid, as inconsistent with Code of Civil Procedure Section 269, which mandates court reporters, particularly since the legislature had rejected legislation authorizing electronic recording in unlimited cases.⁵⁸ Review of *California Court Reporters* was denied.

The result of *Jameson* affirms that choosing, whether for economic or other reasons, not to have trial or motion proceedings recorded by a court reporter could essentially forestall any success on appeal if a party loses in the trial court, particularly if the ruling at stake has any evidentiary component. Alternatively, relying on an agreed or settled statement is risky, given both the difficulty and expense in certifying such a statement and the limits to its efficacy. The resort to a settled statement is only warranted if the proceedings are relatively short and it is likely that the parties and counsel will cooperate in creating the statement. The third option, electronic recording, is currently available only in limited civil cases (under \$25,000), and thus probably will not fill in the gaps in a case record. Thus, given the stakes of the present legal circumstances in California concerning court reporters, trial counsel may be well served

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by consulting an appellate lawyer before having the client forego a court reporter at a hearing. ■

¹ Jameson v. Desta, 241 Cal. App. 4th 491, 504 (2015).
² *Id.* at 495-97, 500.
³ *Id.* at 497, 500.
⁴ *Id.* at 500-03.
⁵ GOV'T CODE, §68086(a)-(c).
⁶ GOV'T CODE, §68086(d).
⁷ CAL. RULE OF COURT 2.956(b)(1)-(2).
⁸ CAL. RULE OF COURT 2.956(c).
⁹ Jameson, 241 Cal. App. 4th at 502.
¹⁰ *Id.* at 502-03.
¹¹ *Id.* at 503.
¹² *Id.* at 503-04.
¹³ *Id.* at 504.
¹⁴ *Id.* at 505.
¹⁵ *Id.* at 495.
¹⁶ *Id.*
¹⁷ Compare Chodos v. Cole, 210 Cal. App. 4th 692, 699-700 (majority opinion: a reporter's transcript not required) with 210 Cal. App. 4th at 707-709 (J. Turner dissenting: without transcript the appellant failed to provide an adequate record, mandating affirmance; see citations when the lack of transcript compelled affirmance).
¹⁸ CAL. R. CT. 8.486(b)(2), (3).
¹⁹ CAL. R. CT. 8.486(b)(4).
²⁰ CAL. R. CT. 8.130(h); see also CAL. R. CT. 8.120(b)(3).
²¹ CAL. R. CT. 8.137(a)(1)-(2).
²² CAL. R. CT. 8.137(a)(3).
²³ CAL. R. CT. 8.137(b)(1).
²⁴ CAL. R. CT. 8.137(b)(2).
²⁵ CAL. R. CT. 8.137(b)(4).
²⁶ CAL. R. CT. 8.137(c)(1).
²⁷ CAL. R. CT. 8.137(c)(2).
²⁸ CAL. R. CT. 8.137(c)(3).
²⁹ CAL. R. CT. 8.120(b)(2), 8.130(h).
³⁰ CAL. R. CT. 8.134.
³¹ Mooney v. Superior Ct., 245 Cal. App. 4th 523, 526 (2016).
³² *Id.* at 527.
³³ *Id.* at 528-29.
³⁴ *Id.* at 529-37.
³⁵ Randall v. Mousseau, No. B263945, 2016 WL 4446574, at *1 (Ct. of App. 2016).
³⁶ *Id.*
³⁷ *Id.* at **1, 4.
³⁸ *Id.* at *1.
³⁹ *Id.* at *2 (citing Sansome v. Superior Ct., 80 Cal. 483, 486 (1889)).
⁴⁰ *Id.* at **2-3.
⁴¹ In re Marriage of Fingert, 221 Cal. App. 3d 1575, 1580 (1990).
⁴² See A.G. v. C.S., 246 Cal. App. 4th 1269 (2016).
⁴³ *Id.* at 1272, 1274.
⁴⁴ *Id.* at 1281.
⁴⁵ *Id.* at 1281-83.
⁴⁶ *Id.* at 1282.
⁴⁷ *Id.* at 1283.
⁴⁸ Cross v. Tustin, 37 Cal. 2d 821, 826-27 (1951).
⁴⁹ *Id.* at 825-26.
⁵⁰ See, e.g., Ketchum v. Moses, 24 Cal. 4th 1122, 1141 (2001).
⁵¹ CODE CIV. PROC §§77, 85, 904.2.
⁵² CAL. R. CT. 2.952, 8.835; GOV'T CODE §69957.
⁵³ GOV'T CODE §69957(a).
⁵⁴ CAL. R. CT. 2.952(a) & (j).
⁵⁵ CAL. R. CT. 8.835(a)-(c).
⁵⁶ CODE CIV. PROC §904.1(a).
⁵⁷ California Ct. Reporters Ass'n v. Jud. Council of Cal., 39 Cal. App. 4th 15 (1995).
⁵⁸ *Id.* at 33-34.



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Rethinking Legal Writing for an Online Readership

AS MORE COURTS MOVE TO E-FILEING and electronic case management systems, it is more likely that judges and clerks will be reading briefs not on paper but on computer screens or tablets such as iPads or e-readers. Should lawyers adjust their legal writing style to account for this shift towards a readership that increasingly uses online resources? The answer is yes.

Research has shown that people read differently on a screen than on paper. Robert DuBose, the author of *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World*, has addressed this topic a number of times, including recently at the 2016 ABA Midyear Meeting in San Diego in February. DuBose, after surveying the research on this topic (including eye-tracking studies), explained that screen readers often scan for information instead of reading a document word-for-word. Screen readers tend to skim a page, looking for headings and summaries of content. They also read initial paragraphs or topic sentences of paragraphs more thoroughly than the text that follows.

Digital technology gives the legal writer more competition for a reader's attention onscreen. Incoming e-mail notifications may be popping up or beeping, and screen readers may have multiple screens or programs open at the same time. Today's readers also have become accustomed to accessing information quickly. Plugging a few words into a search engine like Google or Westlaw immediately generates answers. Readers so conditioned may similarly expect a legal brief to provide the information they need quickly and easily.

The hallmarks of an effective brief do not depend on whether it is read on screen or on paper. Many stylistic techniques that make a brief more persuasive to a screen reader are similar to those that have been recommended for decades to lawyers writing to a nonscreen readership. The most significant difference may be that lawyers writing to a screen reader need to use extra rigor in making their briefs readable. There are various ways to achieve this.

Include a table of contents. Both screen and nonscreen readers benefit from a visual roadmap to a legal document. Lawyers may omit a table of contents if it is not required by the court's rules. This is a missed opportunity to guide the reader through your arguments.

Put concise summaries up front. Because screen readers tend to read the beginning of a document or section more thoroughly than the end, an important point may be lost if buried within the brief. It is helpful to provide the reader a short summary at the beginning of the document and in each argument section. The summary should include a roadmap of the argument and a preview of the best details to support it.

Use frequent headings. Strong headings and subheadings help guide the reader through the arguments. Frequent use of headings also prevents the reader from becoming lost in text when reading on a tablet with a smaller screen.

Craft effective topic sentences. Clear and useful topic sentences summarizing the paragraph that follows help a screen reader scan a document to gather information quickly.

Pay attention to readability. Simple, clear, and well-structured writing, while always important, is even more so when writing for a screen readership. Keep paragraphs short and sentences simple. When appropriate, break down complex information into easily digestible bullets or numbered lists. Avoid repetition and unnecessary words to diminish skimming by screen readers.

Keep document design simple. Do not distract the reader with

Simple, clear, well-structured writing, while always important, is even more so when writing for a screen readership

unexpected formatting or fonts. A simple document allows readers to focus their limited time with the document on its substance.

Avoid footnotes. While lawyers have long debated the proper placement and usage of footnotes in legal writing, a consensus is emerging that footnotes and screen-reading do not mix. When a nonscreen reader encounters a footnote reference, he or she can stop reading and glance at the bottom of the printed page for the text of the referenced footnote—whether or not it is in the writer's interest to make the reader do so. This is more challenging when reading on a computer screen or tablet. To see the footnote, the reader may need to scroll down or enlarge the page. This extra step creates a risk the reader will miss the footnote entirely.

Use bookmarked headings. Bookmarks allow a reader using a PDF viewer such as Adobe Acrobat to move directly to a specific heading in a brief by clicking on the heading in the table of contents or a navigation pane.

Include hyperlinks. For an electronically submitted brief, consider providing the court with hyperlinks to outside sources such as cases, statutes, or other pleadings or evidence in the court file. Consult the particular court's rules for doing so. The easier a court can confirm that the argument is supported by the cited sources, the more effective the brief can be. The flipside of this, of course, is that if a judge can click on a citation and see it in seconds, it had better be on point.

Using these techniques can help attorneys make their briefs more effective and useful to a screen-reading court. But it is important to remember that whether the court reads on paper or on screen, the goal of a brief is to communicate the client's position and persuade the court. To do this, a brief must be well-organized, readable, concise, interesting, and, above all, accurate. ■

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